

March 10, 2023

Dede Rutberg
Office of Management and Budget

RE: [Federal Register Document 88 FR 8374] Proposed 2 CFR Part 184 Amendments / Build America, Buy America Act Provisions of the Infrastructure Investment and Jobs Act

Dear Ms. Rutberg,

The Council of Large Public Housing Authorities (“CLPHA”) appreciates the opportunity to submit comments to the Office of Management and Budget (“OMB”) in response to the proposed revisions of OMB’s Guidance for Grants and Agreements to support the implementation of the Build America, Buy America Act provisions of the Infrastructure Investment and Jobs Act.

CLPHA is a non-profit organization that works to preserve and improve public and affordable housing through advocacy, research, policy analysis, and public education. Our membership of more than seventy large public housing authorities (“PHAs”) own and manage nearly half of the units in the nation’s public housing program, administer more than a quarter of the subsidies in the Housing Choice Voucher Program, and operate a wide array of other housing programs.

The ongoing impact of the COVID-19 pandemic continues to represent a serious threat to the short- and long-term well-being of many vulnerable families in HUD-assisted housing and to the PHAs that own and manage housing and vouchers for nearly 3.3 million households. CLPHA supports the nation’s largest and most innovative PHAs by advocating for the resources they need to solve local housing challenges.

On May 5, 2022, HUD issued a waiver covering all Federal Financial Assistance (“FFA”) obligated by HUD on or before November 14, 2022. CLPHA [submitted comments on that waiver](#) requesting that the implementation of the Build America, Buy America (“BABA”) Act’s Buy American Provision (“BAP”) be waived for one year. On February 15, 2023, HUD issued a waiver exempting most FFA obligated by HUD from BAP until 2024. CLPHA [commented on the Public Interest Phased Implementation Waiver](#), stating that **CLPHA and its members are pleased that HUD made the determination to heed our recommendations and waive the BAP’s application for most HUD federal financial assistance by an additional year.**

Background

CLPHA remains concerned that certain requirements of the BAP could impose undue burdens on PHAs. At a time when inflation is making construction materials costlier and the Operating Cost Adjustment Factors (OCAF) used for adjusting or establishing Section 8 rents for projects assisted with Section 8 Housing Assistance Payments haven't yet taken inflation into account, the Buy American requirements – if implemented hastily – could put added pressure on the already strained resources of PHAs. HUD must be mindful that inefficient regulations can hinder the ability of PHAs to fulfill their mission to deliver affordable housing by increasing both project costs and completion time.

Reduce the Broad Scope of the BAP's Applicability

The proposed definition of "Infrastructure Project" is too broad and arguably exceeds OMB's authority. The term "Project" is defined by the BABA statute to mean "the construction, alteration, maintenance, or repair of infrastructure in the United States." Yet OMB's proposed definition of an infrastructure project expands the definition beyond statute to mean "**any activity related to** the construction, alteration, maintenance, or repair of infrastructure in the United States **regardless of whether infrastructure is the primary purpose of the project.**" This expansive definition of infrastructure eliminates any flexibility PHAs have to request waivers for costs that are not truly infrastructure.

Help PHAs Prepare for Implementation

Many PHAs are developing systems for complying with these requirements for the first time. CLPHA recommends that HUD and OMB begin a concerted outreach effort to educate and inform all stakeholders, including PHAs, on the requirements of BABA. PHAs and their vendors and contractors will need to greatly alter their procurement practices to comply with the BAP. OMB may consider drafting guidance for PHAs and their contractors to help source American-made materials. This guidance could define and give common examples of US-made "manufactured products" and "construction materials" for PHAs to easily reference in a database. OMB could also consider outreach to popular suppliers to discuss ways to clarify for buyers whether the materials they sell meet the Buy American requirements. This could include a 'filter' for American-made products or a disclaimer stating whether those materials fall within the BAP's guidelines.

Outreach efforts could include creating one-page BABA overview documents, hosting webinars, answering Frequently Asked Questions, and improving the information contained in HUD's BABA webpage beyond mere hyperlinks. HUD and OMB should also begin sending email alerts via the appropriate lists to inform PHAs of the upcoming changes. The dissemination of this information should begin as soon as possible so that PHAs and their contractors are given ample time to adjust procurement and prepare for implementation of the BAP. Otherwise, ongoing projects may be delayed.

Raise the Simplified Acquisition Threshold

Overall, CLPHA believes that the thresholds outlined above are exceedingly low and will impede larger housing authorities from maintaining and redeveloping the nation's affordable housing stock. HUD states that in accordance with the BABA Act, the proposed waivers are in the "public interest" and are "critically important" to preventing immediate

project delays that “ensure the safety and health” of HUD program participants. CLPHA agrees that such waivers are critically important, but the threshold levels must be higher to ensure that projects at some of the nation’s largest housing authorities are not delayed.

Many CLPHA members are currently engaged in efforts to revitalize public housing properties (including those units converted to project-based Section 8 programs through the Rental Assistance Demonstration (RAD) and through other HUD asset repositioning tools). These projects are typically a multi-year effort spread over several phases. Nonetheless, HUD states in its proposal that without these waivers grantees and funding recipients may be forced to “modify their current plans to come into compliance or delay activities to protect life, safety, and property, and will negatively impact the most vulnerable Americans HUD seeks to serve.” Yet by setting a threshold at \$250,000 for such infrastructure projects and small grants that routinely far exceed this threshold, HUD is essentially slowing and possibly halting projects that CLPHA members are currently engaged in across the country. As mentioned previously, CLPHA members own and manage nearly half of the units in the nation’s public housing program. Setting threshold levels that are too low will inevitably impede the “construction, alteration, maintenance, or repair of infrastructure” at a vast majority of publicly owned rental housing in the US.

While we understand the “simplified acquisition threshold” that’s being proposed for infrastructure projects and small grants follows a federal standard set in 2 CFR 200.1, **we encourage HUD to detach the \$250,000 maximum threshold from this standard and set a higher amount that would be more appropriate to large scale infrastructure projects.**

When a PHA is requesting a BAP waiver to respond to an emergency or major disaster, the simplified acquisition threshold could potentially be raised to meet the higher maximum of \$800,000 set by [48 CFR part 2, subpart 2.1](#). By contrast, the statute also stipulates that threshold levels are higher for other federal agencies, including the State Department and United States Agency for International Development (USAID) where amounts are set at \$800,000 or \$1.5 million in certain circumstances. Given the differing levels across federal agencies and OMB’s broad regulatory purview, OMB should have the authority to set a higher threshold appropriate for large-scale infrastructure projects.

Consider Total Project Costs as a Single Procurement

In addition to setting an appropriate threshold level, CLPHA encourages OMB to broadly interpret BABA requirements to consider the total costs of an infrastructure project as a single relevant procurement for any project to construct, alter, or maintain or repair infrastructure. We agree that waiver evaluation should take a holistic approach to projects that require multiple procurement contracts. However, it is important that PHAs are not required to submit a separate waiver request for each individual procurement contract if the contracts are all part of the same project. As the proposal is currently presented, PHAs would be required to submit an individual waiver request each time a project exceeds the stated threshold levels.

Under large-scale, multiphase development projects such requirements would force grantees to start and stop their projects to comply with these thresholds. For example, if a PHA engaged in a multi-phase project to increase the energy efficiency of their HVAC systems, under this requirement only the first \$250,000 of this multimillion-dollar project would be considered exempt from BABA. HUD states that these waivers are “in the interest of efficiency, to ease burdens for HUD grantees and funding recipients”, however requiring a PHA to submit multiple waiver requests for the one infrastructure project is a direct contradiction.

Alternatively, the proposed waiver of BAP for any project with a cost less than or equal to the simplified acquisition threshold of \$250,000 could be applied to the total amount of HUD-funding involved in the project rather than the total cost of the project. Projects often involve mixed funding sources, and application of BABA requirements to the non-federal funding sources, and contracts, will create undue hardship and be burdensome for PHAs in contracting and delivering these projects. For example, a project that costs a total of \$300,000 could be comprised of city, state, and federal funds. The federal portion (i.e. HUD funds) could be a very small fraction of the total project costs. **For HUD-subsidized housing projects, OMB should only apply BABA requirements to the portion of project costs that are funded by HUD.**

Include Minor Components in Unreasonable Cost Waivers

For reasons similar to those mentioned above, CLPHA previously recommended that HUD should increase the threshold for total costs allowed to be excluded from 5% to 25% of the total cost of the iron, steel, manufactured products, and construction materials used and incorporated. **CLPHA appreciates that OMB has proposed an “unreasonable cost waiver” category, under which PHAs can apply for exemption from the BAP if the inclusion of iron, steel, manufactured products, or construction materials produced in the United States will increase the cost of the overall project by more than 25 percent.**

Small and miscellaneous minor components within iron and steel products—typically items like fasteners, washers, and screws – in the aggregate frequently comprise a significant portion of the total cost of the BABA-covered items used and incorporated in residential construction projects. As presently proposed, the construction materials list does not include minor components within iron and steel products. If it is the intention of OMB to exempt miscellaneous minor components within iron and steel products, then these items should be explicitly noted in OMB’s final waiver. Therefore, the application of the BAP requirements to such components will create an undue burden and likely significant delays for PHAs, as well as vendors, in sourcing such components.

Shorten Waiver Approval Timeline

CLPHA believes it is critical that exigent circumstances waivers be granted in the shortest timeframe possible. It is *critical* that waiver request receive a timely response. Lengthy turnaround times for waiver requests can massively increase the time it takes for PHAs to construct new units, renovate existing ones, and complete maintenance or repairs. This comes at a time when supply chain issues are already making it difficult to source certain materials, which adds time to project completion. PHAs are concerned that supply chain

issues could exacerbate the delays in sourcing American-made materials and ultimately delay project completion. Projects could start and stop frequently if PHAs must wait for this additional layer of certification or waiver approval to be completed. These delays could also impact the financing of projects as certain financing structures have deadlines for expending funds. Long response times on waivers can create major backlogs for PHAs, ultimately undermining their ability to provide existing residents with reasonable accommodations as well as prepare accessible units for residents.

Thank you for the opportunity to comment on these most important regulations and their impact on the residents we serve.

Sincerely,

A handwritten signature in cursive script that reads "Sunia Zatterman". The signature is written in black ink and has a fluid, connected style.

Sunia Zatterman
Executive Director
Council of Large Public Housing Authorities