

March 2, 2023

Faith Rogers  
Senior Advisor  
Office of the Secretary  
U.S. Department of Housing and Urban Development  
451 Seventh Street SW  
Room 10126  
Washington, DC 20410

RE: [Docket No. FR-6331-N-10] Public Interest Phased Implementation Waiver for FY 2022 and 2023 of Build America, Buy America Provisions as Applied to Recipients of HUD Federal Financial Assistance

Dear Ms. Rogers,

The Council of Large Public Housing Authorities (“CLPHA”) appreciates the opportunity to submit comments to the United States Department of Housing and Urban Development (“HUD”) in response to the notice titled “Public Interest Phased Implementation Waiver for FY 2022 and 2023 of Build America, Buy America Provisions as Applied to Recipients of HUD Federal Financial Assistance.”

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.

## **Background**

On May 5, 2022, HUD previously issued a separate 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. CLPHA also [commented on the subsequent Public Interest Phased Implementation Waiver](#), again requesting that the BAP compliance date be extended by one full year. **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.**

Still, 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.

## **Help PHAs Prepare for Implementation**

CLPHA recommends that HUD begin a concerted outreach effort to educate and inform PHAs on the requirements of BABA. These 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 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.

PHAs and their vendors and contractors will need to greatly alter their procurement practices to comply with the BAP. HUD may consider drafting guidance for PHAs and their contractors to help source American-made materials. HUD 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 guidelines of the BAP.

## **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, HUD 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 HUD 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. **HUD 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. Section 70914(c) provides that a waiver under 70914(b) must be published by the agency with a detailed written explanation for the proposed determination and provide a public comment period of not less than 15 days. PHAs should not have to wait for the 15-day comment period to pass before commencing the activities, particularly when activities must commence immediately to protect life, safety, provide necessary security to residents or community members, or to prevent the destruction of property.

Tenants’ lives are disrupted when they must be temporarily relocated for emergency fixes to their dwellings, so PHAs must be able to move expeditiously to complete these repairs

without needing to wait for an exigent circumstances waiver to be approved. **For activities necessary for emergency maintenance and repairs as well as health and safety-related work, HUD should expedite this waiver category, or allow PHAs to begin work immediately and retroactively apply for the waiver.**

Also included within the scope of exigent circumstances are the remediation of defects impacting housing quality standards that existing HUD policy requires to be completed within 30 days or less. In these instances, CLPHA feels the BAP waiver should apply for the same length of time as the new NSPIRE standards require the remediation to be remedied. Conforming the exigent circumstances waiver with the NSPIRE standards remediation timeline will give PHAs a single clear target timeline to complete the remediation.

Thank you for the opportunity to comment on these most important regulations and their impact on the residents we serve. In addition to feedback on this Public Interest Phased Implementation Waiver, CLPHA has submitted separate comments on the proposed BABA De Minimis and Small Grants Waiver, as well as the BABA Exigent Circumstances Waiver.

Sincerely,

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

Sunia Zaterman  
Executive Director  
Council of Large Public Housing Authorities