

July 15, 2022

Regulations Division
Office of the General Counsel
U.S. Department of Housing and Urban Development
451 Seventh Street SW, Room 10276
Washington, DC 20410-0500

RE: Docket Number FR-6331-N-03, Request for Information Relating to the Implementation of the Build America, Buy America Act

Dear Mr. Carlile,

Enterprise Community Partners, Housing Partnership Network, Local Initiatives Support Corporation, National Council of State Housing Agencies, National Housing Conference, National NeighborWorks Association, and Stewards of Affordable Housing for the Future, appreciate the work HUD has undertaken to implement the Build America, Buy America Act (the Act). Our organizations' continuous commitment to supporting affordable housing in communities across the country provides us with a deep understanding of how new federal requirements can impact the construction and preservation of affordable housing.

Background

The Build America, Buy America Act was enacted as part of the Infrastructure Investment and Jobs Act (IIJA) and established a Buy American Program (BAP) domestic content procurement preference for federal financial assistance programs funding infrastructure projects. The BAP requirement is specific to iron, steel, manufactured products, and construction materials and the law further defines a project to include "the construction, alteration, maintenance, or repair of infrastructure in the United States" and includes within the definition of infrastructure those items traditionally included along with buildings and real property.

The Office of Management and Budget's (OMB) "Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure" (OMB Guidance) informs federal agencies on how to: 1) incorporate a BAP preference to federal financial assistance programs for infrastructure as required by IIJA; and 2) the process of providing waivers. Federal agencies are responsible for applying this guidance, in consultation with OMB, to their financial assistance programs.

Section II of the OMB Guidance provides federal agencies key information on the applicability of Buy America requirements to federal financial assistance programs. The OMB Guidance notes that: "when determining if a particular construction project of a type note listed in the infrastructure definition, agencies should consider whether the project will serve a public function, including whether the project is publicly owned and operated, privately operated on behalf of the public, or is a place of public accommodation, as opposed to a project that is privately owned and not open to the public. Projects with the former qualities have greater indica of infrastructure, while projects with the latter quality have fewer. *Projects consisting solely of the purchase, construction, or improvement or private home for personal use, for example, would not constitute an infrastructure project* (emphasis added)."

Recommendations

HUD should use the authority from the Act and OMB Guidance to exempt HUD resources funding affordable housing projects from the BAP domestic content procurement requirements. While the Act includes “buildings and real property” in the infrastructure definition, the OMB Guidance builds on that to explicitly exempt “projects consisting solely of the purchase, construction, or improvement or private home for personal use, for example, would not constitute an infrastructure project.” The use of HUD resources, such as the Community Development Block Grant, HOME Investment Partnerships Program, Housing Trust Fund, Section 202 Capital Advances, in affordable housing development projects (both single-family and rental) should not trigger BAP requirements since they are used to construct, rehabilitate, or preserve private homes which are not “open to the public.” While most affordable rental housing has a general public use requirement, the actual homes themselves are privately leased and not open to the public unlike other more traditional infrastructure projects. Lastly, peer federal housing agencies, such as the U.S. Department of Agriculture’s Rural Housing Service have determined that these requirements don’t apply to their single-family or multifamily housing programs, which provide similar financial assistance resources for housing rehabilitation and new construction.¹

Our organizations believe it’s important the Department exempt HUD programs financing affordable housing from the BAP requirement since the cost of housing construction has risen substantially in recent years and new procurement requirements will only further increase costs. The cost of housing construction has greatly increased recently due to the economic impacts of the Covid-19 pandemic, including supply chain disruptions. Data from the U.S. Census Bureau show construction costs were up by over 18 percent from 2020 to 2021, the largest yearly increase since 1970.² In 2021, the price of lumber was 17 percent higher than its 25-year average.³ These increases in construction costs are a large contributing factor to our nation’s record setting housing inflation, threatening the housing stability of lower income families and making it difficult for affordable housing developers, which have to find additional scarce resources to meet increased project costs.

Incorporating a BAP requirement on HUD funding utilized for affordable housing will further increase construction costs, with a disparate impact on affordable housing since it requires the use of multiple federal subsidies, unlike market rate projects. Affordable housing sponsors finance projects that are markedly dissimilar to more traditional infrastructure projects in terms of size and costs and don’t have the bargaining power to require the BAP requirement in potential contracts. These increased costs would reduce project viability and undermine the Administration’s commitment to drive down construction costs. The Administration’s Housing Supply Action Plan stress the need to “partner with the private sector to address supply chain disruptions for building materials” and overall increase housing supply for the lowest income Americans.⁴ We believe implementing this discretionary requirement would be inconsistent with the Administration’s policy of lowering housing costs and increasing affordable housing options.

We thank you for considering our comments and please contact Mark Kudlowitz (mkudlowitz@lisc.org), LISC Senior Director of Policy, if you need additional clarification or follow up on any of the recommendations provided in this letter.

¹ <https://www.ocfo.usda.gov/federal-financial-assistance-policy/InfrastructureInvestment>

² <https://www.census.gov/construction/c30/pdf/release.pdf>

³ <https://www.nahb.org/blog/2022/02/lumber-prices-in-2020-and-2021-set-record-highs-even-when-adjusted-for-inflation/>

⁴ <https://www.whitehouse.gov/briefing-room/statements-releases/2022/05/16/president-biden-announces-new-actions-to-ease-the-burden-of-housing-costs/>

Sincerely,

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