

January 13, 2023

Secretary Marcia Fudge
U.S. Department of Housing and Urban Development
451 Seventh Street SW
Washington, DC 20410-0500

RE: Implementation of the Build America, Buy America Act

Dear Secretary Fudge,

Enterprise Community Partners, Habitat for Humanity International, Housing Assistance Council, Housing Partnership Network, LeadingAge, 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.

It is our understanding that HUD expects to apply a Buy America Preference (BAP) requirement to the HOME Investment Partnerships and Housing Trust Fund programs under a phased implementation approach and may include other housing programs in the future. **While supporting American made products is a laudable goal, we don't believe HUD must include a BAP requirement based on the legislative language and implementing guidance from the Office of Management and Budget (OMB), as discussed below.** This is vitally important since the Infrastructure Investment and Jobs Act (IIJA) did not include additional resources for affordable housing. Unfortunately, we are in an environment of declining federal housing subsidies, with a 12.5 percent reduction in Low-Income Housing Tax Credits, and HUD block grants which were flat funded for fiscal year 2023 and still under inflation adjusted funding levels from the past.

We encourage HUD to utilize its discretionary authority with BAP requirements to explicitly exempt affordable housing programs. This is needed since these requirements would add substantial cost and administrative burden to the production and preservation of affordable housing. Building materials are difficult to obtain and expensive given supply chain challenges and the current economic environment. Imposing BAP requirements will complicate construction and raise affordable housing costs, directly contravening the goals of the Administration's Housing Supply Action Plan.¹

¹ <https://www.whitehouse.gov/briefing-room/statements-releases/2022/05/16/president-biden-announces-new-actions-to-ease-the-burden-of-housing-costs/>

Background

The Build America, Buy America Act was enacted as part of the Infrastructure Investment and Jobs Act and established a Buy American 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 “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 IJA; and 2) the process of providing waivers.² 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 not listed in the definition above constitutes ‘infrastructure,’ 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 indicia of infrastructure, while projects with the latter quality have fewer. *Projects consisting solely of the purchase, construction, or improvement of a private home for personal use, for example, would not constitute an infrastructure project* (emphasis added).”

To date, HUD has released several BAP waivers. One applies to infrastructure projects less than \$250,000 and when the federal financial assistance award is less than \$250,000; and another to exigent circumstances, where delays could create safety and health issues. In addition, HUD has waived BAP for Tribal recipients of HUD funds until May 14, 2023. Most recently, HUD has waived the application of the Act for all federal financial assistance obligated on or before February 21, 2023, except for those funds utilized in connection with the purchase of iron or steel products in infrastructure projects funded by Community Development Block Grant (CDBG) formula grants obligated by HUD on or after November 15, 2022. HUD has not, however, defined what housing-related construction is considered infrastructure.

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

² <https://www.whitehouse.gov/wp-content/uploads/2022/04/M-22-11.pdf>

the purchase, construction, or improvement of a private home for personal use.” The use of HUD resources, such as the CDBG, HOME Investment Partnerships Program, Housing Trust Fund, Self-Help Homeownership Opportunity Program, 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.

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 National Association of Home Builders shows residential construction costs increased 19 percent from 2021 to 2022.³ Since the pandemic began, lumber prices have increased, and added \$14,345 to the price of a new single-family home, and \$5,511 to a new multifamily home.⁴ 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 greater 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.⁵ 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.

³ <https://www.nahb.org/news-and-economics/press-releases/2022/06/rising-interest-rates-costs-slow-housing-production>

⁴ <https://eyeonhousing.org/2022/07/since-pandemic-onset-lumber-products-have-added-14k-to-house-price-51-to-rent/>

⁵ <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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CC: Erika Poethig, Special Assistant to the President for Housing and Urban Policy, White House
Vincent Reina, Senior Policy Advisor for Housing and Urban Policy, White House