

## Department of Veterans Affairs

### Waiver of Section 70914(a) of P.L. 117-58, Build America, Buy America Act for Public Interest Waiver of Build America, Buy America Provisions for Certain Projects of State Veteran Home Construction Grant Program

#### I. Summary

In accordance with the Build America, Buy America Act (“BABAA” or “the Act”), VA is issuing a public interest waiver for specific State Veteran Home Construction (SVHC) projects that are subject to the iron, steel, manufactured products, and construction materials requirement of BABAA. SVHC projects to which this waiver applies are the following two projects:

Federal Award Identification Number	State	Locality	Description
42-051	PA	Hollidaysburg	Bed Replacement: 200 Bed Facility
25-087	MA	Holyoke	Bed Replacement: 234 Bed Facility

The waiver will assist these SVHC bed replacement projects avoid immediate and costly delays to critically important projects that serve to provide Veterans access to a home-like nursing home environment that supports quality of life, health, and safety. The new facilities in Pennsylvania and Massachusetts will create a social, physical, and economic environment to promote health and well-being for frail and vulnerable Veterans that require long term care. To prevent undue delays, increases in project costs and disruption of work, there is significant public interest in waiving BABAA requirements for these projects.

#### Build America, Buy America

BABAA was enacted on November 15, 2021, as part of the Infrastructure Investment and Jobs Act (IIJA), P.L. 117-58. With passage of the IIJA, Federal financial assistance projects for infrastructure must comply with domestic content procurement preference requirements established in BABAA § 70912 and § 70913. Buy America’s domestic content procurement preference applies to all the iron, steel, manufactured products, and construction materials used for infrastructure projects under an award.

The Act establishes a domestic content procurement preference for Federal infrastructure programs. Section 70914(a) of the Act establishes that no later than 180 days after the date of enactment, agencies must ensure that none of the funds made available for infrastructure projects may be obligated by the Department unless it has taken steps to ensure that the iron, steel, manufactured products, and construction materials used in a project are produced in the United States. In section 70912, the Act defines a project to include “the construction, alteration, maintenance, or repair of infrastructure in the United States” and includes within the definition of infrastructure the structures, facilities, and equipment for buildings and real property. Thus, starting May

14, 2022, new awards of Federal financial assistance from a program for infrastructure, and any of those funds obligated by the grantee, are covered under the BABAA provisions of the Act, unless covered by a waiver.

## **II. Waiver Authority**

Under § 70914, the head of a Federal agency has authority to waive the application of a domestic content procurement preference when the application of the preference would be contrary to the public interest. Per Office of Management and Budget (OMB) Memorandum M-22-11, "Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure," published on April 18, 2022, "[a] waiver in the public interest may be appropriate where an agency determines that other important policy goals cannot be achieved consistent with [BABAA]." IIJA § 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 with a public comment period of not less than 15 days. In limited situations where there is urgent need in an unforeseen and exigent circumstance, agencies have the authority to waive the application of BABAA preferences without submitting the waiver for public comment. See IIJA § 70937(b)(2).

## **III. SVHC Program and Application Process**

The SVHC grant program is a partnership between VA and the States to construct State home facilities for furnishing domiciliary or nursing home care to Veterans and to expand, remodel or alter existing buildings for furnishing domiciliary, nursing home or adult day health care to Veterans in State homes and equivalent to a 65% VA grant and 35% state contribution. State homes may be owned and operated under various arrangements by one of the 50 States, the District of Columbia, the U.S. Virgin Islands, the Commonwealth of Puerto Rico, Guam, the Commonwealth of the Northern Mariana Islands, and American Samoa.

State home projects, funded in part by SVHC grants, vary in type and cover everything from fire alarm system and HVAC replacement to construction of new State home facilities. The SVHC grant application and grant award process is a multi-step process, regulated through 38 C.F.R. § 59. The process begins when a State submits an initial application, which includes project design, budget, estimated cost (in addition to other information), documentation and specified forms, to VA. Initial applications must be received by VA no later than April 15 for VA to include the application on the priority list for the grant award during the next fiscal year (FY). For example, submission of applications for projects on the FY 2022 priority list was required by April 15, 2021.

Once VA completes review of the initial application, VA may approve the project which begins the wait for funding. Projects that are related to safety get priority on the list for funding. VA generally receives \$150 million in annual appropriation for the SVHC Grant Program, and this means that non-safety projects may not get funding for 3-5 years. Once a project is notified that VA has funding to offer, the State can move to final award

status or if they need more time to complete the required documents accept a conditional award which permits them 180 days to complete the application package. Once VA offers funding and the state award is final or conditional, VA obligates the funds for the project.

38 C.F.R. §59.70(a)(2) allows the Secretary to conditionally approve a grant for a project for which a state has submitted an application that substantially met requirements under 38 C.F.R. Part 59. If a state that has obtained conditional approval for a project does not meet all of the requirements within 180 calendar days after the date of conditional approval, the Secretary will rescind the conditional approval and the project will be ineligible for a grant in the fiscal year in which the state failed to fully complete the application. The funds that were conditionally obligated for the project will be de-obligated.

#### **IV. Public Interest in this General Applicability Waiver of BABAA**

VA is issuing this waiver under exigent circumstances for two SVHC projects that received initial VA approval and offered funding as follows.

<b>State Project</b>	<b>Initial Application Approved by VA</b>	<b>VA offered funding</b>	<b>VA obligates funds on Sec signature for final or conditional award *</b>
Hollidaysburg, PA	9/25/2019	4/20/22	Cond Award 9/15/22
Holyoke, MA	4/12/2021	4/16/21	Cond Award 9/26/22

\*The two SVHC projects received their initial approvals prior to May 14, 2022, the effective date for enactment of BABAA provisions.

As part of the States' applications, the grant proposals included robust justifications, such as project scope, budget justification, needs assessment, schematics for the proposed project, space program analysis for nursing home domiciliary, and five-year capital plan for the State's entire state home program.

The conditional approval for the two projects included in this waiver expired for Hollidaysburg, PA on March 14, 2023, and will expire for Holyoke, MA on March 30, 2023. Pennsylvania has completed their required documentation, while VA expects Massachusetts will complete its documentation by March 30, 2023. Absent a BABAA waiver, these States will be unable to meet the requirements to obtain the grant award and the State will not receive VA's initially-approved grant contribution.

Additionally, without the waiver, the States will need to re-evaluate already approved applications for these 2 projects; will likely delay or halt projects already started or those that have completed the planning and design phases; and require re-executing project costs estimates with domestically sourced products. Furthermore, based on the availability of domestic materials and the potential need to identify new supply chains to

source these materials, implementing BABAA requirement could potentially disrupt or stop the proposed work to the detriment of Veterans' care.

To prevent undue delays, increases in project costs and disruption of work, there is significant public interest in waiving BABAA requirements for these projects:

**Hollidaysburg, PA:** Received a conditional approval for the Hollidaysburg, PA project to construct 200 Bed Nursing Home Facility. The State has completed all required documentation to receive a final award from VA. The old facility where the veterans reside is an institutional environment with four beds to a room and no kitchen services on site. Food service needs to be brought in from another building and concerns exist for health code violations due to inadequate food temperatures.

- The Hollidaysburg project has construction bids that will expire March 20, 2023. If these bids expire, the project is a risk of increased project costs. Pursuant to 38 CFR 59.80(k), the Secretary may not award a grant for an amount that is 10% more than the amount conditionally approved. If Pennsylvania has to seek new construction bids, those new costs will exceed the conditionally approved costs by 10%, thus requiring the state to either absorb the additional costs or force the State to submit a new application for the grant.

- VA generally receives \$150 million in annual appropriation for the SVHC Grant Program and this means that non safety projects may not get funding for 3-5 years and must reinitiate the entire project. Presently, the State has incurred approximately \$2.8 million to start the design of this project and will be ineligible for Federal reimbursement of the \$2.8 million, even upon reinitiating a request to VA.

**Holyoke, MA:** Received a conditional approval for the Holyoke, MA project to construct a 234 Bed Nursing Home Facility Holyoke is in the process of building a small house model nursing home facility. The old facility where the veterans reside is an institutional environment with four beds to a room and experienced a high rate of pandemic related deaths during the height of COVID-19.

- The State's construction project is underway and at 15% completion. The construction bids will expire May 2, 2023. If these bids expire, the project is a risk of increased project costs. Pursuant to 38 CFR 59.80(k), the Secretary may not award a grant for an amount that is 10% more than the amount conditionally approved. If Massachusetts must seek new construction bids, those new costs will exceed the conditionally approved costs by 10%, thus requiring the state to either absorb the additional costs or force the State to submit a new application for the grant.

- VA generally receives \$150 million in annual appropriation for the SVHC Grant Program, and this means that non safety projects may not get funding for 3-5 years and must reinitiate the entire project. Presently, the State has incurred approximately \$15 million to date and will be ineligible for Federal reimbursement of the \$15 million, even upon reinitiating a request to VA.

Compliance with BABAA provisions for these projects is not in the public interest as they will create undue hardship, including burdensome delays, loss of costs incurred to date, and could jeopardize the health and safety of Veterans. Moreover, the expiring

bids associated with these projects present exigent circumstances that necessitate the immediate issuance of a waiver.

### **Assessment of Cost Advantage of a Foreign-Source Product**

Under OMB Memorandum M-22-11, agencies are expected to assess “whether a significant portion of any cost advantage of a foreign-sourced product is the result of the use of dumped steel, iron, or manufactured products or the use of injuriously subsidized steel, iron, or manufactured products” as appropriate before granting a public interest waiver. VA’s analysis concluded that this assessment is not applicable to this waiver, as this waiver is not based on the cost of foreign-sourced products. VA will continue to perform additional market research during the duration of the waiver to better understand the market to limit the use of waivers caused by dumping of foreign-sourced products.

### **V. VA’s Progress in Implementation of BABAA**

Since enactment, VA has been working to understand the application of BABAA requirements as it applies to VA’s Federal financial assistance programs. Throughout the implementation process, VA identified an increasing risk in effectively understanding and implementing BABAA financial assistance requirements, specifically on VA’s grants portfolio. To mitigate the risk, VA is proposing to establish a dedicated Made In America Office under the Office of Acquisition, Logistics and Construction (OALC) to manage all BABAA requirements for both procurement and financial assistance programs. In the interim, VA’s newly established Grants Management Service, with direction from OALC, will assist in the following:

- Drafting agency wide BABAA grants policy, procedures, and standard operating procedures.
- Establishing standard BABAA language in Notice of Funding Opportunity and Grant Award Terms and Conditions.
- Developing a website where stakeholders can learn about the requirements of BABAA on grants and where VA can post proposed and approved grant waivers.
- Designing, implementing, and documenting an agency-level BABAA grants waiver process.

In addition, VA’s SVHC grant program has engaged with State applicants to discuss BABAA requirements and the impact of cost increases, material shortages, and work stoppages. This engagement resulted in VA expanding outreach efforts to identify the full scope and impact the BABAA preferences will have across the SVHC grant program. For applications due April 15, 2023, and after, VA modified its grant award terms and conditions to include standard BABAA terms for projects.

## Conclusion

In accordance with **P.L. 117-58** § 70914(c), the Secretary has the authority to waive the application of the BABAA preferences in certain circumstances. Pursuant to § 70937(b)(2), in limited situations where there is urgent need in an unforeseen and exigent circumstance, the Secretary may waive the application of BABAA preferences without submitting the waiver for public comment. VA has determined that providing a public interest waiver for these specific State Veteran Home Construction (SVHC) projects are in the public interest. Moreover, the waivers for these two building replacement projects will avoid unnecessary risk(s) of project failure and significant delays which will adversely impact 434 Veterans. Further, forbearance of public notice is needed to avoid impending bid expirations, and to ensure care and benefits of Veterans as part of VA's mission.

/s/

Denis McDonough  
Secretary of Veterans Affairs  
March 2023