

DEPARTMENT OF COMMERCE

Department-wide Public Interest Waivers for De Minimis Infrastructure Project Purchases, Small Grants, and Minor Components within Iron and Steel Products

ACTION: Notice of Final Waiver

SUMMARY: Congress passed the Build America, Buy America Act (BABA or Act), which is included in the Infrastructure Investment and Jobs Act, Public Law Number 117-58, 135 Stat. 429 (IIJA), in November 2021. BABA provides for strong and permanent domestic sourcing requirements across all Federal financial assistance programs. The Department of Commerce (the Department), in keeping with its mission to create the conditions for economic growth and opportunity for all communities, is ready to lead on this important mission to catalyze domestic manufacturing, resilient supply chains, and job growth. The Department is eager to contribute to growing America’s domestic production capacity and will comply with BABA’s requirements as much as possible while balancing equity, practicality, and implementation costs.

In accordance with BABA, this notice provides that the Department is establishing Department-wide public interest waivers for de minimis infrastructure project purchases, small grants, and minor components within iron and steel products. The waivers apply to recipients of Department Federal financial assistance awards and provide recipients a limited waiver from the application of the Buy America Domestic Content Procurement Preference provisions (“Buy America Preference”) as applied to the iron and steel, manufactured products and construction materials incorporated into a Federal financial assistance project for infrastructure. The Department has determined that the de minimis, small grants, and minor components waivers are in the public interest as they will assist Department award recipients in keeping projects moving, prevent immediate delays to critically important projects, allow recipients to continue to provide economic opportunity through innovation, and support the timely development of critical domestic public infrastructure.

PUBLIC COMMENT AND RESPONSE: On October 5, 2022, the Department published its proposed de minimis, small grants, and minor components waivers for a 15-day public comment period on the Department’s Build America, Buy America website. The public comment period closed at 11:59 p.m. Eastern Time on October 20, 2022.

The Department received one comment, which was submitted by a national steel and steel products company that encouraged the Department to narrow the scope of or eliminate the de minimis and minor components public interest waivers. The Department carefully considered the comment and determined that the proposed de minimis and minor components waivers are expected to mostly impact awards whose primary purpose is not construction, but that do include relatively small infrastructure elements. Further, the Department determined the waivers, as proposed, are necessary to reduce recipient burden, broaden the potential recipient pool, promote efficiency and speed of project execution, and allow time for domestic manufacturers to make any necessary product adjustments or enhance workforce preparedness. Additionally, the proposed waivers are consistent with and follow the guidance provided by Office of Management and Budget 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 (M-22-11). For these reasons, the Department did not make substantive changes to the proposed de minimis and minor components waivers in response to the comment received.

FOR FURTHER INFORMATION CONTACT: For questions about this notice, please contact John Geisen, Director, Financial Assistance Policy and Oversight Division, Office of Acquisition Management, U.S. Department of Commerce, 1401 Constitution Avenue NW, Room 1854, Washington, DC 20230, via telephone at (202) 482-0602 or by email at jgeisen@doc.gov.

SUPPLEMENTARY INFORMATION:

I. Build America, Buy America

BABA was enacted on November 15, 2021, as part of the Investment Infrastructure and Jobs Act (IIJA), [Pub. L. 117-58](#). With the passage of the IIJA, federal financial assistance projects for infrastructure must comply with domestic content procurement preference requirements established in the “Build America, Buy America Act” set forth in IIJA Section 70901-70952 (“Buy America”). BABA’s domestic content procurement preference applies to all iron and steel, manufactured products, and construction materials used for infrastructure projects under an award. These requirements took effect on May 14, 2022.

Under Section 70914(b) of the Act, the Department has authority to waive the application of a domestic content procurement preference when (1) the application of the preference would be contrary to the public interest, (2) the materials and products subject to the preference are not produced in the United States at a sufficient and reasonably available quantity or satisfactory quality, or (3) inclusion of domestically produced materials and products would increase the cost of the overall project by more than 25 percent. Section 70914(c) of the Act 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.

II. The Department’s Progress in Implementation of BABA

The IIJA will help close gaps in the domestic manufacturing base and since the enactment of BABA, the Department has worked diligently to implement the Buy America Preference. Consistent with the requirements of Section 70913 of the Act, the Department has produced a report that identifies and evaluates all of the Department’s Federal financial assistance programs with potentially eligible uses of funds that include infrastructure as defined by BABA to determine which programs would be in compliance with the Buy American Preference and which would be considered inconsistent with Section 70914 of the Act and thus “deficient” as defined by Section 70913(c) of the Act.

The report was submitted to Congress and OMB and published in the [Federal Register](#) within 60 days after the date of enactment of the Act, on January 21, 2022. Specifically, the Department published the required report entitled “Department of Commerce’s Identification of

Federal Financial Assistance Infrastructure Programs Subject to the Build America, Buy America Provisions of the Infrastructure Investment and Jobs Act” in compliance with Section 70913 of the Act. Since issuing the report, the Department has held regular meetings with the OMB Made in America Office (MIAO) and is an active participant in the MIAO Buy America Preference Working Group.

On May 6, 2022, the Department issued Financial Assistance Memorandum (FAM) 2022-01, *Interim procedures for addressing the applicability of Build America, Buy America Act requirements in Federal Financial Assistance Programs for Infrastructure*. Per FAM 2022-01, the Economic Development Administration (EDA), National Institute of Standards and Technology (NIST), and National Oceanic and Atmospheric Administration (NOAA) grants offices are responsible for conferring with the appropriate program manager and the Federal Assistance Law Division (FALD) of the Department’s Office of the General Counsel regarding the applicability of BABA prior to making an award on or after May 14, 2022, that may be considered a Federal financial assistance program for infrastructure as defined by the Act.

In support of the Administration’s priority to “use terms and conditions of Federal financial assistance awards to maximize the use of goods, products, and materials produced in, and services offered in, the United States,” the Department developed a specific award condition (SAC) that, if determined to be applicable based on the guidance provided by OMB M-22-11 and Department FAM 2022-01, is included in new awards, renewal awards, and amendments obligating additional funds to existing awards that are executed on or after May 14, 2022. Effective as of May 14, 2022, the Department is also including advance notice of BABA requirements in applicable Notice of Funding Opportunities (NOFOs).

III. Public Interest Waivers for De Minimis Infrastructure Project Purchases, Small Grants, and Minor Components within Iron and Steel Products

The Department has determined that waivers for de minimis infrastructure project purchases, small grants, and minor components within iron and steel products are in the public interest in order to allow Department award recipients to focus their efforts on completing major components of their projects, prevent immediate delays to critically important projects, allow recipients to continue to provide economic opportunity through innovation, and support the timely development of critical domestic public infrastructure. The waivers are not an alternative to increasing domestic production; instead, they are valuable tools to promote investment in our domestic manufacturing base in the long term by allowing recipients to continue to make major improvements in infrastructure.

The waivers are in the interest of efficiency, to ease burdens for Department recipients, avoid unnecessary costs, and delays to projects. They will also allow the Department to focus, particularly in the early phases of BABA implementation, on key products and critical supply chains where increased U.S. manufacturing can best advance our economic and national security and allow recipients to continue with projects. The absence of these waivers would likely cause the Department to lose recipients who cannot bear the additional costs created by a minimal component of the project, prevent the Department from making certain small grants in which only foreign-made products can be easily sourced, and negatively impact the most high-need

Americans served by Department federal financial assistance awards if other American-made products are excluded from a project because of minor foreign components within iron and steel products.

The Department is establishing the following targeted and limited waivers:

- The Department is establishing a waiver for otherwise covered infrastructure project purchases, totaling up to 5 percent of the total applicable project costs¹, up to a maximum of \$1,000,000. Once a Federal financial assistance recipient's total purchases of materials otherwise covered by the Buy America preference (iron, steel, manufactured products, and construction materials) reach 5 percent of applicable project costs or \$1,000,000, whichever is lower, all other applicable project purchases must comply with the Buy America preference. This waiver will allow recipients of Department Federal financial assistance awards to focus their compliance efforts on the major components for their projects. Moreover, the de minimis waiver will help to ensure that both recipients and the Department make efficient use of limited resources and help to prevent against the cost of processing individualized BABA waivers exceeding the value of the items waived.
- The Department is establishing a waiver of the Buy America domestic content procurement preference for small grants. The small grants waiver will apply to Federal financial assistance awards equal to or less than the 2 CFR 200.1 Simplified Acquisition Threshold, which is currently \$250,000. If Federal financial assistance provided by the Department is combined with other Federal financial assistance from another Federal agency and the total amount of Federal financial assistance in a single project is greater than the Simplified Acquisition Threshold, then the waiver shall not apply to the Federal financial assistance provided by the Department. This waiver is critical to ensure that agency infrastructure projects conducted by the Department financial assistance recipients sustain progress in communities across the country. The Department anticipates the impact of the small grants waiver will vary by year and by Department program, but estimates that it will affect less than 1% of assistance provided within any given infrastructure program.
- The Department is establishing a waiver of Buy America domestic content procurement preference to allow minor deviations for miscellaneous minor components within iron and steel products. The minor components waiver will allow recipients of Department Federal financial assistance awards to use non-domestically produced miscellaneous minor components comprising no more than 5% of the total material cost of an otherwise domestically produced iron and steel product to be used.

¹ Applicable project costs are defined for the purpose of this waiver as material costs subject to the Buy America preference.

IV. Anticipated Program and Project Impacts Absent Public Interest Waivers: De Minimis, Small Grants, and Minor Components

The Department requested input from its bureaus to identify the full scope and impact the Buy America preference will have across all its programs, inclusive of programs that have a broader purpose other than infrastructure to assess whether the de minimis, small grants, and minor components public interest waivers would be appropriate. Based on feedback gathered from its bureaus, the Department believes that the benefit to its recipients substantially outweighs the minimal impact these waivers will have on the Made in America objectives. The absence of these waivers will likely result in:

- Increased burden for grant recipients, many of which have limited administrative and financial capacity to manage BABA requirements. Some smaller, disadvantaged recipients may be discouraged all together from competing for awards;
- Projects will be completed at a slower rate, potentially delaying project timelines, as individualized waivers will need to be submitted and processed. Department agencies will have to devote more staff time to this process;
- The Department will need to provide additional training and technical assistance to recipients, particularly lower capacity recipients or those without experience applying BABA, which may struggle with compliance requirements; and
- Manufacturers who have not previously had similar requirements will need time to adjust their products and will need training to learn if their existing products comply with the requirements of BABA.

On the other hand, the subject waivers will likely:

- Help grant recipients establish rules and procedures to manage BABA requirements;
- Balance competitiveness;
- Provide recipients more options to efficiently complete projects;
- Assist recipients that are units of State or local government, which must follow well-defined procurement procedures that ensure competition and cost reasonability regardless of whether a waiver is granted or not; and
- Waivers will allow Department award recipients to focus on critical items to keep projects moving and ease the implementation learning curve.

V. Assessment of Cost Advantage of a Foreign-Sourced Product

Under OMB Memorandum M-22-11, “Memorandum for Heads of Executive Departments and Agencies,” published on April 18, 2022, Department 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 iron or steel, iron, or manufactured products or the use of injuriously subsidized steel, iron, or manufactured products” as appropriate before granting a public interest waiver. The Department has concluded that this assessment is not applicable to these waivers, as these waivers are not based on the cost of foreign-sourced products.

VI. Effective Date and Duration of the Waiver

These waivers will be effective upon issuance for all Department recipients of Federal financial assistance for infrastructure. The waivers will apply to all obligations of Federal financial assistance for infrastructure by the Department on or after the effective date. For obligations of Federal financial assistance for infrastructure by the Department that preceded issuance of the final waivers, the waivers will only apply to expenditures incurred on or after the effective date. The Department will review these waivers in five years of the date on which these waivers were issued, as well as annually for the first five years to determine its continued applicability and relevance with the Department’s missions and goals consistent with the IJA, Executive Order 14005, and the OMB Memorandum M-22-11.

JEREMY PELTER Digitally signed by JEREMY
PELTER
Date: 2023.05.17 17:27:20
-04'00'

Jeremy Pelter
Acting Chief Financial Officer and
Assistant Secretary for Administration