

Department of Commerce

Department-wide Public Interest Waivers of the Buy America Domestic Content Procurement Preference for: De Minimis Infrastructure Project Purchases, Small Grants, and Minor Components within Iron and Steel Products

ACTION: Notice

SUMMARY: Congress passed the Build America, Buy America Act (BABA or Act), which includes strong and permanent domestic sourcing requirements across all Federal financial assistance programs. DOC, 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. DOC will also help grow America’s domestic production capacity while complying with BABA’s requirements as much as possible – balancing equity, practicality, and implementation costs.

In accordance with BABA, this notice advises that DOC is proposing to issue Department-wide public interest waivers of the Buy America domestic content procurement preference for de minimis infrastructure project purchases, small grants, and minor components within iron and steel products. The waivers would apply to recipients of DOC Federal financial assistance awards and would 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. DOC determined that the proposed de minimis, small grants, and minor components waivers are in the public interest as they will assist DOC bureaus 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.

DATES: Comments on the proposed BABA waiver set forth in this Notice are due on or before October 20, 2022, at 11:59 p.m. Eastern Time. DOC will review this waiver every five years of the date on which the waiver was issued to determine its continued applicability and relevance with DOC’s missions and goals consistent with the Infrastructure Investment and Jobs Act (IIJA), [Executive Order 14005](#), *Ensuring the Future Is Made in All of America by All of America’s Workers*, and the 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*.

ADDRESSES: Interested persons are invited to submit comments on these proposed de minimis, small grants, and minor components waivers. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by DOC, and enables DOC to make them immediately available to the public. Please submit comments to jgeisen@doc.gov with the subject “DOC Public Interest Waivers: De Minimis,

Small Grants and Minor Components.”

Note that all submissions received, including any personal information therein, may be publicly posted without change or alteration. Do not submit Confidential Business Information or otherwise sensitive or protected information.

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 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” IIJA Section 70901-70952 (“Buy America”). Buy America’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), the DOC 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) 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. DOC’s Progress in Implementation of BABA

The IIJA will help close gaps in the domestic manufacturing base and since the enactment of BABA, DOC has worked diligently to implement the Buy America Preference. Consistent with the requirements of Section 70913 of the Act, DOC has produced a report that identifies and evaluates all of DOC’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 BABA.

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, DOC 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. Since issuing the report, DOC 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, DOC 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,” DOC issued a specific award condition (SAC) that, if determined to be applicable as determined by the guidance provided by FAM 2022-01, is included in new awards, renewal awards, amendments obligating additional funds to existing awards that are executed on or after May 14, 2022, and Notice of Funding Opportunities (NOFOs) effective immediately.

III. Waivers

Under Section 70914(b), DOC has authority to waive the application of a domestic content procurement preference when application of the preference would be contrary to the public interest. Section 70914(c) provides that a waiver under Section 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.

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

DOC 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 DOC 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 proposed 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 DOC recipients, avoid unnecessary costs, and delays to projects. They will also allow DOC 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 this waiver will cause DOC to lose recipients who cannot bear the additional costs created by a minimal component of the project, prevent DOC from making certain small grants in which only foreign-made products can be easily sourced, and will negatively impact the most high-need Americans served by DOC Federal financial assistance awards if otherwise American-made products are excluded because of a minor component of the product.

DOC is proposing the following targeted and limited waivers:

- The waiver for de minimis infrastructure project purchases will set a threshold of 5% of total project costs used under the Federal award up to a maximum of \$1,000,000. For example, if the total cost of a recipient's project is \$2,000,000, up to \$100,000 of costs for iron and steel, manufactured goods and construction materials would be exempt from BABA. This waiver will allow recipients of DOC 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 DOC 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 small grants waiver will apply to DOC federal financial assistance awards with total federal funding (direct DOC funding and any other federal agency) equal to or less than the 2 CFR 200.1 Simplified Acquisition Threshold, which is currently \$250,000. For awards with funding from multiple federal agencies, the waiver applies when DOC is the cognizant agency for the Made in America requirement. This waiver is critical to ensure that agency infrastructure projects conducted by DOC financial assistance recipients sustain progress in communities across the country. The impact of the waiver varies by year and DOC program but the agency estimates that it will affect approximately less than 1% of assistance provided within a given infrastructure program.
- The waiver for minor components within iron and steel products will allow minor deviations for miscellaneous minor components within iron and steel products in a project when a domestically produced component cannot be easily sourced. This waiver will allow recipients of DOC 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.

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

DOC requested input from its bureaus to identify the full scope and impact the Buy America preferences will have across all its programs, inclusive of programs that have a broader purpose other than infrastructure. DOC sought to establish what type of requests for waivers agencies are expecting to receive from recipients to allow DOC to collect important information needed to establish the need for three Department-wide waivers: 1) de minimis (setting a threshold of 5% of total project costs up to a maximum of \$1,000,000, 2) small grants (awards

below the Simplified Acquisition Threshold which is currently \$250,000), and 3) Minor components (minor components comprising no more than 5% of the total material cost of an otherwise domestically produced iron and steel product to be used).

Based on feedback gathered from its bureaus, DOC 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 proposed 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. DOC agencies will have to devote more staff time to this process.
- DOC 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.
- 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, DOC believes that the issuance of the subject waivers will likely:

- Help smaller communities with limited resources. The proposed waivers are particularly necessary to support equity efforts, particularly among the socially vulnerable, distressed, and impoverished communities DOC serves.
- Balance competitiveness.
- Provide recipients more options to efficiently complete projects.
- Help Indian Tribes and other recipients with limited resources.
- 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.
- Waivers will allow DOC and recipients to focus on critical items to keep projects moving and ease the implementation learning curve.

VI. 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, DOC 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. DOC has concluded that this assessment is not applicable to this proposed waiver, as this waiver is not based on the cost of foreign-sourced products.

VII. Effective Date and Duration of the Waiver

This proposed waiver will be effective for all DOC recipients of Federal financial assistance for infrastructure. DOC will review this waiver every five years of the date on which the waiver was issued to determine its continued applicability and relevance with DOC's missions and goals consistent with the IIJA, Executive Order 14005, and the OMB Memorandum M-22-11.

VIII. Solicitation of Comments of the Waiver

As required under Section 70914 of BABA, DOC is soliciting comment from the public on this proposed waiver. Please refer to the "DATES" and "ADDRESSES" sections of this notice for information on submission of comments.