

**The U.S. Department of Commerce, Economic Development Administration Adjustment
Period Waiver of Buy America Requirements**

TITLE: Build America, Buy America Implementation: Agency Adjustment Period Waiver

SUMMARY: In accordance with this general applicability agency adjustment period waiver, the Economic Development Administration (EDA), a bureau of the U.S. Department of Commerce, will implement the requirements of the Build America, Buy America Act (“the Act”) effective November 13, 2022. The Act establishes that Federal financial assistance may only be used for infrastructure projects and activities when the iron, steel, manufactured products, and construction materials to be used are produced in the United States. EDA’s adjustment waiver is designed to avoid requiring EDA grantees that have already submitted applications to EDA prior to the May 14, 2022 effective date of the Act to make costly modifications to budgets, plans, and specifications. By November 13, 2022, EDA expects that all grantees in this position will have had their awards processed and any new applicants to EDA will be expected to comply with the requirements of the Act.

PUBLIC COMMENTS: On July 7, 2022, EDA published its proposed limited adjustment period waiver for a 15-day public comment period on the Department’s Build America, Buy America Waivers website. The public comment period closed at 11:59 p.m. Eastern Daylight Time (EDT) on July 22, 2022. EDA received four comments. Three comments, two from national organizations representing EDA’s grantee community and one from a specific EDA grantee, were supportive of EDA’s adjustment period waiver. One comment was from a national construction organization and encouraged EDA to comply with the Act immediately. EDA did not make substantive changes to the proposed waiver in response to the comments received.

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BACKGROUND: The Infrastructure Investment and Jobs Act (IIJA) includes the Build America, Buy America (“BABA”) Act. Pub. L. 117-58, sections 70901-52. The Act expands the coverage and application of Buy America preferences in Federal financial assistance (e.g., grant) programs for infrastructure. The Act requires that no later than May 14, 2022 the head of each covered Federal agency ensure “none of the funds made available for a Federal financial assistance program for infrastructure ... be obligated for a project unless all of the iron, steel, manufactured products, and construction materials used in the project are produced in the United States.” IIJA at 70914(a). In addition to establishing Buy America preferences, the Act also established procedures for making waivers to these requirements and provides certain statutory authorities for the Made in America Office (“MIAO”) in the Office of Management and Budget (“OMB”). IIJA at 70915(b) and 70923. On April 18, 2022, OMB issued memorandum M-22-11, “Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure” (“Implementation Guidance”). The Implementation Guidance provides that a “waiver in the public interest may be appropriate where an agency determines that other important policy goals cannot be achieved consistent with the Buy America requirements established by the Act.” Implementation Guidance at p. 10. The Implementation Guidance also recognizes several instances in which Federal agencies may consider issuing a public interest waiver and encourages agencies to consider an adjustment period where time limited waivers would allow award recipients and agencies to transition to new Buy America preferences, rules, and processes. Implementation Guidance at p. 11.

PROCESS IN IMPLEMENTING BABA REQUIREMENTS: EDA, in cooperation with the Department of Commerce, has worked diligently towards the implementation of BABA

requirements by establishing a department BABA workgroup; developing proposed policy, procedures, and guidance addressing implementation and compliance; and developing draft applicant and grantee waiver submission processes.

ADJUSTMENT PERIOD WAIVER: With the goal of advancing critical infrastructure projects in a timely manner while implementing the new Buy America requirements to support domestic manufacturing, EDA establishes a limited public interest adjustment period waiver under IJA section 70914(b)(1) for iron and steel products, manufactured products, and construction materials in infrastructure projects funded through EDA’s annual appropriations for applications submitted to EDA prior to May 14, 2022 that are funded under EDA’s annual appropriations through November 12, 2022.

EDA makes infrastructure grants under the Public Works and Economic Development Act of 1965 (PWEDA), in which Congress found that “there continue to be areas of the United States experiencing chronic high unemployment, underemployment, outmigration, and low per capita incomes, as well as areas facing sudden and severe economic dislocations because of structural economic changes, changing trade patterns, certain Federal actions . . . , and natural disasters.” 42 U.S.C. § 3121. EDA grants provide assistance to regions of significant economic distress as determined by factors including rates of unemployment, per capita income and underemployment, outmigration of population and other causes of economic distress. 13 C.F.R. § 301.4. As such, EDA applicants and award recipients represent some of the most distressed communities in America.

EDA has rolling application deadlines, and many applications were submitted prior to issuance of the Implementing Guidance. These applications included plans for use of iron and steel products, manufactured products, and constructional materials in infrastructure projects as

diverse as broadband, bridges, roads, sewer, water, buildings, piers, and many more. EDA found it to be unfair to require applicants that submitted applications prior to May 14, 2022, to submit new applications, including new budgets, preliminary engineering, and construction plans, all of which would be at considerable expense to applicants serving the most economically distressed regions of America. Applicants would incur such expense to accommodate a requirement that did not exist at the time of their original application.

EDA recognizes that the Buy America Requirements, as championed by the Biden administration and enacted in the Act, represent an era-defining shift in how the nation builds things with Made in America products and that bringing back domestic manufacturing and advancing these objectives is critical for the future prosperity of the distressed communities EDA serves. EDA has already seen how supply chain disruptions have negatively impacted construction project schedules and budgets and devoutly believes that Buy America requirements are the best path toward avoiding future disruptions. In the short run, however, application of these requirements would be inconsistent with the public interest because doing so would impose substantial costs on the very communities that have been most harmed by offshoring of American manufacturing. In addition, the effect of a brief waiver for a subset of potential EDA grantees will not impair the of the Buy America requirements. As noted above, EDA makes grants for a wide array of infrastructure projects. EDA infrastructure grants are also fairly modest, with an average range of approximately \$1 to \$4 million. Because of those factors, EDA-funded projects alone are unlikely to have an appreciable effect on demand for any particular Made in America product. EDA's current annual appropriations are made available to eligible entities under a Notice of Funding Opportunity (NOFO) to which applicants can apply on a rolling basis. The current NOFO for infrastructure projects funded under EDA's annual appropriations was published on October 18, 2019 and was last updated on April 1, 2022. (FY 2020 Public Works and Economic

Adjustment Assistance NOFO). As noted above, the Implementation Guidance was published on April 18, 2022. Thus, the current Buy America preference was not a requirement at the time EDA's current NOFO was published, and many applicants have since applied for assistance under the FY 2020 PWEDA NOFO in reliance of requirements contained therein. The impact of this would be that applicants would now need to adjust budgets, preliminary engineering, and construction methods to comply with the updated Buy America preference, all at considerable expense to applicants.

Given the economic distress and limited resources of its applicants, EDA is balancing the burden of any abrupt policy change on its award recipients with the benefits of the Buy America requirements by allowing an adjustment period during which applications already submitted to EDA are not required to be revised to comply with the updated Buy America preference. This adjustment period will also allow prospective applicants to take action to comply with the new requirements. During the waiver period, EDA will also continue to work to prepare to implement the new Buy America requirements.¹ EDA has started conversations with its stakeholders to begin transitioning to the new Buy America requirements and will require that all projects be fully compliant with these requirements by November 13, 2022. EDA has also worked with the Made in America Office to create a waiver that is as narrow as possible. This waiver therefore applies only to awards made under EDA's PWEAA 2020 Notice of Funding Opportunity.²

During the waiver period, EDA expects that its stakeholders will be able to prepare for

¹ OMB has not issued its final standards on "construction materials". "OMB is seeking additional stakeholder input before issuing further guidance identifying initial manufacturing processes for construction materials that should be considered as part of 'all manufacturing processes.'" Implementation Guidance at p. 14. EDA will monitor and participate as necessary in this process. In addition to reducing economic burden, EDA's adjustment period waiver will allow OMB to provide greater clarity to its applicants.

² EDA does not anticipate that any significant portion of any cost advantage of a foreign-sourced product will be the result of the use of dumped items and this waiver is not based on such cost-advantages.

compliance with the new requirements, including:

- Establishing processes for grantees and sub-grantees to determine Buy America compliance;
- Ensuring contractors, subcontractors, and suppliers are prepared to certify compliance with Buy America requirements, and provide all relevant information, including contract provisions prescribing Buy America requirements;
- Establishing appropriate diligence by grantees including audits and reviews as appropriate; and
- Providing further data on the domestic availability of covered materials.

During the waiver period, EDA will also continue its work to prepare for implementation of the Buy America requirements by:

- Continuing its assessment of existing EDA assistance processes to see where Buy America processes can be most efficiently added and aligned;
- Including Buy America requirements into forthcoming Notice of Funding Opportunities;
- Reviewing data, information, and comments provided by grantees, industry, and other partners to further assess opportunities, challenges, and the availability of domestically-sourced construction materials; and
- Training EDA staff and adopting best practices based on interagency work.

AUTHORITY: Infrastructure Investment and Jobs Act, section 70914.

ACCESSIBLE FORMAT: Individuals with disabilities can obtain this document in an accessible format (e.g., braille, large print, audiotape, or compact disc) upon request to the contact person

listed under For Further Information Contact.

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