

Department of Commerce

Economic Development Administration Buy America Projects Planned Prior to the Implementation Date of Build America, Buy America on May 14, 2022

Introduction

Agency: Department of Commerce

The Build America, Buy America Act (BABAA) provisions of the Infrastructure Investment and Jobs Act (Pub. L. 117-58, § 70901-52) require that all iron and steel, manufactured products, and construction materials used on federally-assisted infrastructure projects be produced in the United States. These provisions came into effect on May 14, 2022. Specifically, BABAA requires that “no amounts made available through a program for Federal financial assistance may be obligated for a project unless [all iron and steel, manufactured products and construction materials] are produced in the United States” (§70912 (2)). This creates a unique challenge for applicants seeking funding for previously planned projects designed and selected for their initial award well before BABAA went into effect.

While preparing for implementation, the Economic Development Administration (EDA) identified Public Works (PW) and Economic Adjustment Assistance (EAA) projects under PWEDA (42 U.S.C. §3121 et seq.) that were planned prior to May 14, 2022, the statutory effective date of the BABAA requirements. Without a waiver, BABAA could be applied to projects designed prior to the implementation of the BABAA requirements. Absent action, the likelihood of completion for these projects, which include loans taken out by grantees and carefully coordinated financing to meet repayment timelines, could be at risk. For example, a loan taken out by a grantee prior to May 14, 2022, to cover the costs of construction could expire if substantial additional time is needed to accommodate sourcing from new domestic providers.

EDA supports the implementation of BABAA and recognizes its importance to the Biden-Harris Administration efforts to catalyze domestic manufacturing, resilient supply chains, and good jobs. A one-year waiver of BABAA requirements for previously planned projects for a subset of PW and EAA projects, as further described below, will allow EDA to balance its commitment to compliance with its mission of addressing the unique challenges experienced by distressed communities.

Summary of Waiver

For the reasons set forth in this notice, EDA finds that it is in the public interest to issue a limited, one- year waiver of Build America, Buy America Act (BABAA) domestic preference requirements for previously planned PW and EAA projects, as defined below, that were planned prior to the implementation date of BABAA on May 14, 2022. The waiver covers eligible obligations made on or after the effective date of the waiver, and in the case of awards obligated prior to the effective date, expenditures incurred on or after the effective date of the final waiver. This one-year waiver should clear the queue of projects designed prior to BABAA implementation. The clearly defined timeline will also allow recipients to plan for BABAA requirements in future requests, ensuring a stronger transition to drive domestic production.

Waiver Type:	Public Interest
Time Period:	12 months
Dates:	The waiver is in effect for covered obligations under PW and EAA 12 months after the effective date of this waiver.
Program Coverage:	The previously planned projects waiver would apply to EDA PW and EAA awards obligated on or after the effective date of the final waiver in the following circumstances: (i) contracts that EDA PW and EAA grantees entered into prior to November 13, 2022, the expiration date of EDA's adjustment period waiver and/or (ii) contracts entered into before March 1, 2023 that result from solicitations published before May 14, 2022. For awards and amendments that otherwise meet these criteria but were obligated prior to the effective date of the final waiver, the waiver will apply to eligible expenditures incurred on or after the effective date of the final waiver. The waiver will allow these grantees to continue infrastructure projects that have already executed construction contracts or issued solicitations as DOC EDA transitions to full implementation of BABAA in a timely manner.

The period of this waiver allows EDA to ensure previously planned projects meeting the standard above will not need to undertake new design and planning to continue the work on projects that were not originally designed subject to the BABAA requirements.

Background

In many cases, BABAA requirements can be easily managed and accounted for during the early planning stages of a project, but compliance can be costly and complex past the design phase. In the absence of a waiver, applying BABAA to previously planned projects, including subsequent awards for cost increases, could create significant hardship for those applicants.

Capacity issues in distressed communities often lengthen the timeframe for the development and design of infrastructure and other construction projects in those areas. For example, non-Federal entities in distressed communities that finance upgrades to a wastewater system, or the construction of a business incubator generally do not have the required expertise or dedicated staff capacity because they complete such projects so infrequently. Any specific infrastructure project type is usually unique for engineering teams in rural and/or distressed communities and in some cases a once-in-a-generation investment. For these reasons many projects take years from the original design planning or obligation, which was based on preliminary plans and estimates, to final plans and bids and the beginning of construction. As a result, the final cost for the project is likely to vary from the original estimate.

When project bids exceed the initial award, the Agency does everything it can to ensure the project can proceed, often including the obligation of additional funds to cover the difference. This is a common practice under federal programs that fund construction projects. Cost overruns are even more likely in the current construction environment, where significant cost increases related to supply chain issues have been seen across the country.

To demonstrate the issue, EDA obligates project funds based on cost estimates in the Preliminary Engineering Report (PER), a planning document. In the traditional design-bid-build project delivery method, a final design is required to put a project out to bid but generally not initiated until after obligation of the initial award because the applicant needs assurance that funding is available for a project before incurring additional costs. The median time for an EDA project to go from initial obligation to bidding is approximately 29 months. As a result, most previously planned projects obligated since mid-to-late-2020 have not yet gone to the bid stage. The gap often contributes to variation between the initial project cost estimates and the final bid.

Many of the previously planned projects are now entering the final bid stage and it is likely that many projects may require subsequent awards for cost increases for the purposes of completing infrastructure projects within scope of the original award. Absent a waiver for previously planned projects, applicants may need to redesign the project and continue to incur interest and fees for interim financing and development costs, which continue to grow while construction is delayed.

Additionally, projects bid in distressed and rural areas frequently have only one or two bidders, and such areas have seen reduced competition within construction as the result of tight labor markets after the height of the COVID-19 pandemic. Rebidding a project again with additional requirements creates the risk that no bids will be submitted, in part because of the cost to the provider to prepare the bid and rebid, which would force the applicant to either surrender its EDA award or abandon the project altogether.

The potential application of BABAA to previously planned projects and the resulting costs are of particular concern for PW and EAA. These programs are limited to public bodies, like municipal governments, Indian tribes, and non-profits who are often not otherwise able to obtain commercial credit on reasonable terms to finance their project. Eligibility is further limited by distress criteria. To qualify for assistance under PW and EAA, applicants must demonstrate: 1) an unemployment rate that is, for the most recent 24-month period, at least one percentage point greater than the national average unemployment rate; 2) per capita income that is, 80 percent or less of the national average per capita income; or 3) a Special Need, as determined by EDA (e.g., a natural disaster). For some small communities, these programs provide their only opportunity to improve infrastructure.

Customers & Affected Projects

As explained in the program coverage paragraph above, the waiver covers PW and EAA awards for projects planned (as defined above). As set forth in more detail in the summary paragraph above, the waiver is effective for a one-year period.

To quantify the impact of the waiver, EDA examined previously planned and awarded projects that are now seeking a subsequent award to manage cost overruns. While difficult to predict projects that will require amendments going forward during the waiver period, EDA identified 16 awards in FY22 that were planned prior to May 14, 2022, for a total of \$20,980,438. EDA anticipates roughly the same volume of awards requiring amendments in FY23 and FY24.

Proposed Activities for Waiver Education, Implementation, and Post-Waiver Compliance

EDA sought a six-month implementation period waiver to prepare agency staff and customers for the application of BABAA, which expired on November 13, 2022. While confident in its ability to enforce requirements moving forward, the need to extend relief for this limited subset of projects, which were planned prior to the application of BABAA, has become clear through market research and subsequent experience on the PW and EAA programs. This one-year waiver will allow EDA to expediently clear previously designed projects through the final stages of development, minimizing disruptions to larger program delivery and creating an incentive for applicants to quickly move to bid. After that year, the intent is that any subsequent obligations will be subject to BABAA regardless of the date of the project's initial award.

Following issuance of this waiver, EDA plans to host informational sessions for stakeholders and update external resources, including a customer guide with information about the waiver. These efforts will include proactive outreach to effected customers and key partner organizations about the scope and application of the waiver. Internally, EDA will offer detailed training to staff and incorporate information about the waiver into its BABAA updates for EDA staff. EDA staff will work expediently to process and obligate subsequent awards for cost overruns. EDA will take action, in addition to staff and customer education, to ensure compliance within PW and EAA after expiration of the waiver, given the anticipated challenges for applicants to these programs.

The waiver will be used as a tool to support government-wide efforts to catalyze domestic manufacturing, resilient supply chains, and good jobs while successfully delivering a wide range of infrastructure projects. It will support the creation of resilient supply chains and manufacturing base for critical products here in the United States that will bring about investment in good-paying American manufacturing jobs and businesses. The creation of jobs in communities will also alleviate supply chain disruptions through cultivation of the domestic manufacturing base for a wide range of products commonly used across the infrastructure sectors but not yet made domestically.

Unlike in the past, Build America, Buy America waivers will send clear market signals, creating space for American firms to respond and eliminate the need for the waiver for future projects. The measure of success is investing in America's infrastructure while maximizing the use of Made in America goods.

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, EDA 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. EDA 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.

Duration of the Waiver

This waiver will remain effective for 12 months from the effective date of the final waiver.

Solicitation of Comments on the Waiver

The waiver, posted on September 14, 2023, on the Department's Buy America Build America Waiver [website](#), satisfies the requirement to publish any proposed Buy America waiver and provide the public with a reasonable period for notice and comment. The Department seeks public comment from all interested parties. This notice will be closed for comments on September 29, 2023.

Comments can be sent to mthompson@eda.gov with "EDA Prior Planned Projects Waiver" in the subject line of the email. Comments received prior to the public comment closing date will be reviewed and considered by EDA.

Summary and Response to Comments

EDA will provide details of the comments received during the public comment period. EDA will consider and, if necessary, make modifications to its proposed waiver.

Based on all the information available to EDA, it will determine whether applying BABAA requirements to the projects set forth in the "program coverage" paragraph above would be inconsistent with the public interest and if a one-year waiver of the BABAA requirements for these projects is thus appropriate.

Public Inspection of Comments: All properly submitted comments and communications submitted to EDA will be made available for public inspection upon request.

For Further Information Contact: Mark Thompson, Office of the Chief Counsel, mthompson@eda.gov, or visit the Department's Build America, Buy America [website](#) or MadeinAmerica.gov