

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 (BABA) provisions of the Infrastructure Investment and Jobs Act (Pub. L. 117-58, § 70901-27) 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, BABA 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 BABA 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 BABA requirements. Without a waiver, BABA could be applied to projects designed prior to the implementation of the BABA 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 BABA 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 BABA 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 BABA domestic preference requirements for previously planned PW and EAA projects, as defined below, that were planned prior to the implementation date of BABA 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 waiver. This one-year waiver should clear the queue of projects designed prior to BABA implementation. The clearly defined timeline will also allow recipients to plan for BABA 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, November 9, 2023.

Program Coverage: The previously planned projects waiver would apply to EDA PW and EAA awards obligated on or after the effective date of the 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 of EDA grantees entered into before March 1, 2023, that resulted from solicitations published before May 14, 2022. For EDA awards and amendments that otherwise meet these criteria but which funds were obligated by EDA prior to the effective date of the waiver, the waiver will apply to covered expenditures incurred by EDA grantees on or after the effective date of the 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 BABA 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 BABA requirements.

Background

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 that is 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.

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 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 BABA 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.

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 BABA, 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 BABA, 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 BABA 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 affected 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 BABA 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 BABA compliance within the PW and EAA programs 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, BABA 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 waiver, as this waiver is not based on the cost of foreign-sourced products.

Duration of the Waiver

This waiver is effective for 12 months from the effective date of the waiver, November 9, 2023.

Solicitation of Comments on the Waiver

The waiver was posted on September 14, 2023, on the Department's Buy America Build America Waiver [website](#), from September 14, 2023 – September 29, 2023, which satisfies the requirement to publish any proposed Buy America waiver and provide the public with a reasonable period for notice and comment of no less than fifteen days. The Department sought public comment from all interested parties.

EDA received no comments from the public on the waiver during the comment period, and therefore no substantive changes were made in response. Based on all the information available to EDA, it determined that applying BABA requirements to the projects set forth in the “program coverage” paragraph is inconsistent with the public interest, and it is therefore appropriate to issue this one-year waiver as written.

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

Alejandra Y. Castillo

Alejandra Y. Castillo
Assistant Secretary of Commerce
for Economic Development