

Department of Commerce Build America Buy America Waiver Process

Pursuant to Financial Assistance Memorandum (FAM) 2023-02, *Procedures for Addressing the Applicability of Build America Buy America Act Requirements in Federal Financial Assistance Programs for Infrastructure*, Section 7 (Waivers), the Department of Commerce (DOC) Build America Buy America (BABA)¹ waiver guidance including the BABA waiver submission and approval process is as follows:

I. General BABA Waiver Guidance

1. As provided in BABA, DOC may grant a waiver from the BABA domestic content preference requirements when it determines that:
 - a. Applying the domestic content procurement preference would be inconsistent with the public interest (public interest waiver),
 - b. The types of iron, steel, manufactured products, or construction materials are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality (nonavailability waiver), or
 - c. The inclusion of iron, steel, manufactured products, or construction materials produced in the United States will increase the cost of the overall project by more than 25 percent (unreasonable cost waiver).
2. In preparing or reviewing any proposed waiver, the following principles and criteria from Office of Management and Budget (OMB) memorandum M-24-02, *Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure*, dated October 25, 2023, Section VI *Issuing Buy America Waivers*, should be considered:
 - a. To the greatest extent practicable, waivers should be issued at the project level and be product specific. Overly broad waivers undermine market signals designed to boost domestic supply chains, particularly for key articles, materials, and supplies in critical supply chains (i.e., critical supply chains identified in Executive Order 14017, *America's Supply Chains*). When necessary, bureaus may consider issuing a waiver that has applicability beyond a single project; however, bureaus should always issue, construe, and apply waivers to ensure the maximum use of goods, products, and materials produced in the United States, consistent with applicable law.
 - b. Waivers of any type should be:
 - i. **Time-limited:** In certain limited circumstances, a waiver should be constrained principally by a length of time, rather than by the specific projects to which it applies. Waivers of this type may be appropriate, for example, when an item that is “non-available” is widely used in projects funded by a particular program’s awards. When issuing such a waiver, identify a short, definite time frame (e.g.,

¹ The Build America Buy America Act (Pub. L. No. 117-58, §§ 70901-27) is included in the Infrastructure Investment and Jobs Act (Pub. L. No. 117-58).

no more than one to two years) designed to ensure that, as domestic supply becomes available, domestic producers will have prompt access to the market created by the program.

- ii. **Targeted:** Waivers that are not limited to particular projects should apply only to the item(s), product(s), or material(s) or category(ies) of item(s), product(s), or material(s) necessary. Waivers that are overly broad will tend to undermine domestic preference policies. Broader waivers will receive greater scrutiny from the OMB Made in America Office (MIAO).
 - iii. **Conditional:** Issue waivers with specific conditions that support the policies of BABA and Executive Order 14005, *Ensuring the Future Is Made in All of America by All of America's Workers*.
3. Additionally, to help federal agencies and recipients meet BABA requirements, the DOC's National Institute for Standards and Technology (NIST), Hollings Manufacturing Extension Partnership (MEP) National Network™ provides a service to connect stakeholders, including recipients, to United States manufacturers that have relevant production capabilities and capacities to help fulfill current market and supply chain needs. Recipients considering a BABA nonavailability waiver are strongly encouraged to contact the NIST/MEP for assistance with supplier scouting services prior to seeking a BABA nonavailability waiver. Further information on the NIST/MEP supplier scouting services is available at: <https://www.nist.gov/mep/supplier-scouting>.

II. DOC BABA Waiver Submission and Approval Process

The following BABA waiver submission and approval process is an iterative process between all parties. Prior to proceeding with either of the two processes outlined below, review Section III.1 (Quick Steers). If appropriate, the “quick steer” may help inform the development of the waiver proposal.

1. For waivers requested by applicant/recipient/subrecipient (recipient):

- a. Recipient submits the waiver request (see Section III.3 below) to the Program Officer.
A waiver request initiated by a sub-recipient must be reviewed and supported by the primary recipient prior to being submitted to the Program Officer.
- b. Program Officer reviews the waiver request and consults with the Grants Officer and Federal Assistance Law Division (FALD).
As stated in Section I.3 (above), consult with NIST/MEP Supplier Scouting Services as appropriate.
- c. If a waiver is deemed necessary, Program Officer prepares and forwards the Waiver Proposal Package (see Section III.5 below) to the Office of Acquisition Management (OAM)/Financial Assistance Policy and Oversight Division (FAPOD).

- d. OAM/FAPOD routes the Waiver Proposal Package for Departmental² review.
- e. As applicable, OAM may direct that a Quick Steer be completed with MIAO (see Section III.1 below).
- f. Upon Departmental clearance, OAM/FAPOD forwards the Waiver Proposal Package to MIAO for review and posts a copy on the OMB MAX web page.
- g. Upon MIAO clearance, OAM/FAPOD posts the Proposed Waiver Document (see Section III.4 below) on OAM's [website](#) for public comment and updates the MAIO website.
- h. Upon completion of the public comment period (normally 15 days per OMB M-24-02), the Program Officer adjudicates the comments and updates the Waiver Proposal Package accordingly.
- i. The Program Officer forwards the updated Waiver Proposal Package to OAM/FAPOD for Departmental review. Upon Departmental clearance, OAM/FAPOD forwards the Waiver Proposal Package to MIAO for final review and posts a copy on the OMB Max web page.
- j. If MIAO determines that the waiver request is consistent with policy, OAM coordinates either the issuing correspondence for the Secretary of Commerce or the delegation of authority for the applicable approving authority.
- k. OAM/FAPOD posts the approved waiver on OAM's [website](#) and updates MAIO accordingly.

2. For waivers requested by a bureau:

- a. The bureau prepares and forwards the Waiver Proposal Package (see Section III.5 below) to OAM/FAPOD.
As stated in Section I.3 (above), consult with NIST/MEP Supplier Scouting Services as appropriate.
- b. OAM/FAPOD routes the Waiver Proposal Package for Departmental³ review.
- c. As applicable, OAM may direct that a Quick Steer be completed with MIAO (see Section III.1 below).
- d. Upon Departmental clearance, OAM/FAPOD forwards the Waiver Proposal Package to MIAO for review and posts a copy on the OMB MAX web page.
- e. Upon MIAO clearance, OAM/FAPOD posts the Proposed Waiver Document (see Section III.4 below) on OAM's [website](#) for public comment and updates the MIAO website.
- f. Upon completion of the public comment period (normally 15 days per OMB M-24-02), the bureau adjudicates the comments and updates the Waiver Proposal Package accordingly.

² At a minimum, Departmental review will consist of the Office of General Counsel (OGC), the Office of Acquisition Management (OAM), the Federal Assistance Law Division (FALD), and the Commerce Implementation Coordination Office (CIC).

³ *ibid*

- g. The bureau forwards the updated Waiver Proposal Package to OAM/FAPOD for Departmental review. Upon Departmental clearance, OAM/FAPOD forwards the Waiver Proposal Package to MIAO for final review and posts a copy on the OMB Max web page.
- h. If MIAO determines that the waiver request is consistent with policy, OAM coordinates either the Issuing Letter for the Secretary of Commerce or the Delegation of Authority for the applicable approving authority.
- i. OAM/FAPOD posts the approved waiver on OAM's [website](#) and updates MIAO accordingly.

III. BABA Waiver Forms and Documents

1. Federal Financial Assistance (FFA) Waiver “Quick Steers” Form (Attachment B1)

In limited circumstances, where waivers might be novel, controversial, or have significant cross-agency impact, an initial “quick steer” process may be necessary for agencies to receive policy guidance from MIAO. The goal of the quick steer process is to quickly facilitate a determination that a specific waiver or set of waivers involves unique policy issues which should be resolved before a waiver is drafted. While the intent of this process is to provide policy guidance before an agency drafts a proposed waiver, agencies should have engaged in initial internal evaluation and analysis related to the need for a waiver or a new industrial strategy approach. The quick steer process is important when: the waiver involves a significant program or funding stream for a critical product; the waiver deviates from OMB M-24-02 guidance; and/or the waiver is high-profile, or a novel cross-cutting issue.

2. FFA Waiver Submission Form (Attachment B2)

Pursuant to OMB M-24-02, all waiver requests must include a detailed justification for the use of goods, products, or materials mined, produced, or manufactured outside the United States and a certification that there was a good faith effort to determine domestic manufacturing production capacity, including, where relevant, soliciting bids for domestic products supported by terms included in requests for proposals, contracts, and nonproprietary communications with potential suppliers. The Waiver Submission Form will support efficiency of waiver submission and review process, and ensure agencies are providing the necessary information for MIAO to run an efficient process in evaluating waivers as well as support a more standardized and predictable process.

3. Applicant/Recipient/Subrecipient (Recipient) Waiver Request Document

- a. When a recipient is requesting a BABA waiver from the Program Officer, a written waiver request from the recipient to the Program Officer must include the following information, as applicable:
 - i. Waiver type (nonavailability, unreasonable cost, or public interest).
 - ii. Recipient name and Unique Entity Identifier (UEI).
 - iii. Federal awarding agency organizational information (e.g., Common Government-wide Accounting Classification (CGAC) Agency Code).

- iv. Financial assistance listing name and number.
 - v. Federal financial assistance program name.
 - vi. Federal Award Identification Number (FAIN) (if available).
 - vii. Federal financial assistance funding amount.
 - viii. Total cost of infrastructure expenditures, including all Federal and non-Federal funds (to the extent known).
 - ix. Infrastructure project description and location (to the extent known).
 - x. List of iron or steel item(s), manufactured products, and construction material(s) proposed to be excepted from BABA requirements, including name, cost, Country(ies) of Origin (if known), and relevant Product and Service Code (PSC) and North American Industry Classification System (NAICS) code for each.
 - xi. A certification that the recipient made a good faith effort to solicit bids for domestic products supported by terms included in requests for proposals, contracts, and nonproprietary communications with the prime contractor.
 - xii. A statement of waiver justification, including a description of efforts made (e.g., market research, industry outreach), by the recipient, to avoid the need for a waiver. Such a justification may cite, if applicable, the absence of any BABA-compliant bids received in response to a solicitation released by the recipient.
 - xiii. Anticipated impact if no waiver is issued.
- b. The Waiver Request must be signed by an Authorized Organizational Representative.

NOTE: At the discretion of the Program Officer, the recipient may submit the waiver request using the [Build America Buy America Waiver Request Data Collection](#) (Optional Form 2211).

4. Proposed Waiver Document

- a. The Proposed Waiver Document is a document (i.e., a Microsoft Word document) that provides the overall details of the proposed waiver. This document will be reviewed internally by DOC⁴ as well as MIAO and posted on OAM's [webpage](#) during the public comment period.
- b. OAM/ FAPOD has examples available upon request.

5. DOC Waiver Proposal Package

The Waiver Proposal Package consists of two documents:

- a. The **FFA Waiver Submission Form** (Attachment B2); and

⁴ *ibid*

- b. The **Proposed Waiver Document** (OAM/FAPOD has examples available upon request).

IV. Contact. Contact OAM/FAPOD via OAM-BABA@doc.gov.