

[6450-01-P]

DEPARTMENT OF ENERGY

General Applicability Waiver of Build America, Buy America Provisions as Applied to Recipients of Department of Energy Federal Financial Assistance

AGENCY: Office of the Secretary, U.S. Department of Energy.

ACTION: Notice and request for public comment.

SUMMARY: In accordance with the Build America, Buy America Act (“BABA”) this notice advises that the Department of Energy (“DOE” or the “Department”) is proposing a limited general applicability waiver (“Waiver”) to the Buy America Domestic Content Procurement Preference (as defined below) requirements of the Act. The Waiver will be effective for 180 days after its issuance (the “Effective Period”) and will apply only to awards issued as a result of Funding Opportunity Announcements (“FOA”) released before May 14, 2022 (“applicable awards”). This Waiver will be effective solely with respect to applicable awards signed during the Effective Period; it will not apply to applicable awards signed before or after the Effective Period. Applicable Awards subject to this Waiver will not be required to incorporate the Buy America Preference, which mandates that all iron, steel, manufactured goods, and construction materials used in the award be manufactured domestically. DOE is seeking public comment as to whether this proposed Waiver is in the public interest, as it will provide the Department and its stakeholders a reasonable adjustment period to implement BABA in a more thorough, effective, and exacting manner.

DATES: Comments on the proposed Waiver set out in this document are due on or before

[INSERT DATE 15 DAYS AFTER PUBLICATION IN THE FEDERAL REGISTER].

This proposed Waiver applies to applicable awards for a period of 180 days after its implementation, unless, after reviewing the public comments, DOE publishes a subsequent notice in the *Federal Register* explaining any changes to its determination to issue this Waiver.

ADDRESSES: Interested persons are invited to submit comments on this proposed general applicability waiver. To receive consideration as public comments, comments must be submitted through the method(s) listed. All submissions must refer to the listed docket number and title.

1. *Submission of Comments by Mail.* Comments may be submitted by mail to
BuyAmericanAPWaiver@ee.doe.gov.
2. *No facsimile comments.* Facsimile (FAX) comments will not be accepted.

FOR FURTHER INFORMATION CONTACT: Mr. Richard Bonnell, U.S. Department of Energy, Office of Management, 1000 Independence Avenue, SW., Washington, DC, 20585-0121. Telephone: 202-287-1747. Email: BuyAmericanAPWaiver@ee.doe.gov.

SUPPLEMENTARY INFORMATION

I. Build America, Buy America

The Build America, Buy America Act, was enacted under Division G, Title IX of President Biden's Infrastructure Investment and Jobs Act, a once-in-a-generation opportunity to fix our crumbling infrastructure. The President also views this investment as an

opportunity to create domestic manufacturing jobs, strengthen supply chains, and help lower costs. To that end, BABA attaches a sweeping series of requirements to certain Federally-assisted projects, with the goal of fomenting a resilient domestic supply chain and a manufacturing supply for a number of critical materials both for nascent and existing industries in the United States.

Per section 70914 of the IIJA, Agencies may not obligate funds for an “infrastructure project” unless all of the iron, steel, manufactured products, and construction materials used in the project are produced in the United States. Further, section 70912 of the IIJA provides an extensive list of items that fall under the definition of “infrastructure,” and defines “project” as “the construction, alteration, maintenance, or repair of infrastructure in the United States.” Effectively, this requirement mandates that Federal agencies must carefully review the particulars of a proposed project funded by Federal financial assistance to ensure that any required iron, steel, manufactured products, and/or construction materials were produced domestically (“Buy America”). This necessitates the creation of internal processes to properly vet each funded project to determine Buy America applicability, as well as external, recipient-facing processes that will allow recipients to properly understand, comply with, and report on the obligations established by the Preference. Federal agencies are standing up processes to implement and track these Buy America requirements to ensure that Federally-funded infrastructure projects are carried out using American-made goods.

Advancing these objectives will require a long-term, dedicated approach; there are gaps in our manufacturing base and product knowledge base that will not be filled overnight, but which the BABA will help us fill and strengthen over time. The ultimate measure of success will be

significant investment in America’s infrastructure while contemporaneously maximizing the use of American-made goods.

II. DOE Implementation Progress Thus Far

Since the passage of the IIJA on November 15, 2021, DOE has—alongside several other Federal agencies—worked closely with OMB’s Made In America Office to meet necessary statutory requirements and to provide feedback to help OMB generate guidance and scope out the specific details of BABA’s application. This process began with an attempt to identify—using guidance issued by OMB in its M-22-08 Memorandum, *Identification of Federal Financial Assistance Infrastructure Programs Subject to the Build America, Buy America Provisions of the Infrastructure Investment and Jobs Act*¹—programs which could be defined as “infrastructure programs” as that term is defined in the IIJA. Although the Department was able to identify some programs which would likely include infrastructure projects, the results of this analysis led to the determination that the Department does not have any programs which could categorically be defined as “infrastructure programs.” Rather, the vast majority of the Department’s operations are structured in such a way that funding infrastructure projects is *possible*, but not necessarily *predictable*.

The Department therefore has been soliciting information from its internal programs to determine how to best meet the requirements of the BABA, as well as to determine any unique circumstances present in the Department’s financial assistance programs that would require adjustments or additional consultation with the Made In America Office. The Department has attempted to establish some preliminary processes in an attempt to avoid the need for an adjustment period waiver. However, because of the nature of the Department’s

¹ <https://www.whitehouse.gov/wp-content/uploads/2021/12/M-22-08.pdf>

financial assistance operations, which may, but do not necessarily, involve infrastructure projects, additional time is needed to not only create processes that can pinpoint infrastructure projects to be funded through programs whose primary goal is research and development funding rather than infrastructure, but also to determine specific items that this waiver would cover. In other words, application of the Preference at the Department will need to be done on a case-by-case basis, which precludes the option of using a “one size fits all” approach to Buy America.

In addition, the Department has a significant number of awards that are slated to be made in the next several months which stem from Funding Opportunity Announcements that were released well before May 14, 2022. However, the Department does not want to unfairly burden applicants given that they were not granted the opportunity to incorporate the Buy America requirements into the planning of their award schedules and budgets from the outset.

III. Waivers

The Act provides three bases upon which proposed waivers must be based, and it authorizes two distinct types of waivers. First, section 70914(b) of BABA permits Agencies or financial assistance recipients to submit waiver requests based on the following justifications:

1. Applying the domestic content procurement preference would be inconsistent with the public interest;
2. 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; or

3. 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.

Furthermore, BABA authorizes two distinct types of waivers: specific waiver requests, which are tailored to individual projects and are typically the kind that will be submitted by financial assistance recipients; and “general applicability” waivers (discussed in section 70914(d)), like the one proposed by this notice, which affect whole-cloth programs or agencies as a class. In the interests of transparency, any proposed waivers will be required to be submitted for public comment for a period of at least 15 days.

Any waivers will be narrowly tailored to achieve the specific needs of the project or projects without diluting the overall goals of BABA to fill supply chain gaps and focus more Federal funds toward American manufacturing. As a participant in a global economy, the United States will continue to rely on its trading partners and allies for products that either cannot be manufactured domestically at all or cannot be manufactured domestically without great difficulty. Therefore, the waivers represent a practical tool to ensure Federally-funded projects can proceed as normal without disruptions to timeline or budget. These waivers will also serve to send clear market signals, creating space for American firms to respond to the gaps identified by the waivers, eventually obviating the need for the waivers altogether.

IV. Public Interest In a General Applicability Waiver of Buy America Provisions

As the requirements of BABA are tied to the provision of several different varieties of Federal financial assistance utilized by the Department, and the Department obligates billions of dollars to financial assistance awards each fiscal year, a comprehensive and effective implementation of BABA in the Department stands to play a substantial role in achieving the

outcomes for which BABA was created. Moreover, while the Department is able to identify some programs which will be *more likely* to fund projects that include the construction, alteration, maintenance, or repair of public infrastructure in the United States, this is not the (exclusively) focus on funding research, development, and demonstration of energy technology with no dedicated infrastructure focus. These programs will not be able to definitively identify the presence of infrastructure projects until: (1) applications under a funding opportunity announcement are received; and (2) projects are identified for selection. This is true even for programs that are more likely to include infrastructure work given that there are no programs administered by the Department which mandate infrastructure projects through their enabling statute(s).

The Department's financial assistance programs award approximately 2,000 grants and cooperative agreements each year and anticipate at least doubling this amount with awards for programs authorized under the IIJA. These programs span a multitude of industries, stakeholders, and entity types within the energy sector, which will ensure the effects of BABA are widespread, but which also presents unique challenges for the Department, as there is no "one size fits all" implementation framework that can be easily inserted into the Department's operations.

Many of the awards that the Department makes between now and the end of the FY22 fiscal year, which would be required to include the Preference, originated in Funding Opportunity Announcements that were issued long before the May 14, 2022 implementation date of BABA or the April 18, 2022 issuance of the M-22-11 memorandum from OMB, entitled *Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance*

*Programs for Infrastructure*² (“OMB Memorandum M-22-11”), which provided Federal agencies with expanded implementation guidance on the particulars of BABA. There is, therefore, a strong public interest in ensuring that the requirements which those recipients expected as part of their award execution are not changed mid-stream. Implementing this Waiver would ensure that awards requiring the Preference would stem from Funding Opportunity Announcements that provided clear and detailed guidance on BABA requirements so as to afford applicants an opportunity to properly integrate those requirements into their project and budget planning. The Waiver will thus serve to send a signal to recipients and manufacturers that the Department intends to take application of the Preference seriously, while also signaling that it understands that serious application requires appropriate notice and guidance of the Department’s expectations.

In addition to the necessary internal process changes that must be generated and vetted inside the Department, BABA represents a major change to how many Federal financial assistance recipients, including States, local governments, and Tribal governments must plan, scope, and execute projects that fall under the purview of BABA, requiring application of the Preference. Many recipients may not be familiar with the process of conducting appropriate market research and sourcing products that meet BABA’s requirements, creating the risk of noncompliance and project stops in applicable projects, especially in cases where no BABA information was provided in the FOA to which those entities originally applied. Moreover, many DOE recipients include smaller entities—such as local governmental entities or tribal governments—which may not have resources to quickly adapt to the requirement to domestically source iron, steel, manufactured products, and/or construction materials without

² <https://www.whitehouse.gov/wp-content/uploads/2022/04/M-22-11.pdf>

significant assistance from DOE. Prior Department experience working with these entities applying the Buy America requirement under ARRA may be instructive. However, it cannot be assumed that many of the entities required to apply the Preference will be able to easily locate domestic sources of applicable items or identify instances when international trade agreements consider foreign products “domestic” for purposes of the Preference.

The Waiver is therefore necessary to avoid disruption of projects when the applicants could not have foreseen the BABA requirements at the time when they planned their project activities. In addition, it would allow the Department an opportunity to work with and provide sufficient notice to its future applicants and recipients to ensure that the Preference can be effectively and efficiently integrated into a large swath of the Department’s Federal financial assistance activities without disrupting DOE’s primary mission of ensuring security and prosperity by addressing America’s energy, environmental, and nuclear challenges through transformative science and technology solutions.

Accordingly, with respect to the challenges discussed previously, DOE plans on conducting the following activities during the Waiver period:

1. Consulting with DOE financial assistance programs to ensure that all programmatic needs and unique requirements are met, consistent with the requirements of BABA;
2. Designing a process to effectively vet applications submitted to Funding Opportunity Announcements to determine whether the Preference must be applied, avoiding unnecessary disruption to the project selection process and minimizing, where possible, such reviews for projects that are not likely to be selected for award;

3. Determining what documentation and/or certification processes will be needed from applicants and/or recipients to demonstrate project compliance with the Preference, as well as processes to address non-compliance with the Preference;
4. Crafting comprehensive guidance for applicants and recipients to assist with the planning and integration of the Preference, as well as waiver processes so that projects that need a waiver can easily and efficiency request one; and
5. Investigating the need for a Paperwork Reduction Act approval for the information collected as part of recipient compliance with BABA.

At the conclusion of the Waiver period, DOE expects to have specific guidance for its stakeholders on evaluating their proposed project for the presence of construction, alteration, maintenance, and/or repair of infrastructure in the United States, and properly integrating the domestic procurement of iron, steel, manufactured products, and/or construction materials into their proposed project budgets and schedules as part of their project applications. There will also be an expectation that applicants will seek waivers early and as a result of legitimate needs, as the Department will also be issuing clear waiver guidance with a strong focus on the notion that waivers be issued judiciously.

V. Assessment of Cost Advantage of a Foreign-Sourced Product

Under OMB Memorandum M-22-11, agencies must 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,” before granting a public interest waiver. As the impetus for this Waiver is not related to the sourcing of foreign products, DOE has determined that the above-mentioned assessment is not applicable.

VI. Limited Duration of Waiver

DOE understands and is invested in the successful implementation of BABA and the Preference in tandem with the Department's core mission. The Department will therefore work expeditiously to achieve the objectives discussed in this notice of proposed Waiver. Although the Waiver will be active for applicable awards during a period of 180 days after its implementation, the Department reserves the right to terminate the Waiver early if the objectives of the Waiver are completed before the planned conclusion of the Waiver period. If the Department opts to do so, it will provide as much advance notice as possible.

VII. Solicitation of Comments

As required under section 70914 of the IIJA, DOE is soliciting comments from the public on this proposed Waiver. In particular, DOE welcomes comments on the length, purpose, and scope of the Waiver to allow DOE to make an informed final determination on those aspects of the Waiver, at a minimum. Please refer to the “**DATES**” and “**ADDRESSES**” sections of this notice for information on submission of comments.

Confidential Business Information: Pursuant to 10 CFR 1004.11, any person submitting information that he or she believes to be confidential and exempt by law from public discourse should submit via email two well-marked copies: one copy of the document marked “confidential” including all the information believed to be confidential, and one copy of the document marked “non-confidential” with the information believed to be confidential deleted. Submit these documents via email. DOE will make its own determination about the confidential status of the information and treat it according to its determination.

Signing Authority: This document of the Department was signed on **[ENTER DATE]**, by John Bashista, Director of Acquisition Management, pursuant to delegated authority from the Secretary of Energy. That document, with the original signature and date is maintained by DOE. For administrative purposes only, and in compliance with requirements of the Office of the Federal Register, the undersigned DOE Federal Register Liaison Officer has been authorized to sign and submit the document in electronic format for publication, as an official document of the Department of Energy. This administrative process in no way alters the legal effect of this document upon publication in the *Federal Register*.

Signed in Washington, DC, on **[ENTER DATE]**.

**John R.
Bashista**

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John R. Bashista
Office of Acquisition Management
and Senior Procurement Executive
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