

APPROVED: July 28, 2023  
EXPIRES: July 28, 2028

DEPARTMENT OF ENERGY

**General Applicability Public Interest Waiver in Support of Operational Efficiency: Small Grants, De Minimis, and Minor Components under 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:** Final Action

**SUMMARY:** In accordance with the Build America, Buy America Act (“BABA”), this notice is intended to inform the public of the Department’s intention to issue a targeted, Agency-wide General Applicability waiver of the BABA’s domestic content procurement preference (“the Preference”) with respect to all covered products: iron, steel, manufactured goods, and construction materials. DOE is proposing this waiver not as an alternative to increasing the domestic production of iron, steel, manufactured goods or construction material in the United States; rather, it is a necessary tool to ensure effective implementation of BABA without undue programmatic disruption to the core missions of DOE and to ease burdens for DOE financial assistance recipients so they can focus their efforts on their projects.

These waivers will target infrastructure projects that meet small grants, de minimis, and/or minor component waiver requirements. The *Small Grants* waiver will waive the Preference for any financial assistance agreements that are less than \$250,000; the *De Minimis* waiver will waive the Preference where the covered products represent 5% or less of the total

applicable project costs<sup>1</sup> (up to a maximum of \$1 million); and the *Minor Components* waiver will waive the Preference with respect to minor components of iron and steel products, where the minor components comprise no more than 5% of the total material cost of the iron or steel product in question.

These proposed waivers will apply for a period of 5 years after the effective date of the final waiver July 28, 2023, unless—after reviewing the public comments—the Department publishes a subsequent notice explaining changes to the scope, duration, or applicability of this waiver. Moreover, if put in place, the waivers will be periodically reviewed for continued need, and will be terminated—with appropriate public notice—if it is determined they are no longer required.

## **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 IJJA, Agencies may not obligate funds for an “infrastructure project” unless all of the iron, steel, manufactured products, and construction materials used

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<sup>1</sup> Applicable project costs are defined as total material costs subject to the Buy America preference.

in the project are produced in the United States. Further, section 70912 of the IJA 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.” This requirement means that nearly all Federal financial assistance funding that supports these activities will remain in the United States and will serve to support the growth of domestic manufacturers and support job maintenance and creation, both in scale and in range of products produced. Advancement of the objectives of BABA must also be balanced with prompt, efficient, and effective execution of the Department’s core mission to advance the nation’s security and prosperity by addressing its energy, environmental, and nuclear challenges through transformative science and technology solutions. Waivers such as the one proposed here help the Department balance the goals of BABA with the Department’s mission, ensuring both of these vital needs are being met.

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. 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: project-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) and OMB Memorandum M-22-11), like the one proposed by this notice, which refers to a waiver that applies generally across multiple awards, and which may apply to an entire program or across programs to an entire Federal agency. 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 program 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.

### **III. Scope of, and Justification for, Waivers Covered by this Notice**

DOE developed and provided BABA training to senior leadership and DOE program offices which included listening sessions. The purpose of which was to provide clarifications on the training and seek anticipated programmatic inputs. Programmatic concerns identified included applicability and implementation of BABA requirements, the potential need for Buy America Preference waivers and the impact to project schedules and burdens to recipients. Listening sessions also allowed for feedback of known or anticipated market conditions such as supply chain challenges. These activities indicate there are financial assistance awards with infrastructure where DOE or anticipated recipients are planning to seek Buy America, Build America waivers. Program offices expressed the following concerns absent these waivers:

- Increased financial and administrative burden for small recipients, which have limited capacity to comply with the requirements associated with BABA. For example, some recipients have no dedicated resources to perform market research.
- Projects could be completed at a slower rate, therefore delaying benefits as individual waivers are submitted and processed.
- Small projects/small recipients may withdraw from using DOE programs.

In accordance with Section 70914(c) of the Act, DOE hereby provides notice that it is seeking a limited general applicability public interest waiver of the Buy America, Build America requirements in support of operational efficiency for Small Grants, De Minimis, and Minor Components.

The following are synopses of each proposed waiver.

1. *Small Grants Waiver*: The small grants waiver will exempt awards that do not exceed the Simplified Acquisition Threshold currently set at \$250,000 from the Buy America requirement. If Federal financial assistance provided by the Department is combined with other Federal financial assistance from other Federal agency and the total amount of Federal financial assistance in a single project is greater than the Simplified Acquisition Threshold, then the waiver shall not apply to the Federal financial assistance provided by the Department. In 2022, the Department made 608 awards under this \$250,000 threshold, for a combined award amount of approximately \$105M. These 608 awards represent roughly one-third of the 1,831 awards made by the Department in 2022, but the \$105M combined amount obligated to those awards only represents about 1.1% of the total amount of all awards made by the Department in 2022, which totals approximately \$9 billion. This provides a starting point to estimate the magnitude of awards to which this proposed waiver may apply going forward, with a couple important caveats. First, there are no programs at DOE who are statutorily required to provide 100% of their funding to infrastructure projects only; that is, for all of the Department's programs, individual assessments must be made for each award to determine whether there is work being performed that would make BABA applicable. Consequently, of the 608 awards made in 2022 valued at \$250,000 or less, it is likely that only a fraction of those awards involved infrastructure work that would result in BABA being applied to that project. We can therefore use that information to infer that only a fraction of these types of small dollar awards that will be made in FY23 and beyond will be subject to BABA.

That said, it is likely that for FY 2023 and beyond, the total number of awards valued at \$250,000 or less will be somewhat larger due to the IIJA and IRA leading to an overall increase

in the amount of funding issued for the fiscal years that programs funded by those bills are operating. Therefore, the total number of awards valued at \$250k or less, as well as the total aggregate award amount, will increase—but only a fraction of those awards will be subject to BABA.

Given the above information, if the ratio of awards under the \$250k threshold versus all Departmental awards stays roughly the same in future fiscal years, and we assume that only about 50% of those awards under the \$250k threshold will be subject to BABA, we can estimate that only about 0.5% of the Department's total awards obligations in future fiscal years will have the option to utilize this waiver. In addition to the limited application of this waiver discussed in the analysis above, there is a strong policy justification for this waiver. Awards under \$250,000 are generally executed by smaller recipients that do not have a dedicated infrastructure for Federal grants management, such as local governments, tribal governments, and non-profit organizations, so the compliance burden on these applicants is more dramatic than it would be with a recipient that has significant experience managing Federal grants. Putting this waiver into effect will therefore reduce the compliance burden faced by these recipients and maximize efficient use of limited financial assistance.

2. *De Minimis Waiver*: This waiver applies to projects in which there is covered infrastructure work, but for which the total cost of all covered products on a given project constitutes 5% or less of the total applicable project cost, as referenced in Footnote 1 on Page 2, up to a total of \$1 million. Once a Federal financial assistance recipient's total purchases of materials otherwise covered by the Buy America preference (iron, steel, manufactured products, and construction materials) reach 5 percent of applicable project costs or \$1 million, whichever is lower, all other

applicable project purchases must comply with the Buy America preference. The Department will not accept requests from recipients to apply this waiver where the total cost of all covered products exceeds these values, regardless of amount.

This waiver will reduce the overall compliance burden on recipients for projects where the covered products and/or infrastructure work on a particular project are so minimal relative to the overall scope of the project that its value to the objectives of BABA are outweighed by its value to the mission of the Department. In many cases, the resources and effort that would have to be expended to ensure BABA compliance on such an award could add significant time and cost to the project budget; slowing down the project and getting very little value toward the goals of BABA in return. This waiver will allow recipients to dedicate attention to a project's most significant products, particularly those that are in critical supply chains.

3. *Minor Components Waiver*: This waiver would allow miscellaneous minor components which may be present in domestically produced iron and steel to come from foreign sources, provided the value of those minor components within an iron and steel product does not exceed 5 percent of the total material cost of otherwise domestically produced iron and/or steel in which they are present. This waiver would not exempt the whole iron and steel product from the BABA requirement, and the primary iron and steel components of the product must be produced domestically. To attempt to estimate the scope of this waiver, the Department analyzed programs under the Bipartisan Infrastructure Law (BIL) and Inflation Reduction Act (IRA) for BABA applicability, looking for things like estimated entity type(s) that will apply and whether—based on the provisions—they were likely to involve public infrastructure. Without knowing entity type until actual application, and without knowing whether any projects funded under these



programs will involve construction/alteration/maintenance/repair of public infrastructure, a high-end estimate would be approximately 65% of BIL and IRA projects being subject to BABA. Of these, the Department estimates minor components associated with energy sector materials include small fasteners, washers or small screws incorporated within domestic iron and steel products; it is possible that some of the BIL and IRA projects, therefore, will seek to utilize this waiver.

This waiver will meaningfully reduce the compliance burden on the recipient, by eliminating the need to do a more granular review of these components every time they are used in a project. Recipients will be free to purchase domestically-produced iron and steel without the need to itemize each and every minor component present to determine BABA compliance. This will significantly reduce delays in recipient project execution by allowing iron and steel that is otherwise BABA-compliant to be used in most instances, rather than forcing recipients to reject this otherwise-conforming iron and steel because one or more minor components present were not domestically produced.

These public interest general applicability waivers are an important approach to promoting Buy American provisions by efficiency promoting domestic production and enhancing supply chain resilience with agency focus on Energy Sector equities. The common theme is that waivers will help focus recipient resources and effort to energy sector projects, as well as the amount of effort expended by the Department to conduct thorough oversight to ensure all requirements of BABA are being met.

Accordingly, per the requirements of BABA, the Department proposed that the proposed small grants, de minimis, and minor components waivers, applicable to all Agency-funded projects, to be in the public interest. These waivers will minimize project delays, allow recipients

to focus on the core objectives of their projects, and promote security and the economic prosperity of all Americans by supporting the Agency’s continual push for innovation and transformation of the domestic energy supply.

#### **IV. 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.

#### **V. Duration of Waivers**

These waivers are intended to remain in place for a period of five (5) years from the effective date of the final waiver. The Department will review these waivers within five years from their date of issuance and as often as necessary to determine their continued need and overall effectiveness with respect to Departmental programs and BABA more generally. If, in the interim, the Department determines that one or all of these proposed waivers is no longer needed, it will issue a notice to the public to announce the rescission of the waiver(s).

#### **VI. Comments Received**

The Agency received two comments, each with multiple suggestions, in response to this waiver:

##### **1. DOE should not link the Small Grants threshold to the Simplified Acquisition Threshold.**

The simplified acquisition threshold was chosen as a useful baseline, but the amount chosen for the small grants waiver is not *tied* to the threshold. The \$250,000 threshold will remain the same for the duration of this waiver unless DOE chooses to revisit that number (an action for which public comment would be sought) prior to the expiration of this waiver. Given the overall funding levels of DOE projects, and the percentage of DOE projects that are at or under the \$250k level, the Agency feels like this is an appropriate threshold for this waiver, at this moment.

**2. DOE should place additional limitations on the *De Minimis* waiver, such as single item cost limitations and specific accounting and documentation requirements associated with utilization of this waiver, as other Agencies have done.**

The Agency will engage in rigorous project oversight to ensure that all requirements of the Buy America requirement and any applied waivers are done so in compliance with the law. The Agency can implement additional oversight requirements as needed through grant terms and conditions for applicable awards.

**3. DOE should significantly reduce the proposed threshold (proposed at \$1 million) for application of its *De Minimis* waiver.**

The Agency has determined 5% or less of the total applicable project costs (up to a maximum of \$1 million) to be an appropriate threshold for the de minimis waiver at this time, but will be tracking utilization of this waiver closely to determine whether threshold adjustments are needed. Should such adjustments be needed, the Agency will update the de minimis waiver and seek additional public comment.

**4. The Minor Components Waiver is unnecessary, as other Agencies have implemented Buy America policies for a long time without needing one.**

The Agency reserves the right to rescind one or more of these waivers at any time if an internal determination is made that a given waiver is not being utilized. Rather than terminating the waiver now, the Agency prefers to keep the waiver in place and analyze its utility/utilization as a first step.

## **VII. Comment Resolution**

The Agency has carefully considered the comments received and has determined that no changes to the waiver scope or duration will be made as a result of the comments.