



# FINANCIAL ASSISTANCE LETTER

This Financial Assistance Letter is issued under the authority of the Senior Procurement Executives of DOE and NNSA. It is intended for use by the procurement professionals of DOE, primarily Contracting and Grants Officers, and other officials of DOE that participate in the acquisition process. Other parties are welcome to its information, but definitive interpretation of its effect on DOE solicitations, Notice of Funding Opportunity Announcements, Awards, and other related procedures and actions may only be made by DOE Contracting and Grants Officers.

**Subject: The Buy America Requirement -The Required Use of Iron, Steel, Manufactured Products, and Construction Materials Produced in the United States in Federally Funded Awards that Contain Construction, Alteration, Maintenance, or Repair of Public Infrastructure in the United States.**

**References:**

Infrastructure Investment and Jobs Act, Division G, Title IX, Pub. L. No. 117-58.

2 CFR 184 – Buy America Preferences For Infrastructure Projects.

Office of Management and Budget, Memorandum M-24-02, dated Oct. 25, 2023.

Executive Order 14017, America’s Supply Chains, dated February 24, 2021

Executive Order 14005, Ensuring the Future is Made in All of America by All of America’s Workers dated January 25, 2021.

**When is this Financial Assistance Letter (FAL) effective?**

The guidance provided in this FAL is effective as of date issued.

**When does this FAL expire?**

This FAL supersedes FAL 2023-01 and remains in effect until canceled or superseded.

**Who is the point of contact?**

For DOE, questions concerning the Buy America Requirement or Project Specific Waivers should be sent to the Contract and Financial Assistance Policy Division, Office of Policy in the Office of Acquisition Management at [DOE\\_oapmpolicy@hq.doe.gov](mailto:DOE_oapmpolicy@hq.doe.gov).

For NNSA, contact NNSA at (505) 845-5639.

For questions concerning General Applicability Waivers for the Buy America Requirement please contact the Build America, Buy America (BABA) Coordinator at [BuyAmericanGAWaiver@hq.doe.gov](mailto:BuyAmericanGAWaiver@hq.doe.gov).

**Who is the intended audience?**

Department of Energy (DOE) and National Nuclear Security Administration (NNSA) Contracting and Grants Officers. Any reference in this guidance to Contracting Officer (CO) should be understood to include Grants Officer. Any reference in this guidance to the DOE should be understood to include the NNSA, unless otherwise indicated.

**What is the purpose?**

The purpose of this FAL is to provide information and guidance regarding the Department of Energy's (DOE or Department) implementation of the Domestic Content Procurement Preference Requirement (Buy America Requirement) established in the Build America, Buy America Act (BABA), Title IX of Division G of the Infrastructure Investment and Jobs Act, Pub. L. No. 117-58 and codified in OMB's primary guidance provided to Agencies in 2 CFR 184, with further guidance provided to Agencies in OMB's Memorandum M-24-02.

**What types of actions are affected by this FAL/OTL?**

This FAL applies to all DOE notice of funding opportunities (NOFOs), funding opportunity announcements (FOAs) or other solicitations (such as annual program notices, broad agency announcements (BAAs) or administrative and legal requirements documents (ALRDs)) and the resulting federally funded awards (grants and cooperative agreements) or other federal financial assistance actions, whether or not funded through the Infrastructure Investment and Jobs Act (IIJA), where funds are appropriated or otherwise made available and used for financial assistance awards or actions for or that include public infrastructure projects—NOFOs, FOAs, BAAs, other solicitations and federally funded awards or actions that include construction, alteration, maintenance, or repair of public infrastructure

in the United States. This FAL also includes guidance on DOE's Buy America Requirement waiver request submittal and review process.

### **What is the background?**

The Build America, Buy America Act (BABA), enacted under Division G, Title IX of the IIJA, applies a domestic content procurement preference requirement (Buy America Requirement) for the iron, steel, manufactured products, and construction materials purchased by recipients or subrecipients under federally funded awards that contain construction, alteration, maintenance, or repair of public infrastructure in the United States, when those items are consumed in, incorporated into, or permanently affixed to the infrastructure. The goal of the Buy America Requirement is to increase the resiliency of our domestic supply chain and manufacturing supply for critical materials both for emerging and existing industries in the United States consistent with Executive Order 14017. The IIJA supports the Administration's priority to use terms and conditions of federal financial assistance awards to maximize use of domestically produced goods, products, and materials consistent with Executive Order 14005. Per Section 70914 of the IIJA, Agencies may not obligate funds for a project on public infrastructure unless all of the iron, steel, manufactured products, and construction materials used in the infrastructure project are produced in the United States or the Agency provides a waiver of this requirement.

The Office of Management and Budget's (OMB) initial implementation guidance to Agencies on the application of a Buy America Requirement in financial assistance programs and awards that was provided in OMB Memorandum M-22-11 has been rescinded. OMB's primary guidance to Agencies related to implementation of BABA is codified in 2 CFR part 184.

Further guidance to Agencies has been issued by OMB in Memorandum M-24-02. Memo M-24-02 summarizes certain aspects of 2 CFR part 184 and provides supplemental guidance for public infrastructure projects subject to BABA.

### **What guidance is included in this FAL/OTL?**

COs must ensure that the **Buy America Requirement for Infrastructure Projects** provision (See Attachment 1) and award term (See Attachment 2) is included in all DOE notice of funding opportunities (NOFOs), funding opportunity announcements (FOAs) or other solicitations (such as annual program notices, broad agency announcements (BAAs) or administrative and legal requirements documents (ALRDs)) and the resulting DOE funded awards (grants and cooperative agreements) or other federal financial assistance actions, whether or not funded through the Infrastructure Investment and Jobs Act (IIJA), where funds are appropriated or otherwise made available and used for financial assistance awards or actions for or that include public infrastructure projects that include, or may

include, construction, alteration, maintenance, or repair of public infrastructure in the United States.

COs are also responsible for coordinating with the Program Office, Recipient and the cognizant MA-621 Analyst to review, concur, submit and adjudicate a recipient project-specific waiver request as outlined in part III.C of this FAL.

COs must ensure new awards include a special award term identifying the specifics of the Buy America Requirement waiver if the waiver is approved prior to award. COs must amend existing awards to incorporate a project-specific waiver or general applicability waiver after the award was made.

## I. Terms

Terms used but not defined in this FAL have the same meaning as provided in 2 CFR 184 and 2 CFR 200.

**Components** -See 2 CFR 184.3 Definitions.

**Construction Materials** -See 2 CFR 184.3 Definitions.

**Covered** – for purposes of this guidance, “covered” means that it meets all the requirements necessary for the Domestic Content Procurement Preference Requirement to apply. For example, a “covered award” refers to an award that contains construction, alteration, maintenance, or repair of public infrastructure in the United States.

**Domestic Content Procurement Preference Requirement** – means a requirement that no amounts made available through a program for federal financial assistance may be obligated for an infrastructure project unless—

- (A) all iron and steel used in the project are produced in the United States;
- (B) the manufactured products used in the project are produced in the United States; or
- (C) the construction materials used in the project are produced in the United States.

Also referred to as the **Buy America Requirement, BABA Requirement or Buy America Preference requirement.**

**General Applicability Waiver**- means a waiver of the Domestic Content Procurement Preference Requirement that applies across multiple DOE awards.

**Infrastructure** -See 2 CFR 184.4(c) and (d).

**Infrastructure Project** – See 2 CFR 184.3 Definitions.

**Manufactured Products**- See 2 CFR 184.3 Definitions.

**Non-Federal Entity** includes States, Local Governments, Territories, Indian Tribes, Institutions of Higher Education (IHEs), and Non-Profit Organizations. **NOTE:** for purposes of this guidance, in accordance with guidance provided in by OMB in Memorandum M-22-11 and M-24-02, For-Profit Entities are not included in this definition when applying the statutory Buy America Requirement to Prime Recipients of DOE awards. See Section II.B.3 Applicable Non-Federal Entities for more information.

**Predominantly of iron or steel or a combination of both** -See 2 CFR 184.3 Definitions.

**Produced in the United States** -See 2 CFR 184.3 Definitions.

**Project** – For purposes of this guidance, means the activities under an award that contain or pertain to the construction, alteration, maintenance, or repair of infrastructure in the United States.

**Public** – For purposes of this guidance, infrastructure should be considered “public” if it is: (1) publicly owned (owned, operated, funded and managed, in whole or in part, by any unit or authority of a Federal, State, or Local government-including U.S. Territories and Indian Tribes); or (2) privately owned but utilized primarily for a public purpose. Infrastructure should be considered to be “utilized primarily for a public purpose”, and therefore “public”, if it is privately owned but operated on behalf of the public or is a place of public accommodation. The Buy America Requirement does not apply to non-public (private) infrastructure.

**Section 70917(c) Materials** – See 2 CFR 184.3 Definitions.

## II. **Buy America Requirement**

### A. **REQUIREMENTS**

The following information provides details on the Buy America Requirement established in BABA, codified by OMB in 2 CFR 184, with further implementation guidance provided to Agencies in Memorandum M-24-02. OMB’s primary guidance related to implementation of BABA is contained in 2 CFR part 184.

Effective for all DOE awards made or funded after May 14, 2022, “None of the funds made available for a federal financial assistance program for [public]

infrastructure may be obligated for a project unless all of the iron, steel, manufactured products, and construction materials used in the project are produced in the United States.”

Subawards shall conform to the terms and conditions of the prime federal award from which they flow, regardless of the sub-awardee entity type.

DOE is responsible for processing requests to waive the Buy America Requirement for specific awards/projects or across multiple awards/projects. Project/award specific waiver requests must be submitted to the CO in writing by the Prime Recipient in accordance with the terms and conditions of the award and will be processed in accordance with the process outlined in Section III part C. Requests to waive the Buy America Requirement for multiple projects/awards must be coordinated with the BABA Coordinator and follow the process outlined in Section III part D for Agency General Applicability waiver requests.

## **B. APPLICABILITY**

The Buy America Requirement is applicable to new and renewal awards to Non-Federal Entities (as defined in Sections I and II.B.3) made by DOE on or after May 14, 2022, that contain projects (as defined in Section I) on public infrastructure, and to existing awards that contain projects on public infrastructure if additional funds are provided in a modification executed on or after May 14, 2022. These covered awards must contain the *Buy America Requirement for Infrastructure Projects* term and condition (see Section V, also referred to as the Buy America Requirement term and condition) requiring use of domestically produced iron, steel, manufactured products, and construction materials in the infrastructure project.

The Buy America Requirement applies to *an entire infrastructure project*, even if it is funded by both Federal and recipient cost share or non-Federal funds under one or more awards. In other words, if a recipient receives a Federal award for an infrastructure project, the Buy America Requirement applies to both the Federal funds and the cost share/non-Federal funds used for the infrastructure project.

Any funding modification (continuation award, supplemental award, or any other incremental or additional funding modification) made on or after May 14, 2022, to an existing covered award (covered awards made prior to May 14, 2022) must incorporate the Buy America Requirement term and condition (see Section V) into that award.

As initially stated in OMB Memo M-22-11 and restated in Memo M-24-02, For-Profit Entities are not considered a Non-Federal Entity when applying the Buy America Preference to prime awards. Therefore, the Buy America Requirement does not apply to awards where the Prime Recipient is a For-Profit Entity. However, if the Buy America Requirement does apply (i.e., the Prime Recipient is

a State, Local Government, Territory, Indian Tribe, IHE, or Non-Profit Organization), the Buy America Requirement flows down to all sub-awards for work performed under the infrastructure project regardless of sub-awardee entity type, including For-Profit Entities.

For awards made to For-Profit Entities as the Prime Recipient, the Buy America Requirement does not apply and therefore the Buy America Requirement would not flow down to sub-awardees, regardless of sub-awardee entity type. See section II.B.3 for more information on For-Profit Entities.

All NOFOs, FOAs, BAAs or other solicitations issued on or after May 14, 2022, must contain the *Buy America Requirement for Infrastructure Projects* provision (See Section IV, also referred to as the Buy America Requirement provision) to make applicants aware of the Buy America Requirement for items utilized in project activities on public infrastructure under a DOE award. All solicitations issued after May 14, 2022, that are still open and do not contain the Buy America Requirement provision must be amended to add the Buy America Requirement provision.

In general, the Buy America Requirement **does not** apply:

- To DOE Prime Recipients that are For-Profit Entities and any of its subawardees;
- To non-public infrastructure utilized solely for private purposes (not utilized for a public purpose or as a place of public accommodation);
- If there are no DOE or Recipient cost-share funds under an award that will be used for an infrastructure project;
- To non-infrastructure expenditures under a covered award that includes an infrastructure project;
- To equipment and furnishings, such as movable chairs, desks, and portable computer equipment, that are used at or within the finished infrastructure project but are not an integral part of or permanently affixed to the infrastructure;
- To tools, equipment, and supplies, such as temporary scaffolding, brought to the construction site and removed at or before the completion of the infrastructure project;
- To a covered award in accordance with an approved DOE Buy America Requirement waiver;
- To expenditures for assistance authorized for Disaster Relief and Emergency Assistance (See 2 CFR 184.8).

## 1. **Award Types**

DOE award types that must have the Buy America Requirement include any of the following types of financial assistance awards that include construction, alteration, maintenance, or repair of public infrastructure in the United States:

- Grants (block, formula or discretionary)
- Cooperative agreements
- Non-cash contributions or donations of property
- Direct assistance
- Loans
- Loan guarantees

**NOTE:** Section 70914 of the IIJA expanded the definition of federal financial assistance to include “all expenditures by a Federal agency to a non-Federal entity for an infrastructure project.” Please reach out to your local GC if you have questions regarding application of the Buy America Requirement to other DOE expenditures under an award type not listed above.

When the Buy America Requirement term and condition is included in an award, the Buy America Requirement flows down to all sub-awards regardless of the sub-awardee’s entity type, including For-Profit Entities (See part B.3. Applicable Entities below for more information). The Buy America Requirement applies to both the Federal funds and non-Federal funds (cost-share) obligated and used for the public infrastructure project.

## 2. **Projects (Infrastructure Projects)**

The applicable projects are awards for, or awards that contain, construction, alteration, maintenance, or repair of public infrastructure in the United States. Infrastructure includes, at a minimum, the structures, facilities, and equipment located in the United States for:

- roads, highways, and bridges;
- public transportation;
- dams, ports, harbors, and other maritime facilities;
- intercity passenger and freight railroads;
- freight and intermodal facilities;
- airports;
- water systems, including drinking water and wastewater systems;
- electrical transmission facilities and systems;
- utilities;
- broadband infrastructure;
- buildings and real property; and
- generation, transportation, and distribution of energy - including electric vehicle (EV) charging.

The Buy America Requirement does not apply to non-public (private) infrastructure utilized solely for private purposes (not utilized for a public purpose or as a place of public accommodation). For purposes of this

guidance, when DOE or the applicant/recipient is determining if an infrastructure project is public (the project includes public infrastructure), they must consider whether the infrastructure in the project is: (1) publicly owned (owned, operated, funded and managed, in whole or in part, by any unit or authority of a Federal, State, or Local government-to include U.S. Territories and Indian Tribes); or (2) privately owned but utilized primarily for a public purpose. Infrastructure should be considered to be “utilized primarily for a public purpose”, and therefore ‘public’, if it is privately owned but operated on behalf of the public or is a place of public accommodation. The CO and/or Program Office should consult local GC if there are questions regarding the determination of the infrastructure in an award.

The above must be considered when determining whether the infrastructure involved in the project is public as opposed to just considering if the infrastructure is privately owned and not open to the public.

**NOTE:** The Buy America Requirement does not apply to non-public infrastructure. Therefore, projects consisting solely of the purchase, construction, alteration, maintenance, repair, or improvement of a private home for personal use, for example, would not constitute an infrastructure project.

### 3. Applicable Non-Federal Entities

The Buy America Requirement is applicable to the following Non-Federal Entity Prime Recipients and flows down to all sub-recipients or sub-awardees regardless of the entity type (including For-Profit Entities):

- States
- Local Governments
- Institutions of Higher Education (IHE)
- Nonprofit Organizations
- Territories of the US
- Indian Tribes (Consultation with the Indian Tribe(s) is necessary before applying a Buy America Preference to a covered program, award, or project with an Indian Tribe(s).)

**NOTE on For-Profit Entities:** For the purposes of this guidance the Buy America Requirement does not statutorily apply to Prime Recipients that are For-Profit Entities and therefore the Buy America term and condition should not be included in an award to the For-Profit Entity. However, the Buy America Requirement is applicable to a For-Profit Entity if: (1) it is a sub-recipient or sub-awardee under an award that contains the Buy America Requirement term and condition, or (2) it is the Prime Recipient that voluntarily chooses to use domestically sourced iron, steel, manufactured products, and constructions materials by stating so in the proposed

infrastructure project, and its award contains a Buy America Requirement term and condition.

The Prime Recipient is responsible for flowing the Buy America Requirement down to the For-Profit in its subawards when the For-Profit Entity is a sub-recipient or sub-awardee under a covered award. The CO is responsible for including a Buy America Requirement term and condition in the prime award to the For-Profit Entity when the domestically sourced requirement for iron, steel, manufactured products, and construction materials in the proposed infrastructure project was successfully negotiated into the award.

This guidance does not alter independent statutory authorities that DOE may have to include domestic content requirements in financial assistance awards issued to For-Profit Entities.

#### 4. Applicable Items

The Buy America Requirement only applies to an article, material, or supply classified into one of the following categories\* based on its status at the time it is brought to the work site for incorporation into an infrastructure project:

- (i) Iron or steel products;
- (ii) Manufactured products; or
- (iii) Construction materials;

The Buy America Requirement only applies to the iron or steel products, manufactured products, and construction materials used for the construction, alteration, maintenance, or repair of public infrastructure in the United States under an applicable award when those items are consumed in, incorporated into, or permanently affixed to the infrastructure. An article, material, or supply incorporated into an infrastructure project must meet the Buy America Preference requirement for only the single category in which it is classified.

All iron and steel, manufactured products, and construction materials used in the infrastructure project must be produced in the United States (see below).

\* **Section 70917(c) Materials** are cement and cementitious materials; aggregates such as stone, sand, or gravel; or aggregate binding agents or additives as provided in section 70917(c) of BABA. Section 70917 (c) materials are excluded from Construction materials. Asphalt concrete pavement mixes are typically composed of asphalt cement (a binding agent) and aggregates such as stone, sand, and gravel. Accordingly, asphalt is also excluded from the definition of Construction materials.

OMB clarifies that “Section 70917(c) materials, on their own, are not manufactured products. Further, Section 70917(c) materials should not be

considered manufactured products when they are used at or combined proximate to the work site—such as is the case with wet concrete or hot mix asphalt brought to the work site for incorporation. However, certain Section 70917(c) materials (such as stone, sand, and gravel) may be used to produce a manufactured product, such as is precast concrete. Precast concrete is made of components, is processed into a specific shape or form, and is in such state when brought to the work site.” Furthermore, wet concrete should not be considered a manufactured product if not dried or set prior to reaching the work site.

OMB provides further clarification in 2 CFR 184 on the circumstances under which a determination is made that Section 70917(c) materials should be treated as components of a manufactured product. That determination is based on consideration of: (i) the revised definition of the “manufactured products” at 2 CFR 184.3; (ii) a new definition of “section 70917(c) materials” at 2 CFR 184.3; (iii) new instructions at 2 CFR 184.4(e) on how and when to categorize articles, materials, and supplies; and (iv) new instructions at 2 CFR 184.4(f) on how to apply the Buy America preference by category.

**Produced in the United States:**

- a. For **iron and steel** this means all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States.
- b. For **manufactured products** this means:
  - i. the manufactured product was manufactured in the United States; **and**
  - ii. the cost of the components of the manufactured product that are mined, produced, or manufactured in the United States is greater than 55 percent of the total cost of all components of the manufactured product, unless another standard for determining the minimum amount of domestic content of the manufactured product has been established under applicable law or regulation. The costs of components of a manufactured product are determined according to 2 CFR 184.5.
- c. For **construction materials** this means all manufacturing processes for the construction material occurred in the United States. See 2 CFR 184.6 for more information on the meaning of “*all manufacturing processes*” for specific construction materials.

**NOTE:** The Buy America Requirement does not apply to non-infrastructure expenditures under a covered award that also includes an infrastructure project, nor does it apply to equipment and furnishings, such as movable chairs, desks, and portable computer equipment, that are used at or within the

finished infrastructure project but are not an integral part of or permanently affixed to the infrastructure.

It also does not apply to tools, equipment, and supplies, such as temporary scaffolding, brought to the construction site and removed at or before the completion of the infrastructure project.

### III. **Buy America Requirement Waiver**

#### A. **Types of Waivers**

Pursuant to 2 CFR 184.7, DOE may waive the application of a Buy America Requirement under a specific award or across multiple awards in any case in which it determines that:

1. Applying the Buy America Requirement would be inconsistent with the public interest (“**Public Interest waiver**”);
2. 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 (“**Non-Availability waiver**”); 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 (“**Unreasonable Cost waiver**”).

A Buy America Requirement waiver will be issued as either a Project - Specific Waiver applicable to a specific DOE award or a General Applicability Waiver applicable to multiple DOE awards.

#### B. **Waiver Requests**

Requests to waive the application of a Buy America Requirement under a specific project/award or across multiple projects/awards (General Applicability waiver) must be submitted in writing with sufficient information:

- To demonstrate adequate due diligence was performed in analyzing the request and researching domestic availability/capacity of the items;
- To determine whether the waiver request is consistent with BABA law and policy; and

- To ensure the waiver request contains sufficient information for public review and comment.

Waivers must be based on one of the following justifications:

1. **Public Interest** – Applying the Buy America Preference would be inconsistent with the public interest;
2. **Non-Availability** – 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; or
3. **Unreasonable Cost** – 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.

Written requests to waive the Buy America Requirement must include the following information, as applicable:

- Waiver type (Public Interest, Non-Availability, or Unreasonable Cost);
- Federal awarding agency organizational information (e.g., Common Government-wide Accounting Classification (CGAC) Agency Code);
- Financial assistance listing name and number;
- Federal financial assistance program name;
- Recipient name and Unique Entity Identifier (UEI);
- Federal Award Identification Number;
- A brief description of the award - project objectives, location, and the specific project activities being performed on the public infrastructure;
- Total estimated Financial Assistance award value, inclusive of recipient cost share;
- Total estimated infrastructure costs, (estimated costs of the Iron, Steel, Manufactured Products and Construction Materials being purchased under the award and utilized in the infrastructure project)
- In the case of General Applicability waivers, a description of the relevant Federal program(s)—including information on the size and scale of the program(s), an estimate of the dollar amount of Federal financial assistance that would be subject to the waiver, and an estimate of how many infrastructure projects would be subject to the waiver;

- List and description of iron or steel item(s), manufactured goods, and/or construction material(s) the requester seeks to waive from the Buy America Requirement, including name, cost, quantity(ies), country(ies) of origin, and relevant Product Service Codes (PSC) and North American Industry Classification System (NAICS) codes for each;
- A detailed justification as to how the non-domestic item(s) is/are essential to the project or program and the anticipated impact to the project or program if no waiver is issued;
- A certification that the requester made a good faith effort to solicit bids for domestic products supported by terms included in requests for proposals, contracts, and non-proprietary communications with potential suppliers;
- A justification statement—based on one of the applicable justifications outlined above—as to why the listed items cannot be procured domestically, including the due diligence performed (e.g., market research, industry outreach, cost analysis, cost-benefit analysis) by the requester to attempt to avoid the need for a waiver. This justification may cite, if applicable, the absence of any Buy America-compliant bids received for domestic products in response to a solicitation;
- A description of the market research conducted that includes who conducted the market research, when it was conducted, sources that were used, and the methods used to conduct the research; and
- For final waivers, any relevant comments received through the public comment period, and DOE’s adjudication of those comments.

The requester must consider using the following principles as minimum requirements contained in the project/award-specific waiver or general applicability waiver request:

- **Time-limited:** Consider a waiver constrained principally by a length of time, or phased-out over time, rather than by the specific project/award to which it applies. Waivers of this type may be appropriate, for example, when an item that is “non-available” is widely used in the project/award. When requesting such a waiver, the requester should identify a reasonable, definite time frame (e.g., no more than one to two years) designed so that the waiver is reviewed to ensure the condition for the waiver (“non-availability”) has not changed (e.g., domestic supplies have become more available).
- **Targeted:** Waiver requests not limited to specific projects should apply only to the item(s), product(s), or material(s) or category(ies) of item(s), product(s), or material(s) as necessary

and justified. Waivers should not be overly broad as this will undermine domestic preference policies.

- **Conditional:** Waivers may be requested with specific conditions that support the policies of IIJA/BABA and Executive Order 14017.

The requester may utilize [Optional Form 2211](#) (OF2211) or any other format to provide the required information for a waiver request. DOE or OMB may request, and the requester must provide, additional information for consideration of the waiver request. DOE's final determination regarding approval or rejection of the waiver request may not be appealed.

### **C. Project Specific Waiver Requests Submittal and Review**

Prime Recipient requests to waive the application of the Buy America Requirement under their specific award must be submitted in writing to the CO in accordance with the terms and conditions of the award. The Recipient may utilize [Optional Form 2211](#) (OF2211) or any other format to provide the required information for a project-specific waiver request.

DOE must review the Recipient's Buy America Requirement waiver request to determine whether to grant a project-specific waiver for those covered items listed in the request. DOE may reject or grant waivers in whole or in part depending on its review, analysis, and/or feedback from OMB or the public. Waiver requests are subject to CO review, DOE Made In America Senior Accountable Official (MIA SAO) review (performed through the DOE Office of Contract Management, Field Assistance and Oversight Division (MA-621)), OMB initial review of no less than 10 business days, a public comment period of no less than 15 calendar days, and a final OMB review of no less than 10 business days. The waiver request review and public comment process required for a waiver determination can take up to 65 calendar days.

For NNSA, contact NNSA at (505) 845-4337 to get information on how to submit NNSA Recipient project specific waiver requests for NNSA review. NNSA waiver requests are subject to review by and concurrence of the MIA SAO and OMB, and a public comment period of no less than 15 calendar days.

#### **1. CO/Program Review**

The CO must review the Recipient's waiver request (including the market research, cost-benefit analysis, cost comparisons, PSCs and NAICS) to ensure that the Recipient provided all the information

required by the term and condition of the award and that the information regarding the award and Recipient are correct.

The CO, in consultation with the Program Office, must create a Waiver Package for the DOE Made in America Senior Accountability Official (MIA SAO) to review. The Waiver Package must include the Recipient's waiver request, a description of the due diligence the CO and Program Office performed in reviewing the Recipient's waiver request, and a recommendation for the waiver based on their due diligence. The description should provide the details on what due diligence the CO and Program Office performed on the Recipient's requested waiver and the justifications and certifications used by the Recipient to support the request. In performance of their due diligence, the CO may request, and the Recipient must provide, additional information for consideration of this waiver.

Any questions the CO has regarding the contents and review of the Waiver Package should be sent to the cognizant MA-621 analyst.

The CO must follow their local procedures for routing documents to MA-621 for review. The cognizant MA-621 analyst will route the Waiver Package to the MIA SAO for review.

If, as a result of performing due diligence, the CO determines that DOE cannot recommend the waiver, the CO should promptly notify the Recipient of the rejected waiver request and provide the details of the due diligence to include any domestic sources found.

## **2. MIA SAO/OMB Initial Review**

The MIA SAO, or designee, must review the Waiver Package to ensure that sufficient information and analysis has been provided and documented to support the waiver request and that it is consistent with the BABA law and policies prior to sending to OMB for review or posting to the DOE BABA website.

The MIA SAO may request additional information from the CO regarding the Waiver Package, including any due diligence they performed.

The MIA SAO will inform the OMB that the waiver is ready to be posted on the DOE BABA website for public comment when the determination is made that the Waiver Package contains sufficient information for public comment and is consistent with the BABA law and policies.

The MIA SAO will send the Waiver Package to OMB for its review and concurrence. OMB has up to 10 business days to review the waiver request. The CO will work with the MA-621 Analyst to address any comments or additional information requests from OMB on the package.

The waiver cannot be posted for public comment on the DOE BABA website until the MIA SAO and OMB have made a determination on the content of the waiver.

### **3. Public Review and Comment Period**

Once the MIA SAO has received concurrence from OMB on the Waiver Package, DOE must post the proposed waiver on the DOE BABA website located at <https://www.energy.gov/management/doe-buy-america-requirement-waiver-requests> for a minimum of 15 calendar days to get public comment and feedback on the waiver request.

The MIA SAO, through the appropriate MA-621 Analyst, will coordinate with MA-625 (Systems Division) to get the proposed waiver posted to the DOE BABA website and notify the CO. The CO, or its designee, must be the POC for receipt of the public comments. The CO must provide an email address to be used for the receipt of the public comments and it must be clearly stated on the waiver request.

### **4. CO Adjudication of Comments**

The CO, in coordination with the Program Office and, if necessary, the Recipient, must prepare: 1) a Memo to the File (MTF) that summarizes the public comments received and the adjudication of those comments; and 2) a proposed Buy America Requirement Waiver (Waiver) that provides the specific waiver information that will be modified into the award.

The MTF and proposed Waiver must include the CO/Program Office's changes, if necessary, to the Waiver as a result of the adjudication of comments and their recommendation (approval or dismissal) on the waiver. A MTF is not required if no public comments were received. The CO must send this to the appropriate MA-621 analyst for MIA SAO final review.

### **5. MIA SAO/OMB Final Review**

The MIA SAO, or designee, must review the proposed Waiver, and the MTF (if necessary), to ensure the adjudication of public comments and any changes, if necessary, to the proposed Waiver align with BABA law and policy, and support the recommendation provided by the CO/Program Office.

If the due diligence, justifications, certifications, or adjudication of public comments does not support issuance of a waiver, the MIA SAO will dismiss the waiver request and promptly inform the CO of this decision so the CO can provide the specific details to the Recipient.

If the due diligence, justifications, certifications, and adjudication of public comments support issuance of the proposed Waiver, the MIA SAO will concur on the proposed Waiver and send it, and any supporting documents required, to OMB for their final policy/legal determination.

The MIA SAO must submit the proposed Waiver to OMB for their final review after the public comment period has concluded. OMB will review the proposed Waiver to ensure it is consistent with applicable law and policy and will notify the MIA SAO of its determination. OMB has up to 10 business days to complete its final review.

The MIA SAO will promptly notify the CO if OMB concurs on the proposed waiver or if additional information is required to complete its review of the waiver request/proposed Waiver.

## **6. Approved Waivers**

After OMB completes their final determination and does not object to the proposed Waiver, the Waiver becomes finalized, and the MIA SAO notifies the CO through the appropriate MA-621 Analyst.

The CO must notify the Recipient and modify the award to incorporate the approved Project-Specific Waiver (waiver items, timeline, other details in the waiver). All waiver documentation (waiver request, MTF, approved waiver) must be included in the award file.

DOE must post the approved waiver on the DOE BABA website located at <https://www.energy.gov/management/doe-buy-america-requirement-waiver-requests>. The MIA SAO, through

the appropriate MA-621 Analyst, will coordinate with MA-625 to get the proposed waiver posted to the DOE BABA website.

#### **D. General Applicability Waiver Requests Submittal and Review**

A General Applicability Waiver refers to a waiver that applies to multiple DOE awards, can be product-specific or non-product specific, and should be issued only when necessary to advance DOE's mission and goals consistent with applicable BABA/IIJA law, policy, and guidance. A DOE Program Office that requests to waive the application of the Buy America Requirement across multiple awards must submit the request in writing to the BABA Coordinator at [BuyAmericanGAWaiver@hq.doe.gov](mailto:BuyAmericanGAWaiver@hq.doe.gov) in accordance with this guidance and the process outlined below. Program Office coordination with the BABA Coordinator is required due to the complexity of the analysis and information required for preparing a General Applicability Waiver and the level at which these waiver requests must be reviewed within DOE.

The BABA Coordinator must review the General Applicability Buy America Requirement waiver requests to determine whether to grant the waiver for those covered items or conditions listed in the request. DOE may reject or grant waivers in whole or in part depending on its review, analysis, and/or feedback from OMB or the public. DOE review of Waiver requests includes BABA Coordinator review, GC review, Senior Leadership review (which includes the Secretary or its designee), OMB review, and a public comment period of no less than 15, up to 30, calendar days (minimum 30 calendar days for renewal of a waiver). A minimum of 120 business days should be used for planning purposes for the General Applicability Waiver request review and public comment process.

For NNSA, contact NNSA at (505) 845-4337 to get information on how to submit NNSA Program General Applicability Waiver requests for NNSA review. NNSA should consult with the BABA Coordinator when contemplating General Applicability waivers. NNSA General Applicability waiver requests are subject to review by and concurrence of the BABA Coordinator, Senior Leadership (which includes the Secretary or its designee), and OMB, and a public comment period of no less than 15, up to 30, calendar days (renewal waivers require a minimum of 30 calendar days).

##### **1. DOE Program Office Waiver Request**

Program Offices must first consult with the BABA coordinator when contemplating issuing a General Applicability Waiver. The BABA coordinator will provide an overview of the requirements

of the waiver package, the DOE and OMB review process, lessons learned from recent approved waivers and answer any questions the Program Office has regarding the creation of the Waiver Package and use of a General Applicability Waiver.

The DOE Program Office, in coordination with the BABA Coordinator, must create a Waiver Package that includes a General Applicability Waiver request, a detailed description of the due diligence performed, and a business case justification for the recommendation for the waiver based on their due diligence. The description should provide the details on what market research and analysis the requesting Office performed on the requested waiver items/conditions and the waiver justifications and certifications to support the request. The content and format of the business case justification will be provided to the Program Office by the BABA Coordinator. In performance of its due diligence, the BABA Coordinator may request, and the Office must provide, additional information for consideration of this waiver.

The BABA Coordinator must review a DOE Office General Applicability Waiver request (including the justifications, analysis, market research, cost-benefit analysis, cost comparisons, PSCs and NAICS) to ensure that the Office provided all the information required by this guidance (see Section B) and the necessary justifications.

Any questions the requesting Office has regarding the contents of the Waiver Package, or the General Applicability Waiver review and approval process should be sent to the BABA Coordinator.

## **2. BABA Coordinator Initial Review**

The BABA Coordinator reviews the Waiver Package, briefs DOE Senior Leadership (which includes the Secretary, or its designee), coordinates DOE and OMB concurrences and requests the DOE MIA SAO approval to post on the DOE BABA website for public comment.

The BABA Coordinator must review the Waiver Package and the due diligence performed by the requesting Office to ensure that sufficient information and analysis has been provided and documented to support the waiver request and that it is consistent with the BABA law and policies.

The BABA Coordinator may request additional information from the requesting Office when reviewing the Waiver Package, including any due diligence performed by the Office.

If the BABA Coordinator determines that sufficient information and analysis has been provided in the initial Waiver Package then the BABA Coordinator will brief the Secretary, or designee, for approval to send the Waiver to OMB for its review.

The Waiver request cannot be sent to OMB or posted for public comment on the DOE BABA website until concurrence has been provided by the Secretary, or designee.

### **3. OMB Review/Approval to Post**

Once the BABA Coordinator receives internal DOE concurrence on the General Applicability waiver request it can be sent to OMB for a preliminary policy review to ensure the waiver is consistent with BABA policy and it has sufficient information provided in it for public comment. OMB has up to 15 business days to complete its initial review.

If OMB concurs on the waiver the BABA Coordinator will inform the MIA SAO so the waiver can be posted on the DOE BABA website for public comment. If OMB has comments or requests additional information on the waiver request, the BABA Coordinator will work with the DOE Office and Senior Leadership as necessary to address the comments or provide the additional information to OMB.

The waiver cannot be posted for public comment on the DOE BABA website until OMB concurs on the waiver and the MIA SAO has been informed of the waiver.

### **4. Public Review and Comment Period**

Once OMB determines that the waiver is consistent with law and policy and contains enough information for public comment, the BABA Coordinator must send the waiver to the MIA SAO so it can be posted on the DOE BABA website located at <https://www.energy.gov/management/doe-buy-america-requirement-waiver-requests> for a minimum of 15 calendar days to get public comment and feedback on the waiver request. The BABA Coordinator will determine the length of time the waiver request will be available for public comment.

The MIA SAO, through the appropriate MA-621 Analyst, will coordinate with MA-625 to get the proposed waiver posted to the DOE BABA website. The BABA Coordinator must provide an email address to be used for the receipt of the public comments and it must be clearly stated on the proposed waiver.

## **5. Adjudication of Comments**

After the public comment period has concluded, the BABA Coordinator must adjudicate the comments received in coordination with the DOE Office and, if necessary, GC. The BABA Coordinator must prepare: 1) a Summary of the public comments received and the adjudication of those comments; and 2) a proposed Buy America Requirement Waiver (Waiver) that provides the specific General Applicability waiver information.

The Summary and proposed Waiver must include the BABA Coordinator's changes, if necessary, to the waiver as a result of the adjudication of comments and a recommendation (approval or dismissal) on the waiver.

## **6. BABA Coordinator/OMB Final Review**

The BABA Coordinator must review the Summary and proposed Waiver to ensure the adjudication of public comments align with BABA law and policy, and support the recommendation provided.

If the due diligence, justifications, certifications, or adjudication of public comments does not support issuance of a waiver, the BABA Coordinator will dismiss the waiver request and promptly inform the DOE Office of this decision and provide the reasons.

If the due diligence, justifications, certifications, and adjudication of public comments support issuance of the proposed Waiver, the BABA Coordinator will concur on the proposed Waiver and prepare the final Waiver Package (to include the Summary and proposed Waiver) for the Secretary, or designee, for final review and approval to send the final Waiver to OMB for their final policy/legal determination review.

Once the Secretary, or designee, concurs on the final Waiver the BABA Coordinator will send it, and any supporting documents required, to OMB for their final policy/legal determination. OMB has up to **15** business days to complete its final review.

## **7. Approved Waivers**

After OMB completes their final determination and does not object to the proposed Waiver, the General Applicability Waiver becomes finalized. The BABA Coordinator will notify the DOE Office and the MIA SAO.

All waiver documentation (waiver request, analysis, concurrences, approvals, and final approved waiver) must be included in the Waiver file.

DOE must post the approved waiver on the DOE BABA website <https://www.energy.gov/management/doe-buy-america-requirement-waiver-requests>. The MIA SAO, through the appropriate MA-621 Analyst, will coordinate with MA-625 to get the proposed waiver posted to the DOE BABA website.

#### **E. Posting Waiver Requests and Approved Waivers to the Website**

Once the DOE MIA SAO or BABA Coordinator has received concurrences from OMB on the Waiver Requests and Approved Waivers DOE will post them on the DOE Buy America Requirement Waiver Request webpage located at <https://www.energy.gov/management/doe-buy-america-requirement-waiver-requests>.

All Waiver Requests and Approved Waivers, including approved General Applicability Waivers, are listed at [DOE Buy America Requirement Waiver Requests webpage](#).

Requests to post the approved Waiver Requests or Approved Waivers will be made in writing to the MIA SAO through MA-621 and include the appropriately formatted documents, correct contact information and specific waiver details.

#### **F. Use of an Approved Waiver**

To use a General Applicability Waiver, the CO must review the waiver, confirm the waiver is applicable to the award, and document use of the General Applicability Waiver in the award file. For NOFOs, FOAs and other solicitations, a special provision must be created and used to inform applicants of the Waiver. For new awards, the CO must ensure that an Award term is created and used to identify the specific details and parameters of the General Applicability Waiver. For existing awards, the CO must amend the award to include the specific details and parameters of the General Applicability Waiver into the award.

Approved Project-Specific Waivers must be incorporated into an existing award through an amendment of the award by the CO that identify the specific details and parameters of the Project-Specific Waiver. For new awards, the CO must ensure that an Award term is created and used to identify the specific details and parameters of the Project-Specific Waiver.