

From: Xochitl Torres Small, Under Secretary

Approved: June 20, 2023

**Expires: 12 months from
enactment**

Subject: USDA Rural Development Build America, Buy America previously planned Water and Environmental Programs (WEP) and Community Facilities (CF) projects that were planned prior to the implementation date of BABA on May 14, 2022

Agency: United States Department of Agriculture Action:

Notice

Introduction

The Build America, Buy America Act (BABAA) provisions of the Infrastructure Investment and Jobs Act (Pub. L. 117-58, § 70901-52) require that all iron and steel, manufactured products, and construction materials used on federally-assisted infrastructure projects be produced in the United States. These provisions came into effect on May 14, 2022. Specifically, BABAA requires that “no amounts made available through a program for Federal financial assistance may be obligated for a project unless [all iron and steel, manufactured products and construction materials] are produced in the United States” (§70912 (2)). This includes both new obligations and increases to existing awards, in some cases where the initial award was obligated prior to May 14, 2022. This creates a unique challenge for applicants seeking funding for previously planned projects designed and selected for their initial award well before BABAA went into effect.

While preparing for implementation, the United States Department of Agriculture Rural Development (RD)¹ identified Water & Environmental Programs (WEP) and Community Facilities Program (CF) projects that were planned prior to May 14, 2022, the statutory effective date of the BABA requirements. Without a waiver, BABAA could be applied to projects designed prior to the implementation of the BABAA requirements. Absent action, the likelihood of completion for these projects, which include loans and carefully coordinated financing to meet repayment timelines, could be at risk.

The RD is proud of its history of successful implementation of American Iron and Steel provisions in its Water and Waste Disposal as well as Buy American provisions in its Telecommunications and Electric Programs. Across all its agencies and offices, RD supports the implementation of BABAA and recognizes its importance to the Biden-Harris Administration efforts to catalyze domestic

¹ RD is a mission area within USDA. Although RD is used to refer to USDA in this waiver notice, USDA is the Federal agency making findings in this notice and issuing the waiver.

manufacturing, resilient supply chains, and good jobs. A one-year waiver of BABAA requirements for previously planned projects for a subset of WEP and CF projects, as further described below, will allow RD to balance its commitment to compliance with its mission of addressing the unique challenges experienced by rural communities.

Summary of Waiver

For the reasons set forth in this notice, RD finds that it is in the public interest to issue a limited, one-year waiver of Build America, Buy America Act (BABAA) domestic preference requirements for previously planned WEP and CF projects, as defined below, that were planned prior to the implementation date of BABAA on May 14, 2022. The waiver covers eligible obligations made on or after the effective date of the waiver, and in the case of awards obligated prior to the effective date, expenditures incurred on or after the effective date of the final waiver. This one-year transition should clear the queue of previously projects designed prior to BABAA implementation. The clearly defined timeline will also allow recipients to plan for BABAA requirements in future requests, ensuring a stronger transition to drive domestic production.

Waiver Type: Public Interest

Time Period: 12 months

Dates: The waiver is in effect for covered obligations under WEP and CF for 12 months after the date of enactment.

Program Coverage: WEP and CF Program projects that were planned prior to May 14, 2022. For purposes of this waiver, previously planned projects mean: (1) projects where funds were previously awarded and the scope was not increased after May 14, 2022; or (2) projects evidenced by: (a) a submittal of a project to USDA prior to May 14, 2022 with a significant level of design and engineering; or (b) documentation indicating that substantial public engagement for project selection and approval had occurred on or before May 14, 2022 for projects with a significant level of design and engineering. Examples of undertaking substantial public engagement include holding public meetings or publishing a notice related to project selection. For the purposes of this waiver, a “significant level of design and engineering” means a state of design and engineering such that it would be likely to cause disruption, delay, or significant additional costs to revise to comply with BABAA requirements.

Pre-existing American Iron and Steel requirements and Buy American preferences related to other RUS programs will continue to apply during the waiver period.

The period of this waiver allows RD to ensure previously planned projects meeting the standard above will not need to undertake new design and planning and provide for cost increases to continue the work on projects that were not originally designed subject to the BABAA requirements.

Background and Summary

In many cases, BABAA requirements can be easily managed and accounted for during the early planning stages of a project, but compliance can be costly and complex past the design phase. In the absence of a waiver, applying BABAA to previously planned projects, including subsequent awards for cost increases, could create significant hardship for those applicants.

Capacity issues in rural communities often lengthen the timeframe for the development and design of infrastructure and other construction projects in those areas. For example, non-Federal entities in rural communities that finance upgrades to a wastewater system or the construction of a health clinic generally do not have the required expertise or dedicated staff capacity because they complete such projects so infrequently. Any specific infrastructure project type is usually unique for engineering teams in rural communities and in some cases a once-in-a-generation investment. For these reasons many projects take years from the original design planning or obligation, which was based on preliminary plans and estimates, to final plans and bids and the beginning of construction. As a result, the final cost for the project is likely to vary from the original estimate.

When project bids exceed the initial award, the Agency does everything it can to ensure the project can proceed, often including the obligation of additional funds to cover the difference. This is a common practice under federal programs that fund construction projects. Cost overruns are even more likely in the current construction environment, where significant cost increases related to supply chain issues have been seen across the country.

To demonstrate the issue, Rural Development obligates WEP projects based on cost estimates in the Preliminary Engineering Report (PER), a planning document. In the traditional design-bid-build project delivery method, a final design is required to put a project out to bid but generally not initiated until after obligation of the initial award because the applicant needs assurance that funding is available for a project before incurring additional costs. The median time for a WEP project to go from initial obligation to bidding is approximately 32 months. As a result, most previously planned projects obligated since mid-2020 have not yet gone to the bid stage. The gap often contributes to variation between the initial project cost estimates and the final bid.

Many of the previously planned projects are now entering the final bid stage and it is likely that many projects may require subsequent awards for cost increases for the purposes of completing infrastructure projects within scope of the original award. Absent a waiver for previously planned projects, applicants

may need to redesign the project, and continue to incur interest and fees for interim financing and development costs, which continue to grow while construction is delayed.

Additionally, projects bid in rural areas frequently have only one or two bidders, and rural areas have seen reduced competition within construction as the result of tight labor markets after the height of the COVID-19 pandemic. Rebidding a project again with additional requirements creates the risk that no bids will be submitted, in part because of the cost to the provider to prepare the bid and rebid, which would force the applicant to either surrender its USDA award or abandon the project altogether.

The potential application of BABAA to previously planned projects and the resulting costs are of particular concern for WEP and CF. These programs are limited to public bodies, like municipal governments, and non-profits who are not otherwise able to obtain commercial credit on reasonable terms to finance their project. Eligibility is further limited by population. To provide some understanding of the rural communities potentially impacted by the waiver, WEP grants are limited to projects that will serve a community of 10,000 or less and for CF grants, eligibility is capped at 20,000 or less. Over 80 percent of persistent poverty counties are in rural areas served by WEP and CF programs. For some small communities, these programs provide their only opportunity to improve access to health care services and to clean drinking water.

Customers & Affected Projects

As explained in the program coverage paragraph above, the waiver covers WEP and CF awards for projects planned (as defined above) prior to May 14, 2022, and other projects where funds were previously awarded and additional obligations will be made to the existing award, but only if the scope was not increased after May 14, 2022. As set forth in more detail in the summary paragraph above, the waiver is effective for a one-year period.

To quantify the impact of the waiver, USDA examined previously planned and awarded projects that are now seeking a subsequent award to manage cost overruns. Of this universe, RD estimates that the waiver, if approved, will impact a total of \$2 billion in (initial) awards for projects awarded before May 14, 2022.

Under WEP, there are approximately 1,800 open obligations that have not gone to bid and may have cost increases. WEP in the past has experienced the majority of RD's cost overruns. Of these 1,800, approximately 1,500 were made prior to May 14, 2022, and would be covered by this waiver request. WEP funds mostly small projects and the volume is around 1,000 projects per year. Among the projects that would be covered by this waiver the average obligation amount is \$3.26 million, and the median obligation amount is \$1.9 million.

WEP's recent experience shows that 33 percent of its projects have the need for additional obligations for cost increases, and recent cost increase requests sought approximately 30 percent in additional funds

above the original award. Thus, RD anticipates that it would receive approximately 500 cost increase requests for covered projects.

Under Community Facilities, there are approximately 1,600 open obligations prior to May 14, 2022. Because less than 10 percent of the total obligation of these projects has not been disbursed, it is likely that construction has not started and cost overrun obligations may be needed. However, some of these obligations will not be subject to BABAA because they are not for public infrastructure projects.

Proposed Activities for Waiver Education, Implementation, and Post-Waiver Compliance

RD sought a six-month implementation period waiver to prepare agency staff and customers for the application of BABAA, which expired on February 3, 2023. While confident in its ability to enforce requirements moving forward, the need to extend relief for this limited subset of projects, which were planned prior to the application of BABAA, has become clear through market research on the CF and WEP programs. This one-year waiver will allow RD to expediently clear previously designed projects through the final stages of development, minimizing disruptions to larger program delivery and creating an incentive for applicants to quickly move to bid. After that year, any subsequent obligations for cost increases will be subject to BABAA regardless of the date of the project's initial award.

Following issuance of this waiver, RD plans to host informational sessions for stakeholders and update external resources, including a customer guide and an online information hub, with information about the waiver. These efforts will include proactive outreach to effected customers and key partner organizations, such as the National Rural Water Association and the National Rural Health Association, about the scope and application of the waiver. Internally, RD will offer detailed training to staff and incorporate updates about the waiver into its recurring mission area-wide "office hours" on BABAA for RD staff. RD staff will work expediently to process and obligate subsequent awards for cost overruns.

RD will take action, in addition to staff and customer education, to ensure compliance within WEP and CF after expiration of the waiver, given the anticipated challenges for applicants to these programs. RD's BABAA Team leadership is actively involved in the Office of Management & Budget (OMB) Made in America Office (MIAO) Market Research and Industrial Engagement Working Group and supports continuation of the working group and a proposed charter to cover future research and engagement. WEP is tied to, and works very closely with, the Environmental Protection Agency's (EPA) market research team. EPA plans to continue including RD in this work and sharing market research on like parts and projects relevant to both agencies; RD will participate in resulting waivers moving forward. As noted above, CF can provide funding for hospital and medical centers, schools and libraries, and other related infrastructure projects. RD will work with the Department of Health and Human Services, Department of Education, and Army Corp of Engineers, and continue to support and review BABAA assessments for these agencies.

The waiver will be used as a tool to support government-wide efforts to catalyze domestic manufacturing, resilient supply chains, and good jobs while successfully delivering a wide range of infrastructure projects. It will support the creation of resilient supply chains and manufacturing base for critical products here in the United States that will bring about investment in good-paying American manufacturing jobs and businesses. The creation of jobs in communities will also alleviate supply chain disruptions through cultivation of the domestic manufacturing base for a wide range of products commonly used across the infrastructure sectors but not yet made domestically.

Unlike in the past, Buy America waivers will send clear market signals, creating space for American firms to respond and eliminate the need for the waiver for future projects. The measure of success is investing in America's infrastructure while maximizing the use of Made in America goods.

Assessment of Cost Advantage of a Foreign-Sourced Product

Under OMB Memorandum M-22-11, "Memorandum for Heads of Executive Departments and Agencies," published on April 18, 2022, USDA agencies are expected to assess "whether a significant portion of any cost advantage of a foreign-sourced product is the result of the use of dumped steel, iron, or manufactured products or the use of injuriously subsidized steel, iron, or manufactured products" as appropriate before granting a public interest waiver. USDA has concluded that this assessment is not applicable to this proposed waiver, as this waiver is not based on the cost of foreign-sourced products.

Duration of the Waiver

This waiver will remain effective for 12 months from the effective date of the final waiver.

Solicitation of Comments on the Waiver

The waiver is posted on the Department's Buy America Build America Waiver website. The comment period for the proposed waiver opened on May 19, 2023 and closed on June 2, 2023.

Summary and Response to Comments:

USDA RD received a total of eleven comments, only one of which did not support the proposed waiver. The positive comments included multiple responses relating to a single recipient and project. There were also positive comments from one builder and one State Senator.

The one comment that did not support the waiver was that RD has failed "to justify waiving the requirements for all steel, in particular, used on the WEP and CF projects."

Rural Development's WEP programs remain subject to the American Iron and Steel requirements. All projects with initial obligation dates of May 5, 2017, or later must use only domestically produced iron

and steel products. Such projects represent the largest portion of the projects that will fall under this waiver.

With respect to the Rural Development Communities Facilities program, the projects in question were all significantly planned prior to the May 14, 2022, the effective date of BABAA, and often years in advance. Additionally, these CF projects are for small rural communities and application of the legislation could cause these rural projects significant additional costs and delays in needed critical rural infrastructure. All other CF projects that were planned after May 14, 2022, will be in full compliance with BABAA.

Based on all the information available to USDA RD, it concludes that applying BABAA requirements to the projects set forth in the “program coverage” paragraph above would be inconsistent with the public interest. A one-year waiver of the BABAA requirements for these projects is thus appropriate.

Public Inspection of Comments: All properly submitted comments and communications submitted to USDA will be made available for public inspection upon request.

For Further Information Contact: Tyson Whitney, Office of the Chief Financial Officer, Director, Transparency and Accountability Reporting, Tyson.whitney@usda.gov.