

Approved: 9/13/2022

Expires: Indefinite

USDA Departmentwide Public Interest Waivers: De Minimis, Small Grants and Minor Components of Build America, Buy America Provisions as Applied to Recipients of USDA Federal Financial Assistance

AGENCY: United States Department of Agriculture (USDA)

ACTION: Notice of Final Waiver

SUMMARY: In accordance with the Build America, Buy America Act (“BABA”), this notice advises that USDA is proposing to issue departmentwide public interest waivers effective as of date of issuance, for De Minimis, Small Grants, and Minor Components to recipients of Federal financial assistance from application of the Buy America Domestic Content Procurement Preference provisions (“Buy America Preference”) as applied to the iron, steel, manufactured products, and construction materials requirement of BABA.

USDA is proposing this waiver not as an *alternative* to increasing domestic production, but as an important *tool* to implement the Buy American provisions in the most efficient manner in order to promote investment in our domestic manufacturing base, strengthen critical supply chains, and position United States workers and businesses to compete and lead globally in the 21st century. USDA understands that advancing Made in America objectives is a long game. USDA plans to move forward to implement the new requirements in a way that maximizes coordination and collaboration to support long-term investments in domestic production.

In accordance with BABA, USDA has found the proposed USDA departmentwide De Minimis, Small Grants and Minor Components waivers are in the public interest. The waivers will assist USDA’s 29 agencies and staff offices keep projects moving, prevent immediate delays to critically important projects, continue to provide economic opportunity through innovation, help rural America to thrive, to promote agriculture production that better nourishes Americans while also help feed others throughout the world, preserve our Nation's natural

resources through conservation, restored forests, improved watersheds, and healthy private working lands.

DATES: Comments on the proposed waiver were due on or before August 2, 2022. This waiver is effective as of date of issuance for all USDA recipients of Federal financial assistance infrastructure. As USDA component agencies develop efficient waiver review capabilities, USDA will review this waiver within five years of the date on which the waiver was issued or more often as appropriate to determine its continued utility, applicability and relevance with USDA's missions and goals consistent with the Infrastructure Investment and Jobs Act (IIJA), [Executive Order 14005](#), *Ensuring the Future Is Made in All of America by All of America's Workers*, and the Office of Management and Budget (OMB) Memorandum [M-22-11](#), *Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure*. During this timeframe, USDA will determine whether the small grants waiver threshold should be reduced or if the small grants waiver is needed at all.

SUMMARY AND RESPONSE TO COMMENTS:

USDA received seven comments in total on the waiver representing a nonprofit organization, non-profit, non-partisan partnership organization representing America's leading manufacturers, international trade association, nonprofit housing and community development organization, a diversified U.S. manufacturing company with manufacturing facilities across the United States, coalition composed of United States manufacturers of iron, steel, aluminum and other cast and molded products, and the largest industrial union in North America representing workers in steel, aluminum, and other metals; paper; rubber; glass; cement; chemicals; refining; other industrial sectors; and service. One commenter strongly supports USDA's proposed public interest waivers for De Minimis, Small Grants, and Minor Components, including the reasons identified for proposing such a waiver. Four commenters commented on discrepancies with the proposed de minimis waiver between the Rural Development (RD) Rural Utilities Service (RUS) American Iron and Steel (AIS) policy. Two commenters believe Rural Housing should be exempt from the Buy America Build America requirements. USDA understands the public's concerns. In the interest of efficiency and to ease burdens for USDA recipients, USDA

will align the BABA de minimis policy more closely with AIS regarding allowable cost limits for de minimis items and tracking requirements. Updated language can be found in Section IV. *Public Interest Waivers: De Minimis, Small Grants and Minor Components of Build America, Buy America Provisions.*

Five respondents commented on the small grants waiver. The commenters questioned the application of the Simplified Acquisition Threshold, currently set at \$250,000. One commenter wanted the waiver significantly revised or rescinded. One commenter was concerned about many awards at USDA being exempted. Three commenters asserted that most awards under the \$250,000 threshold do not have a construction component. The commenters indicated it is not apparent from consolidated available data that assistance awards under \$250,000 universally do not have a construction component. They also indicated BABA defines “project” to include construction, alternation, maintenance, or repair of infrastructure in the United States. One commenter indicated there is a risk that taxpayers’ dollars will support foreign manufacturers, undermining domestic investment as well as the Congressional intent of BABA. USDA has determined that, at the present time, it will not make any change to this threshold as the Office of Management and Budget (OMB) provided on page 11 of OMB Memorandum 22-11. Any award over \$250,000 that includes infrastructure will need a waiver to waive the application of a Buy America preference to awards from their agency/staff office. It is the responsibility of each agency and staff office to determine if BABA applies to their specific programs. A waiver could be submitted, but not necessarily accepted. USDA is committed to upholding the BABA provisions and would approve waivers on a case by case basis. USDA understands the public concerns and has revised Section VII. *Duration of Waiver* to reflect USDA policy to review waivers within five years of the date on which the waiver was issued or more often as appropriate to determine the applicability of this waiver and whether the small grants waiver threshold should be reduced or if the small grants waiver is needed at all. USDA agrees with the commenter and has clarified the term construction component in the waiver to agree with BABA: “project related to the construction, alteration, maintenance, or repair of infrastructure in the United States.”

Four commenters recommended that USDA align the minor components waiver to the RUS AIS policy and further clarify the waiver. One commenter supports the waiver; however,

they asked about how USDA determined the appropriate percentage of the total material cost of an otherwise domestically produced iron and steel product to be used. One commenter talked about USDA taking responsibility for the analysis to support application of the minor deviation waiver. One commenter noted that if the waiver incorporated all non-ferrous components (e.g., a rubber washer or gasket) as part of the minor components waiver calculation it would be inconsistent with the AIS Requirements. USDA understands the public's concerns. In the interest of efficiency and to ease burdens for USDA recipients, USDA will apply the RUS AIS minor components policy. Updated language can be found in Section IV. *Public Interest Waivers: De Minimis, Small Grants and Minor Components of Build America, Buy America Provisions*. USDA determined the appropriate percentage to allow non-domestically produced miscellaneous minor component comprising no more than 5% of the total material cost of an otherwise domestically produced iron and steel product to be consistent with OMB's initial implementation guidance M-22-11, page 11. USDA's interpretation of the statute and M-22-11 is that the non-ferrous portion of an iron/steel product can be non-domestic. The statute and M-22-11 specify that iron/steel must be produced domestically. The non-ferrous portion of an iron/steel product language can be found in Section IV. *Public Interest Waivers: De Minimis, Small Grants and Minor Components of Build America, Buy America Provisions*.

Three commenters expressed a preference for waiver proposals to be published in the Federal Register. One commenter asked about the Rural Housing Programs subject to BABA. M-22-11, *Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure*, guidance provides before issuing a waiver, the head of the Federal agency must make publicly available on the agency's website a detailed written explanation for the proposed determination to issue the waiver and provide at least 15 days for public comment on the proposed waiver. Since waiver guidance is needed as soon as possible, USDA's decision to publish waivers on the website is more expedient. The Federal Register process takes a minimum of 90 days. The BABA covered Rural Housing Service programs are: Rural Housing Site Loans and Self-Help Housing Land Development Loans, Rural Rental Housing Loans, Section 538 Rural Rental Housing Guaranteed Loans, The RD Multi-Family Housing Revitalization Demonstration Program (MPR), and Community Facilities Loans and Grants (Includes Guarantees, Emergency Rural Health Care Grants and Tribal College Initiatives Grants).

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: Please submit any questions, comments, or concerns to Tyson Whitney, Office of the Chief Financial Officer, Director, Transparency and Accountability Reporting Division, 202-720-8978, Tyson.whitney@usda.gov.

SUPPLEMENTARY INFORMATION:

I. Build America, Buy America

The BABA was enacted on November 15, 2021, as part of the IIJA, [Public Law 117-58](#). With the passage of the IIJA, Federal financial assistance projects for infrastructure must comply with domestic content procurement preference requirements established in the “Build America, Buy America Act” at Section 70911 *et seq.* (“Buy America”). Buy America’s domestic content procurement preference applies to all of the iron, steel, manufactured products, and construction materials used for infrastructure projects under an award. These requirements took effect on May 14, 2022; however, parties may seek waivers under certain circumstances.

Under Section 70914(b), the USDA has authority to waive the application of a domestic content procurement preference when (1) the application of the preference would be contrary to the public interest, (2) the materials and products subject to the preference are not produced in the United States at a sufficient and reasonably available quantity or satisfactory quality, or (3) inclusion of domestically produced materials and products would increase the cost of the overall project by more than 25 percent. Section 70914(c) provides that a waiver under 70914(b) must be published by the agency with a detailed written explanation for the proposed determination and provide a public comment period of not less than 15 days.

II. USDA’s Progress in Implementation of BABA

The President’s infrastructure law will help close gaps in manufacturing base. USDA is building processes that have to work long into the future—not just for a few months. As this transition occurs, some limited waivers will be required to keep projects moving. Since the

enactment of BABA, USDA has worked diligently to implement the Buy America Preference. Consistent with the requirements of Section 70913 of the Act, USDA has produced a report that identifies and evaluates all of USDA's Federal Financial Assistance programs with potentially eligible uses of funds that include infrastructure as defined by BABA to determine which programs would be in compliance with the Buy American Preference and which would be considered inconsistent with Section 70914 of the Act and thus "deficient" as defined by Section 70913(c) of BABA. The report was submitted to Congress and OMB and published in the [Federal Register](#) within 60 days after the date of enactment of the Act, on January 20, 2022. Specifically, USDA published the required report entitled "Identification of Federal Financial Assistance Infrastructure Programs Subject to the Build America, Buy American Provisions of the Infrastructure Investment and Jobs Act Report" in compliance with Section 70913. Since issuing the report, USDA has held regular meetings with the Made in America Office (MIAO), USDA Agencies and Staff Offices, and USDA Bipartisan Infrastructure Law (BIL)/Infrastructure Investment and Jobs Act (IIJA) Implementation Working Group to develop plans to implement BABA. USDA is an active participant in the MIAO Buy America Preference Working Group.

III. Waivers

Under Section 70914(b), USDA has authority to waive the application of a domestic content procurement preference when (1) application of the preference would be contrary to the public interest, (2) the materials and products subject to the preference are not produced in the United States at a sufficient and reasonably available quantity or satisfactory quality, or (3) inclusion of domestically produced materials and products would increase the cost of the overall project by more than 25 percent. Section 70914(c) provides that a waiver under Section 70914(b) must be published by the agency with a detailed written explanation for the proposed determination and provide a public comment period of not less than 15 days.

Information on this waiver may be found at the webpage at this link: <https://www.ocfo.usda.gov/federal-financial-assistance-policy/InfrastructureInvestment>.

The purpose of this departmentwide waiver is to provide an agency-wide waiver for USDA's 26 agencies and staff offices to recipients of Federal financial assistance from

application of the Buy America domestic content procurement provisions. It is the responsibility of each agency and staff office to determine if BABA applies to their specific programs. A waiver could be submitted, but not necessarily accepted. USDA is committed to upholding the BABA provisions and would approve waivers on a case by case basis. These waivers are for Federal financial Assistance according to Title 2 of the Code of Federal Regulation section 200.1, Federal Financial Assistance. For more on USDA's Buy America Build America procurement waiver requests please see: [Waivers | Made in America](#).

IV. Public Interest Waivers: De Minimis, Small Grants and Minor Components of Build America, Buy America Provisions

USDA has determined that de minimis, small grants, and minor components waivers are in the public interest in order to allow USDA award recipients to focus their efforts on their projects. Proposing the waivers is not an alternative to increasing domestic production. It is actually a tool to promote investment in our domestic manufacturing base in the long term.

The waivers are in the interest of efficiency, to ease burdens for USDA recipients, and to avoid unnecessary costs, and delays to projects. They will also allow USDA to focus, particularly in the early phases of BABA implementation, on key products and critical supply chains where increased U.S. manufacturing can best advance our economic and national security. This waiver will allow recipients to continue with projects. Without this waiver, USDA will likely lose recipients, be exposed to liabilities if we force recipients to modify their current plans to come into compliance and will negatively impact the most high need Americans we seek to serve. The waivers would apply to new awards and amendments to existing awards obligating additional funds for infrastructure projects in accordance with Section 70935 of the IJA and OMB Memorandum M-22-11.

Analysis was completed by USDA through a data call to our 26 agencies and staff offices to determine the waiver thresholds and level of impact to USDA programs. Based on the responses, 38 Assistance listings at USDA plan to seek Buy America, Build America waivers for financial assistance awards where there is infrastructure. This analysis determined a targeted and narrow need for the following waivers and thresholds for programs at USDA:

- The total de minimis of 5% must include itemized list of components, each of which cannot exceed 1% of the project total amount and must be documented by

contractor official or financial assistance equivalent. The general contractor must maintain an itemized list of components and the cost must be less than 5% of total materials cost for the project. This waiver will allow recipients of USDA funds to focus their compliance efforts on the major goods in their projects. USDA agencies are developing documentation and compliance requirements for keeping an itemized list of components.

- The small grants waiver will apply to awards with total federal funding below the Simplified Acquisition Threshold, which is currently set at \$250,000. This waiver will allow recipients of USDA funds to continue with projects without jeopardizing performance goals, and reduce burden to ensure they make efficient use of limited resources. It is the responsibility of each agency and staff office to determine if BABA applies to their specific programs. When there is a funding amendment to an existing award and is over the current Simplified Acquisition Threshold, a waiver request for an infrastructure project could be submitted, but not necessarily accepted. USDA is committed to upholding the BABA provisions and would approve waivers on a case by case basis.
- The minor components waiver will allow minor deviations for miscellaneous minor components within iron and steel products in a project. This waiver will allow recipients of USDA funds to use iron and steel products that contain non-domestically produced miscellaneous iron or steel minor components comprising no more than 5% of the total material cost of the product. The non-ferrous portion of an iron/steel product can be non-domestic. The statute and M-22-11 provide that iron/steel must be produced domestically.

V. Anticipated Program and Project Impacts Absent Public Interest Waivers: De Minimis, Small Grants, and Minor Components

On June 9, 2022, USDA sent out a data call to our 26 agencies and staff offices to expand its outreach efforts to identify the full scope and impact the Buy America preferences will have across all its programs, inclusive of programs that have a broader purpose other than infrastructure. The purpose of the data call was to: A) assess what type of waivers agencies and staff offices are expecting to receive from recipients from BABA, and B) allow USDA to

collect important information needed to establish three USDA wide waivers: 1) De minimis (setting a threshold of 5% of project costs up to a maximum of \$1,000,000), 2) Small grants (awards below the Simplified Acquisition Threshold which is currently \$250,000), and 3) Minor components.

In Fiscal Year 2021, most of USDA's financial assistance awards were under \$250,000. Most of these awards under the \$250,000 threshold do not have a project related to the construction, alteration, maintenance, or repair of infrastructure in the United States. Awards with a project related to the construction, alteration, maintenance, or repair of infrastructure in the United States are found in loan awards over \$250,000, and Buy America Build America provisions will apply. Feedback from agencies and staff offices determined there are 38 Assistance listings at USDA planning to seek Buy America, Build America waivers for financial assistance awards where there is infrastructure. USDA is proposing public interest waivers for De Minimis, Small Grants, and Minor components. Agencies and staff offices expressed the following concerns absent these waivers:

- Increased burden for grant recipients, which have limited capacity to handle nuances of grants management.
- Projects will be completed at a slower rate as individual waivers will need to be submitted and processed. USDA agencies will have to devote more staff time to this process. Additional time will need to be spent for both USDA agencies and the grantees and additional training will also need to be provided to recipients. USDA agencies would also need to become aware of market conditions of the availability of domestic construction materials.
- There could be project delays, burden to the project and Agency, and small projects/small communities may withdraw from using the program.
- Without waivers, multifamily housing program participants will experience significant cost and time increases for essential affordable housing development, projects community facility projects, such as hospitals, clinics, fire stations, and schools as well as preservation recapitalizations of existing affordable multifamily housing properties. Applicants have been compiling application documents for months to years without awareness of this new requirement. Projects will need to be re-scoped leading to additional delays. Lower capacity applicants will likely

struggle with compliance requirements associated with BABA and require extensive Technical Assistance.

- Some programs have no Market Research/Resources. Without waivers, expect project delays and cost over-runs, raising the risk that USDA lose applicants and subscribers for vital programs that aim to provide investment capital in the form of loans and loan-guarantees for the maintenance and improvement of electric infrastructure in areas where commercial capital is not available.
- Without waivers, there will be increased audit risk. Outreach will be needed to explain requirements to applicants, engineers, and contractors. Many products are not currently made in US. As a result, many projects will require waivers. Time is needed to explain requirements to manufacturers who have not previously had Buy American requirements even if their products comply. This will create project delays and additional expenses.

USDA agencies and staff offices indicated the issuance of these waivers will:

- Enable more options to use appropriate energy systems.
- Help smaller communities with limited resources.
- Balance competitiveness.
- Enable more options to use appropriate equipment and systems.
- Help Tribal governments with limited resources.
- Help smaller, rural communities with limited resources.
- Allow for projects to continue. Waivers are particularly necessary to support equity efforts, particularly among the socially vulnerable, distressed, and impoverished communities the program serves.
- Recipients for these projects are units of state or local government, which must follow well-defined procurement procedures that ensure competition and cost reasonability regardless of whether a waiver is granted or not.
- Waivers will allow USDA and recipients to focus on critical items to keep projects moving and ease the implementation learning curve.

VI. 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.

VII. Duration of the Waiver

This proposed waiver will be effective as of date of issuance for all USDA recipients of Federal Financial Assistance for infrastructure. As USDA component agencies develop efficient waiver review capabilities, USDA will review this waiver within five years of the date on which the waiver was issued or more often as appropriate to determine its continued utility, applicability and relevance with USDA’s missions and goals consistent with the IJA, [Executive Order 14005](#), and the OMB Memorandum [M-22-11](#). During this timeframe, USDA will determine whether the small grants waiver threshold should be reduced or if the small grants waiver is needed at all.

VIII. Solicitation of Comments

As required under Section 70914 of BABA, USDA completed the solicitation of comments from the public on this waiver. Please refer to the “FOR FURTHER INFORMATION CONTACT” and “SUMMARY AND RESPONSE TO COMMENTS” sections of this notice for information on submission of comments received and a summary of USDA’s responses to those comments.