



DEPARTMENT OF THE ARMY
OFFICE OF THE ASSISTANT SECRETARY OF THE ARMY
ACQUISITION LOGISTICS AND TECHNOLOGY
103 ARMY PENTAGON
WASHINGTON DC 20310-0103

SAAL-ZP

28 March 2024

AGENCY: The Department of Defense, Department of the Army

ACTION: Notice of Final Waiver: General Applicability Public Interest Waiver under the Build America, Buy America Act for De Minimis Purchases, Small Grants and Minor Components for Department of Army (DA) Financial Assistance Awards

WAIVER NUMBER: SAALZP-2024-001

(P.L. 117-58 § § 70901-70927) (BABA)

SUMMARY:

The Department of Defense (DoD) Department of the Army (DA), and its components, are issuing a general applicability public interest waiver of the requirements of section 70914 of the Build America, Buy America (BABA) Act (Buy America preference) included in the Infrastructure Investment and Jobs Act (IIJA) (Pub. L. No. 117-58) as applied to DA recipients of federal financial assistance. The waiver for de minimis purchases and small grants applies to purchases of iron, steel, manufactured products, and construction materials, while the minor components waiver applies to purchases of iron and steel products. The DA establishes this waiver as an important tool to implement the Buy America provisions in the most efficient manner. This waiver is in the public interest as the waiver would assist the Army's infrastructure programs in keeping projects moving forward and preventing delays to critical projects. Additionally, the waiver will allow the DA, its components, and recipients¹ to focus on BABA implementation where it will have the greatest impact.

The waiver will remain in effect for all DA Federal financial assistance funded infrastructure projects, for a period of five years from the date of approval. The waiver will be reviewed as often as necessary to assess its continued need.

BACKGROUND:

The Buy America preference in section 70914 of the BABA Act included in the Infrastructure Investment and Jobs Act (Pub. L. No. 117-58), requires all iron, steel, manufactured products, and construction materials used for infrastructure projects under Federal financial assistance awards be produced in the United States.

Under section 70914(b), 2 CFR 184.7, and in accordance with the Office of Management and Budget's (OMB) October 25, 2023, implementation guidance memorandum on the subject (M-24-02), an agency may waive the application of the Buy America preference, in any case in which it finds that applying the domestic content procurement preference would be inconsistent with the public interest. All waivers must have a written

¹ For purposes of this waiver, "recipients" are defined as federal financial assistance recipients awarded grants, cooperative agreements, loans or loan guarantees.

explanation for the proposed determination; provide a period of not less than 15 calendar days for public comment on the proposed waiver; and submit the waiver to the Office of Management and Budget Made in America Office for review to determine if the waiver is consistent with policy.

OMB Memorandum M-24-02 provides guidance for agencies to consider whether a general applicability public interest waiver should be issued to reduce the administrative burden for recipients and agencies. OMB directs agencies to ensure that recipients and Federal agencies make efficient use of limited resources, especially if the cost of processing the individual waiver(s) would risk exceeding the value of the items waived.

WAIVERS:

The DA determined that waivers for de minimis purchases, small grants, and minor components within iron and steel products are in the public interest to allow recipients to focus compliance efforts on major components of their projects, prevent immediate delays to urgent and important projects, allow recipients to continue to provide economic opportunity through innovation, and support the timely development of critical domestic public infrastructure.

The DA is establishing the following targeted and limited waivers:

- **De Minimis Purchases:** The DA is establishing a waiver for otherwise covered infrastructure project purchases, totaling up to five (5) percent of the total applicable project costs², up to a maximum of \$1,000,000. Once a Federal financial assistance recipient's total purchases of materials otherwise covered by the Buy America preference (iron, steel, manufactured products, and construction materials) reach five (5) percent of applicable project costs or \$1,000,000, whichever is lower, all other applicable project purchases must comply with the Buy America preference.
- **Small Grants:** The DA is establishing a waiver of the Buy America domestic content procurement preference for small grants³. The small grants waiver will apply to Federal financial assistance awards at or below the Simplified Acquisition Threshold (SAT), which is currently \$250,000.00, that meet the following criteria: (1) the total Federal award does not exceed the SAT, and (2) the Federal award amount, inclusive of other funding sources for the infrastructure project, is not anticipated to exceed the SAT for the life of the Federal award.
- **Minor Components:** The DA is issuing a waiver of Buy America domestic content procurement preference to allow minor deviations for miscellaneous minor

² For purposes of this waiver, "applicable project costs" are defined as material costs subject to the Buy America Preference under one award.

³ For purposes of this waiver, "grants" encompasses all forms of Federal financial assistance that the DA administers, including cooperative agreements and grants.

components within iron and steel products. The minor components waiver will allow non-domestically produced miscellaneous minor components comprising of no more than five (5) percent of the total material cost of an otherwise domestically produced iron and steel product. This waiver does not exempt an entire iron and steel product from the Buy America preference; the primary iron and steel components of the product must still be produced domestically.

WAIVER JUSTIFICATION:

This waiver allows recipients of DA funds to continue with projects without jeopardizing performance and reducing the burden on recipients. The waiver allows the agency to ensure efficient use of limited resources while reducing the financial cost and administrative burden of processing individualized waivers. Due to the Army components' substantial involvement required to protect federal funds, mandatory cooperative agreements are used to provide federal funds to support the State Military Department (SMD) mission to sustain readiness to meet federal national security requirements.

The DA's infrastructure missions span a wide range of projects, both in scope and cost. Most infrastructure projects funded through financial assistance are carried out through cooperative agreements and grants that support multi-use facilities and other infrastructure construction from academic research and updating existing buildings to new construction. For example, last year one Army command awarded over \$2.8 billion, and determined that approximately \$2.6 billion in projects, spread across 575 cooperative agreements, were subject to the Buy America preference. The DA notes that most of these cooperative agreements authorize a wide variety of activities in addition to infrastructure projects. Therefore, the impact of this waiver will be smaller than the total amount of funding provided for these programs. Most DA component financial assistance awards for infrastructure projects exceed the small grant threshold of \$250,000, and therefore the number of awards covered by the small grant waiver will be minimal. For example, small grants are uncommon in the NGB enterprise, estimated at less than 5% of financial assistance funding. For the remainder of the programs that are not covered by the small grant waiver, the de minimis waiver and minor component waiver will help reduce the administrative burden for smaller purchases while still requiring the vast majority of DA funding to be subject to domestic preference requirements.

The DA infrastructure projects may contain a variety of miscellaneous, generally low-cost maintenance and repair components that are essential for day-to-day Department of Defense operations. The DA believes that the cost of items acquired by its infrastructure projects exercising these waivers would be low but the administrative burden of tracking them for compliance would be complex. Using these waivers, recipients can dedicate resources to Buy America compliance for larger acquisitions, rather than diverting resources to sourcing various, low-cost products. These waivers will help ensure that the Army and its Federal financial assistance recipients do not devote significant public resources toward compliance activities where there is limited public benefit. These waivers will also ensure that requests for project specific waivers for larger infrastructure

projects may be responded to in a timely manner.

DA also recognizes the importance of security considerations. During the period of the waiver, should recipients purchase any non-domestic product whose failure may impact critical infrastructure, then the recipient shall demonstrate that they have properly mitigated risk of failure from such products through a plan or other measure, as determined by the funding component.

The absence of a waiver will likely result in:

- **Increased Burden for Recipients:** Failure to grant this waiver creates administrative burden for the DA and its recipients, some of which have limited administrative financial capacity to manage domestic procurement requirements. Smaller, disadvantaged recipients are especially impacted, leading to these entities being discouraged from participating in DA projects.
- **Increased Project Timelines:** Projects will be completed at a significantly slower rate, potentially delaying project timelines as well as risking funding as individual waivers for additional minor infrastructure project purchases will need to be submitted and processed.
- **Delays to Necessary Infrastructure Projects:** The DA infrastructure projects could experience delays in project implementation and completion due to the additional time necessary to locate domestic sources for minor materials and submit and process waivers when domestic materials are not available. It is imperative that these projects remain on schedule to allow for completion and minimal impact to other projects and to further ensure that the readiness mission of the National Guard is not negatively impacted. Some projects may affect national security- in which delays would be unacceptable.
- **Impact to On-going Research:** When a DA infrastructure project experiences a delay in construction, alteration, or maintenance of a facility, it results in subsequent impacts to Army activities which are planned around the availability of these facilities. These initiatives are often planned and funded years in advance. Even small delays to the availability of facilities can result in research projects needing to be reduced and/or cancelled.
- **Increased Burden to Agency:** Without this overarching waiver, the DA, and its components, would have a heavy burden to review the potentially high-volume of waivers that would result. This added time and attention would affect the feasibility of the DA, its components and its recipients being able to complete projects that are BABA compliant within budget and schedule.

On the other hand, the subject waivers will:

- Assist recipients to establish rules and procedures to manage BABA requirements.

- Provide recipients options to more effectively and efficiently complete projects.
- Ensure continuity of national security related construction.
- Permit funds to be obligated and expended in a timely manner.
- Allow DA recipients to focus on critical items to keep projects moving and ease implementation learning curve for projects that require BABA compliance.

ASSESSMENT OF COST ADVANTAGE OF A FOREIGN-SOURCED PRODUCT:

Under OMB Memorandum M-24-02, 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. The DA’s analysis has concluded that this assessment is not applicable to this waiver, as this waiver is not based on the cost of foreign-sourced products.

REQUEST FOR COMMENTS:

This notice was posted on February 2, 2024, to satisfy the requirement to publish proposed Buy America waivers and provide the public with a reasonable amount of time for notice and comment. The DA sought public and industry comment from all interested parties. The notice closed for comments on February 16, 2024. Comments were sent to usarmy.ncr.hqda-asa-alt.mesg.pi-grants-team@army.mil. A total of four comments were received in response to the proposed waiver. One public commenter asked about the cost of processing waivers but did not state that they do or do not support the waiver. A manufacturer made three comments in opposition to the de minimis and minor components elements of DA’s proposed waiver. The commenter recommended reducing the threshold for the de minimis waiver, and asserted that exempting minor steel components from Buy America coverage undermines the mandate of the BABA Act.

The DA, together with NGB, thoroughly reviewed and considered each comment, and determined the comments provided did not warrant revision to the waiver at this time; therefore, the DA issues this waiver with no substantive changes.


For more information on the Build America, Buy America preference, please reference MadeinAmerica.gov.

This waiver is posted at the following site:

<https://api.army.mil/e2/c/downloads/2024/02/02/8d93b337/army-baba-waiver-final-2-2-24.pdf>

EFFECTIVE DATES OF THE WAIVER:

The waiver will remain in effect for all DA Federal financial assistance funded infrastructure projects, for a period of five years from the date of approval. The waiver will be reviewed as often as necessary to assess its continued need.

A handwritten signature in black ink, appearing to read 'D. Bush', with a long horizontal flourish extending to the right.

Douglas R. Bush
Assistant Secretary of the Army
(Acquisition, Logistics and Technology)