

DEPARTMENT OF THE INTERIOR

TITLE:

GENERAL APPLICABILITY WAIVER FOR DE MINIMIS PURCHASES

1. Summary

Agency: Department of the Interior

Proposed Waiver: The Department of the Interior (DOI) is establishing a general applicability waiver of the requirements of section 70914 of the Build America, Buy America Act (Buy America preference) included in the Infrastructure Investment and Jobs Act (Pub. L. No. 117-58) for “De Minimis Purchases,” having determined such waiver to be in the public interest. This waiver is critical to ensure that infrastructure project purchases below a de minimis threshold funded through financial assistance agreements sustain progress while reducing the burden on recipients. The waiver will remain in effect for all DOI Federal financial assistance infrastructure projects for a period of five years from the date of final approval and will be reviewed as often as necessary.

DOI is proposing a waiver for otherwise covered infrastructure project purchases, totaling up to 5 percent of the total applicable project costs¹, up to a maximum of \$1,000,000.00. For example, if a recipient will expend \$4,000,000.00 in costs that are subject to Buy American preference under an infrastructure project, then up to \$200,000.00 (5%) would be exempt from the Buy America preference. If a recipient’s applicable costs are \$20,000,000.00 or greater, this waiver is capped at \$1,000,000.00 total in otherwise covered project purchases. Once a Federal financial assistance recipient’s total purchases of materials otherwise covered by the Buy America preference reach 5 percent or \$1,000,000.00, whichever is lower, all other applicable project purchases must comply with the Buy America preference.

DOI posted a proposed waiver for public comment on December 22, 2022. The comment period ended on January 6, 2023.

2. Background

The Buy America preference set forth in section 70914 of the Build America, Buy America 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), and in accordance with the Office of Management and Budget’s (OMB) April 18, 2022 initial implementation guidance memorandum on the subject (M-22-11), the Department of the Interior 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; types of iron, steel, manufactured products, or construction

¹ Applicable project costs are defined as material costs subject to the Buy America preference.

materials are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality; or 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. All waivers must have a written 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 proposed 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-22-11 provided guidance for agencies to consider whether a general applicability public interest waiver should apply to infrastructure project purchases below a de minimis threshold 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 individualized waiver(s) would risk exceeding the value of the items waived.

This waiver advances the Buy America preference by reducing the administrative burden to potential financial assistance recipients. DOI's infrastructure projects vary widely across DOI's 309 financial assistance programs ranging from small community projects to large regional infrastructure projects. DOI infrastructure projects often contain a variety of miscellaneous, generally low-cost products that are essential to the project. With this waiver, recipients can devote their resources to Buy America compliance with larger purchases, rather than diverting resources to sourcing the many miscellaneous, low-cost products. Failure to provide recipients such flexibilities could result in project delays and additional project costs as financial assistance recipients must exert considerable effort to account for the sourcing of miscellaneous, low-cost items. DOI remains committed to implementing Buy America preference to cultivate the domestic manufacturing base for a range of products. For this reason, DOI is including a cost cap of \$1,000,000.00 for this waiver.

This waiver seeks to reduce the administrative burden on financial assistance recipients by exempting a small share (up to 5% of the total applicable project costs) of otherwise covered purchases from the Buy America preference. Providing a waiver at this "de minimis" level will allow recipients of DOI funds to focus their compliance efforts on the major components for a project, rather than minor components up to a set cap, after which all infrastructure project purchases must comply with Buy America, unless subject to additional waiver. This empowers recipients to prioritize their compliance efforts and scale such efforts to the relative purchase prices of otherwise covered items.

3. Waiver Justification

The DOI requested inputs from its bureaus to identify the full scope and impact of the Buy America preference across all its 309 programs, including programs that have a broader purpose other than infrastructure. Based on the feedback gathered from its Bureaus, the DOI has determined that waivers for de minimis infrastructure project purchases are in the public interest in order to allow DOI financial assistance recipients to focus their efforts on ensuring domestic sourcing of major components of their projects. This waiver seeks to significantly reduce the administrative burden for DOI recipients and avoid unnecessary costs and delays to projects by exempting a small share (5% or less) of otherwise covered purchases up to \$1,000,000.00. This will also allow DOI to focus compliance efforts on major components while continuing efforts to

identify critical supply chains where increased U.S. manufacturing can best advance our economic and national security during the early phases of Buy America preference implementation.

Infrastructure projects often contain a relatively small number of high-cost products incorporated into the overall project. These high-cost products are generally described within technical specifications for a project, or the detailed project budget submitted as part of the recipient's project application. For these major products, recipients are generally familiar with the conditions of availability, the potential alternatives for each detailed specification, the approximate cost, and the country of manufacture of the available components. Infrastructure projects also involve the use of potentially miscellaneous, generally low-cost products that are essential for construction and are incorporated into the physical structure of the project, many of which are or will be subject to Buy America preference.

This de minimis purchase waiver ensures that DOI and its financial assistance community does not devote significant public resources toward compliance activities where there is limited public benefit and ensures that requests for product-specific waivers for larger infrastructure project purchases can be responded to in a timely fashion. Failure to grant this waiver creates significant administrative burden for DOI and recipients. Absent this de minimis purchases waiver, the following concerns have been expressed by DOI's financial assistance community:

- **Delays to Necessary Projects:** DOI infrastructure projects could experience substantial delays in project implementation and completion due to the additional timeframe necessary to locate domestic sources for minor materials and submit and process waivers when domestic materials are not available. This could have a significant impact on agreements with more urgent timelines, such as projects mitigating the historic Western drought. Absent the waiver, staff focus on critical drought infrastructure projects will expend resources inefficiently, potentially failing to deliver on the additional funding Congress has appropriated in the Bipartisan Infrastructure Law and Inflation Reduction Act for the compiling drought conditions in the Western US.
- **Increased Project Timelines:** Projects will be completed at a slower rate, potentially delaying project timelines as individualized waivers for more numerous, minor infrastructure project purchases will need to be submitted and processed.
- **Recipient Compliance Costs:** There will be an increased burden for the DOI financial assistance community who now must put forth resources to identify and maintain domestic sources of supply for potentially long lists of minor components, along with applicable documentation, for the sake of single audit compliance.

A de minimis purchase waiver will enable better use of limited resources for both recipients and government staff. A waiver will also provide recipients flexibilities needed to ensure project success at a time when recipients are already facing increased barriers, such as recovery from COVID, rising costs for materials, inflation, and material transportation delays. Due increased

funding from the Bipartisan Infrastructure Law and Inflation Reduction Act, it is estimated that DOI will issue approximately \$2 billion per year in financial assistance agreements for infrastructure related projects over the next five years. A de minimis waiver affords these large infrastructure projects a workable compromise, enabling recipients to concentrate their efforts on sourcing the majority of their materials domestically, rather than all materials. This approach will assist recipients in achieving long term Buy America preference compliance in phases, without further delaying project implementation with project waiver requests that are broad in scope.

4. Assessment of Cost Advantage of a Foreign-Sourced Product

Under OMB Memorandum M-22-11, 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. DOI’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.

5. Summary of Comments

Proposed Waiver: This notice was posted on December 22, 2022 to satisfy the requirement to publish proposed Buy America waivers and provide the public with a reasonable period of time for notice and comment. The Department of the Interior sought public and industry comment from all interested parties. In particular, the Department of the Interior sought comment regarding whether 5 percent of the applicable project cost is an appropriate threshold for a de minimis waiver, or whether a different threshold would be more appropriate. Furthermore, the DOI sought public feedback on the definition of “applicable project cost” or whether a different base, such as “total project cost” should be considered. The DOI was also interested in whether \$1 million is an appropriate dollar cap. Relevant information and comments were requested to help understand completely the facts surrounding the waiver requests and the agency’s proposal. The notice closed for comments on January 6, 2023.

20 entities provided a response to this proposed waiver. A summary of the comments received are as follows:

- 9 entities responded with concurrence with the waiver as is.
- 10 entities concurred with a small financial assistance agreement waiver, but requested the waiver be expanded also eliminate individual projects under \$250,000 that would not otherwise be covered under other DOI waivers.
- 3 of the responses received also requested more clarity be provided around the definition of “total applicable project costs”
- 1 Disagreed with the waiver in its entirety stating it goes against the intent of BABA.

In response to the comments received, a determination was made by the DOI to proceed with the waiver as written. The majority of the comments requested the waiver be expanded to include individual infrastructure projects under \$250,000.00 to allow for additional flexibilities of small projects. DOI considered the suggestions provided will refer these

recipients to our small grant waiver.² In addition, the DOI will seek to provide guidance to our financial assistance awarding offices to clarify the definition of “total applicable project costs”.

² For purposes of the small grant waiver, grants encompass all forms of DOI’s financial assistance including cooperative agreements and grants.