

Approved: July 13, 2022

Expires: January 12, 2023

DEPARTMENT OF THE INTERIOR

TITLE:

Adjustment Period General Applicability Waiver of Build America, Buy America Provisions as Applied to DOI Federal Financial Assistance Agreements

AGENCY: Office of the Secretary, U.S. Department of the Interior

SUMMARY: In accordance with the Build America, Buy America Act, this notice advises that the U.S. Department of the Interior (DOI) is proposing a general applicability waiver for six months to the Buy America Domestic Content Procurement Preference (“Buy America Preference,”) to provide the agency with sufficient time to identify domestic sources of supply for various infrastructure projects while still maintaining current project deadlines and milestones. An adjustment period will afford time for DOI to continue to narrow down the scope of where long-term project or material specific waivers may be needed without delaying performance of current infrastructure projects. In accordance with the Act, DOI has found that this proposed general applicability waiver is in the public interest as DOI continues to collect the information necessary to establish long term compliance with the Buy America Procurement Preferences.

DATES: This waiver is effective upon approval and will remain in effect for all DOI Federal financial assistance infrastructure projects for a period of six months from the date of final approval.

INTRODUCTION: The Build America, Buy America Act (the Act) was enacted on November 15, 2021, as part of the Infrastructure Investment and Jobs Act (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 take effect on May 14, 2022; however, parties may seek waivers under certain circumstances.

Under section 70914(b), the DOI 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.

DOI'S PROGRESS IN IMPLEMENTATION OF THE ACT:

Since the enactment of the Act, DOI has worked diligently to begin implementing Buy America preferences for financial assistance agreements. Consistent with the requirements of section 70913 of the Act, DOI produced a report that evaluates all DOI Federal Financial Assistance programs with potentially eligible uses of funds that include infrastructure as defined by the Act to identify which programs would be considered inconsistent with section 70914 of the Act and thus "deficient" as defined by section 70913(c) of the Act. The report was submitted to Congress and the Office of Management and Budget (OMB) and published in the Federal Register within 60 days after the date of enactment of the Act, on January 18, 2022. DOI published the required report in a notice entitled "Report on the Department of the Interior Federal Financial Assistance Infrastructure Programs Subject to the Build America, Buy America Act Provisions of the Infrastructure Investment and Jobs Act" in compliance with section 70913. In the report DOI found that none of its existing 287 discretionary funding programs reviewed to date fully met the Buy America requirements outlined in section 70914 of the Act and are considered "deficient" under the definition in section 70913(c).

Since issuing the report, DOI has held regular meetings with the Made in America Office, Bureau financial assistance offices, and the DOI Bipartisan Infrastructure Law Project Management Office to develop plans to implement the Act. During these meetings and discussions, and throughout the implementation process, it became apparent that the DOI had a large volume of financial assistance agreements across all its Bureaus for various infrastructure projects that align under DOI programs without an overall infrastructure purpose. This has resulted in DOI seeking 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 which have never been subject to domestic procurement requirements. DOI has since begun communicating with its recipient base about the new Buy America preferences and has issued standard Buy America terms for use in its financial assistance awards and agreements.

DOI has also begun the process of developing internal guidance on the types of DOI projects and associated materials that may be subject to Buy America preferences to help ensure long-term success of these infrastructure projects while still advancing the objectives of the Build America, Buy America provisions. DOI's financial assistance programs have previously not required compliance with domestic procurement preferences similar to those of Buy America. As a result, DOI is currently establishing new processes and procedures necessary to fully implement and demonstrate compliance with Buy America preferences.

PROGAM WAIVER:

The DOI is proposing a general applicability waiver of the Buy America Domestic Preference procurement requirements for DOI's Federal Financial Assistance awards to provide recipients of financial assistance agreements with sufficient time to apply the Buy America preferences without having to disrupt current projects and to allow projects to continue to be executed swiftly without jeopardizing performance goals. This waiver action permits the use of non-domestic iron, steel, manufactured products, and construction materials in such projects that may

otherwise be prohibited under section 70914(a) during the specified time period, while recipients of DOI Federal financial assistance agreements work to incorporate the new Buy America requirements.

JUSTIFICATION:

In fiscal year 2022, DOI grantees will receive more than \$4 billion through the Department's 300+ financial assistance programs. For the first time with the passage of IJJA, DOI's Federal financial assistance community must apply domestic procurement preferences. While the majority of DOI's financial assistance programs are not focused on infrastructure, the DOI recognizes that programs may occasionally contain infrastructure related projects from time to time. Per OMB M-22-11, Domestic Procurement preferences apply to projects for infrastructure, even when the program itself has a purpose other than infrastructure.

An adjustment period is needed to allow recipients time to identify and assess domestic sources of supply for various infrastructure projects while still maintaining timely performance of current projects, many of national importance. Many DOI projects proposed in FY22 and earlier submitted applications without awareness of a Buy America preference condition. Although Build America, Buy America will achieve important goals including boosting domestic manufacturing capacity and supporting manufacturing jobs, applying the Buy America preference to these projects before DOI, grant recipients, and contractors are adequately prepared could create significant funding and project delays. Affected applications will need to certify compliance, adjust application materials (if feasible), or seek project specific waivers. Immediate implementation of the Buy America preference is especially complicated for applicants who have already completed infrastructure planning and design work, potentially making pre-award obligations for materials that may not be compliance with the Buy America preference. The amount of time to complete these steps to coordinate with current applicants is unknown, but it could create delays to pending awards for projects that are intended to help build infrastructure resiliency across the United States.

Given current conditions, DOI anticipates immediate compliance with the Buy America preferences will create further demand for domestically produced products. The infrastructure projects that may be funded with DOI Federal financial assistance dollars are varied in scope and materials and may have nationwide impact. DOI will be using this adjustment period to conduct further market research to assess the scope and impact of the Buy America requirements to enable successful implementation, and/or identify the need for targeted waivers for certain materials. For long-term compliance with the Buy America preferences, it is essential to afford recipients the time needed to both complete thorough research efforts, and to identify domestic sources of supply upon which these important projects may rely. Conducting this research upfront will help to identify where specific product-specific waivers are needed while maximizing the utilization of goods, products, and materials produced in the United States. An adjustment period will allow DOI to identify the impacts of the Buy America preference on agency operations, and appropriately prepare for its application across both large and small financial assistance agreements throughout the United States, especially with the construction industry in fluctuation and many recipients operating in rural settings where materials are in high demand and low supply.

An adjustment waiver for six months will allow the DOI to apply the Buy America preferences to FY23 applications, giving applicants time to adjust their project proposals as necessary or coordinate with DOI where a project specific waiver is absolutely necessary. This waiver will also enable currently pending agreements to be executed swiftly without jeopardizing performance goals. The DOI has already begun including a Buy America term within financial assistance agreements and has established a processes project waiver requests submitted by recipients. DOI is also continuing to identify where targeted, product specific waivers may be necessary and will continue to coordinate the establishment and approval of such waivers throughout this time-limited adjustment period.

ANTICIPATED PROGRAM AND PROJECT IMPACTS ABSENT A WAIVER:

DOI's financial assistance programs have previously not required compliance with domestic procurement preferences similar to those of Buy America. As a result, DOI does not have any pre-existing waivers in place. DOI is currently, and for the first time, establishing the processes and procedures necessary to fully implement and demonstrate compliance with Buy America preferences. Given this important change to DOI's financial assistance programs for both DOI and its recipients, absent an adjustment period waiver, DOI anticipates significant delays in the implementation of infrastructure projects while recipients and the Department identify domestic sources of supply and assess their viability for projects of varying sizes and in various parts of the country, including remote locations. Work on pending financial assistance agreements would necessarily halt while DOI and recipient staff identify processes for implementing these new requirements.

Though DOI does not have a complete understanding of the precise impacts on DOI's Federal Financial Assistance infrastructure projects that will be subject to the Act's provisions, during an initial review, it was found that approximately 38 DOI programs expect to make awards which may fund projects for infrastructure in the next six months. Each of these 38 programs expect to issue multiple awards whose progress on infrastructure projects could be compromised if not covered under this waiver. For example, the Bureau of Reclamation anticipates impacts to its projects for Title XVI water reclamation and reuse and WaterSMART projects which helps to supply water to the Western states; the Office of Surface Mining Reclamation and Enforcement anticipates impacts to its Abandoned Mine Land Reclamation projects; the National Park Service anticipates impacts to its Land and Water Conservation Fund state grants and National Heritage Areas projects, and more. Many of these programs will receive new funding for projects that may include infrastructure, or currently fund infrastructure projects underway that will receive additional funding in FY22. Initial DOI correspondence with various interest groups, such as non-profit organizations and states have resulted in concerns being expressed about needing time to adjust internal procurement policies and procedures and identify domestic sources of supply to move towards compliance with the Act.

For this reason, the DOI has determined that it would be contrary to the public's interest to apply the Buy America preference to DOI's Federal Financial Assistance agreements until DOI has a more complete understanding of the product or project specific waivers necessary to ensure continued success of DOI's financial assistance programs. This will also allow time for the agency to adjust operations to implement necessary processes and procedures both at the

Departmental and the bureau/office level. An adjustment period will afford the Department and our financial assistance recipients the time to identify and assess domestic sources of supply, identify where specific waivers are needed, and to conduct adequate market research to maximize the utilization of goods, products, and materials produced in the United States over the long-term. The six-month adjustment period is necessary and reasonable in the case of DOI and its recipients because it has not previously implemented a domestic procurement preference for Federal financial assistance. DOI further intends to continue dialogue with interest groups and stakeholders to continue to work towards long-term compliance with the Buy America requirements.

DEPARTMENT IMPLEMENTATION CONSIDERATIONS: During the proposed waiver period, DOI expects actions will be taken by Departmental offices, DOI Bureaus, and financial assistance recipients to include the following:

1. Recipients to identify domestic and non-domestic sources of supply and conduct market research to identify qualified sources of supply or alternate items, products or materials;
2. DOI offices to establish and refine processes for review of grantee and sub-grantee submitted waivers to determine Buy America compliance;
3. Ensuring contractors, subcontractors, and suppliers are prepared to meet Buy America requirements, and provide all relevant information, including contract provisions prescribing Buy America requirements;
4. Establishing appropriate monitoring techniques to include audits and reviews as appropriate;
5. Collect further data and information to DOI on the domestic and non-domestic availability of materials to identify where specific product or project specific waivers are necessary to limit the number of general applicability waivers.

During the proposed waiver period, DOI will also work to prepare for implementation of new Buy America requirements by:

1. Assessing existing Federal financial assistance processes to see where Buy America processes can be most efficiently added and aligned;
2. Build new Buy America requirements into forthcoming Notice of Funding Opportunities and financial assistance agreements;
3. Review existing enforcement processes, including recipient monitoring, applicant risk assessments, and Departmental internal controls to help enforce Buy America standards.
4. Review data, information, and comments provided by grantees, industry, and other partners to further assess opportunities, challenges, and the availability of domestically-sourced construction materials.
5. Train DOI staff and adopt best practices based on lessons learned and collaboration with other agencies.

By the end of the proposed waiver period, the DOI expects grantees, industry, and other partners to be ready to implement Buy America preference requirements. Based on information gathered during the proposed waiver period, the DOI will work with partners to identify and assess domestic sources of supply or establish product or project specific waivers where adequate

justification exists to maximize utilization of goods, products, and materials produced in the United States over the long-term.

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, 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. DOI will continue to perform additional market research during the duration of the waiver to better understand the market to limit the use of waivers caused by dumping of foreign-sourced products.

LIMITED DURATION OF THE WAIVER:

DOI remains committed to the successful implementation of Buy America preferences for financial assistance infrastructure projects. This waiver is effective upon approval and will remain in effect for all Federal financial assistance infrastructure projects for a period of six months from the date of final approval. During this period, the DOI anticipates managing approximately \$4B in financial assistance across over 300 financial assistance programs, not including the approximately \$28.1B appropriated in the Bipartisan Infrastructure Law. While most of the programs and associated financial assistance awards covered under this waiver are not specifically programs for infrastructure, the DOI acknowledges that some of these programs may contain infrastructure projects that will ultimately comply with the Buy America preference upon expiration of this waiver.

SOLICITATION OF COMMENTS:

Comments on the proposed waiver set out in this document are due on or before June 18, 2022. Interested persons are invited to submit comments on the general applicability waiver. The DOI is committed to engagement with our financial assistance recipient community, and we invite recipients of DOI financial assistance awards to identify materials where domestic sources are not currently available, as well as potential domestic suppliers for materials that may otherwise be difficult to obtain from domestic sources. To receive consideration as public comments, comments must be submitted through one of two methods, specified below. All submissions must reference the above project title.

1. **Electronic Submission of Comments.** Interested persons may submit comments electronically via e-mail to DOI_Grants_BuyAmerica_Waiver@ios.doi.gov. DOI recommends comments be submitted electronically via email.
2. **Submission of Comments by Mail.** Comments may be submitted by mail to the Office of Grants Management, Department of the Interior, 1849 C Street, N.W. Room 3024, Washington, DC, 20240.