

DEPARTMENT OF THE INTERIOR

TITLE:

GENERAL APPLICABILITY WAIVER FOR SMALL FINANCIAL ASSISTANCE AGREEMENTS

1. Summary

Agency: Department of the Interior

Proposed Waiver: The Department of the Interior (DOI) is proposing a general applicability waiver of the requirements of section 70914 of the Build America, Buy America Act included in the Infrastructure Investment and Jobs Act (Pub. L. No. 117-58) (Buy America preference) for small financial assistance agreements, having determined such waiver to be in the public interest. This waiver is critical to ensure that agency small infrastructure projects conducted through financial assistance agreements sustain progress and reduce the burden on recipients, many of whom are small organizations operating in rural or disadvantaged communities. The comment period for this waiver will be open for 15 days after the date of this notice. DOI will modify or finalize this proposed waiver after the comment period and 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.

This proposed 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 period of time for small financial assistance agreements that meet the following standard:

- The Federal share of the total project cost, inclusive of Federal funds that may be received from other Federal agencies, does not exceed the Simplified Acquisition Threshold¹ of currently \$250,000.00;
- The Federal share of the total project cost is not anticipated to exceed the Simplified Acquisition Threshold for the life of the financial assistance agreement.

Date posted for public comment: December 22, 2022

Date closed for public comment: 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.

¹ Simplified Acquisition Threshold is defined in [48 C.F.R. §2.101](#). As of the date of this waiver, the threshold is \$250,000.00.

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 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 provides guidance to agencies to consider whether a general applicability public interest waiver should apply to "small grants," such as financial assistance agreements below the Simplified Acquisition Threshold. 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 reduces 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. While only 13 of DOI's 309 financial assistance programs are deemed to be "infrastructure programs", individual infrastructure projects still occur from time to time under other programs.

In fiscal year 2022, DOI issued more than \$5 billion across over 6,000 financial assistance agreements, inclusive of small projects to assist in a variety of efforts benefitting small and disadvantaged communities or non-profit organizations providing services and employment to local youth, veterans, or older Americans. This small agreement waiver provides flexibility to potential recipients to help prevent the perpetuation of systemic barriers to opportunities. In addition, this waiver will help to prevent project delays and project costs associated with the additional recipient effort needed to account for the sourcing of potentially non-compliant items associated with small projects.

3. Waiver Justification

A small financial assistance agreement waiver is critical to reduce the administrative burden to recipients where the costs of compliance with the Buy America preference would significantly negate the benefits of these small projects. Based on recent historical data, DOI issues approximately 4,000 financial assistance agreements per year for projects under the Simplified Acquisition Threshold. An analysis of the entities that receive DOI small financial assistance agreements found that many of these recipients (approximately 62%) were either non-profit institutions, private landowners, or tribes, many of which are also recipients within small and disadvantaged communities with limited capacity to manage compliance with the Buy America preference. Examples of FY22 small financial assistance projects funded by the DOI include:

- 792 small financial assistance agreements to non-profit organizations for the purpose of promoting and stimulating education, job training, and community involvement for

young adults and veterans. These agreements are typically short-term, seasonal projects providing rehabilitation and restoration of public lands.

- 781 small financial assistance agreements for habitat restoration projects, many of which are issued to private landowners voluntarily working with the government, for purposes of conserving, protecting, and enhancing habitats for fish, wildlife, and plants.
- 484 small financial assistance agreements were used for cooperative research purposes to facilitate multi-disciplinary scientific research, assistance, and education to address natural and cultural resource management across the Department of the Interior.
- 408 small financial assistance agreements issued to native America tribes or tribally controlled colleges or universities for a variety of projects ranging from historic preservation initiatives to economic development of the tribes.
- 155 small financial assistance agreements issued to Minority Serving Institutions that serve minority populations across the country to provide education skills needed to overcome racial discrimination and limited economic opportunities.

DOI awards that contained more significant construction (yielding a higher Buy America preference benefit) were found to be predominantly above the \$250,000.00 threshold.

Without a waiver in place for these small agreements, small projects that do contain minor construction could be subject to project delays and greater costs associated with the need to ensure compliance with the Buy America preference. This could result in significant administrative costs for each individual agreement. The impact associated with the Buy America preference is substantial for small financial assistance agreement recipients, many of whom do not have experience in applying domestic content preferences. A small agreement waiver ensures that DOI and its financial assistance community do not devote significant public resources toward compliance activities where there is limited public benefit and ensures that requests for project-specific waivers for larger projects can be responded to in a timely fashion. Absent a small agreement waiver, the following concerns have been expressed by DOI's financial assistance community:

- **Delays to Necessary Projects:** Small agreement projects may experience substantial delays in project implementation and completion due to the additional time required to research and locate domestic sourced materials and submit and process waivers when domestic materials are not available. This would have a significant impact on shorter-term agreements, such as water drought projects, farming and ranching projects containing minor construction, projects with seasonal constraints, seasonal internships, and youth programs, where implementation delays associated with a waiver could jeopardize the overall project.
- **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 along with applicable documentation for the sake of single audit compliance.

A small financial assistance agreement waiver will enable better use of limited resources for both recipients and government staff, particularly in the early years of BABA implementation when DOI and recipients are learning new rules and processes to promote the use of American-made goods in Federally funded infrastructure projects.

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. Solicitation of Comments

Proposed Waiver: This notice posted on December 22, 2022, satisfies the requirement to publish any proposed Buy America waiver and provide the public with a reasonable period of time for notice and comment. The Department of the Interior seeks public and industry comment from all interested parties. In particular, the Department of the Interior seeks comment regarding whether the Simplified Acquisition Threshold (currently \$250,000.00) is an appropriate threshold for a small financial assistance agreement waiver, or whether a different threshold would be more appropriate. Relevant information and comments will help to understand completely the facts surrounding the waiver requests and the agency’s proposal. This notice will be closed for comments on January 6, 2023

Comments can be sent to DOI_Grants_BuyAmerica_Waiver@ios.doi.gov. Please reference the associated waiver title in the subject line of the email. Comments received prior to the public comment closing date will be reviewed and considered by DOI.

For more information on the Build America, Buy America preference, please reference www.doi.gov/grants/buyamerica or MadeinAmerica.gov.