



Northern Border Regional Commission

Northern Border Regional Commission: Proposed Public Interest *De Minimis*, Small Grants and Minor Components Waiver of the Build America, Buy America Act requirements as Applied to Recipients of NBRC Federal Financial Assistance

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Summary

This notice served as advisement that the Northern Border Regional Commission (NBRC) is issuing a *public interest De Minimis, Small Grants and Minor Components 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) for recipients of Federal Financial Assistance. The waiver will remain in effect for a period of five years from the date of final waiver approval.

For the reasons set forth in this notice, NBRC believes limited, public interest *De Minimis*, Small Grants and Minor Components waivers of Build America, Buy America Act domestic preference requirements. 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 waiver will assist NBRC and its grant recipients in preventing immediate delays to critical projects in the communities NBRC serves. Additionally, the waiver will allow NBRC and its recipients to focus on BABA implementation where it will have the greatest impact. During the period the waiver is active, NBRC encourages its recipients, to the greatest extent practicable, to purchase, acquire, or use goods, products, or materials produced in the United States.

Request for Public Comment

The NBRC posted this notice on March 29, 2024 for a period of 15 days. The notice encouraged public comments on this waiver, specifically with regard to the proposed purpose, and scope.

NBRC received one comment, which was submitted by a national steel and steel products company that encouraged NBRC to narrow the scope of or eliminate the de minimis and minor components public interest waivers. NBRC carefully considered the comment and determined that the proposed de minimis and minor components waivers are expected to mostly impact awards that include relatively small infrastructure elements. Further, NBRC determined the waivers, as proposed, are necessary to reduce recipient burden, broaden the potential recipient pool, promote efficiency and speed of project execution, and allow time for domestic manufacturers to make any necessary product adjustments or enhance workforce preparedness. Additionally, the waivers are consistent with and follow the guidance provided by Office of Management and Budget Memorandum M-24-02, Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure, published on October 25, 2023 (M-24-02). For these reasons, NBRC did not make substantive changes to the proposed de minimis and minor components waivers in response to the comment received.

NBRC believes it is in the public interest to issue this waiver with no significant changes from the version that was proposed.

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 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.

The Office of Management and Budget's October 25, 2023, memorandum, "Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure" (M-24-02) specifically encourages agencies to consider whether it is in the public interest to waive application of the Buy America preference to awards below the Simplified Acquisition Threshold. NBRC is issuing this waiver not as an alternative to increasing domestic production, but as an important tool to implement the Buy America provisions in the most efficient manner in order to promote investment in domestic manufacturing while reducing administrative burden. NBRC understands that advancing Made in America objectives is a continuous effort. NBRC plans to continue moving forward to implement the requirements in a way that maximizes coordination and collaboration to support long-term investments in domestic production.

Indeed, thus far, NBRC has taken the following actions to implement the requirements among our grantees:

- Inserted relevant *Made in America* language into our grant compliance manual, which is utilized by both grantees and “Local Development Districts” (LDDs), to guide grant administration activities such as procurement.
- Inserted relevant *Made in America* language in our grant agreements, which serve as our contract with grantees.
- Reinforced the aforementioned language in the Agency’s information sessions about our funding held earlier this year across the four states, as well as incorporated into materials for our new grantee and grant administration training efforts.
- Liaised with near-peer Federal agencies to understand the challenges and opportunities in their efforts to comply.
- Joined the interagency BABA Working Group and the Sub-group on monitoring recipient compliance.

Public Interest General Applicability Waiver of Buy America Provisions for *De Minimis*, Small Grants and Minor Components

NBRC will issue the following targeted and limited waivers:

- **De Minimis Purchases:** NBRC is issuing 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. 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:** NBRC is issuing a waiver of the Buy America domestic content procurement preference for small grants². The small grants waiver will apply to Federal financial assistance awards at or below the Simplified Acquisition Threshold³ (SAT), which is currently \$250,000, 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:** NBRC is issuing a waiver of the Buy America domestic content procurement preference to allow minor deviations for miscellaneous minor components⁴ within iron and steel products. The minor components waiver will allow non-domestically produced miscellaneous minor components comprising 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

¹ For purposes of this waiver, “applicable project costs” are defined as material costs subject to the Buy America Preference.

² For purposes of this waiver, “grants” encompasses all forms of Federal financial assistance that NBRC administers including cooperative agreements, cooperative support agreements, and grant agreements.

³ The 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.

⁴ For purposes of this waiver, “minor component” means an article material, or supply, whether manufactured or non-manufactured, incorporated directly into an iron or steel product that comprises no more than 5 percent of the total material cost of the iron or steel product. Reference 2 C.F.R. §184.3.

produced domestically.

Waiver Justification:

The purpose of this waiver is to reduce the administrative burden on NBRC grantees and subgrantees. The vast majority of the communities NBRC serves have high rates of poverty, unemployment, or outmigration and are severely and persistently economic distressed and underdeveloped. For most of our grantees, this is their first time accessing NBRC funds. Many of these projects are once in a generation investments. Projects would need to be re-scoped which could lead to additional delays, raising the risk that NBRC grantees withdraw from the program. Failure to issue these waivers could undermine the opportunities and benefits to the communities relying on NBRC's assistance, limiting the ability to deliver critical resources equitably and efficiently.

Further, NBRC believes this waiver will be an important tool to implement BABA in a more efficient manner in order to promote investment in our domestic manufacturing base and position U.S. workers and businesses to compete and lead globally in the 21st century. This waiver will reduce administrative burden and allow NBRC and its recipients to focus on BABA compliance for projects with the greatest impact.

NBRC evaluated the impact of these waivers by applying the proposed criteria for fiscal year 2024. In fiscal year 2024, NBRC grantees will receive more than \$75 million through programs where infrastructure is an eligible activity and subject to the BABA. Of that \$75 million, approximately \$3 million would be exempt under a *de minimis*, small grants or minor components waiver. These figures support that this waiver is appropriate for NBRC programs because it would reduce administrative burden for certain projects while still requiring the majority of NBRC funding to be subject to the domestic preference requirements of BABA. Failure to provide grantees with such flexibilities could delay or even prevent the award for infrastructure projects.

NBRC will review this waiver every five years from the effective date of this waiver or more often as appropriate to evaluate its continued need.

Issuance of Waivers

Section 70914(c) authorizes the Federal Agency head (in the case of the NBRC, the Federal Co-Chair) to waive the application of a Buy America preference under an infrastructure program when:

1. Applying the domestic content procurement preference would be inconsistent with public interest ("public interest waiver");
2. The 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 ("nonavailability waiver");
3. 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 ("unreasonable cost waiver").

The section also stipulates that the Federal Agency head 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.

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. NBRC’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.



Christopher Saunders
NBRC Federal Co-Chair

Date: 4-24-24