



FEMA

March 14, 2023

Re: Public Interest: De Minimis General Applicability Waiver of Section 70914(a) of P.L.117-58, Build America, Buy America Act, 2021 for Federal Emergency Management Agency (FEMA) Financial Assistance Awards

AGENCY: Grant Programs Directorate, FEMA

ACTION: Notice

SUMMARY: In accordance with the Build America, Buy America Act (BABAA), this notice advises that FEMA grants a general applicability waiver to the Buy America Domestic Content Procurement Preference (“Buy America preference”) for otherwise covered infrastructure project purchases, totaling up to 5% of the total applicable project costs¹, up to a maximum of \$1,000,000 (a de minimis threshold), to reduce the administrative burden for recipients and subrecipients. Once a Federal financial assistance recipient’s total purchases of materials otherwise covered by the Buy America preference reach 5% of applicable project costs or the de minimis threshold of \$1,000,000, whichever is lower, all other applicable project purchases must comply with the Buy America preference. A de minimis waiver ensures 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. Guidance outlining the application of the de minimis waiver is forthcoming.

DATES: This waiver is effective upon approval date, which is **March 14, 2023**, and will remain in effect for all awards or funding obligated to recipients and subrecipients of FEMA financial

¹ Applicable project costs are defined for the purpose of this waiver as material costs subject to the Buy America preference.

assistance infrastructure projects for five years from the approval date. As FEMA develops efficient waiver review capabilities, FEMA will review this waiver within five years of the date on which the waiver was issued or more often as appropriate to determine its continued utility, applicability and relevance with FEMA's missions and goals consistent with the Infrastructure Investments and Jobs Act (IIJA), and the Office of Management and Budget (OMB) Memorandum M-22-11, [Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure](#).

SUPPLEMENTARY INFORMATION:

I. Build America, Buy America

The Build America, Buy America Act (BABAA) was enacted on November 15, 2021, as part of the Infrastructure Investment and Jobs Act (IIJA). Pub. L. 117-58. BABAA establishes a domestic content procurement preference, the Buy America preference, for federal infrastructure programs. Section 70914(a) of BABAA establishes that no later than 180 days after the date of enactment, FEMA must ensure that none of the funds made available for infrastructure projects may be obligated by FEMA unless it has taken steps to ensure that the iron, steel, manufactured products, and construction materials used in a project are produced in the United States. In section 70912, BABAA further defines a project to include "the construction, alteration, maintenance, or repair of infrastructure in the United States" and includes within the definition of infrastructure those items traditionally included along with buildings and real property.

II. Waivers

Under section 70914(b), FEMA has authority to waive the application of a domestic content preference when (1) 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%. 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. Information on this waiver may be found on FEMA's website at <https://www.fema.gov/grants/policy-guidance/buy-america>.

III. Public Interest in a General Applicability Waiver of Buy America Provisions for De Minimis products

FEMA is approving a general applicability waiver to the Buy America preference for otherwise covered infrastructure project purchases, totaling up to 5% of the total applicable project costs, as referenced in Footnote 1 on Page 1, up to a maximum of \$1,000,000. The waiver is being established to reduce the administrative burden to recipients and subrecipients, which include small and disadvantaged communities, where the costs of compliance with the BABAA requirements could significantly distract from the focus on higher value BABAA compliant items. Without this waiver, awards may be delayed for infrastructure projects as award recipients must exert considerable effort accounting for the sourcing of miscellaneous, low-cost items and systematically undermine the opportunities and benefits to such communities requiring FEMA financial assistance, limiting the Agency's ability to deliver critical resources equitably and efficiently.

The BABAA requirements apply to [23 FEMA financial assistance programs](#). To understand the scope of this waiver, FEMA reviewed awards for FY2020 and determined that under FEMA's Hazard Mitigation Assistance programs (which include FEMA's largest

financial assistance programs subject to BABAA), \$1.7 billion in project costs would be subject to BABAA. Of those \$1.7 billion, FEMA will waive otherwise covered infrastructure project purchases, totaling up to 5% of the total applicable project costs, as referenced in Footnote 1 on Page 1, up to a maximum of \$1,000,000. These figures support that a de minimis waiver is appropriate for FEMA programs because it would reduce administrative burden for smaller projects while still requiring the vast majority of FEMA funding to be subject to the domestic preference requirements of BABAA.

Many of the resources and benefits delivered by these programs support projects in communities with limited technical and financial expertise to comply with complex, domestic preference requirements. Furthermore, FEMA will allocate additional personnel to process project-specific waivers. A de minimis waiver allows the Agency to dedicate critical personnel to the compliance activities of higher value BABAA compliant items and strengthen the Agency's ability to successfully implement the BABAA requirements.

To date, FEMA has taken the actions below to implement the BABAA requirements:

1. Promulgated Agency-wide policy;
2. Developed Agency website on BABAA;
3. Ensured Notices of Funding Opportunity and awards were updated, as appropriate, with applicable terms and conditions;
4. Engaged in Tribal consultations;
5. Established process for waiver review and routing;
6. Developed outreach strategy plan to provide guidance and training to FEMA staff and recipients, subrecipients, and stakeholders; and
7. Developed contract provision and self-certification for recipients and subrecipients to

include in their contracts and subcontracts funded by FEMA federal financial assistance for infrastructure.

In addition to the actions above, a de minimis waiver focused on reducing administrative burden on recipients and subrecipients is also a key part of FEMA's implementation.

IV. 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. FEMA has concluded that this assessment is not applicable to this waiver, as this waiver is not based on the cost of foreign-sourced products. FEMA will perform additional market research during the duration of the waiver and consult with International Trade Administration (ITA) to better understand the market to limit the use of waivers caused by dumping of foreign-sourced products.

V. Limited Duration of Waiver

FEMA is committed to the successful implementation of the Buy America preference across its programs providing covered federal financial assistance for infrastructure projects and will move swiftly toward completing the processes outlined in this notice. This waiver is effective upon approval date, which is **March 14, 2023**, and will remain in effect for all awards or funding obligated to recipients and subrecipients of FEMA financial assistance infrastructure projects for five years from the approval date. As FEMA develops efficient waiver review capabilities, FEMA will review this waiver within five years of the date on which the waiver

was issued or more often as appropriate to determine its continued utility, applicability and relevance with FEMA's missions and goals consistent with the IIJA, and the Office of Management and Budget (OMB) Memorandum M-22-11, *Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure*.

VI. Public Comments

FEMA solicited public comments on the waiver as required under Section 70914 of BABAA. In particular, FEMA invited interested parties to comment on the length, purpose, and scope of the waiver to allow FEMA to make an informed final determination on this waiver. A total of sixteen comments were received in response to the proposed waiver. FEMA thoroughly reviewed and considered each of the comments in determining to move forward with the issuance of this waivers as published in this Final Notice. The comments generally favored a De Minimis waiver as proposed.

A total of seven commenters supported the De Minimis waiver as written, while two commenters supported the waiver but noted that only 5% should be limited to material costs, there should be a 1% cap on any one item, and that a documentation requirement should be implemented. Another commenter supported the waiver but with an increase of 10% of project costs and with no cap and one commenter suggested a cap greater than \$1,000,000. Additionally, one commenter submitted questions seeking clarification on compliance to the 5% and \$1,000,000 limits. FEMA appreciates the input provided on the proposed waiver and believes that the monetary thresholds set forth align with BABAA intent to ensure domestic preference while balancing program financial limitations and obligations when pursuing infrastructure projects.

One commenter supported the waiver but suggested matching the Department of Transportation's or Federal Transit Authority's limits. One commenter suggested the waiver have a minimum length of five years, while two commenters noted a need for a Minor Components Waiver and a waiver for manual gear valve actuators. FEMA appreciates the feedback provided by the commenters and notes that the limitations as set forth in this Final Notice will remain, however FEMA will regularly review and evaluate issued waivers to ensure that waivers align with BABAA intent and provide value to stakeholder program delivery.

As an extension to public comment on the waivers, FEMA conducted a Request for Information (RFI) in July 2022 to solicit feedback from FEMA Headquarters and Regional personnel regarding impacts of waivers and needs for additional waivers for grant programs. Results from the RFI revealed that stakeholders supported the development of the de minimis waiver.

At this time, after reviewing the submitted comments, FEMA is issuing this De Minimis waiver with no substantive changes described herein and with other minor, inconsequential grammatical revisions.

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FEMA

Attachment: *Table A: FEMA Federal Financial Assistance Programs Subject to BABAA Buy America Preference*

Table A: FEMA Federal Financial Assistance Programs Subject to BABAA Buy America Preference

#	FEMA Grant Program Office	Assistance Listing Number	FEMA Grant Program
1.	GPD	97.044	Assistance to Firefighters Grant Program (AFG)
2.	FIMA	97.047	Building Resilient Infrastructure and Communities (BRIC)
3.	NPD	97.040	Chemical Stockpile Emergency Preparedness Program (CSEPP)
4.	ORR	97.024	Emergency Food and Shelter Program (EFSP – Regular & Humanitarian)
5.	GPD	97.042	Emergency Management Performance Grant Program (EMPG)
6.	GPD	97.052	Emergency Operations Center Grant Program (EOCGP)
7.	GPD	97.044	Fire Prevention & Safety (FP&S)
8.	FIMA	97.029	Flood Mitigation Assistance (FMA) (including Swift Current)
9.	GPD	97.067	Homeland Security Grant Program (HSGP)
10.	GPD	97.057	Intercity Bus Security Grant Program (IBSGP)
11.	GPD	97.075	Intercity Passenger Rail (IPR)
12.	NCP	97.138	Next Generation Warning System (NGWS)
13.	GPD	97.008	Nonprofit Security Grant Program (NSGP)
14.	GPD	97.056	Port Security Grant Program (PSGP)
15.	FIMA	97.047	Pre-Disaster Mitigation (PDM)
16.	FIMA	97.041	Rehabilitation of High Hazard Potential Dams (HHPD)
17.	FIMA	97.139	Safeguarding Tomorrow Through Ongoing Risk Mitigation Revolving Loan Fund (Safeguarding Tomorrow RLF)
18.	GPD	97.083	Staffing for Adequate Fire and Emergency Response (SAFER)
19.	GPD	97.137	State and Local Cybersecurity Grant Program (SLCGP)
20.	GPD	97.075	Transit Security Grant Program (TSGP)
21.	GPD	97.137	Tribal Cybersecurity Grant Program (TCGP)
22.	GPD	97.067	Tribal Homeland Security Grant Program (THSGP)
23.	ORR	97.025	Urban Search & Rescue (US&R)

Legend for FEMA Grant Program Offices:

- FIMA- Federal Insurance and Mitigation Administration
- GPD- Grant Programs Directorate
- NCP- National Continuity Programs
- NPD- National Preparedness Directorate
- ORR- Office of Response and Recovery