



FEMA

August 1, 2023

Re: General Applicability Waiver for Public Interest Waiver of the Build America, Buy America Act Requirements of Financial Assistance Agreements to the US Pacific Island Territories of the Commonwealth of the Northern Mariana Islands (CNMI), Guam, and American Samoa

1. Summary

Agency: Grant Programs Directorate, FEMA

Waiver: FEMA grants a general applicability public interest waiver of the requirements of Section 70914(a) of the Build America, Buy America Act (BABAA) included in the Infrastructure Investment and Jobs Act (IIJA) (Pub. L. No. 117-58) for federal financial assistance awarded for infrastructure projects located in the U.S. Pacific Island Territories of the Commonwealth of Northern Mariana Islands (CNMI), Guam, and American Samoa, collectively referred to Pacific Island Territories.

This waiver is effective upon approval date, which is August 1, 2023, and will remain in effect for awards or funding obligated to recipients and subrecipients of FEMA federal financial assistance infrastructure projects for eighteen months from the approval date and will be reviewed as often as necessary.

Applicability: This waiver permits the use of non-domestic iron, steel, manufactured products, and construction materials in infrastructure projects located within the Pacific Island Territories of CNMI, Guam, or American Samoa when the total project cost exceeds the Simplified Acquisition Threshold of \$250,000. This waiver applies to all awards obligated after the

effective date August 1, 2023, and up to 18 months after the effective date, which is January 31, 2025. For awards obligated prior to the effective date of the final waiver, this waiver will apply to expenditures for non-domestic iron, steel, manufactured products, and construction materials incurred after the effective date August 1, 2023.

2. Background

The Buy America preference set forth in section 70914(a) of BABAA included in the IIJA, 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 (OMB)'s Guidance Memorandum M-22-11, *Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure*, FEMA may waive the BABAA application in any case in which it finds that: (i) applying the domestic content procurement preference would be inconsistent with the public interest; (ii) types of iron, steel, manufactured products, or construction materials are not produced in the U.S. in sufficient and reasonably available quantities or of a satisfactory quality; or (iii) the inclusion of iron, steel, manufactured products, or construction materials produced in the U.S. 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 fifteen (15) calendar days for public comment on the proposed waiver; and submit the proposed waiver to the OMB Made in America Office for review to determine if the waiver is consistent with policy.

FEMA provides grants to the three Pacific Island Territories, Guam, American Samoa, and CNMI. Most of this funding is for Hazard Mitigation Assistance (HMA) projects that are awarded to the Pacific Islands territorial government entities, including territorial agencies and

instrumentalities. In FY 2019, the Pacific Island Territories received \$8,118,567 dollars through FEMA's various grant programs where infrastructure is an eligible activity and may be subject to BABAA. This funding supported 3 individual projects with applicable costs that would be covered by the Buy America preference requirements for iron, steel, construction materials and manufactured products.

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 an outreach strategy plan to provide guidance and training to FEMA staff and recipients, subrecipients, and stakeholders;
7. Developed contract provisions and self-certification for recipients and subrecipients to include in their contracts and subcontracts funded by FEMA federal financial assistance for infrastructure;
8. Issued a Six-Month General Applicability-Adjustment Period Waiver to allow time for FEMA to develop policies and procedures to implement the BABAA requirements.
This waiver was issued on July 1, 2022 and expired on January 1, 2023;
9. Issued a Six-Month Adjustment Period for Tribes Waiver. This waiver was issued on February 6, 2023 and is in effect through August 6, 2023;
10. Issued a Small Projects General Applicability Waiver. This waiver was issued on

February 21, 2023 and is in effect through February 20, 2028;

11. Issued a De Minimis General Applicability Waiver (5% of material costs subject to BABAA, not to exceed \$1,000,000). This waiver was issued on March 14, 2023 and is in effect through March 13, 2028; and
12. Issued a Minor Components Waiver (5% of the total material cost of an otherwise domestically produced iron or steel product). This waiver was issued on July 23, 2023 and is in effect through July 22, 2028.

A limited public interest Pacific Island Territories waiver, that allows a greater period for Pacific Island Territory award recipients to comply with Buy America preference requirements is also a key part of FEMA's implementation.

3. Waiver Justification

FEMA is granting a public interest waiver from the BABAA requirements for infrastructure projects located within the Pacific Island Territories of CNMI, Guam or American Samoa. The duration of the waiver is eighteen months from the effective date of the final waiver, which is Aug. 1, 2023.

Economies in the Pacific Islands are over 5,000 miles from the mainland United States and must import products via air or sea. These economies have few local heavy manufacturers and largely rely on established regional supply chains from east Asia, Australia, and New Zealand. Most goods, equipment, materials, and supplies are imported and rely on shipping with associated timelines and unpredictable shipping fuel costs fluctuations. Moreover, materials sourced from the United States lead to additional shipping fees and longer lead times, thus significantly extending construction activity schedules. Lastly, ongoing gaps in supply chain availability impact lead times for materials, increasing project timelines. For these reasons, the

agency is concerned that complying with the domestic sourcing requirements in BABAA may increase already elevated project time and costs—particularly in the short run—and seeks time to better understand the local manufacturing footprint and the balance of equities for residents of the Pacific Island Territories. The agency is aware that substantial changes to shipping and supply chains to incorporate domestic sourcing requirements in the Pacific Island Territories could take multiple years to establish.

These economic and logistical constraints were also confirmed by the market research that FEMA performed. In early 2023, FEMA conducted research through Requests for Information (RFI) from the Pacific Island Territories which include CNMI, Guam, and American Samoa to assess the impacts of BABAA.

CNMI and Guam responded that shipping costs from Asia are lower due to geographic distance and other cost efficiencies. They commented that there is a general lack of supply chains from the U.S. compared to Asia resulting in longer lead times from the U.S. for product delivery which leads to longer construction timelines. Standard products like typhoon-rated glass windows and aluminum shutters cost significantly more if sourced domestically. For example, representatives stated, “the cost of aluminum is double if sourced from the U.S. Mainland” and “The shipping cost from Korea or Asia for a 20-footer container is \$3,000 but shipping from the mainland United States is about \$12,000.”

Representatives from American Samoa responded that “As a containerized community, our territories depend on goods, equipment, materials and supplies to be imported.” They said, “we can purchase equipment from foreign countries closer to American Samoa and with reasonable prices and shorter shipping time.” American Samoa representatives also noted that

availability of materials from nearby foreign countries such as New Zealand and Australia would be a significant cost savings to the grantors.

It is in the public interest to waive the BABAA requirements for Federal financial assistance awarded for infrastructure projects in the Pacific Island Territories for a limited period of 18 months. The agency is concerned that failure to provide these remote infrastructure projects such flexibilities could perpetuate systemic barriers to opportunities and benefits and limit the agency's ability to deliver resources and benefits equitably to all in these Pacific Island territories. Additionally, FEMA may need to dedicate significant staff and contractor time to assist extremely remote communities with implementing preference requirements for the first time and to support the increased workload to process project-specific waivers.

4. 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 fifteen 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 waiver as published in this Final Notice. The comments generally favored a Pacific Territories waiver as proposed.

A total of ten commenters supported the Pacific Islands Territories waiver and five opposed the waiver. Of the ten commenters in support of the waiver, four commented that the timeframe of the waiver should be extended from the proposed eighteen months to periods from thirty-six months to five years, and to be permanent.

Nine of the fifteen commenters were government entities. Four comments were from the Government of Guam, two comments were from the American Samoa Government, and two comments were from the Commonwealth of Northern Mariana Islands (CNMI).

Of these nine, eight commenters support the waiver citing:

- The remote location and distance of Pacific Island Territories from the U.S. mainland and the delivery of construction materials results in additional shipping fees and longer lead times, significantly extending construction activity schedules.
- Due to the location of these territories, there are fewer shipping routes and services available, leading to infrequent and unreliable deliveries.
- Products for infrastructure projects are not readily available since most construction materials are imported into the Pacific Island Territories.
- “Guam’s relationship with foreign capital differs considerably from mainland territories due to a lack of mainland providers. Since Guam’s infrastructure is influenced by private investment capital, foreign providers (and their preferences for specific goods and materials) will always have an influence on Guam’s execution of projects.”

One commenter was a supplier in American Samoa, who opposed the waiver citing:

“...the quality of products and building materials should not be compromised. As often as our island has the threat of tsunamis, hurricanes and cyclones and most recently, the king tides, we must ensure the quality of products we bring in to rebuild our infrastructure is not compromised in any way. We know there’s a wait time, being on a remote island, but the inconvenience of waiting for product is minimal compared to the long-term effect of poor-quality materials, insufficient spec sheets, maybe inferior product testing.”

One commenter was an infrastructure construction company in CNMI that supports the waiver and commented: “I can testify that BABAA is almost twice the cost of products (steel), procured in Korea or Taiwan. Ultimately most of the costs go to shipping companies and this would not be in the best interest of the Government to pay for material costs twice what could be obtained within the region.”

Five of the fifteen commenters were associations and manufacturers of products subject to BABAA. Of these, two of the comments were from manufactures of manufactured products, two of the comments were from manufacturers of iron and steel products and one of commenters was an association of manufacturers commenting on behalf of metal casting industry partners.

Of the manufacturers, one commenter supports the waiver as written and four commenters oppose the waiver, citing the following reasons:

- The Environmental Protection Agency (EPA) excluded traditional AIS products (pipe and fittings, manhole covers, hydrant flanges, etc.) from waiver discussion based on a robust supply chain and FEMA should remain consistent with the precedent other federal agencies have set.
- The waiver’s rationale inaccurately implies that it significantly extends project timelines.
- The domestic steel industry has more than ample capacity to support projects in the Pacific Island Territories, as evidenced by U.S. steel capacity utilization data over the past two years.
- Current supply chains to the Pacific Island Territories are well-established, therefore the waiver is not necessary for infrastructure projects in these territories.

FEMA recognizes the established relationships of manufacturers to supply iron and steel and manufactured products to infrastructure projects in the Pacific Territories.

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.

5. Impact Absent the Waiver

Without the waiver, infrastructure projects located within the Pacific Island Territories could experience challenges with product delivery, availability, reliability, and project scheduling. Infrastructure project schedules rely on readily available products delivered within reasonable timeframes. Due to the extreme distances that manufacturers for products produced in the mainland United States would have to ship products to the Pacific Island Territories and due to the lack of existing local product supply networks for these products, projects in the Pacific Island Territories could potentially face unreasonable scheduling uncertainty.

On the other hand, the proposed waiver will likely help grant recipients establish rules and procedures to manage the BABAA requirements as well as time to identify opportunities for regional production.

Uncertainties regarding capacity, shipping, and supply networks make domestic sourcing in the Pacific Island Territories challenging for assistance recipients, shippers, and FEMA staff in the short run. FEMA will continue to engage to understand opportunities to leverage existing shipping and transportation processes to make domestic sourcing feasible over the longer term.

6. 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’s analysis has concluded that this assessment is not applicable to this waiver.

7. Duration of Waiver

The proposed duration of the waiver is effective upon approval date, which is August 1, 2023, and will remain in effect for awards obligated to recipients of FEMA federal financial assistance infrastructure projects for eighteen months from the effective date of the final waiver. FEMA will review this waiver as often as necessary to assess whether it remains necessary to the fulfillment of FEMA’s missions and goals and consistent with applicable legal authorities, such as the IIJA, Executive Order 14005, and OMB M-22-11. FEMA may, based on the results of that review, terminate the waiver, or take action to develop a new waiver in consultation with the MIAO.

For more information on the Build America, Buy America preference, please reference <https://www.fema.gov/grants/policy-guidance/buy-america> or [MadeinAmerica.gov](https://www.madeinamerica.gov).

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