

## DEPARTMENT OF THE INTERIOR

### TITLE:

### GENERAL APPLICABILITY WAIVER FOR SMALL GRANTS<sup>1</sup>

#### 1. Summary

Agency: Department of the Interior

Proposed Waiver: The Department of the Interior (DOI) is establishing 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 grants, having determined such waiver to be in the public interest. This waiver is critical to ensure that agency small infrastructure projects conducted through small grants sustain progress and reduce the burden on recipients, many of whom are small organizations operating in rural or disadvantaged communities. The waiver will remain in effect for all eligible DOI Federal grants 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 grants that meet the following standard:

- The total award amount does not exceed the Simplified Acquisition Threshold<sup>2</sup> of currently \$250,000.00;
- The award amount is not anticipated to exceed the Simplified Acquisition Threshold for the life of the grant.

DOI posted a proposed waiver for public comment from December 22, 2022. The comment period ended on 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.

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

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<sup>1</sup> For purposes of this waiver, grants encompass all forms of Federal financial assistance that DOI administers including cooperative agreements and grants.

<sup>2</sup> 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.

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 grants 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 grant 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 grants, 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 grant 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 grant 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 grants per year for projects under the Simplified Acquisition Threshold. An analysis of the entities that receive DOI small grants 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 grants to non-profit organizations for the purpose of promoting and stimulating education, job training, and community involvement for young adults and veterans. These grants are typically short-term, seasonal projects providing rehabilitation and restoration of public lands.
- 781 small grants 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 grants 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 grants 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 grants 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 grants, 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 grant. The impact associated with the Buy America preference is substantial for small grant recipients, many of whom do not have experience in applying domestic content preferences. A small grant 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 grant waiver, the following concerns have been expressed by DOI's financial assistance community:

- **Delays to Necessary Projects:** Small grant 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 grants, 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 grant 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 was posted on December 22, 2022, to satisfy 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 sought public and industry comment from all interested parties. In particular, the Department of the Interior sought comment regarding whether the Simplified Acquisition Threshold (currently \$250,000.00) is an appropriate threshold for a small grant waiver, or whether a different threshold would be more appropriate. Relevant information and comments were requested to help understand completely the facts surrounding the waiver requests and the agency’s proposal. This notice closed for comments on January 6, 2023

19 entities provided a response to this proposed waiver. A summary of the comments received are as follows:

- 8 entities responded with concurrence with the waiver as is.
- 11 entities concurred with a small grant waiver, but requested the waiver threshold be based on individual projects rather than individual grants to allow for the waiver to apply to larger grants consisting of multiple smaller infrastructure projects.
- 3 of the entities also requested the waiver threshold be increased to \$500,000.00
- None of the responses received expressed disagreement with the waiver.

In response to the comments received, a determination was made by the DOI to proceed with the waiver as written. The majority of the comments requested the threshold be based on individual infrastructure projects rather than the amount of the grant and/or an increase in the threshold amount. DOI considered the suggestions provided but feel the requested adjustments will make the waiver overly broad as the Department continues to promote investment in our domestic manufacturing base.