

U.S. Department of Education Public Interest Waiver for Certain Previously Planned Infrastructure Projects

TITLE:

U.S. Department of Education Public Interest Waiver for Certain Previously Planned Infrastructure Projects for Department Grantees.

SUMMARY:

In accordance with the Build America, Buy America Act (“BABAA”), the U.S. Department of Education (ED or the Department) establishes a department-wide public interest waiver effective November 3, 2023, for previously planned infrastructure projects from application of the Buy America Domestic Content Procurement Preference provisions (“Buy America Preference”). ED establishes this narrowly tailored waiver to waive the domestic iron, steel, construction materials and manufactured requirements for certain contracts and solicitations. The previously planned projects waiver applies to ED awards obligated on or after the effective date of this waiver, November 3, 2023, in the following circumstances: (i) contracts that ED grantees entered into prior to October 1, 2022, the expiration date of the ED’s adjustment period waiver; and/or (ii) contracts entered into before March 1, 2023, that result from solicitations published before May 14, 2022. For awards and amendments that otherwise meet these criteria but were obligated prior to the effective date of this waiver, the waiver applies to eligible expenditures incurred on or after the effective date of this waiver. The waiver will allow these grantees to continue infrastructure projects that have already executed construction contracts or issued solicitations as the Department transitions to full implementation of BABAA in a timely manner.

The waiver applies to obligations by ED on or after the effective date of this waiver, November 3, 2023, for a period of two years in the following circumstances: (i) contracts that ED grantees entered into prior to October 1, 2022, the expiration date of the ED’s adjustment period waiver; and/or (ii) contracts entered into before March 1, 2023, that result from solicitations published before May 14, 2022. For awards and amendments that otherwise meet these criteria but were obligated prior to the effective date of this waiver, the waiver applies to eligible expenditures incurred on or after the effective date of this waiver.

FOR FURTHER INFORMATION CONTACT:

The Education Program Contact listed in box 3 of the Grant Award Notification.

SUPPLEMENTARY INFORMATION:

I. Build America, Buy America Act

The BABAA was enacted on November 15, 2021, as part of the bipartisan Infrastructure Investment and Jobs Act (IIJA) (P.L. 117-58). The law requires that all recipients of Federal financial assistance projects for infrastructure must comply with certain domestic content procurement preference requirements. These domestic content preferences apply to all the iron, steel, manufactured products, and construction materials used for infrastructure projects under an award. These requirements took effect on May 14, 2022.

Under IIJA section 70914(b), ED has authority to waive the application of a domestic content procurement preference when (1) the 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 percent. Section 70914(c) of the IIJA provides that a waiver under section 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.

Consistent with these requirements, ED issued an agency-adjustment period waiver that delayed the implementation of the BABAA domestic sourcing requirements until October 1, 2022, to support the implementation and transition to the BABAA domestic sourcing requirements.

During the adjustment time, ED (1) developed and issued agency-level policies, guidance, and internal training documents to help support agency implementation on October 1, 2022, (2) finalized grant condition text, notice of funding opportunity language, and various FAQs, (3) developed and received approval for a grantee BABAA waiver request form, (4) established internal processes to facilitate the review of waiver requests, and (5) coordinated an awareness campaign that included developing a dedicated public BABAA website, a public training series, and engagements and consultations with Indian Tribal Communities.

II. Public Interest Waiver for Certain Previously Planned Infrastructure Projects

ED recognizes the importance of ensuring the use of domestically produced iron, steel, construction materials and manufactured products on ED-funded projects and the need to implement the Buy America Preference established by BABAA in a way that does not delay delivery of projects that were sufficiently advanced before the requirements apply to ED's funding. Per OMB Memorandum M-22-11, Section V, "agencies may consider whether public interest waivers may be needed to avoid undue increases in the time and cost of a project. Similarly, public interest waivers may be needed for awards and amendments made on or after May 14, 2022, where budgets for purchase of covered materials have already been agreed upon (including if materials have been ordered and construction has begun)."

In Fiscal Year 2022, ED awarded 17,685 grants, with a total value of \$68.5 billion. Of the total grants, only 1,595 (with a total value of \$19 billion) were awarded under the covered programs that allowed for infrastructure projects.

In light of all the information available to ED, the Department finds that it is in the public interest to issue a previously planned projects waiver of the Buy America Preference for iron, steel, construction materials and manufactured products for:

- (1) Contracts that grantees entered into prior to October 1, 2022, the expiration date of the ED's adjustment period waiver; and/or
- (2) Contracts that grantees entered into before March 1, 2023, provided that those contracts result from solicitations issued prior to May 14, 2022.

In these circumstances, ED grantees executed contracts and were conducting procurements with long lead times prior to the Buy America Preference established by BABAA taking effect, or during the effective period of ED's adjustment period waiver. This waiver will preserve the eligibility of costs a project sponsor already incurred or estimated before the Buy America Preference requirement took effect for ED. To the extent that contracts have already been entered into, applying BABAA domestic sourcing requirements to those contracts would require a recipient to renegotiate the previous contract or to re-bid the contract entirely, impacting previously approved recipient budgets and grant timelines. The purpose of covering contracts through March 1, 2023, for contracts resulting from solicitations issued before May 14, 2022, is to provide recipients with reasonable time to complete procurements. Recipients and offerors have invested significant resources in such procurements, which are based on design and engineering conducted before the Buy America Preference requirement went into effect. The contracts may be for existing multi-year construction, remodeling, broadband, or routine maintenance and repairs, provided that they meet the conditions referenced above.

Any recipient covered by this waiver is under a continuing affirmative duty to provide any future contract modifications to ED for review and approval consistent with the requirements of 2 CFR § 200.308(h). This waiver from BABAA domestic sourcing does not apply to any contract modifications that changes the scope or the objectives of the project, including additional or new construction, remodeling, or broadband infrastructure development.

The waiver is intended to be a tool to support government-wide efforts to catalyze domestic manufacturing, resilient supply chains, and good jobs while successfully delivering a wide range of infrastructure projects. It supports the creation of resilient supply chains and manufacturing base for critical products here in the United States that brings about investment in good-paying American manufacturing jobs and businesses. The creation of jobs in communities also alleviates supply chain disruptions through cultivation of the domestic manufacturing base for a wide range of products commonly used across the infrastructure sectors but not yet made domestically.

Unlike in the past, Buy America waivers sends clear market signals, creating space for American firms to respond and eliminate the need for the waiver for future projects. The measure

of success is investing in America's infrastructure while maximizing the use of Made in America goods.

III. Assessment of Cost Advantage of a Foreign-Sourced Product

Under OMB Memorandum M-22-11, "Memorandum for Heads of Executive Departments and Agencies," published on April 18, 2022, 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. ED has concluded that this assessment is not applicable to this waiver, as this waiver is not based on the cost of foreign-sourced products.

IV. Duration of the Waiver

This waiver is effective for two years from the effective date of this waiver, November 3, 2023, for all contracts that meet the conditions identified in Section II that receive Federal Financial Assistance awards obligated on or after the effective date of this waiver. For awards and amendments that otherwise meet these criteria but were obligated prior to the effective date of this waiver, the waiver applies to eligible expenditures incurred on or after the effective date of this waiver.

ED will review this waiver within two years of the date or as often as necessary to determine its continued applicability and relevance with ED's missions and goals consistent with the IIJA, Executive Order 14005, and the OMB Memorandum M-22-11. ED anticipates that this waiver will have decreasing utility in future fiscal years as grantees complete their previously planned projects and receive new ED grant awards in which the BABAA domestic sourcing requirements apply.

V. Public Comment

Under Section 70914 of BABAA, ED published its proposed Public Interest Waiver for Certain Previously Planned Infrastructure Projects on August 15, 2023 for 15 days. A total of four comments were received in response to the proposed waiver. One commenter supports the waiver; two commenters support BABAA while neither explicitly state that they support or do not support the waiver; and one commenter shared their support for the waiver while having specific concerns on navigating the timeline; exempt projects disadvantaging projects that adhere to the original requirements; and need for robust oversight to ensure grantees do not exploit or abuse the waiver.

ED thoroughly reviewed and considered each of the comments. ED determined after its review that the submitted comments do not warrant revisions to the waiver; thus, the waiver was not

revised in response to comments received. ED, therefore, issues this waiver with no substantive changes.

A handwritten signature in black ink, appearing to read "Roberto J. Rodríguez". The signature is fluid and cursive, with a long horizontal stroke at the end.

Roberto J. Rodríguez,
Assistant Secretary for Planning, Evaluation and
Policy Development.