



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OCT 21 2022

THE ADMINISTRATOR

DECISION MEMORANDUM

SUBJECT: Public Interest: *De Minimis* General Applicability Waiver of Section 70914(a) of P.L. 117-58, Build America, Buy America Act, 2021 for U.S. Environmental Protection Agency Financial Assistance Awards and Procurements

FROM:

Michael S. Regan

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Introduction

Congress passed, and the President signed in November 2021 the Infrastructure Investment and Jobs Act, which included the Build America, Buy America Act. This is a transformational opportunity to build a resilient supply chain and manufacturing base for critical products here in the United States that will catalyze new and long-term investment in good-paying American manufacturing jobs and businesses. Consistent with the policy direction of Executive Order 14005: Ensuring the Future is Made in All of America by All of America's Workers, section 70914 of the Infrastructure Investment and Jobs Act establishes governmentwide Buy America conditions on all federal financial assistance programs and the projects funded through federal financial assistance funded after May 14, 2022.

The U.S. Environmental Protection Agency remains committed to implementing Build America, Buy America to cultivate the domestic manufacturing base for a range of products. Products that qualify for a *de minimis* waiver cumulatively may comprise no more than a total of five percent of the total project cost. This waiver is not additive with the existing American Iron and Steel national *de minimis* waiver. The EPA's infrastructure programs vary widely from small community projects costing thousands of dollars up to large billion-dollar regional infrastructure projects. The EPA solicited public comment on including a dollar cap per project. The EPA received no public comments supporting including a cap. Based on an assessment of agency infrastructure projects, many larger projects in a variety of covered infrastructure programs have such significant material costs that a dollar cap would not provide the flexibility intended by the *de minimis* waiver. After consideration of the public comments received, the EPA is not including a dollar cap for its waiver.

Build America, Buy America *De Minimis* Waiver

The Office of Management and Budget's April 18, 2022, memorandum, "Initial Implementation Guidance on Application of Buy American Preference in Federal Financial Assistance Programs for Infrastructure" (M-22-11) encourages agencies to consider whether a general applicability public interest waiver should apply to infrastructure project purchases below a *de minimis* threshold to reduce the administrative burden for recipients and agencies. 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 would risk exceeding the value of the items waived.

This waiver advances Build America, Buy America by reducing the administrative burden to potential assistance recipients where the costs of compliance could distract from the focus on higher value compliant items. Failure to provide recipients such flexibilities could delay the award for infrastructure projects as assistance recipients must exert considerable effort accounting for the sourcing for miscellaneous, low-cost items.

Anticipated Program Impacts Absent a Waiver

Build America, Buy America impacts more than 60 EPA programs. The agency is committed to robust implementation of the act's Buy American Preference in an efficient and effective manner. This waiver seeks to significantly reduce the administrative burden on recipients while exempting a small share (five percent or less) of the total project cost from the Buy American Preference requirement.

Infrastructure projects often contain a relatively small number of high-cost products incorporated into the projects. In solicitations for a project, these high-cost products are generally described in detail via project specific technical specifications. For these major products, recipients are generally familiar with the conditions of availability, the potential alternatives for each detailed specification, the approximate cost, and the country of manufacture of the available components.

Infrastructure projects also involve the use of potentially thousands of miscellaneous, generally low-cost products that are essential for construction and are incorporated into the physical structure of the project. For many of these miscellaneous products, the country of manufacture and the availability of alternatives are not always readily or reasonably identifiable prior to procurement in the normal course of business; for other miscellaneous products, the country of manufacture may be known but the miscellaneous character in conjunction with the low cost, individually or procured in bulk, mark them as potentially *de minimis* items.

Failure to grant such a waiver creates significant administrative burden for the EPA and recipients as both sides must negotiate such products on a project-by-project basis, which will increase the cost to the taxpayer, delay the award of assistance agreements and procurement, and has negligible relevance to the intent of Build American, Buy American. With application of this waiver, federally funded infrastructure projects would be aided in meeting the critical public health protection and environmental project purposes on time and on budget. By focusing the programs' attention on high-value domestic products (representing most of the federal infrastructure investment), the EPA will be well-positioned to catalyze resilient domestic supply chains and invest in good-paying American manufacturing jobs and businesses. Absent the waiver, critical public-health protection and environmental infrastructure projects could expend resources inefficiently, potentially failing to deliver on the critical goals of projects and the domestic preference requirements.

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. The EPA's analysis has concluded that this

assessment is not applicable to this waiver, as this waiver allows only a small, *de minimis* value of products to be waived relative to the total cost of a project. The EPA will perform additional market research as it implements the Build America, Buy America requirements to better understand the market and to limit the use of waivers caused by dumping of foreign-sourced products.

Public Notice

The EPA published July 27, 2022, a notice proposing to issue this waiver, and the comment period was open until August 15, 2022. The agency received 41 comments during the public comment period: one representing a federal agency; nine representing manufacturers and the manufacturing industry; 21 representing state agencies; three representing territories; and seven representing rural partnerships and water associations. Most comments were supportive of the waiver with many requesting a threshold higher than the proposed five percent, usually 10 to 15 percent. Of the few comments on a cap, some were opposed, and others supported a cap contingent on a threshold higher than the proposed five percent. Some commenters opposed the waiver because the waiver could reduce opportunities for American manufacturing. Other commenters requested that the Build America, Buy America *de minimis* waiver mirror the American Iron and Steel *de minimis* waiver.

The EPA received comments on the use of material cost as the calculation basis for the threshold versus using project costs. The EPA agrees that material costs are often built into contracts along with other costs, making it difficult to consistently determine an appropriate threshold for projects. Using project cost and not material cost will simplify the calculation and would alleviate burden and confusion for assistance recipients. Therefore, the EPA has changed the calculation basis from material cost to project cost.

The EPA also received many comments on the five percent threshold itself. No comments requested that the threshold be lowered, a few comments agreed with the EPA's threshold, and many requested that the threshold be increased (to up to 20 percent with most requesting an increase to 15 percent) or requested that the threshold be modified so the five percent limit would apply to each of the three subcategories (five percent for iron and steel, five percent for construction materials and five percent for manufactured products). With the cost calculation changing from material costs to project costs, this will functionally increase the amount of products that can be covered by this waiver for most projects. Therefore, after consideration of these comments, the EPA is finalizing the proposed five percent threshold.

The EPA received comments and questions on the examples provided as items that, dependent on the conditions and purpose of the project, may or may not be considered *de minimis*. The EPA's intention was to provide examples to assist programs; however, this created confusion that only certain items could be covered. The five percent threshold can be used for any products, independent on the purpose of the project. The EPA is removing the examples from the text of the final waiver to avoid confusion.

After reviewing these comments, the EPA concludes that the information provided to the agency generally supports a general applicability waiver. Products that qualify for a *de minimis* waiver cumulatively may comprise no more than a total of five percent of the total project cost.

Waiver Decision

Section 70914(b)(1) of the Infrastructure Investment and Jobs Act authorizes the Administrator to waive the requirements of Build America, Buy America if implementation would be inconsistent with the public interest. Due to the critical need to reduce the administrative burden for recipients and agencies and to ensure recipients can effectively carry out the EPA funded activity in a timely manner, it is in the public interest to waive Build America, Buy America requirements for products used in and incorporated into a project that cumulatively comprise no more than five percent of the total project cost. This waiver is not additive with the existing American Iron and Steel national *de minimis* waiver. The EPA will review this waiver every five years after the date on which the waiver is issued.

If you have any questions concerning the contents of this memorandum, please contact Dan Coogan at EPA_BABA_Waiver@epa.gov.