



FEMA

DATE

Re: Public Interest: Small Projects 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 is proposing a general applicability waiver to the Buy America Domestic Content Procurement Preference (“Buy America preference”) as applied to small projects, where projects under a FEMA federal financial assistance award or subaward is less than the [federal simplified acquisition threshold](#) (currently set at \$250,000). A FEMA federal financial assistance award may be comprised of multiple projects with varying levels of cost. The waiver would be applicable to any project under the financial award that meets the federal simplified acquisitions threshold (currently \$250,000 or less). If the waiver is approved, FEMA will issue guidance outlining the application of the small projects waiver.

DATES: If approved, this waiver will be effective upon the final approval date and will remain in effect for recipients and subrecipients of FEMA financial assistance infrastructure projects. 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 Investment 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.

ADDRESSES: Interested persons are invited to submit comments on this proposed general applicability waiver. To receive consideration as public comments, comments must be submitted through email to FEMA-Grants-BuyAmerica@fema.dhs.gov.

SUPPLEMENTARY INFORMATION:

I. Build America, Buy America

The Build America, Buy America Act (BABAA) was enacted on Nov. 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 Small Projects

The purpose of this waiver is 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 negate the benefits of the smallest projects. Failure to issue this small projects waiver could 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, approximately \$10.2 million would be exempt under a small projects waiver, which represents 0.6% of total project costs subject to BABAA. These figures support that a small projects 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 small projects waiver allows the Agency to dedicate critical personnel to the compliance activities of larger projects and 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 small projects 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. If approved, this waiver will be effective upon the final approval date 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 issue 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. Solicitation of Comments on the Waiver

As required under Section 70914 of BABAA, FEMA is soliciting public comments on the waiver. In particular, FEMA invites comments on the length, purpose, and scope of the waiver to allow FEMA to make an informed final determination on this waiver. 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 small projects waiver for projects under the federal simplified acquisition threshold (currently \$250,000).

Please refer to the “**DATES**” and “**ADDRESSES**” sections of this notice for information on submission of comments.

Pamela S. Williams
Assistant Administrator, Grant Programs Directorate
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	TBD	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