

DEPARTMENT OF THE INTERIOR
and
Department of Agriculture
Department of Education
Department of Energy
Department of Housing and Urban Development
Environmental Protection Agency
Federal Emergency Management Agency
Department of Commerce

General Applicability Public Interest Waiver
Build America, Buy America Act Waiver: Pacific Island Territories

1. Summary

Agency: Department of the Interior; Department of Agriculture; Department of Education; Department of Energy; Department of Housing and Urban Development; Environmental Protection Agency; Department of Commerce; and Federal Emergency Management Agency (hereafter “the Agencies”).

Final Waiver: The Agencies are issuing a multi-agency general applicability public interest waiver of the requirements of section 70914 of the Build America, Buy America Act (BABA) included in the Infrastructure Investment and Jobs Act (Pub. L. No. 117-58) for infrastructure projects funded through federal financial assistance from the Agencies to the recipients in the United States-Affiliated Pacific Island Territories (hereafter “Pacific Island territories”). For the purposes of this general applicability waiver, the Pacific Island territories are Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands (CNMI). The Agencies propose to waive BABA requirements for recipients in the Pacific Island territories due to the longstanding supply chain challenges that their unique geographical barriers create for the territories, including high shipping costs, infrequent shipping to and from the mainland, and limited market purchasing power so that they can manage their federally funded activities effectively. The duration of this waiver is from the effective date to five (5) years following the effective date. The waiver is applicable to federal awards obligated during the five-year effective period and apply throughout the period of performance for such awards. In the case of awards obligated prior to the effective date of the final waiver, the waiver will be applicable to expenditures made on or after the effective date and for the remainder of the period of performance of the award.

The waiver waives BABA requirements for all iron and steel, manufactured products, and construction materials for public infrastructure projects funded by the Agencies in the Pacific Island territories except for the following items that have been identified as having critical supply chains that are essential to U.S. strategic interests:

- Telecommunications infrastructure:

- Telecommunications equipment used to transmit and receive digital signals across constructed networks (e.g., vaults, cabinets, routers, switches, optical line terminals (OLTs), optical network terminals (ONTs), wi-fi capable customer equipment, and other electronic hardware used to connect the network). This includes:
 - Video surveillance equipment, including any equipment that is used in fixed and mobile networks that provides advanced communications service in the form of a video surveillance service, provided the equipment includes or uses electronic components. This encompasses any equipment that can be used in a fixed or mobile broadband network to enable users to originate and receive high quality voice, data, graphics, and video telecommunications using technology with connection speeds of at least 200 kbps in either direction.¹
 - Broadcasting equipment, including radio frequency devices contained in electronic-electrical products that are capable of emitting radio frequency energy by radiation, conduction, or other means. These products have the potential to cause interference to radio services operating in the radio frequency range of 9 kHz to 3000 GHz.²
- Broadband equipment (e.g., fiber/coax cable, conduit, pedestals, handholes, tower structures, and other physical components used to connect to telecommunication equipment)
- Grid-connected utility-scale energy generation and stationary storage (> 5MW)
- Cargo handling equipment, including cranes, that are manufactured by or contain any networks, operating systems, or software identified in U.S. Maritime Advisory 2024-0026 or successor advisories³

Exclusion from this waiver does not mean that purchases of these items from non-domestic sources may not be warranted for individual projects through project-specific waivers; instead, the Agencies propose to find that items included on the list above represent items that need to be handled on a case-by-case basis. The Agencies will consider individual project waivers for the listed items should they be requested by project sponsors. For public infrastructure projects in the Pacific Island territories involving these products, recipients have the option to request a project-level nonavailability waiver, if necessary.

Waiver Type: Public Interest

Waiver Level: General Applicability, Regional

¹ <https://www.fcc.gov/laboratory-division/equipment-authorization-approval-guide/equipment-authorization-system#step2>

² <https://www.fcc.gov/oet/ea/rfdevice>

³ 2024-002-Worldwide-Foreign Adversarial Technological, Physical, and Cyber Influence <https://www.maritime.dot.gov/msci/2024-002-worldwide-foreign-adversarial-technological-physical-and-cyber-influence>

Waiver Justification Summary: This waiver is consistent with the public interest because it reduces the administrative burden to potential Federal financial assistance recipients, including extremely remote communities in the Pacific Island territories, where complying with domestic sourcing requirements presents geographical obstacles and challenges that could significantly negate the benefits of their projects and could perpetuate systemic barriers to opportunities and benefits equitably to all within these territories. Additional information is provided below.

Length of the Waiver: This waiver will remain in effect for five (5) years from the effective date of this waiver. The waiver applies to all federal financial assistance awards obligated after the effective date and, in the case of awards obligated prior to the effective date, all expenditures for non-domestic iron, steel, manufactured products, and construction materials incurred after the effective date. This waiver, if finalized, would be reviewed as often as necessary to determine if the conditions necessitating the waiver have changed.

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), a Federal agency 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 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 determination; provide a period of not less than 15 calendar days for public comment on the waiver; and was submitted to the Office of Management and Budget, Made in America Office for review to determine if the waiver is consistent with policy.

The Office of Management and Budget's Memorandum M-24-02, "Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure," dated October 25, 2023, provides that agencies may consider whether it is in the public interest to waive application of a Buy America preference based on a variety of policy considerations, including for equity purposes. The Agencies have identified a need for such a waiver in the Pacific Island territories.

The Agencies previously published separate agency-specific temporary waivers for BABA requirements for the Pacific Island territories:

- Department of Commerce (effective September 1, 2023, expires March 1, 2025);
- Department of Education (effective January 2, 2024, expires January 2, 2025);
- Department of Energy (effective August 18, 2023, expires February 18, 2025);
- Department of Housing and Urban Development (effective November 15, 2023, expires February 15, 2025);
- Department of the Interior (effective August 15, 2023, expires February 15, 2025);

- Environmental Protection Agency (effective July 5, 2023, expires January 5, 2025); and
- Federal Emergency Management Agency (effective August 1, 2023, expires February 1, 2025).

Summary of Funding Programs: The Agencies provide grants to the three Pacific Island territories of Guam, American Samoa, and CNMI via multiple funding programs, though total federal financial assistance to the Pacific Island territories is much less than 1% for each of the Agencies.

The majority of Department of the Interior (DOI) financial assistance awards to Pacific Island territories provide funding to state government agencies such as the Department of Homeland Security, Department of Public Works, Department of Power Authority, Department of Marine and Wildlife Resources, and Department of Port Administration. Examples of current DOI funded programs include, but are not limited to capital improvement projects, energy programs, maintenance and repair of roads, water and waste treatment facilities, and ports. The DOI provided \$97.2 million for infrastructure assistance to the Pacific Island territories in FY 2024.

For the Environmental Protection Agency (EPA), most of the funding provided as grants to the Pacific Island territories has been for drinking water and clean water infrastructure projects that are conducted by the Pacific Islands' drinking water and wastewater utilities, as well as other EPA-funded infrastructure projects. In FY 2024, EPA awarded the Pacific Island territories over \$327 million (which may include revisions to earlier grants) through EPA's various grant programs where infrastructure is an eligible activity and may be subject to BABA.

In FY 2024, the Department of Education awarded over \$32 million dollars in educational grant programs that could potentially be used for infrastructure spending that could be subject to domestic content requirements. The majority of this funding was provided as special education grants to states, with much smaller amounts having been awarded to rehabilitation services grants to states, special education grants for infants and families, and higher education aid programs.

The Federal Emergency Management Agency (FEMA) awarded the Pacific Island territories just over \$8 million dollars in FY 2024 through different subagency grants. Note that disaster funding is not subject to BABA and is therefore not included.

In FY 2024, the Department of Energy (DOE) awarded the Pacific Island territories \$15.7 million dollars to support energy efficiency and conservation and grid resilience projects.

The Department of Agriculture (USDA) awarded more than \$39 million to the Pacific Island territories over the course of FY 2022 and FY 2023. This was largely driven by grants for the Rural Utilities Service and the Forest Service.

The Department of Housing and Urban Development (HUD) spent approximately \$15.4 million in FY 2024 for public housing maintenance and repair and community planning and development.

3. Waiver Justification

The Agencies propose a public interest waiver to waive BABA requirements for infrastructure projects located within the Pacific Island territories. The duration of the waiver is five (5) years from the effective date of the final waiver.

Economies in the Pacific Island territories do not have available land nor sufficient local demand to sustain local manufacturing. In addition, the Pacific Island territories are over 5,000 miles from the mainland United States and must therefore largely rely on established regional supply chains from east Asia, Australia, and New Zealand. Accordingly, in the Pacific Island territories most goods, equipment, materials, and supplies rely on shipping with associated timelines (which could have long lead times) and have unpredictable shipping fuel cost fluctuations. Moreover, sourcing materials from the United States leads to additional shipping fees and longer lead times, thus significantly extending construction activity schedules and delaying project completion dates.

The Agencies have reviewed the U.S. International Trade Commission's 2023 report *U.S.- Pacific Islands Trade and Investment: Impediments and Opportunities*, which noted the geographic isolation, high costs of shipping, dependence on imports, regulatory barriers, limited economies of scale, and environmental challenges as persistent barriers that the Pacific Island territories face. Additionally, the lack of available land on the Pacific Island territories creates barriers for developing new manufacturing and assembly facilities. Those infrastructure products readily available and produced locally on the Pacific Islands, such as aggregates and cement products, are mostly statutorily exempt from BABA requirements. For these reasons, the Agencies are concerned that complying with the domestic sourcing requirements in BABA may increase already elevated project timelines and costs.

The Agencies propose to find that it is in the public interest to waive the BABA requirements for Federal financial assistance awarded for infrastructure projects in the Pacific Island territories. The Agencies are concerned that failure to provide these remote recipients such flexibilities could perpetuate systemic barriers to opportunities and benefits and limit the Agencies' abilities to deliver resources and benefits equitably to all in these Pacific Island territories. Additionally, the Agencies would need to dedicate significant staff and contractor time to assist extremely remote communities with implementing domestic sourcing requirements for the first time and to support with increased workload to process project-specific waivers.

In considering this waiver, the Agencies engaged in many outreach efforts to Pacific Island territories through meetings, webinars, workshops, and other technical assistance to help them better understand the BABA requirements and to gauge the impacts of BABA implementation.

On August 1, 2024, DOI, along with the Department of Transportation, hosted a listening session regarding BABA implementation in the Pacific Island territories during the Territorial Climate and Infrastructure Workshop. The workshop included many representatives from various Territorial agencies/departments who commented that BABA requirements would result in significant cost increases and delays in project timelines. This feedback was also shared from these Territory stakeholders during prior year workshops. In addition, in February 2023, DOI hosted the Interagency Group on Insular Areas, when the Governors of the Territories expressed

concerns related to BABA implementation and potential project delays and requested that federal agencies be flexible in these requirements, including consideration of waivers. DOI also conducted five (5) webinars on BABA requirements, where participants identified significant challenges of applying BABA requirements in a small, geographically remote territory.

The other Agencies have also conducted outreach efforts to the Pacific Island territories and received similar feedback. For example, the Pacific Island territories have cited their isolated location in the Western Pacific and reliance on ocean freight as the only mode of transporting commodities to the island as creating significant challenges in obtaining materials from domestic sources, with impacts on both project costs and delivery schedules. The territories have also indicated that shipping construction materials from the continental United States raises shipping costs by approximately 30 percent above the cost to ship directly to the islands from Asia. In addition, representatives from American Samoa have indicated to FEMA, that “As a containerized community, our territories depend on goods, equipment, materials, and supplies to be imported.” They further stated that “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 result in a significant cost savings to the grantors.

Anticipated Program Impacts Absent a Waiver: Without the waiver, infrastructure projects located within the Pacific Island territories will 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, manufacturers may not be able to assure on-time delivery of compliant products and associated projects in the Pacific Island territories could potentially face unreasonable scheduling uncertainty.

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

Under OMB Memorandum M–24-02, 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 Agencies have concluded that this assessment is not applicable to this waiver. As the Agencies periodically review this waiver, they will perform additional market research as BABA implementation progresses to better understand the market in the Pacific Island territories and to limit the use of waivers caused by dumping of foreign-sourced products.

5. Summary of Comments

This notice posted for fifteen (15) days on December 11, 2024, and closed on December 26, 2024, satisfies the requirement to publish any proposed BABA waiver and provide the public with a reasonable period of time for notice and comment.

Agencies received 19 comments related to the proposed waiver with input from Territories, non-governmental organizations, private enterprise, and citizens. All but two of the commenters supported the proposed waiver. A summary of the comments is provided below:

Several comments raised concerns with the list of excluded manufactured products from this waiver for national security purposes. Some cited that excluding certain broadband products impacts the flexibility in sourcing materials that are crucial for timely project execution. Another comment noted similar concerns related to video surveillance equipment. Agencies found that the exclusion list includes those manufactured products that need to be handled on a case-by-case basis due to national security and other important public interests. Exclusion of certain manufactured products from this waiver does not mean that purchases from non-domestic sources may not be waived for individual projects. For public infrastructure projects in the Pacific Island Territories involving excluded manufactured products, recipients have the option to request a project-level nonavailability waiver for Agency consideration. Further awards which have already been obligated under the Department of Commerce's National Telecommunications and Information Administration's (NTIA) Broadband Equity, Access, and Deployment (BEAD) Program or Tribal Broadband Connectivity Programs (TBCP or TBCP 2) are, in general, covered by existing BABA waivers, including the BEAD, TBCP, and TBCP 2, that can be found on the Department of Commerce website: <https://www.commerce.gov/oam/build-america-buy-america>.

One comment noted that while the waiver of Buy America provisions for steel in U.S. territories is a practical measure to address procurement challenges, it is essential to enforce ASTM compliance for all materials. Nothing in this waiver would exempt the need for products to meet required standards, including ASTM standards.

Two of the commentors objected to the waiver of the BABA requirements outright, noting that granting a waiver undermines the Buy America Preference, and will likely lead to reliance on foreign sourced goods. The Agencies determined that this waiver is consistent with the public interest because it reduces the administrative burden to potential Federal financial assistance recipients, including extremely remote communities in the Pacific Island territories, where complying with domestic sourcing requirements presents geographical obstacles and challenges that could significantly negate the benefits of their projects and could perpetuate systemic barriers to opportunities and benefits equitably to all federal financial assistance recipients within the territories..

Another opposing comment objected to the waiver's 15 day comment period, noting that additional time is needed to evaluate the impact of this waiver. OMB Memorandum M-24-02 provides that before issuing a final waiver, the Federal awarding agency must make the proposed waiver and the detailed written explanation publicly available in an easily accessible location on a website designated by the Federal awarding agency and OMB. The Federal agency must also provide a period of not less than 15 calendar days for public comment on the proposed waiver; and that general applicability waivers are subject to a minimum 30-day public comment period *when reviewed for modification or renewal*. This notice was posted for fifteen (15) days from December 11 through December 26, 2024 and satisfies the requirement to publish any proposed BABA waiver and provide the public with a reasonable period of time for notice and comment.

After considering these comments, the Agencies are finalizing the waiver as proposed.

For more information on the Buy America Preference, please reference www.doi.gov/grants/buyamerica or MadeinAmerica.gov.

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