



FEMA

May 22, 2023

Public Interest: Minor Components of Iron and Steel Products General Applicability Waiver of Section 70914(a) of Pub. 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 minor components within an iron and steel product. This proposed waiver will permit FEMA federal financial assistance for infrastructure projects to use non-domestically produced miscellaneous iron and steel minor components, comprising no more than 5% of the total material cost of an otherwise domestically produced iron and steel product. This waiver does not exempt the whole iron and steel product from the BABAA requirement, and the primary iron and steel components of the product must be produced domestically. If this waiver is approved, FEMA will issue guidance outlining the application of the Minor Components Waiver.

DATES: If approved, this waiver will be effective upon final approval date and will remain in effect for all awards or funding obligated to recipients and subrecipients of FEMA federal financial assistance infrastructure projects for a period of five years.

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 at FEMA-Grants-BuyAmerica@fema.dhs.gov by **June 6, 2023**.

SUPPLEMENTARY INFORMATION:

I. Build America, Buy America Act

The Build America, Buy America Act (BABAA) was enacted on November 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 procurement 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 U.S. at a sufficient and reasonably available quantity or satisfactory quality, or (3) including 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 at the webpage at this link:

<https://www.fema.gov/grants/policy-guidance/buy-america>.

III. Public Interest in a General Applicability Waiver of Buy America Provisions for Minor Components

Under this waiver, FEMA proposes to permit FEMA federal financial assistance for infrastructure projects to use non-domestically produced miscellaneous iron and steel minor components comprising no more than five percent of the total material cost of an otherwise domestically produced iron and steel product. This waiver would not exempt the whole iron and steel product from the BABAA requirement, and the primary iron and steel components of the product must be produced domestically.

The purpose of this waiver is to reduce the administrative burden to iron and steel manufacturers who have reported significant compliance challenges for products that are otherwise domestically produced, but contain miscellaneous iron and steel minor components, the origin of which cannot be reliably tracked or determined. Due to these challenges, communities receiving FEMA financial assistance are generally unable to obtain a range of BABAA-compliant iron and steel products that contain 100% domestic components. Absent this waiver, these communities would incur a significant administrative burden attempting to source these products and, if unavailable, pursuing project-specific waivers. Manufacturers typically purchase these low-cost, miscellaneous minor components in bulk and, absent this waiver, would incur excessive costs associated with establishing and managing duplicative inventories for production lines.

The BABAA requirements apply to 23 FEMA financial assistance programs. FEMA

award recipients are anticipated to receive more than \$4.1 billion with fiscal year 2022 funding through the Agency's programs where infrastructure is an eligible activity and may be subject to the Buy America preference. FEMA only anticipates using this waiver for a subset of iron and steel products where product manufacturers would greatly benefit from this waiver.

FEMA consulted with iron and steel manufacturers regarding the need for, and scope of a potential minor components waiver for iron and steel products. Based on feedback provided by industry stakeholders, the 5%-threshold for minor components is reasonable and aligns with BABAA minor components waivers across other federal agencies, including the Environmental Protection Agency and the United States Department of Agriculture. Manufacturers stressed the importance of consistency across federal agencies, which keeps costs down as manufacturers do not need to establish and maintain multiple product lines to meet multiple requirements.

Manufacturers also stated that absent a waiver, miscellaneous iron and steel components are difficult to acquire from domestic sources or their origins are unknown. The lack of a minor components waiver for iron and steel products would prevent manufacturers from being able to offer BABAA-compliant products for infrastructure projects subject to BABAA, forcing a recipient to request a waiver for non-domestically sourced product.

The minor components waiver is appropriate for FEMA programs because it would reduce administrative burden by not requiring manufacturers to track and count these minor components in otherwise compliant domestic steel and iron products. Finally, a minor components waiver will provide consistency across agencies and domestic preference requirements, helping to keep product costs down for critical infrastructure projects.

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 need to allocate additional personnel to process project-specific waivers. A minor components waiver allowing miscellaneous iron and steel minor components of unknown origin up to five percent of the total material cost of an otherwise domestically produced iron and steel product allows the agency to dedicate critical personnel to the compliance activities of higher value BABAA compliant items. Failure to provide recipients and manufacturers flexibilities with minor components purchases may limit the agency's ability 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.

8. Issued Six-Month General Applicability-Adjustment Period Waiver to allow time for FEMA to develop policies and procedures to implement the BABAA requirements. This waiver was issued on July 1, 2022 and expired on January 1, 2023.
9. Issued general applicability waivers for small projects and a de minimis waiver (5% of material costs subject to BABAA, not to exceed \$1 million).

In addition to the actions above, a minor components 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 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*, 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. FEMA has concluded that this assessment is not applicable to this waiver, as this waiver is not based in the cost of foreign-sourced products. FEMA will perform additional market research during the duration of the waiver and consult with International Trade Administration 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 important 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. 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 necessary to determine its continued utility, applicability and relevance with FEMA’s mission and goals consistent with the IIJA, and OMB Memorandum M-22-11.

VI. Solicitation of Comments on the Waiver

As required under Section 70914 of BABAA, FEMA is soliciting comment from the public 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. Please refer to the “**DATES**” and “**ADDRESSES**” sections of this notice for information on submission of comments.

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Federal Emergency Management Agency

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