



4910-9X

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

[Docket No. DOT-OST-2022-0124]

Notice That the Build America, Buy America Requirement for Construction Materials Applies Effective November 10, 2022, and Notice of Proposed Waiver of Buy America Requirements for De Minimis Costs, Small Grants, and Minor Components

ACTION: Notice; Request for Comments.

SUMMARY: The Department of Transportation (DOT) seeks to maximize the use of American-made products and materials in all federally funded projects as part of the Biden-Harris Administration's implementation of the Build America, Buy America Act (the Act), which was included in the historic Bipartisan Infrastructure Law (BIL). The implementation of this law will transform the Department's approach to domestic procurement requirements. The Department is taking three concurrent actions: (1) DOT is not extending its temporary waiver for construction materials, making that requirement applicable effective November 10, 2022; (2) in a separate notice, DOT is proposing a waiver for narrow categories of contracts and solicitations; and (3) in this notice, DOT is proposing a narrow waiver to allow DOT and its assistance recipients to focus their domestic sourcing efforts on products that provide the greatest manufacturing opportunities for American workers and firms and reduce delays in the delivery of important transportation infrastructure projects that provide jobs and promote economic growth. DOT is seeking comments on whether a waiver of Buy America requirements under the Act and related domestic preference statutes administered by DOT and its Operating Administrations (OAs) should be granted in the public interest for de minimis costs, small grants, and minor components. .

DATES: Comments must be received by November 20, 2022.

ADDRESSES: Please submit your comments to the U.S. Government electronic docket site at <http://www.regulations.gov>, Docket: DOT-OST-2022-0124.

Note: All submissions received, including any personal information therein, will be posted without change or alteration to <http://www.regulations.gov>. For more information, you may review DOT's complete Privacy Act Statement published in the Federal Register on April 11, 2000 (65 FR 19477).

FOR FURTHER INFORMATION CONTACT: For questions about this notice, please contact Darren Timothy, DOT Office of the Assistant Secretary for Transportation Policy, at darren.timothy@dot.gov or at 202-366-4051. For legal questions, please contact Michael A. Smith, DOT Office of the General Counsel, 202-366-2917, or via e-mail at michael.a.smith@dot.gov.

SUPPLEMENTARY INFORMATION:

Background

In January 2021, President Biden issued Executive Order (EO) 14005, titled Ensuring the Future is Made in All of America by All of America's Workers. The EO states that the United States Government "should, consistent with applicable law, use terms and conditions of Federal financial assistance awards and Federal procurements to maximize the use of goods, products, and materials produced in, and services offered in, the United States." DOT is committed to ensuring strong and effective Buy America implementation consistent with EO 14005.

On November 15, 2021, President Biden signed the Bipartisan Infrastructure Law (BIL) enacted as the Infrastructure Investment and Jobs Act, Pub. L. No. 117-58. The BIL includes the Act, Pub. L. No. 117-58, div. G §§ 70901-27, which greatly strengthens Made in America standards by expanding the coverage and application of Buy America preferences in Federal

financial assistance programs for infrastructure. The Act requires that the head of each covered Federal agency shall ensure that “none of the funds made available for a Federal financial assistance program for infrastructure ... may be obligated for a project unless all of the iron, steel, manufactured products, and construction materials used in the project are produced in the United States.” BIL § 70914(a). However, Federal agencies may waive the application of Buy America in certain circumstances, including where the agency finds that applying the Buy America requirement “would be inconsistent with the public interest.” BIL § 70914(b)(1).

The Act required the Office of Management and Budget (OMB) to issue guidance to assist in applying the Act’s requirements. BIL § 70915. On April 18, 2022, OMB issued memorandum M-22-11, “Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure” (“Implementation Guidance”). Section VII(b) of the Implementation Guidance, *Waiver Principles and Criteria*, states that “Federal agencies may wish to consider issuing a limited number of general applicability public interest waivers in the interest of efficiency and to ease burdens for recipients.” Implementation Guidance at p. 10. The Implementation Guidance goes on to provide examples of certain types of public interest waivers an agency may consider issuing that would support that goal, including infrastructure project purchases below a *de minimis* threshold; purchases made under small Federal grant awards; and miscellaneous minor components within iron and steel products. As the Implementation Guidance notes, such waivers could help “ensure that recipients and Federal agencies make efficient use of limited resources, especially if the cost of processing the individualized waiver(s) would risk exceeding the value of the items waived.” Implementation Guidance at p. 11.

The Act also provides that the preferences under Section 70914 apply only to the extent that a domestic content procurement preference as described in Section 70914 does not already apply to iron, steel, manufactured products, and construction materials. BIL § 70917(a)–(b). Federal financial assistance programs administered by DOT’s Operating Administrations (OAs)

are subject to a variety of mode-specific statutes that apply particular Buy America¹ requirements to iron, steel, and manufactured products, including 49 U.S.C. § 50101 (FAA); 23 U.S.C. § 313 (FHWA and NHTSA); 49 U.S.C. § 22905(a) (FRA); 49 U.S.C. § 5323(j) (FTA); and 46 U.S.C. § 54101(d)(2) (MARAD). Recent annual appropriations acts have also required DOT to apply the Buy American Act (41 U.S.C. Chapter 83) to funds appropriated under those acts², where a mode-specific statute is not in place. These statutes also allow for waivers of the Buy America requirements to be issued when doing so is deemed to be in the public interest.

Certain DOT OAs currently do not apply Buy America preferences to *de minimis* purchases or project costs under their existing statutory requirements. For example, the Federal Transit Administration (FTA) exempts purchases of \$150,000 or less by statute. 49 U.S.C. 5323(j)(13). The Federal Highway Administration's (FHWA) minimum threshold for Buy America to apply is \$2,500 (the total amount of iron and steel products as delivered to the project) or 0.1% of the total contract amount, whichever is greater. 23 CFR 635.410(b)(4). However, other DOT OAs, including the Federal Railroad Administration (FRA), the Federal Aviation Administration (FAA), and the Maritime Administration (MARAD) do not have similar exceptions by statute or regulation.

In DOT's experience, the development and substantiation of individual Buy America waivers requires recipients to determine the availability or nonavailability of domestically sourced items. Such efforts can help ensure that potential domestic suppliers are not overlooked and, where waivers may be appropriate, help send signals to industry about market opportunities. However, when the cost of the items is relatively low, suppliers may have a lesser incentive to track and document the country of origin of those items in a manner sufficient to meet the

¹ In this notice, references to "Buy America" include domestic preference laws called "Buy American" that apply to DOT financial assistance programs.

² For example, Section 409 of the Transportation, Housing and Urban Development, and Related Agencies Appropriations Act, 2022 states that "no funds appropriated pursuant to this Act may be expended by an entity unless the entity agrees that in expending the assistance the entity will comply with sections 2 through 4 of the Act of March 3, 1933 (41 U.S.C. §§ 8301-8305, popularly known as the "Buy American Act")."

requirements of the Buy America statutes applied to Federal assistance, which can lead to increased administrative burdens even as the potential impact of applying domestic preferences in those cases may be lower. Focusing on higher value items can also allow Federal agencies and their assistance recipients to focus their domestic sourcing efforts on products that provide the greatest manufacturing opportunities for American workers and firms and reduce delays in the delivery of important transportation infrastructure projects that provide jobs and promote economic growth.

Transportation infrastructure projects use a variety of iron and steel items, manufactured goods, and construction materials. Typical iron and steel items subject to Buy America preferences include structural and reinforcing steel incorporated into pavements, bridges, and buildings (such as maintenance facilities); steel rail; rolling stock (such as buses and trains); and other equipment. Manufactured products may include airfield lighting and navigational aids; ties and ballast; traffic control systems; fare collection and other electronic systems; and mooring bollards, fenders, and gate operating systems. Construction materials include non-ferrous metals, plastic and polymer-based products, glass, lumber, and drywall, as well as materials³ that are explicitly exempted from being considered construction materials under the Act.

Proposed Waiver and Request for Comments

DOT is proposing to use its authority under Section 70914(b)(1) to waive the Act's Buy America preferences for iron and steel, manufactured products, and construction materials used in infrastructure projects funded under DOT-administered financial assistance programs for iron, steel, manufactured products, and construction materials under a single financial assistance award for which:

- The total value of the non-compliant products is no more than the lesser of \$1,000,000 or 5% of total allowable costs under the Federal financial assistance award;

³ See BIL section 701917(c). Exempted materials include cement and cementitious materials, aggregates such as stone, sand, or gravel, and aggregate binding agents or additives.

- The size of the Federal financial assistance award is below \$500,000; or
- The non-domestically produced miscellaneous minor components comprise no more than 5 percent of the total material cost of an otherwise domestically produced iron or steel product.

The basis for this proposal is that applying Buy America preferences to iron, steel, manufactured products, and construction materials below these thresholds would be inconsistent with the public interest. If issued, the waiver would be applicable to awards that are obligated on or after the effective date of the waiver. The Department requests comment on whether such a waiver would be warranted. DOT also specifically seeks comment on the proposed percentage and dollar thresholds for applying the waiver, including whether those thresholds should be higher or lower than the levels in the proposal.

Because many DOT-administered financial assistance programs are also subject to program-specific domestic preference requirements, the waiver proposed in this notice would also apply to those requirements. Specifically, the waiver would also be an exercise of DOT's authority to issue public interest waivers under 23 U.S.C. § 313(b)(1), 49 U.S.C. § 5323(j); 46 U.S.C. § 54101(d)(2)(B)(i)(I), 49 U.S.C. § 22905(a)(2), 49 U.S.C. § 50101(b)(1), and 41 U.S.C. Chapter 83.

In developing this proposal, DOT considered different thresholds for applying the waiver to small grants. While DOT makes federal assistance through discretionary and formula awards at a variety of dollar amounts, the vast majority of its assistance funding is provided in larger sums to transportation infrastructure projects. Reviewing 19,000 awards totaling \$83 billion in FY 2022 that may be covered by DOT's domestic preference requirements, awards for an amount under \$500,000 represented 48% of the 19,000 total, but just 1.4% of the \$83 billion. Awards under \$250,000 accounted for 37% of the 19,000 total and 0.5% of the \$83 billion. Given the scope and scale of DOT's infrastructure assistance programs, the Department believes that it is appropriate to apply the waiver to awards below the higher \$500,000 threshold, as this

would significantly reduce administrative burdens while still ensuring that Buy America requirements would be applied to almost all DOT assistance funding. DOT seeks comment on the proposed dollar threshold for applying the waiver to small grants.

DOT believes that waiving the domestic preference requirements for lower-cost items purchased for infrastructure projects under the Act and the DOT-administered Buy America statutes referenced above will support the goals of E.O. 14005 to maximize domestic content in Federal financial assistance awards. Doing so will allow the Department and its assistance recipients to make efficient use of its limited resources to focus their efforts on higher-value products with more significant opportunities to develop a domestic supply base and create well-paid jobs for American workers.

Section 70914(d) of the Act requires that any general applicability waivers issued under section 70914(b) must “be reviewed every 5 years after the date on which the waiver is issued,” and prescribes a process for that review that includes an opportunity for public notice and comment and publication in the Federal Register of a determination on whether to continue or discontinue the waiver at that time. Accordingly, this proposed general applicability waiver would be subject to such a review within five years of its issue date. However, DOT would reserve the right to modify or shorten the duration of this waiver if it obtains information before the end of the five-year period indicating the waiver is no longer in the public interest.

The Implementation Guidance also provides that, before granting a waiver in the public interest, to the extent permitted by law, agencies shall 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.” Implementation Guidance at p. 12. E.O. 14005 at Section 5 includes a similar requirement for “steel, iron, or manufactured goods.” However, because the public interest waiver that DOT is proposing in this notice is not based on consideration of the cost advantage

of any foreign-sourced steel, iron, or manufactured product content, there is not a specific cost advantage for DOT to consider.

DOT will consider all comments received in the initial 15-day comment period during our consideration of the proposed waiver, as required by section 70914(c)(2) of the BIL. Comments received after this period, but before notice of our finding is published in the Federal Register, will be considered to the extent practicable. Section 117 of the SAFETEA-LU Technical Corrections Act of 2008 (Pub. L. 110-244, 122 Stat. 1572) also requires an additional 5-day, comment period after FHWA publishes a waiver finding notice. Comments received during that period will be reviewed, but the finding will continue to remain valid. Those comments may influence DOT/FHWA's decision to terminate or modify a finding.

Issued in Washington, DC on: November 4, 2022.

Polly E. Trottenberg,

Deputy Secretary.

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