



DEPARTMENT OF TRANSPORTATION

Office of the Secretary

[Docket No.: OST-2023-0111]

Waiver of Buy America Requirements for the Pacific Island Territories and the Freely

Associated States

ACTION: Notice.

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 historic Bipartisan Infrastructure Law (BIL). In this notice, DOT is taking action to finalize a temporary general applicability waiver of the requirements of section 70914(a) of the Build America, Buy America Act (BABA), included in BIL, and related domestic preference statutes administered by DOT and its Operating Administrations (OAs) for federal financial assistance awarded by DOT and its OAs for infrastructure projects located in the Commonwealth of Northern Mariana Islands (CNMI), Guam, and American Samoa, collectively referred to as the “Pacific Island territories.” The waiver also applies to discretionary grant assistance provided by DOT and its OAs to the Freely Associated States (the Republic of Palau, Republic of the Marshall Islands, and Federated States of Micronesia) in the Pacific that are subject to a domestic preference statute. As it applies to the Freely Associated States, the waiver does not include BABA, which only applies to infrastructure projects in the United States and its territories. The waiver will provide time for DOT to collect and analyze evidence to determine if a more targeted waiver of these requirements is in the public interest. The waiver allows time for DOT and its OAs to offer technical assistance to potential assistance recipients in the remote communities in the Pacific

Island territories and Freely Associated States. The waiver will be reviewed prior to its expiration.

DATES: The waiver is applicable to awards that are obligated on or after **[INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER]** until March 1, 2025.

FOR FURTHER INFORMATION CONTACT: For questions about this notice, please contact Elizabeth Fox, DOT Office of the Assistant Secretary for Transportation Policy, at elizabeth.fox@dot.gov or at 202-981-2838. For legal questions, please contact Jennifer Kirby-McLemore, DOT Office of the General Counsel, 405-446-6883, or via e-mail at jennifer.mclemore@dot.gov.

SUPPLEMENTARY INFORMATION:

Background

The Buy America preferences set forth in section 70914(a) of BABA included in BIL require that all iron, steel, manufactured products, and construction materials used for infrastructure projects in the United States under federal financial assistance awards be produced in the United States.

Under section 70914(b) and in accordance with the Office of Management and Budget (OMB)'s Memorandum M-24-02, Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure, DOT may waive the BABA application in any case in which it finds that: (i) applying the domestic content procurement preference would be inconsistent with the public interest; (ii) types of iron, steel, manufactured products, or construction materials are not produced in the U.S. in sufficient and reasonably available quantities or of a satisfactory quality; or (iii) the inclusion of iron, steel, manufactured products, or construction materials produced in the U.S. will increase the cost of the overall project by more than 25 percent. All waivers must have a written explanation for the proposed determination; provide a period of not less than fifteen (15) calendar days for public

comment on the proposed waiver; and submit the proposed waiver to the OMB Made in America Office (MIAO) for review to determine if the waiver is consistent with policy.

BABA 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)¹ are subject to a variety of mode-specific statutes that apply specific Buy America² requirements to iron, steel, and manufactured products, including 49 U.S.C. 50101 (FAA); 23 U.S.C. 313 (FHWA); 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 acts,³ where a mode-specific statute is not in place. These statutes also allow for waivers of the Buy America requirements to be issued when the DOT determines that doing so is in the public interest.

DOT and its OAs provide financial assistance to the three Pacific Island territories of Guam, American Samoa, and CNMI through both discretionary grants and allocated programs, including assistance programs for highways and bridges, public transportation, airports, and port facilities. The Freely Associated States (the Republic of Palau, Republic of the Marshall Islands, and Federated States of Micronesia) in the Pacific region are also eligible recipients of discretionary grants under FAA’s Airport Improvement Program (AIP).

Over five years from FY 2018 to FY 2022, DOT OAs provided over \$340 million in financial assistance for 160 capital projects in the Pacific Island territories under various

¹ DOT OAs that provide or administer financial assistance covered under this proposed waiver include the Federal Aviation Administration (FAA); Federal Highway Administration (FHWA); Federal Transit Administration (FTA); and the Maritime Administration (MARAD).

² In this notice, references to “Buy America” include domestic preference laws called “Buy American” that apply to DOT financial assistance programs.

³ 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”).”

programs where infrastructure is an eligible activity and may be subject to BABA or other DOT existing Buy America requirements. FAA also provided \$88 million in AIP discretionary grants to the Freely Associated States in the Pacific region for 20 projects over that same time period.

Economies in the Pacific Islands are over 5,000 miles from the mainland United States and must import products via air or sea. These economies have few local heavy manufacturers and rely largely on established regional supply chains from east Asia, Australia, and New Zealand. Most goods, equipment, materials, and supplies are imported and rely on shipping with associated timelines and unpredictable shipping fuel costs fluctuations. Moreover, materials sourced from the United States lead to additional shipping fees and longer lead times, thus significantly extending construction activity schedules. Lastly, ongoing gaps in supply chain availability impact lead times for materials, increasing project timelines. For these reasons, DOT is concerned that complying with Buy America requirements may increase already elevated project time and costs—particularly in the short run—and seeks time to better understand the local manufacturing footprint and the balance of equities for residents of the Pacific Island territories. DOT is aware that substantial changes to shipping and supply chains to incorporate domestic sourcing requirements in the Pacific Island territories could take multiple years to establish.

In considering this waiver, DOT consulted with the relevant Federal assistance programs in the respective OAs, including the regional offices in those agencies that directly administer DOT funding programs in the Pacific Island territories and Freely Associated States. DOT also relied on other communications that it has received from stakeholders in those territories. For example, CNMI and Guam 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 two 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.

Other Federal agencies have also conducted outreach efforts to the Pacific Island territories and received similar feedback. For example, representatives from American Samoa have indicated to the Federal Emergency Management Agency 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.

ISSUANCE OF THE PROPOSED WAIVER AND DISCUSSION OF COMMENTS

RECEIVED

On August 9, 2023, DOT published a proposed Buy America waiver for projects located within the Pacific Island territories of CNMI, Guam, or American Samoa and funded under DOT-administered financial assistance programs in the Federal Register 88 FR 53949. DOT received five comments on the proposed waiver. Three of the comments were supportive of the waiver, while two opposed the waiver.

The opposing commenters noted that there are existing opportunities to purchase both US made equipment and steel in the Pacific Island territories. One commenter noted they have supplied BABA compliant equipment to Guam in the recent past. The other commenter noted that the domestic steel industry has capacity to support infrastructure in the Pacific Island territories.

The supportive commenters noted that higher costs and longer lead times are barriers to Buy America compliance in the Pacific Island territories. Additionally, higher cost estimates were cited as a reason for grant applications being less competitive with other states. Similarly,

one commenter noted they have experienced considerable risk and uncertainty when bidding due to the limited time manufacturers and suppliers can hold steel pricing quotes and noted that in the recent past several projects have gone through the Invitation for Bid procurement process and received proposals that greatly exceed the grant funding allocation. The commenters also noted the impacts of fluctuating shipping costs add to the overall cost and uncertainty around procurement.

DOT acknowledges that there are current opportunities for purchase of Buy America compliant products in the territories; however, DOT also recognizes that the purchase of those compliant products may result in substantially higher costs and require longer lead times to procure, leading to impacts on both project competitiveness and project delivery. Moreover, the stated intent of the waiver is to provide time for DOT to collect and analyze evidence to determine if a more targeted waiver of these requirements is in the public interest and allow time for DOT and its OAs to offer technical assistance to potential assistance recipients in the remote communities in the Pacific Island territories and Freely Associated States. Thus, during this temporary general applicability waiver period, DOT will come to better understand the local manufacturing footprint, consider how to best balance the equities for residents of the Pacific Island territories, and work with other federal agencies on ways to help ease supply chain challenges for domestic sources in those territories.

One commenter also noted that the region's strategic locations should be guarded against technology that could be detrimental to their security. Another commenter also recognized the strategic importance of their location, but noted that a waiver is necessary to allow purchases even from countries who are in strategic defense alliances with the United States. DOT recognizes the importance of security considerations for port equipment purchases, particularly for ship to shore cranes, and the recently announced Biden-Harris Administration

effort to bolster port security.⁴ The Department also recognizes that the issues extend to U.S. ports more broadly, beyond those in the Pacific Island territories. As a result, DOT has chosen to exempt ship to shore cranes from the waiver and will address domestic supply issues for these critical assets through separate actions. DOT will exercise additional oversight for assistance agreements involving ports during the period the waiver is active.

One opposing commenter noted that the waiver would be inconsistent with Congressional intent and Administration policy because it would not be maintaining and strengthening the existing DOT Buy America requirements. DOT believes that this waiver will help ensure that all Americans, including those in the Pacific Island Territories, are able to access the benefits provided by the once in a generation investment in infrastructure provided by BIL. Providing these short-term flexibilities to projects in that region will help alleviate systemic barriers to opportunities that have limited DOT's ability to deliver resources and benefits equitably to all in these territories. The waiver will allow DOT to work with other infrastructure agencies to ensure that the shipping and supply chains to the Pacific Island territories integrate domestic sourcing requirements in a feasible and equitable way over the longer term.

One supporting commenter noted that they believe that the challenges they outlined in complying with Buy America requirements fully support a waiver for at least 18 months, potentially permanently. DOT believes that the time frame is appropriate and will reevaluate if a more targeted waiver is in the public interest as it gathers additional information.

DOT-assisted infrastructure projects located within the Pacific Island territories and Freely Associated States are expected continue to experience challenges with product delivery, availability, reliability, and project scheduling without the waiver. Infrastructure project schedules rely on readily available products delivered within reasonable timeframes. Due to the extreme shipping distances required for products produced in mainland United States and due to

⁴ <https://www.whitehouse.gov/briefing-room/statements-releases/2024/02/21/fact-sheet-biden-harris-administration-announces-initiative-to-bolster-cybersecurity-of-u-s-ports/>

the lack of existing local product supply networks for these products, manufacturers may not be able to assure on-time delivery of compliant products. As a consequence, associated projects in the Pacific Island territories and Freely Associated States may face unreasonable scheduling uncertainty. The waiver will help grant recipients establish rules and procedures to manage Buy America requirements. Furthermore, the waiver will provide recipients more options to efficiently complete projects.

Uncertainties regarding capacity, shipping, and supply networks make domestic sourcing in the Pacific Island territories and Freely Associated States challenging for assistance recipients, shippers, and DOT staff in the short run. DOT is taking steps to understand opportunities to leverage existing shipping and transportation processes to make domestic sourcing more feasible over the longer term.

FINDING ON THE WAIVER

Based on all the information available to the Agency, DOT finds that it is in the public interest to issue a temporary general applicability public interest waiver of the requirements of 70914(a) of the Build America, Buy America preferences for iron, steel, manufactured products, and construction materials used in infrastructure projects located within the Pacific Island territories of CNMI, Guam, or American Samoa and funded under DOT-administered financial assistance programs. The waiver applies to recipients located in CNMI, Guam or American Samoa of all DOT-administered financial assistance programs, including those subject to program-specific domestic preference requirements. The waiver applies to all 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. However, this waiver does not apply to purchases of ship to shore cranes.

DOT is issuing this temporary general applicability public interest waiver under the following authorities; 70914(b) of BIL, 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. 50101(b)(1), and 41 U.S.C. chapter 83. Under those DOT authorities, the proposed waiver would also apply to projects in the Freely Associated States (the Republic of Palau, Republic of the Marshall Islands, and Federated States of Micronesia). As it applies to the Freely Associated States, the waiver does not include BABA, which only applies to infrastructure projects in the United States and its territories.

The duration of the waiver is from the effective date [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER] until March 1, 2025. The proposed waiver had a duration of 18 months from the effective date of the final waiver. DOT is issuing the final waiver with a sunset date of March 1, 2025 to better align with the coordinated strategy for the issuance of this waiver type across the Federal government. DOT will review this waiver prior to its expiration to assess whether it remains necessary to the fulfillment of DOT's missions and goals and consistent with applicable legal authorities, such as BABA, Executive Order 14005, 2 CFR part 184, and OMB Memorandum M-24-02. DOT may, based on the results of that review, terminate the waiver, or take action to develop a new waiver in consultation with the MIAO.

Section 117 of the SAFETEA-LU Technical Corrections Act of 2008 (Pub. L. 110-244, 122 Stat. 1572) also requires an additional five-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.

Christopher Coes,

Acting Under Secretary for Policy.