



DEPARTMENT OF TRANSPORTATION

Office of the Secretary

[Docket No.: DOT-OST-2024-0129]

Notice of Proposed Waiver of Buy America Requirements for the Pacific Island Territories and the Freely Associated States

ACTION: Notice; request for comments.

SUMMARY: The Department of Transportation (DOT) is seeking comments on a proposed general applicability public interest waiver of the requirements of section 70914(a) of the Build America, Buy America Act (BABA) and related domestic preference statutes administered by DOT and its Operating Administrations (OAs) for Federal financial assistance awarded 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 proposed waiver would also apply to discretionary grant assistance provided by DOT to the Freely Associated States (the Republic of Palau, Republic of the Marshall Islands, and Federated States of Micronesia) in the Pacific that is subject to a domestic preference statute (which does not include BABA, as that statute only applies to the United States and its territories). The waiver will remain in effect for five years after the effective date of the final waiver.

DATES: Comments must be received by [INSERT DATE 15 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

ADDRESSES: Please submit your comments to the U.S. Government electronic docket site at <https://www.regulations.gov>, Docket: DOT-OST-2024-0129.

Note: All submissions received, including any personal information therein, will be posted without change or alteration to <https://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 Elizabeth Fox, DOT Office of the Assistant Secretary for Transportation Policy, at elizabeth.fox@dot.gov or at 202-366-4540. 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 BABA¹ 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 Guidance Memorandum M-24-02, Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure, DOT may waive the application of BABA requirements 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.

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. IJA section 70917(a)–(b). Federal financial assistance programs administered by DOT's Operating Administrations

¹ The Build America, Buy America Act was included as title XI, subtitle A of the Infrastructure Investment and Jobs Act (IIJA) (Pub. L. 117-58).

(OAs)² are subject to a variety of mode-specific statutes that apply particular Buy America³ 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,⁴ 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 Department 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).

During FY 2024, DOT OAs provided more than \$132.7 million in financial assistance for at least 20 capital projects in the Pacific Island territories under various programs where infrastructure is an eligible activity and may be subject to BABA or other DOT existing Buy America requirements. DOT also provided \$47.6 million in AIP discretionary grants to the Freely Associated States in the Pacific region for 3 projects during that time.

On April 29, 2024, DOT issued a temporary general applicability waiver of the requirements of section 70914(a) of BABA and related domestic preference statutes administered by DOT and its OAs. The DOT waiver was part of an interagency effort, led by the

² 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).

³ In this notice, references to "Buy America" include domestic preference laws referred to "Buy American" that apply to DOT financial assistance programs.

⁴ For example, section 409 of the Transportation, Housing and Urban Development, and Related Agencies Appropriations Act, 2024 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')."

OMB, to provide time for DOT and other infrastructure agencies to collect and analyze evidence to determine if a long-term 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. The temporary waiver expires on March 1, 2025.

During the temporary general applicability waiver period, DOT has worked with OMB's Made in America Office (MIAO) and with other infrastructure agencies to better understand the local manufacturing environment, consider how to best balance the equities for residents of the Pacific Island territories and domestic suppliers, and explore ways to potentially ease supply chain challenges for infrastructure projects in those territories. 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 largely rely on regional supply chains from east Asia, Australia, and New Zealand. Most goods, equipment, materials, and supplies are imported and rely on shipping with extended timelines and unpredictable shipping cost fluctuations. Moreover, materials sourced from the mainland U.S. lead to additional shipping fees and longer lead times, thus significantly extending construction activity schedules.

Along with other Federal agencies, DOT has 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 DOT remains concerned that complying with the domestic sourcing requirements may increase already elevated project time and costs.

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.

In August 2024, the U.S. Department of the Interior (DOI) hosted the third Territorial Climate and Infrastructure Workshop in Honolulu, HI, which included many representatives from various territorial agencies and departments. During the workshop, DOI and DOT led a session on the Build America, Buy America Act, during which many participants described the structural challenges the territories face in complying with Buy America requirements and the desire for relief due to the significant cost increases and delays in project timelines that would ensue. In addition, in February 2023, DOI hosted the Interagency Group on Insular Areas, at which 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.

Additionally, 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.

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 located within the Pacific Island territories of CNMI, Guam, or American Samoa and funded under DOT-administered financial assistance programs, on the basis that doing so would be in the public interest. The proposed waiver would apply to all awards obligated after the effective date and, in the case of awards obligated prior to the effective date, the proposed waiver would apply to all expenditures for non-domestic iron, steel, manufactured products, and construction materials incurred after the effective date. The proposed waiver would not apply to the following products that have been identified by OMB as critical supply chains that warrant special consideration:

- 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.⁵

- 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.⁶
 - 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 advisories⁷

While these items would be excluded from this general waiver, DOT recognizes that purchases of these items from non-domestic sources as part of a federally-assisted project may be warranted in certain circumstances. For those individual projects, DOT and its OAs will consider requests for potential waivers of BABA or other Buy America requirements on a case-by-case basis, with special attention to any strategic security issues that may be associated with those purchases.

DOT specifically requests comment on the items that have been identified by OMB as critical supply chains that warrant special consideration and whether any of those items should be removed from the list, for example broadband equipment. If items are removed from this list

⁵ <https://www.fcc.gov/laboratory-division/equipment-authorization-approval-guide/equipment-authorization-system#step2>

⁶ <https://www.fcc.gov/oet/ea/rfdevice>

⁷ 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>

following the public comment period, then those products would be included within the scope of the final waiver.

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. 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).⁸

The proposed duration of the waiver is five years after the effective date of the final waiver. The Department will periodically review this waiver to assess whether it remains necessary to the fulfillment of DOT's missions and goals and consistent with applicable legal authorities, such as the IIJA, Executive Order 14005, and OMB M-24-02. The Department may, based on the results of that review, terminate the waiver, or take action to develop a new waiver in consultation with the MIAO.

Without the waiver, DOT-assisted 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

⁸ The proposed waiver under section 70914(b)(1) of BABA excludes projects in the Freely Associated States because the requirements under section 70914(a) are applicable only to infrastructure projects "in the United States" and, therefore, the BABA requirements do not apply to projects in the Freely Associated States. However, airports located in the Freely Associated States are eligible recipients under FAA's Airport Improvement Program, and the Buy American requirements specific to that program would thus also apply to the Freely Associated States.

projects. As a result, the Pacific Island territories could potentially face unreasonable scheduling uncertainty.

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. DOT’s analysis has concluded that this assessment is not applicable to this waiver.

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 IIJA. Comments received after this period, but before notice of our finding is published in the Federal Register, will be considered to the extent practicable. Pursuant to section 117 of the SAFETEA-LU Technical Corrections Act of 2008 (Pub. L. 110-244, 122 Stat. 1572), if FHWA makes a finding that a waiver is appropriate under 23 U.S.C. 313(b), FHWA will also invite public comment on this finding for an additional 5 days following the date of publication of the finding. 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.

Polly E. Trottenberg,

Deputy Secretary.

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