

U.S. Department of Education

General Applicability Public Interest Waiver of the Build America, Buy America Act Requirements Under Formula and Discretionary Grants to the U.S. Pacific Island Territories of the Commonwealth of the Northern Mariana Islands, Guam, and American Samoa

1. Summary

Agency: U.S. Department of Education

Proposed Waiver: The U.S. Department of Education (the Department) is implementing a temporary general applicability public interest waiver of the requirements of Section 70914(a) of the Build America, Buy America Act (BABAA) included in the Infrastructure Investment and Jobs Act (IIJA) (Pub. L. No. 117-58) for federal financial assistance awarded for infrastructure projects located in the U.S. Pacific Island territories of the Commonwealth of Northern Mariana Islands (CNMI), Guam, and American Samoa, collectively referred to as “Pacific Island Territories.”

This waiver provides the time for the Department to collect and analyze evidence to determine if a more targeted waiver of these requirements is in the public interest. The waiver also allows time for the Department to offer training and technical assistance to formula and discretionary grant recipients in the remote communities in the Pacific Island Territories. The waiver will remain in effect for 12 months after January 2, 2024, the effective date of the final waiver and will be reviewed as often as necessary.

Applicability: This waiver permits the use of non-domestic iron, steel, manufactured products, and construction materials in infrastructure projects located within the Pacific Island Territories of CNMI, Guam, or American Samoa when the total Federal award exceeds the Simplified Acquisition Threshold, currently set at \$250,000. Federal financial assistance awards below \$250,000 are covered by the Department’s [De Minimis, Small Grants, Minor Components Waiver.pdf \(ed.gov\)](#). The Department applies the waiver to all infrastructure grants obligated after the effective date and, in the case of grants obligated prior to the effective date of this waiver, the waiver will apply to all expenditures for non-domestic iron, steel, manufactured products, and construction materials incurred after the effective date.

2. Solicitation of Public Comments and Public Comments Summary

In accordance with section 70914 of BABAA, this waiver was published for a 15-day public comment period on November 27, 2023, which expired at 5:00 p.m. on December 12, 2023. A total of two comments were received in response to the proposed waiver. One commenter opposes the waiver as being contrary to the intent of BABAA. The second commenter supports BABAA but does not explicitly state support or opposition for the waiver.

The Department thoroughly reviewed and considered each comment. As further described in the Waiver Justification section, the Pacific Islands are over 5,000 miles from the mainland United States with few local heavy manufacturers; thus, they must largely rely on established regional supply chains from east Asia, Australia, and New Zealand. For these reasons, the Department is concerned that complying with the domestic sourcing requirements in BABAA may increase

already elevated project time and costs—particularly in the short run. It is therefore necessary that the Department collect and analyze evidence to determine if a more targeted waiver of the BABAA requirements is in the public interest. Additionally, the waiver would also allow time for the Department to offer BABAA related training and technical assistance to formula and discretionary grant recipients in remote communities within the Pacific Island Territories. After review, the Department determined that the submitted comments do not warrant revisions to the waiver; thus, the waiver was not revised in response to comments received. The Department, therefore, issues this waiver with no substantive changes.

3. Background

The Buy America preference set forth in section 70914(a) of BABAA included in the IIJA, 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) 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* and the BABAA related *Guidance for Grants and Agreements* ([88 FR 57750](#)), the Department may waive the BABAA 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.

The Department provides grants to the three Pacific Island Territories, CNMI, Guam, and American Samoa. Most of this funding is for non-infrastructure related activities and projects; however, under formula and discretionary grants awarded under the Department's BABAA compliant programs to the Pacific Islands' territorial government entities, including territorial agencies, infrastructure is limited to construction, major remodeling, and broadband infrastructure. From October 1, 2022, through July 10, 2023, the Pacific Island territories received 40 million dollars through the Department's following grant programs in which infrastructure is an eligible activity and may be subject to BABAA:

1. State Grants - B (611) Program, AL 84.027A, Formula - Program Purpose: Provides grants to States to assist them in providing special education and related services to all children with disabilities.
2. Strengthening Institutions Program, AL 84.031A, Discretionary - Program Purpose: Provides grants to eligible colleges and universities to strengthen their management and fiscal operations and to assist such institutions to plan, develop, or implement activities including endowment building to strengthen the academic quality of their institutions.
3. State Vocational Rehabilitation Services Program, AL 84.126A, Formula - Program Purpose: Provides grants to assist States in operating comprehensive, coordinated, effective, efficient, and accountable programs of vocational rehabilitation (VR); to

assess, plan, develop, and provide VR services for individuals with disabilities, consistent with their strengths, resources, priorities, concerns, abilities, capabilities, and informed choice so they may prepare for and engage in an employment outcome.

4. Infants and Toddlers/Families (Part C), AL 84.181A, Formula - Program Purpose: Provides grants to States to assist them to implement and maintain a Statewide, comprehensive, coordinated, multidisciplinary, interagency system to make available early intervention services to infants and toddlers with disabilities and their families.

This funding supports approximately 16 individual projects that may require individual BABAA waivers.

To date, the Department has accomplished the following related to its implementation of BABAA.

1. In accordance with BABAA, the Department issued its report to Congress identifying its infrastructure programs.
2. The Department implemented a General Applicability Adjustment Period Waiver that allowed it to develop BABAA related policies, procedures, guidance, and training. In accordance with this waiver, the Department implemented BABAA effective October 1, 2022.
3. The Department promulgated agency-wide policies, procedures, guidance, and frequently asked questions addressing the establishment of:
 - a. BABAA language to be included in Notices Inviting Applications and in other public notices addressing formula State Plan and formula grant application submission requirements, which explains that, if funded, grantees engaging in infrastructure under the announced program will be subject to the BABAA requirements;
 - b. A BABAA Grant Award Notification condition requiring grantee compliance with BABAA requirements; and
 - c. Internal and external processes that address grantee waiver request submissions, reviews, and approvals.
4. The Department established its BABAA Waiver website in which the public may access waiver related information including approved agency level and grantee waivers.
5. BABAA related internal and external trainings were conducted and continue to be conducted, internal and external computer-based trainings were developed, and a training and outreach plan was implemented to ensure ongoing training needs are met.
6. A Tribal consultation was held in accordance with Executive Order 13175, *Consultation and Coordination with Indian Tribal Governments*, to aid the Department

in gauging BABAA impact within Indian Tribes and to aid in identifying training and technical assistance needs.

7. The Department implemented, as final, its OMB cleared Public Interest De Minimis, Small Grants, and Minor Components agency level waiver.

4. Waiver Justification

The Department implements a public interest waiver to waive BABAA requirements in infrastructure projects located within the Pacific Island Territories of CNMI, Guam or American Samoa. The duration of the waiver is 12 months from the effective date of the final waiver.

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 largely rely 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 cost 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 thereby increasing project timelines. For these reasons, the Department is concerned that complying with the domestic sourcing requirements in BABAA 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. The Department 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.

These economic and logistical constraints were confirmed by the market research that other Federal agencies performed. For example, in early 2023, the Federal Emergency Management Agency conducted research through a Request for Information from the Pacific Island Territories, i.e., CNMI, Guam, and American Samoa, to assess the impacts of BABAA.

CNMI and Guam responded that shipping costs from Asia are lower due to geographic distance and other cost efficiencies. They commented that there is a general lack of supply chains from the U.S. compared to Asia resulting in longer lead times from the U.S. for product delivery which leads to longer construction timelines. Standard products like typhoon-rated glass windows and aluminum shutters cost significantly more if sourced domestically. For example, representatives stated, “the cost of aluminum is double if sourced from the U.S. Mainland.”

Representatives from American Samoa responded that: “As a containerized community, our territories depend on goods, equipment, materials and supplies to be imported.” They said: “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 be a significant cost savings to the grantors.

In addition to considering market research and consultations conducted by other Federal agencies, the Department will conduct its own outreach and consultations to gauge BABAA’s effect on the Pacific Island Territories by gathering additional information about supply chains, costs, and other impacts, and to aid in identifying training and technical assistance needs.

The Department affirms that it is in the public interest to waive the BABAA requirements for grants awarded for infrastructure projects in the Pacific Island Territories while it works to gather more information on supply chains, costs, and other impacts. This waiver is critical to provide the time for the Department to collect and analyze evidence to determine if a more targeted waiver of these requirements is in the public interest. The waiver also allows time for the Department to offer training and technical assistance to reduce the administrative burden to potential grant recipients in the remote communities in the Pacific Island Territories where complying with the domestic sourcing requirements in BABAA presents challenges. The Department is concerned that failure to provide these remote infrastructure projects such flexibilities could perpetuate systemic barriers to opportunities and benefits and limit the Department's ability to deliver resources and benefits equitably to the Pacific Island Territories. Additionally, the Department may need to dedicate significant staff and contractor time to assist extremely remote communities with implementing preference requirements for the first time and to support the increased workload to process project-specific waivers. The Department is interested in determining if these concerns justify a targeted waiver and whether its initial assessment may or may not be borne out by evidence.

5. Impact Absent the Waiver

Without this waiver, infrastructure projects located within the Pacific Island Territories may 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 U.S. would have to ship products to the Pacific Island Territories and due to the lack of existing local product supply networks for these products, associated projects in the Pacific Island Territories could potentially face unreasonable scheduling uncertainty.

On the other hand, this waiver will likely help grant recipients establish rules and procedures to manage the BABAA requirements as well as time to identify opportunities for regional production.

Uncertainties regarding capacity, shipping, and supply networks make domestic sourcing in the Pacific Island Territories challenging for grant recipients, shippers, and Department staff in the short run. The Department will engage with the Pacific Island Territories and other Federal agencies to understand opportunities to leverage existing shipping and transportation processes to make domestic sourcing feasible over the longer term.

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


7. Duration of Waiver

The duration of the waiver is 12 months after January 2, 2024, the effective date of the waiver. The Department will review this waiver at least once prior to the expiration of the waiver, to assess whether it remains necessary to the fulfillment of the Department’s missions and goals and is consistent with applicable legal authorities, such as the IJA, Executive Order 14005, 88 FR

57750, 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.

8. Contact

For questions about this waiver, please contact Pedro Romero, U.S. Department of Education, 400 Maryland Avenue SW, Room LBJ 5A220, Washington, D.C. 20202. Phone: (202) 453-7886. Email: Pedro.Romero@ed.gov. For more information about the Build America, Buy America preference, please visit the Department's [Build America Buy America Waivers \(ed.gov\)](#) website or the [MadeinAmerica.gov](#) website.

A handwritten signature in black ink, reading "Roberto J. Rodríguez", is positioned above a horizontal line.

Roberto J. Rodríguez,
Assistant Secretary for Planning, Evaluation and
Policy Development.