

U.S. Department of Education De Minimis, Small Grants and Minor Components Waiver

TITLE:

U.S. Department of Education Public Interest Waiver: De Minimis, Small Grants and Minor Components Buy America Provisions as Applied to Recipients of Department of Education Federal Financial Assistance

SUMMARY:

In accordance with the Build America, Buy America Act (“BABAA”), the U.S. Department of Education (ED) establishes a department-wide public interest waiver effective July 31, 2023, for De Minimis, Small Grants, and Minor Components to recipients of Federal financial assistance from application of the Buy America Domestic Content Procurement Preference provisions (“Buy America Preference”) as applied to the iron, steel, manufactured products, and construction materials requirement of BABAA. ED establishes this waiver not as an alternative to increasing domestic production, but as an important tool to implement the Buy American provisions in the most efficient manner. In Fiscal Year (FY) 2022, ED awarded 16,516 grants. Of this total only 1,595 or 10% were awarded under the programs that may allow for infrastructure projects. As of January 31, 2023, of the current FY (i.e., FY 2023), ED has awarded 1,160 new grants. Of this total only 145 or 13% were awarded under the programs that may allow for infrastructure projects. In accordance with BABAA, ED proposes that the departmentwide De Minimis, Small Grants and Minor Components waiver is in the public interest because the waiver will assist ED’s infrastructure grant programs to keep projects moving forward and prevent immediate delays to critically important projects. Additionally, the waiver will allow for ED and its recipients to focus on BABAA implementation that will have the greatest impact.

The waiver applies to obligations after the effective date of this waiver, July 31, 2023. In addition, in the case of funds obligated by ED on or after October 1, 2022, the expiration date of ED’s adjustment period waiver, but prior to the effective date of this waiver, this waiver will apply to expenditures on or after the effective date of this waiver.

ED will review this waiver within five years of this waiver’s issue date, or more often as necessary, to determine its continued applicability and relevance with ED’s missions and goals consistent with the Infrastructure Investment and Jobs Act (IIJA), Executive Order 14005, Ensuring the Future Is Made in All of America by All of America’s Workers, and the 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.

FOR FURTHER INFORMATION CONTACT:

The Education Program Contact listed in box 3 of the Grant Award Notification.

SUPPLEMENTARY INFORMATION:

I. Build America, Buy America Act

The BABAA was enacted on November 15, 2021, as part of the IIJA, Public Law 117-58. With the passage of the IIJA, Federal financial assistance projects for infrastructure must comply with domestic content procurement preference requirements established in the “Build America, Buy America Act” at Section 70911 et seq. Buy America’s domestic content procurement preference applies to all the iron, steel, manufactured products, and construction materials used for infrastructure projects under an award. These requirements took effect on May 14, 2022.

Under Section 70914(b), ED has authority to waive the application of a domestic content procurement preference when (1) the 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 United States at a sufficient and reasonably available quantity or satisfactory quality, or (3) inclusion of domestically produced materials and products would increase the cost of the overall project by more than 25 percent. 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.

II. Public Interest Waivers: De Minimis, Small Grants and Minor Components of Build America, Buy America Provisions

ED establishes that the De Minimis, Small Grants, and Minor Components waiver is in the public interest to allow ED award recipients to focus their efforts on their projects and for ED to focus BABAA implementation efforts in the most impactful ways. ED believes that the cost of items acquired by its infrastructure projects exercising these waivers would be low but the administrative complexity of tracking them for compliance would be significant. This waiver is critical to ensure that agency infrastructure projects that are conducted through small grants, make purchases below a de minimis threshold, or utilize minor deviations for miscellaneous minor components within iron and steel products, sustain progress and reduce the burden on recipients.

The waiver is in the interest of efficiency, to ease burdens for ED recipients, avoid unnecessary costs, and avoid delays to projects. The waiver applies to new awards and amendments to existing awards obligating additional funds for infrastructure projects in accordance with Section 70935 of the IIJA and OMB Memorandum M-22-11. In FY2022, ED awarded approximately 16,516 new grants. Within this total only 1,595 or 10 % were awarded

under the programs that may allow for infrastructure projects. As of January 31, 2023, of the current FY (i.e., FY 2023), ED has awarded 1,160 new grants. Of this total only 145 or 13% were awarded under the programs that may allow for infrastructure projects. ED notes that most of these programs authorize a wide variety of activities in addition to infrastructure projects. Thus, the impact of this waiver could be smaller than the estimated amount of grants made because ED does not anticipate that all the grants awarded under these programs will engage in infrastructure. Recipients under these grants will be impacted by ED's De Minimis, Small Grants, and Minor Components waiver by refraining to implement within their construction and broadband infrastructure projects the Buy America Domestic Content Procurement Preference provisions, should they choose to exercise this waiver.

ED establishes a targeted and narrow focus for the following waivers and thresholds for programs at ED:

- The waiver for De Minimis infrastructure project purchases sets a threshold of 5% of total applicable project costs¹ up to a maximum of \$1,000,000. Once a Federal financial assistance recipient's total purchases of materials otherwise covered by the Buy America preference purchases reach 5 percent of applicable project costs or \$1,000,000, whichever is lower, all other applicable project purchases must comply with the Buy America preference. For example, if the applicable project costs total \$2,000,000, up to \$100,000 of costs for iron and steel, manufactured goods and construction materials would be exempt from BABAA. This waiver allows recipients of ED Federal financial assistance awards to focus their compliance efforts on the major components for their projects. Moreover, as noted in M-22-11, the De Minimis waiver helps to ensure that both recipients and ED make efficient use of limited resources and helps to prevent against the cost of processing individualized BABAA waivers exceeding the value of the items waived.
- The small grants waiver applies to awards with total federal funding at or below the Simplified Acquisition Threshold, which is currently set at \$250,000. This waiver allows recipients of ED funds to continue with projects without jeopardizing performance goals and reduce burden to ensure they make efficient use of limited resources. Under its infrastructure programs in FY 22, ED obligated 55 grants for \$250,000 for less. The total amount obligated to all grants of \$250,000 or less was \$10,790,774.12. ED anticipates obligating grants at approximately this number and amount in FY 23. If Federal financial assistance provided by ED is combined with other Federal financial assistance from other Federal agency and the total amount of Federal financial assistance in a single project is greater than the Simplified Acquisition Threshold, then the waiver shall not apply to the Federal financial assistance provided by ED.
- The minor components waiver allows minor deviations for miscellaneous minor iron and steel components within otherwise domestically manufactured iron and steel products. This waiver allows recipients of ED funds to use a non-

¹ Applicable project costs are defined as material costs subject to the Buy America preference.

domestically produced miscellaneous minor iron and steel components comprising no more than 5% of the total material cost of an otherwise domestically produced iron and steel product. The minor components waiver will reduce administrative burden on manufacturers that seek to ensure that their iron and steel products comply with BABAA but may have small iron or steel components within their product that are non-domestic or of unknown origin. The recipient would be expected to provide analysis for ED review.

III. Assessment of Cost Advantage of a Foreign-Sourced Product

Under OMB Memorandum M-22-11, “Memorandum for Heads of Executive Departments and Agencies,” 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. ED has concluded that this assessment is not applicable to this waiver, as this waiver is not based on the cost of foreign-sourced products.

IV. Duration of the Waiver

The waiver applies to obligations after the effective date of this waiver, July 31, 2023, for a period of five years (sunset date July 31, 2028). In addition, in the case of funds obligated by ED on or after October 1, 2022, but prior to the effective date of this waiver, this waiver applies to expenditures on or after the effective date of this waiver. ED will review this waiver within five years of this waiver’s issue date, or more often as necessary, to determine its continued applicability and relevance with ED’s missions and goals consistent with the IJJA, Executive Order 14005, and the OMB Memorandum M-22-11.

V. Public Comments

Under Section 70914 of BABAA, ED published its proposed De Minimis, Small Grants and Minor Components. A total of six comments were received in response to the proposed waiver. One commenter supports the waiver; another supports the waiver while also recommending that infrastructure projects costing \$250K or below that are funded under Federal grants receiving more than \$250K be exempt; two commenters support BABAA while neither explicitly state that they support or do not support the waiver; one commenter does not support the waiver and instead suggests that the Federal government provide enough support and funding so that American businesses can buy American; and one commenter shares the impending challenges with implementing BABAA within small remodeling projects but the commenter does not explicitly communicate her support or lack of support for the waiver.

ED thoroughly reviewed and considered each of the comments and consulted with OMB MIAO regarding the request that infrastructure projects costing \$250K or below that are funded under Federal grants receiving more than \$250K also be exempt. ED determined after its review

and consultation with OMB MIAO that the submitted comments do not warrant revisions to the waiver; thus, the waiver was not revised in response to comments received. ED, therefore, issues this waiver with no substantive changes.



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