

## **GENERAL APPLICABILITY WAIVER OF BUILD AMERICA, BUY AMERICA PROVISIONS**

**AGENCY:** National Endowment for the Humanities

**ACTION:** Issuance of General Applicability Waiver under the *Build America, Buy America Act* (P.L. 117-58 §§ 70901-70927)

**DATE:** November 1, 2022

**SUMMARY:** In accordance with the Build America, Buy America Act (BABA or the Act) ([Public Law 117-58 §§ 70901-70953](#)), and after consultation with the Office of Management and Budget and solicitation of public comment, the National Endowment for the Humanities (NEH) is issuing a general applicability adjustment period waiver of the domestic content procurement preference set forth at Section 70914(a) of the Act. The waiver is effective for a period of six months, beginning on the date set forth above (“Effective Date”).

The Act provides that after May 14, 2022, NEH may not obligate any of the funds made available for infrastructure projects “unless all of the iron, steel, manufactured products, and construction materials used in the project are produced in the United States.”<sup>1</sup> NEH has determined that this general applicability waiver will provide the agency with sufficient time to identify how to comply with and implement BABA, will avoid immediate delays and disruptions to existing NEH infrastructure projects, and is in the public interest. NEH is using this waiver as an important tool to enable compliance with BABA, which promotes investment in the U.S. domestic manufacturing base, strengthens critical supply chains, and positions our workers and businesses to compete and lead globally in the 21st century.

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<sup>1</sup> BABA § 70914(a).

## **FOR FURTHER INFORMATION CONTACT:**

Please submit requests for further information to [BABAInfo@neh.gov](mailto:BABAInfo@neh.gov).

## **SUPPLEMENTARY INFORMATION:**

### **I. Build America, Buy America**

The Build America, Buy America Act<sup>2</sup> was enacted on November 15, 2021, as part of the Infrastructure Investment and Jobs Act. The Act establishes a domestic content procurement preference for federal infrastructure programs, including the construction, alteration, maintenance, or repair of buildings and real property in the United States.<sup>3</sup> The Act requires that, not later than 180 days after the date of enactment, none of the funds made available for infrastructure projects may be obligated by NEH “unless all of the iron, steel, manufactured products, and construction materials used in the project are produced in the United States.”<sup>4</sup> Section 70912 of BABA further defines a “project” to include “the construction, alteration, maintenance, or repair of infrastructure in the United States” and includes buildings and real property within the definition of “infrastructure,” among other items.

### **II. The National Endowment for the Humanities**

Consistent with 2 CFR § 200.322 and Executive Order 14005, NEH encourages all federal award recipients, to the extent permitted by law, to maximize their use of goods, products, and materials produced in the United States when procuring goods and services under Federal awards.

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<sup>2</sup> Public Law 117-58 §§ 70901–70952.

<sup>3</sup> BABA § 70912(5)(K), (7).

<sup>4</sup> *Id.* § 70914(a).

In accordance with Section 70913 of BABA, NEH prepared a report that identified two federal assistance programs for infrastructure as defined by the Act: Promotion of the Humanities Challenge Grants (Federal Assistance Listing 45.130), and the Promotion of the Humanities Division of Preservation and Access (Federal Assistance Listing 45.149). NEH identified these programs as inconsistent with Section 70914 of the Act and therefore “deficient” within the meaning of Section 70913(c) of the Act. NEH submitted the report to Congress and the Office of Management and Budget (OMB), and published it in the Federal Register ([87 FR 3129](#)) on January 20, 2022.

NEH has taken the following actions since then:

1. Included the Act’s domestic preference requirements in applicable Notices of Funding Opportunity, developed a term with implementing language to include in award documents, and provided related technical assistance to applicants and recipients
2. Established a [Notice of Build America, Buy America Act and Waiver Requests webpage](#)
3. Identified active offers and awards that may be subject to the Act’s domestic content procurement preference
4. Considered potential public interest waivers that may be applicable to these programs
5. Provided ongoing technical assistance to applicants and recipients regarding BABA requirements

NEH recognizes that BABA is a key part of reinvestment and growth in domestic manufacturing and is committed to aligning its programs with the public interest priorities set forth in BABA.

### **III. Waivers**

Section 70914(b)(1) of the Act authorizes NEH to waive the application of the domestic content procurement preference when application of the preference would be inconsistent with the public interest. Per Section 70914(c), NEH made this waiver publicly available on NEH's website and [www.madeinamerica.gov](http://www.madeinamerica.gov), and allowed not less than 15 days for public comment. Additional information on this waiver is available at [https://www.neh.gov/neh\\_buildamericabuyamerica\\_waivers](https://www.neh.gov/neh_buildamericabuyamerica_waivers).

### **IV. Public Interest in a General Applicability Waiver of Buy America Provisions**

NEH requires this waiver in the public interest because it will provide the time to develop internal and external policies, procedures, and guidance needed to enable the agency in preparing to fully comply with the Act. The scope of this waiver covers all iron and steel products, manufactured goods, and construction materials. The waiver will allow NEH a transition period to implement the new requirements of the Act and avoid immediate delays and disruptions to infrastructure projects receiving NEH financial assistance. NEH identified 32 awards and 46 offers, from fiscal years 2019-2022, that are scheduled to receive incremental funding that will be adversely affected without this waiver. The applications for these awards and offers were submitted in response to Notices of Funding Opportunity (NOFOs) issued prior to BABA being signed into law. Many of these projects are at an advanced state of design or

are currently conducting construction activities. Implementation of BABA for these existing recipients will be difficult, if not impossible. NEH has not obligated any funding that would be subject to BABA since May 13, 2022. This waiver is necessary to avoid bringing NEH's infrastructure programs to a standstill and jeopardizing approximately \$29 million in funding reserved to incrementally fund these awards. NEH anticipates obligating approximately \$14,331,664 of funding for infrastructure within the six-month adjustment period.

NEH has communicated the requirements of BABA to recipients and prospective applicants that could be subject to it. Communications have been in the form of webinars, individual consultations, and email correspondence. Future prospective applicants will be informed of BABA requirements in NOFOs and may consult directly with NEH if they have additional questions.

NEH has determined this waiver is supportive of BABA implementation because it will enable NEH to focus on awards, projects, and products that provide the greatest opportunity to support an increase in domestic manufacturing. Specifically, NEH will use the adjustment period to consider general applicability waivers, including a time-limited general applicability waiver for projects in an advance state of design or construction for offers, awards that will still receive incremental funding after the adjustment period ends, and ongoing general applicability waivers for de minimis and small projects. NEH will also identify and establish administrative processes, certification, and documentation standards; develop the capacity necessary for compliance with the Act's requirements; avoid unnecessary disruption of award recipients' work on federally assisted infrastructure projects; and, as appropriate, engage with the National

Council on the Humanities, recipients, subrecipients, and the general public regarding the Act. NEH believes these activities will advance BABA compliance and achieve important policy goals and benefits in the long term.

By the end of this adjustment period waiver, NEH expects to have addressed the impact on awards issued prior to the Act, and have internal and external processes, policies, and resources in place to implement BABA. Moving forward, applicants that have applied to infrastructure NOFOs since March 2022 will be expected to implement BABA requirements unless they fall under the proposed de minimis or small project waiver or submit a request for NEH to consider an individual waiver for unreasonable cost or non-availability.

#### **V. Assessment of Cost Advantage of a Foreign-Sourced Product**

Pursuant to Section 5 of Executive Order 14005, OMB Memorandum M-22-11, *Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure*, April 18, 2022, directs agencies 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” before issuing a waiver in the public interest. This assessment was not applicable to this waiver because the adjustment period waiver is not related to the cost of foreign-sourced products.

## **VI. Limited Duration of the Waiver**

NEH is committed to the successful implementation of the Act's domestic content procurement preference across its infrastructure programs. This waiver is effective from the Effective Date it is issued and will remain in effect for all Federal financial assistance for infrastructure projects for six months after its final publication, unless NEH extends the waiver by subsequent public notice.

## **VII. Solicitation of Comments on the Waiver**

As required under Section 70914 of BABA, NEH made the proposed adjustment period waiver available for public review for fifteen days beginning August 24, 2022. NEH received no comments during this period. NEH has determined that the waiver is in the public interest, because it will allow the agency time to develop and implement the process, policy, and resources necessary to implement BABA.