

**PUBLIC INTEREST PREVIOUSLY PLANNED PROJECTS GENERAL
APPLICABILITY WAIVER OF BUILD AMERICA, BUY AMERICA PROVISIONS
FOR CHALLENGE GRANTS PROGRAM**

AGENCY: National Endowment for the Humanities

ACTION: Issuance of General Applicability Waiver under the Build America, Buy America Act

DATE: November 20, 2023

SUMMARY: In accordance with the Build America, Buy America Act (BABA) (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 Public Interest Previously Planned Projects general applicability waiver of the domestic content procurement preference set forth at Section 70914(a) of BABA for certain contracts within awards obligated under NEH’s Infrastructure and Capacity Building Challenge (Challenge) Grants program. The waiver applies to Challenge grant program awards obligated on or after the Effective Date of this waiver that applied under Notice of Funding Opportunities (NOFOs) that did not include reference to BABA. The waiver allows an exception from the Buy America preference requirements for iron, steel, construction materials and manufactured products, for contracts that were entered into by August 30, 2023, under eligible awards. The waiver is effective for a period of two years, beginning on the date set forth above (“Effective Date”).

NEH seeks to maximize the use of American-made products and materials in all federally assisted projects as part of the Biden-Harris Administration’s implementation of the Build America, Buy America Act (BABA) ([Public Law 117-58 §§ 70901-70953](#)).

BABA requires 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.”¹ NEH has determined this Previously Planned Projects waiver strikes a reasonable balance between minimizing undue burdens for projects that have already entered construction contracts or issued solicitations and moving forward to fully implement the domestic content preference on NEH-funded infrastructure projects in a timely manner.

APPLICABILITY and DURATION: The waiver applies to Challenge grant program awards obligated on or after the Effective Date of this waiver that applied under Notice of Funding Opportunities (NOFOs) that did not include reference to BABA. The waiver allows an exception from the Buy America preference requirements for iron, steel, construction materials and manufactured products, for contracts that were entered into by August 30, 2023, under eligible awards. The duration of the waiver is two years from the Effective Date of this waiver.

FOR FURTHER INFORMATION CONTACT:

Please submit requests for further information to BABAInfo@neh.gov.

¹ Build America, Buy America Act § 70914(a).

SUPPLEMENTARY INFORMATION:

I. Build America, Buy America

The Build America, Buy America Act² (BABA) was enacted on November 15, 2021, as part of the Infrastructure Investment and Jobs Act. BABA 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.³ BABA requires that, no 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.”⁴ 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

NEH strongly 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, as required under [2 CFR § 200.322](#). NEH has been establishing a compliance process and guidance since BABA went into effect May 14, 2022, and OMB published [M-22-11, Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure](#) on April 18, 2022.

² Public Law 117-58, §§ 70901-53

³ Section 70912(5)(K) and (7)

⁴ Section 70914(a)

In accordance with Section 70913 of BABA, NEH prepared a report that identified two federal assistance programs that support infrastructure projects as defined by BABA: 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 BABA and therefore “deficient” within the meaning of Section 70913(c) of BABA. 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.

Since then, NEH has taken the following actions:

1. Since March 2022, included BABA’s domestic preference requirements in applicable NOFOs, developed a term with implementing language to include in award documents, and provided related technical assistance to applicants and recipients.
2. Established a Build America, Buy America Act and Waivers webpage at https://www.neh.gov/neh_buildamericabuyamerica_waivers.
3. Published an Adjustment Period Waiver, effective from November 1, 2022, to April 30, 2023.
4. Published Individual Waiver Request requirements and instructions on our Build America, Buy America Act and Waivers webpage at https://www.neh.gov/neh_buildamericabuyamerica_waivers.
5. Identified the estimated labor requirements and workload for processing individual waiver requests. NEH has also reached out to larger agencies regarding opportunities to establish inter-agency agreements to take advantage of existing expertise, contracts, and economies of scale.
6. Drafted a Small Projects Waiver based on the small acquisition threshold.

III. Waivers

Section 70914(b)(1) provides NEH with the authority to waive the application of a domestic content procurement preference when application of the preference would be inconsistent with the public interest. Per Section 70914(c), NEH must make the waiver publicly available on NEH's Build America, Buy America Act and Waivers webpage at https://www.neh.gov/neh_buildamericabuyamerica_waivers and the [Made In America Office](#) website for a public comment period of no fewer than 15 days.

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

NEH recognizes the importance of ensuring the use of domestically produced iron, steel, construction materials, and manufactured products in NEH-funded projects and the need to implement the domestic content preference requirements established by BABA in a way that does not delay delivery of projects that were sufficiently advanced before the requirements applied to NEH's funding under the Challenge Grants Program. Per [OMB Memorandum M-22-11, Section V](#), "agencies may consider whether public interest waivers may be needed to avoid undue increases in the time and cost of a project. Similarly, public interest waivers may be needed for awards and amendments made on or after May 14, 2022, where budgets for purchase of covered materials have already been agreed upon (including if materials have been ordered and construction has begun)."

Considering all the information available to NEH, the agency finds that it is in the public interest to issue a waiver of the domestic content preference for iron, steel, construction materials and manufactured products for recipients that applied under NOFOs that did not include a reference to the Build America, Buy America Act, and have entered into contracts or solicitations by August 30, 2023. In these circumstances, NEH recipients entered into contracts and conducted procurements with long lead times prior to BABA's effective date.

The purpose of covering contracts through August 30, 2023, is to provide recipients with reasonable time to complete procurements. Project sponsors and offerors have invested significant resources in such procurements, which are based on design and engineering conducted before the domestic content preference requirements went into effect. NEH estimates the waiver will cover 24 Challenge Grant grants (13 awards and 11 offers) for a total amount of approximately \$11,037,187 in federal matching funds. Of the 24 grants, 16 have ordered materials and construction activities are underway.

Conditional and Time-Limited Waiver

The Previously Planned Projects waiver is conditional and time limited. It covers recipients that applied to NOFOs that did not include the Build America Buy, America Act and who have entered into contracts by August 30, 2023. This is to allow for pre-existing contracts with work underway and for contracts that require long lead times to continue. The duration of this waiver is two years after the Effective Date of the waiver. Refer to the specifications listed in the “Applicability and Duration” section of this notice, for eligibility criteria for the waiver.

Timing of NEH Federal Matching Funds

Because NEH funds Challenge grants incrementally, many awards were not subject to BABA at the time of award but have or will become subject to BABA due to later funding. After NEH issues a Challenge grant offer, recipients must raise funds from third-party, nonfederal sources to meet the matching requirement. NEH will not award federal matching funds prior to the recipient certifying third-party, nonfederal funding and will only obligate match proportional to the amount of the recipient’s certified third-party, nonfederal funds. Awards are typically incrementally funded as third-party, nonfederal funding is raised and certified over the award period of performance.

NEH Challenge Projects

NEH funds some smaller nonprofit organizations that typically do not apply for federal assistance. Approximately 73 percent of recipients of Challenge grants are nonprofit organizations, 24 percent are colleges and universities of higher education, and three percent are state or local governments. Of the nonprofits, approximately 20 percent have an annual operating budget of less than \$1 million.

Most NEH infrastructure projects funded are small compared to other federal infrastructure investments. The average federal assistance for an NEH Challenge grant project is less than \$500,000 (\$446,611) and ranges from \$46,173 to \$750,000. Seventy-five percent of Challenge grant infrastructure projects are limited to historic preservation and restoration, ADA upgrades, renovation, and expansion, and the remaining 25 percent involve new construction or expansion of humanities-related facilities.

Examples of restoration and renovation projects are:

- CHA-264403-19: Awarded \$500,000 to the Christ Church Preservation Trust in Philadelphia, PA, for the restoration of the Christ Church steeple and supporting brick tower, and interior restoration of the upper level of the tower. Steeple restoration included repainting, wood restoration, re-gilding of the weathervane, and roofing. Work on the tower included restoration and brick replacement.
- CHA-261857-19: Awarded \$400,000 to Pellissippi State Community College in Strawberry Plains, TN, for renovation of a 9,038-square-foot space in a campus building into an educational and cultural resource center. The space would house an Appalachian

heritage collection, currently maintained in the college's main campus library, along with exhibits, class visits, and public events.

- CHA-268798-20: Awarded \$520,000 to the Lower Phalen Creek Project in Saint Paul, MN, to construct a 10,000-square-foot cultural and environmental interpretive center within the Bruce Vento Nature Sanctuary, a former brownfield site along the Mississippi River. The Wakan Tipi Center would educate the community about the natural and cultural history of the Wakan Tipi Cave, a Dakota sacred site that contains 2,000-year-old petroglyphs that depict Dakota origin stories, as well as other caves and features of the surrounding Lower Phalen Creek corridor.

Applying the domestic content preference requirements could be burdensome for organizations that have invested significant resources in procurements that are based on design and engineering conducted before the domestic content preference requirements went into effect.

Impacts of the Waiver

Without the Previously Planned Projects waiver, recipients would experience delays, work stoppage, and increased project costs. Requiring compliance with BABA's requirements for domestic content preference would be burdensome for projects that have already executed construction contracts. In these circumstances, application of the domestic content preference requirements could compel contract terminations and cause projects to be suspended while conducting new procurements.

The waiver will be used as a tool to support government-wide efforts to catalyze domestic manufacturing, resilient supply chains, and good jobs while successfully delivering a wide range of infrastructure projects. It will support the creation of resilient supply chains and

manufacturing base for critical products in the United States that will bring about investment in well-paying American manufacturing jobs and businesses. The creation of jobs in communities will also alleviate supply chain disruptions through cultivation of the domestic manufacturing base for a wide range of products commonly used across the infrastructure sectors but not yet made domestically.

Unlike in the past, Build America, Buy America waivers will send clear market signals, creating space for American firms to respond and eliminate the need for the waiver. The measure of success is investing in America's infrastructure while maximizing the use of Made in America goods.

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

Under [OMB Memorandum M-22-11](#) "agencies shall 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 granting a waiver in the public interest. This assessment is not applicable to this waiver, because the Previously Planned Project waiver is not related to the cost of foreign-sourced products.

VI. Limited Application Waiver

NEH is committed to the successful implementation of BABA's domestic content procurement preference across its infrastructure programs.

The waiver will remain in effect for two years after the Effective Date of this waiver.

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 October 6, 2023. NEH reached out to industry groups associated with project types that are more commonly seen under our programs and to all 24 organizations that would be impacted by the Previously Planned Project waiver. 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.