

PROPOSED GENERAL APPLICABILITY WAIVER OF BUILD AMERICA, BUY AMERICA PROVISIONS

AGENCY: National Endowment for the Humanities

ACTION: Notice

SUMMARY: In accordance with the Build America, Buy America Act (BABA or the Act) ([Public Law 117-58 §§ 70901-70953](#)), the National Endowment for the Humanities (NEH) is proposing a general applicability, adjustment period waiver of the domestic content procurement preference set forth at Section 70914(a) of the Act from the date this waiver is issued, and expiring six months after the final publication date of this waiver. 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.”¹ NEH proposes that this general applicability waiver is in the public interest and will provide the agency with sufficient time to identify how it will comply with and implement BABA.

DATES: Send comments on or before **September 8, 2022**.

The proposed waiver applies to awards with funding obligated on or after May 14, 2022, for a period of six months after final publication of this waiver.

ADDRESSES:

You may send comments by email to gencounsel@neh.gov.

Instructions:

Include “Proposed Transition Period General Applicability Waiver of Build America, Buy America Provisions” in the subject line of the email.

¹ BABA § 70914(a).

NEH may post comments it receives, or portions thereof, to the Notice of Build America, Buy America Act and Waiver Requests webpage at

[https://www.neh.gov/neh_buildamericabuyamerica_waivers, in its sole discretion.](https://www.neh.gov/neh_buildamericabuyamerica_waivers_in_its_sole_discretion)

FOR FURTHER INFORMATION CONTACT:

Elizabeth Voyatzis, Deputy General Counsel, Office of the General Counsel, National Endowment for the Humanities, 400 7th Street SW, Room 4060, Washington, DC 20506; (202) 606-8322; gencounsel@neh.gov.

SUPPLEMENTARY INFORMATION:

I. Build America, Buy America

The Build America, Buy America Act² 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.³ 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.”⁴

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.

² Public Law 117-58 §§ 70901–70952.

³ BABA § 70912(5)(K), (7).

⁴ *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 that time:

1. Included the Act’s domestic preference requirements in applicable Notices of Funding Opportunity, developed an award 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](#) at https://www.neh.gov/neh_buildamericabuyamerica_waivers.
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.

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 must make the waiver publicly available on

NEH's website and www.madeinamerica.gov, and allow not less than 15 days for public comment.

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

NEH is proposing this waiver in the public interest because it will assist the agency in preparing to fully comply with the Act. The scope of this proposed waiver will cover all iron and steel products, manufactured goods, and construction materials. The proposed 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 has identified 32 awards and 46 offers from fiscal years 2019 – 2022, scheduled to receive incremental funding will be adversely affected without this waiver. The applications for these awards and offers were submitted in response to Notices of Funding Opportunities (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 could be difficult, if not impossible. To date, NEH has not obligated any funding that would be subject to BABA. 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 that could be subject to BABA and prospective applicants. Communications have been in the form of webinars, individual consultations, and email correspondence. Future prospective applicants are informed

of BABA requirements in Notices of Funding Opportunity and may consult directly with NEH, if they have additional questions.

NEH believes this proposed 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 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 and 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 achieving important policy goals and benefits of BABA in the long term.

By the end of the adjustment period waiver, NEH expects to have addressed the impact on awards issued prior to BABA, and have an internal and external process, policy, and resources in place to implement BABA. Moving forward, applicants that have applied to infrastructure NOFOs since March 2022 are 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 granting a waiver in the public interest. This assessment is not applicable to this waiver because the proposed adjustment period 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 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 the Act, NEH is soliciting comment from the public on the proposed waiver. Refer to the Dates and Addresses sections of this notice for information on comment submission.