

**GENERAL APPLICABILITY WAIVER OF BUILD AMERICA, BUY AMERICA PROVISIONS FOR DE MINIMIS PURCHASES, SMALL GRANTS, AND MINOR COMPONENTS**

**AGENCY:** Office of the Chair, National Endowment for the Humanities

**ACTION:** Notice

**DATE:** March 19, 2024

**SUMMARY:** In accordance with the Build America, Buy America Act (BABA or the Act) (Public Law 117-58 §§ 70901-70953), and after solicitation of public comment, the National Endowment for the Humanities (NEH) is issuing a general applicability waiver of the Buy America domestic content procurement preference for iron, steel, construction materials, and manufactured products for de minimis purchases, small grants, and minor components within iron and steel products.

The waiver is effective for five years, beginning on the date set forth above (“Effective Date”). NEH will review the waiver as often as necessary to determine its continued relevancy.

NEH seeks to maximize the use of American-made products and materials in all federally assisted projects. 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.”<sup>1</sup> This waiver is in the public interest because the waiver will keep projects supported by NEH infrastructure grant programs moving forward and prevent immediate delays to critical projects. Additionally,

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<sup>1</sup> Build America, Buy America Act § 70914(a).

the waiver allows NEH recipients to focus on BABA implementation where it will have the greatest impact.

**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**

BABA 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>2</sup> The Act 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.”<sup>3</sup>

[2 CFR § 184.3](#) defines “infrastructure project” as “any activity related to the construction, alteration, maintenance, or repair of infrastructure in the United States regardless of whether infrastructure is the primary purpose of the project.” Section 70912 of BABA further 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

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<sup>2</sup> BABA § 70912(5)(K), (7)

<sup>3</sup> *Id.* § 70914(a)

procuring goods and services under federal awards, as required under [2 CFR § 200.322](#) and [2 CFR Part 184](#).

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 [www.madeinamerica.gov](http://www.madeinamerica.gov) and allowed no 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 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 reduces the administrative burden for recipients and federal agencies. OMB directs agencies in memorandum [M-24-02](#) section VI to ease the burden for recipients and agencies and ensure that recipients and Federal agencies make efficient use of limited resources, especially if the cost of processing the individualized waiver(s) would risk exceeding the value of the items waived. 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 de minimis purchases, small grants, and minor components within otherwise domestically manufactured iron and steel products.

The waiver enables recipients to focus their compliance efforts on major components of their projects, prevent immediate delays to urgent and important projects, allow recipients to continue to provide economic opportunity through innovation, and support the timely development of critical domestic public infrastructure. NEH believes that it is in the public interest to reduce the burden on recipients and NEH, a small federal agency, by waiving the domestic content procurement preference for awards and purchases that meet these criteria.

NEH issues a waiver for the following:

- **De Minimis Purchases:** NEH establishes a waiver of the BABA domestic content procurement requirement for otherwise covered federal financial assistance, totaling up to five percent of the total applicable project costs<sup>4</sup>, up to a maximum of \$1,000,000.<sup>5</sup> Once a recipient's total purchases of materials otherwise subject to BABA (iron, steel, manufactured products, and construction materials) reaches five percent of applicable project costs or \$1,000,000, whichever is lower, all other applicable project purchases must comply with the Buy America preference.
- **Small Grants:** NEH establishes a waiver of the BABA domestic content procurement requirement for small grants. The small grants waiver applies to Federal financial assistance awards at or below the Simplified Acquisition Threshold (SAT)<sup>6</sup>, which is currently \$250,000, that meet the following criteria: (1) the total Federal award does not exceed the SAT, and (2) the Federal award amount, inclusive of other funding sources for the infrastructure project, is not anticipated to exceed the SAT for the life of the Federal award.

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<sup>4</sup> For purposes of this waiver, "applicable project costs" are defined as material costs subject to the Buy America Preference.

<sup>5</sup> BABA § 70912 (7) The term "project" means the construction, alteration, maintenance, or repair of infrastructure in the United States."

<sup>6</sup> The Simplified Acquisition Threshold is defined in 48 CFR § 2.101. As of the date of this waiver, the threshold is \$250,000.00.

- Minor Components: NEH establishes a waiver of Buy America domestic content procurement preference to allow minor deviations for miscellaneous minor components<sup>7</sup> within iron and steel products. The minor components waiver allows non-domestically produced miscellaneous minor components comprising no more than five percent of the total material cost of an otherwise domestically produced iron and steel product. This waiver does not exempt an entire iron and steel product from the Buy America preference; the primary iron and steel components of the product must still be produced domestically.

## **V. WAIVER JUSTIFICATION**

NEH has two programs under which it supports infrastructure projects: Challenge Infrastructure and Capacity Building Grants (ICB) and Sustaining Cultural Heritage Collections (SCHC). The ICB program supports the design, purchase, construction, restoration, or renovation of buildings or sites of historical, architectural, or cultural significance and facilities that house humanities collections or are used for humanities activities. This includes the purchase and installation of related moveable and permanently affixed equipment for monitoring and protecting collections, and for critical building systems, such as electrical, climate control, security, life safety, lighting, utilities, telecommunications, and energy management. NEH recently sunset the ICB program and will not make any new offers after March 2024. However, NEH will continue to make incremental obligations on existing ICB awards over multiple years.

The SCHC program supports environmentally sustainable preventive care, which includes measures and actions aimed at avoiding, minimizing, and slowing future deterioration or loss of cultural heritage collections, thereby sustaining them for future generations. This includes

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<sup>7</sup> For purposes of this waiver, “minor component” means an article material, or supply, whether manufactured or non-manufactured, incorporated directly into an iron or steel product that comprises no more than 5 percent of the total material cost of the iron or steel product. Reference 2 CFR § 184.3.

facility and collection assessments, planning, and design; supplies and movable equipment purchases; and alterations and renovations.

To assess the potential impact on the NEH infrastructure programs, NEH has reviewed its recommended federal financial assistance for the ICB and SCHC program during fiscal years 2022 and 2023.<sup>8</sup> The total amount of NEH federal financial assistance for all programs (including CHA and SCHC) in this timeframe totaled \$238,648,888 across 1,570 awards. During this time, NEH funding for ICB totaled \$30,053,862 (12.59% of the total NEH federal financial assistance) for 70 awards. Of these, seven awards, totaling \$890,460, fell below the SAT and required compliance with BABA, which is .37% of total NEH funding, and 2.96% of ICB funding. NEH funding for SCHC totaled \$4,130,2633 (1.73% of the total NEH federal financial assistance) for 29 awards. Of these, only three SCHC awards, which totaled \$383,952, fell below the SAT and required compliance with BABA. This is 9.3% of the total SCHC awards funding and .16% of all NEH award funding.

Given the number of awards and the amount of funding that would be covered under the small grants waiver, NEH has determined that this waiver is in the public interest because the waiver will reduce the administrative burden on NEH infrastructure grant recipients and NEH for smaller grant recipient purchases. It enables recipients and NEH to make efficient use of limited resources and reduce situations where the cost of processing small dollar individual waivers will exceed the value of the items waived and allow recipients to implement their projects without further impacting their timelines, performance, and overall project costs.

For the remainder of the awards that are not covered by the small grant waiver, the de minimis waiver helps reduce the administrative burden for smaller purchases while still requiring the majority of NEH funding to be subject to domestic preference requirements. Similarly, the

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<sup>8</sup> NEH used recommended award counts and amounts for analysis purposes, because ICB awards are issued as offers and funding schedules extend out multiple years due to a matching requirement.

minor components waiver eases the administrative burden by allowing minor deviations for otherwise domestically manufactured iron and steel products.

NEH 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. With these waivers, recipients can devote their resources to BABA compliance with larger purchases, rather than diverting resources to sourcing miscellaneous, low-cost products. These waivers help ensure that NEH and its financial assistance recipients do not devote significant public resources toward compliance activities where there is limited public benefit. It also ensures that NEH can respond to requests for product-specific waivers for larger infrastructure project purchases in a timely fashion.

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

Section 5 of Executive Order 14005, OMB Memorandum M-24-02, Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure, October 25, 2023, 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 de minimis, small projects, and minor components waiver because it 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 for five years from the Effective Date. NEH will review the waiver as often as necessary to determine its continued relevancy.

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

As required under Section 70914 of BABA, NEH made the de minimis purchases, small grants, and minor components waiver available for public review for fifteen days beginning February 1, 2024. NEH received no comments during this period, and therefore no substantive changes were made in response.