

PROPOSED 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: February 1, 2024

SUMMARY: The National Endowment for the Humanities (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 is proposing a public interest 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. 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, the waiver will allow NEH recipients to focus on BABA implementation where it will have the greatest impact.

The proposed duration of the waiver is five years from the effective date of final approval. NEH will review the waiver as often as necessary to determine its continued relevancy.

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

DATES: NEH is providing a 15-day public comment period. You must submit comments by no later than February 17, 2024.

ADDRESSES: You may send comments to gencounsel@neh.gov. Include “De Minimis Purchases, Small Grants, and Minor Components General Applicability Waiver of Building America, Buy America Provisions” in the subject line of the email.

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.

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, 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

² Public Law 117-58 §§ 70901–70952

³ BABA § 70912(5)(K), (7)

⁴ *Id.* § 70914(a)

[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 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 must make the waiver publicly available on NEH’s website and www.madeinamerica.gov and allow no less than 15 days for public comment.

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 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 will enable 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 proposes a waiver for the following:

- **De Minimis Purchases:** NEH is establishing a waiver of the BABA domestic content procurement for otherwise covered federal financial assistance, totaling up to five percent of the total applicable project costs⁵, up to a maximum of \$1,000,000. 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 costs⁶ or \$1,000,000, whichever is lower, all other applicable project purchases must comply with the Buy America preference.
- **Small Grants:** NEH is establishing a waiver of the BABA domestic content procurement for small grants. The small grants waiver will apply to Federal financial assistance awards below

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

⁶ For purposes of this waiver, "applicable project costs" are defined as material costs subject to the Buy America Preference.

the Simplified Acquisition Threshold (SAT)⁷, 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.

- **Minor Components:** NEH is establishing a waiver of Buy America domestic content procurement preference to allow minor deviations for miscellaneous minor components⁸ within iron and steel products. The minor components waiver will allow 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

⁷ The Simplified Acquisition Threshold is defined in 48 CFR § 2.101. As of the date of this waiver, the threshold is \$250,000.00.

⁸ 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.

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 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 2023.⁹ 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 percent of the total SCHC awards funding and .16 percent of all NEH award funding.

Given the number of awards and the amount of funding that would be covered under the proposed small grants waiver, NEH believes that this waiver is in the public interest because the proposed waiver will reduce the administrative burden on NEH infrastructure grant recipients and NEH for smaller grant recipient purchases. It will enable recipients and NEH to make efficient use of limited resources and reduce situations where the cost of processing small dollar

⁹ 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.

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 will help reduce the administrative burden for smaller purchases while still requiring the majority of NEH funding to be subject to domestic preference requirements. Similarly, the minor components waiver will ease 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 the 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

Pursuant to 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 proposed de minimis, small projects, and minor components waiver because it is not related to the cost of foreign-sourced products.

VI. Solicitation of Comments on the Waiver

As required under Section 70914 of the Act, NEH is soliciting comments from the public on the proposed waiver. Refer to the Dates and Addresses sections of this notice for information on comment submission.