



ENERGY AND
ENVIRONMENT CABINET

IMPLEMENTING
BUILD AMERICA,
BUY AMERICA
DOMESTIC PREFERENCE REQUIREMENTS

AN AML GUIDE FOR SUBRECIPIENTS

ISSUE DATE: FEBRUARY 1, 2024

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1. INTRODUCTION

THE BUILD AMERICA, BUY AMERICA ACT

The [Bipartisan Infrastructure Law \(BIL\)](#) (Public Law No. 117-58), also known as the Infrastructure Investment and Jobs Act, was signed into law on November 15, 2021. This legislation includes the Build America, Buy America (BABA) Act, §§ 70901-27. BABA requires all agencies, including Abandoned Mine Lands (AML), to ensure by May 14, 2022, that no federal financial assistance is provided for any activity related to the construction, alteration, maintenance, or repair of infrastructure in the United States *“unless all of the iron, steel, manufactured products, and construction materials used in the project are produced in the United States.”*

On August 23, 2023, the Office of Management and Budget (OMB) issued a Notification of Final Guidance revising title 2 of the Code of Regulations (“CFR”) to add a new [part 184](#) and revise [section 200.322](#). Part 184 provides guidance to Federal agencies on how to apply the “Buy America” preference set forth in BABA to Federal awards for infrastructure projects. The revised section 200.322 clarifies existing provisions within part 200 on domestic preferences for procurements made under Federal financial assistance awards, and specifies that Federal agencies providing Federal financial assistance for infrastructure projects must implement the Buy America preferences set forth in 2 CFR part 184.

On October 25, 2023, the Office of Management and Budget (OMB) issued [Memorandum M-24-02](#), which rescinds and replaces Memorandum M-22-11, to provide supplemental implementation guidance for agencies on the application of a Buy American preference to Federal financial assistance programs for infrastructure and the process for waiving such a Buy American preference – including the circumstances under which waivers may be justified as consistent with applicable law and policy. To the extent that any guidance provided in this memorandum conflicts with guidance in 2 CFR part 184, the guidance in part 184 prevails.

In accordance with the memo, AML must ensure that all of its applicable federal financial assistance programs comply with [section 70914](#) of BABA. There are three key requirements that grantees, contractors, and subcontractors are required to follow for an infrastructure project (Appendix A).

1. Domestic Preferences
2. Contract Language
3. Waivers

2. DOMESTIC PREFERENCES

WHAT ITEMS ARE COVERED BY A DOMESTIC, OR “BUY AMERICA”, PREFERENCE?

Grantees, contractors, and subcontractors must ensure that all articles, materials, or supplies used in their infrastructure project are produced in the United States. An article, material, or supply should only be classified into one of the following categories: Iron and steel products; Manufactured products; Construction materials; or Section 70917(c) materials. An article, material, or supply should not be considered to fall into multiple categories. In some cases, an article, material, or supply may not fall under any of the categories listed in this paragraph. The classification of an article, material, or supply must be made based on its status at the time it is brought to the work site for incorporation into an infrastructure project. An article, material, or supply incorporated into an infrastructure project must meet the Buy America Preference for only the single category in which it is classified.

IRON AND STEEL

- Articles, materials, or supplies that consist wholly or predominantly of iron or steel or a combination of both. “Wholly or predominantly” means that the cost of the iron and steel content exceeds 50 percent of the total cost of all its components. The cost of iron and steel is the cost of the iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the product and a good faith estimate of the cost of iron or steel components.
- All manufacturing processes, from the initial melting stage through the application of coatings, must occur in the United States.

MANUFACTURED PRODUCTS

- The manufactured product was manufactured in the United States.
- The cost of the components of the manufactured product that are mined, produced, or manufactured in the United States is greater than 55 percent of the total cost of all components of the manufactured product, unless another standard for determining the minimum amount of domestic content of the manufactured product has been established under applicable law or regulation.

In determining whether the cost of components for manufactured products is greater than 55 percent of the total cost of all components, use the following instructions:

- a. For components purchased by the manufacturer, the acquisition cost, including transportation costs to the place of incorporation into the manufactured product (whether or not such costs are paid to a domestic firm), and any applicable duty (whether or not a duty-free entry certificate is issued); or
- b. For components manufactured by the manufacturer, all costs associated with the manufacture of the component, including transportation costs as described in paragraph (a) of this section, plus allocable overhead costs, but excluding profit. Cost of components does not include any costs associated with the manufacture of the end product.

CONSTRUCTION MATERIALS

- All manufacturing processes for the construction material occurred in the United States. Construction materials means articles, materials, or supplies incorporated into an infrastructure project that consists of only one or more of the following materials. Each construction material is followed by a standard for the material to be considered “produced in the United States.” Except as specifically provided, only a single standard should be applied to a single construction material.
 - Non-ferrous metals – All manufacturing processes, from initial smelting or melting through final shaping, coating, and assembly, occurred in the United States.
 - Plastic and polymer-based products – All manufacturing processes, from initial combination of constituent plastic or polymer-based inputs, or, where applicable, constituent composite materials, until the item is in its final form, occurred in the United States.
 - Glass – All manufacturing processes, from initial batching and melting of raw materials through annealing, cooling, and cutting, occurred in the United States.
 - Fiber optic cable (including drop cable) – All manufacturing processes, from the initial ribboning (if applicable), through buffering, fiber stranding and jacketing, occurred in the United States. All manufacturing processes also include the standards for glass and optical fiber, but not for non-ferrous metals, plastics and polymer-based products, or any others.
 - Optical fiber – All manufacturing processes, from the initial preform fabrication stage through the completion of the draw, occurred in the United States.
 - Lumber – All manufacturing processes, from initial debarking through treatment and planning, occurred in the United States.
 - Drywall – All manufacturing processes, from initial blending of mined or synthetic gypsum plaster and additives through cutting and drying of sandwiched panels, occurred in the United States.
 - Engineered wood – All manufacturing processes from the initial combination of constituent materials until the wood product is in its final form, occurred in the United States.

SECTION 70917(C) MATERIALS

- These materials are exempt from a Buy America preference and therefore do not have to be produced in the United States.
 - Cement and cementitious materials.
 - Aggregates such as stone, sand, or gravel.
 - Aggregate binding agents or additives.

WHEN DOES “BUY AMERICA” PREFERENCE APPLY?

A Buy America preference only applies to the iron and steel, manufactured products, and construction materials **used for the infrastructure project**. If AML determines that no funds from a particular award will be used for infrastructure, a Buy America preference does not apply to that award.

Similarly, a Buy America preference **does not apply to non-infrastructure spending** under an award that also includes an infrastructure component. A Buy America preference applies to *an entire infrastructure project*, even if it is funded by both federal and non-federal funds under one or more awards.

A Buy America preference only applies to articles, materials, and supplies that are **consumed in, incorporated into, or affixed to an infrastructure project**. It does not apply to tools, equipment, and supplies, such as temporary scaffolding, brought to the construction site and removed at or before the completion of the infrastructure project.

It also does not apply to equipment and furnishings, such as movable chairs, desks, and portable computer equipment that are used or within the finished infrastructure project **but are not part of or permanently affixed to the structure**.

EXEMPTIONS TO THE “BUY AMERICA” PREFERENCE?

The Buy America preference does not apply to expenditures for assistance authorized under section 402, 403, 404, 406, 408, or 502 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170a, 5170b, 5170c, 5172, 5174, or 5192) relating to a major disaster or emergency declared by the President under section 401 or 501, respectively, of such Act (42 U.S.C. 5170, 5191) or pre and post disaster or emergency response expenditures.

“Pre and post disaster or emergency response expenditures” consist of expenditures for financial assistance that are:

- (1) Authorized by statutes other than the Stafford Act, 42 U.S.C. 5121 *et seq.*; and
- (2) Made in anticipation of or response to an event or events that qualify as an “emergency” or “major disaster” within the meaning of the Stafford Act, 42 U.S.C. 5122(1), (2).

3. CONTRACT LANGUAGE AND CERTIFICATIONS

All contractor and subcontractor contracts under AML financial assistance awards for infrastructure, must include a contract provision explaining the BABA requirements and a self-certification where contractors can certify compliance with Buy America preference requirements outlined in Section 2 of this handbook.

REQUIRED CONTRACT LANGUAGE

Any contracts that may include a project for infrastructure, including subcontracts, shall include the following terms:

Buy America Domestic Procurement Preference:

As required by Section 70914 of the Bipartisan Infrastructure Law (also known as the Infrastructure Investment and Jobs Act), P.L. 117-58, on or after May 14, 2022, none of the funds under a federal award that are part of Federal financial assistance program for infrastructure may be obligated for a project unless all of the iron, steel, manufactured products, and construction materials used in the project are produced in the United States, unless subject to an approved waiver. The requirements of this section must be included in all subawards, including all contracts and purchase orders for work or products under this program.

Recipients of an award of Federal financial assistance are hereby notified that none of the funds provided under this award may be used for a project for infrastructure unless:

1. all iron and steel used in the project are produced in the United States—this means all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States;
2. all manufactured products used in the project are produced in the United States—this means the manufactured product was manufactured in the United States; and the cost of the components of the manufactured product that are mined, produced, or manufactured in the United States is greater than 55 percent of the total cost of all components of the manufactured product, unless another standard that meets or exceeds this standard has been established under applicable law or regulation for determining the minimum amount of domestic content of the manufactured product; and
3. all construction materials are manufactured in the United States—this means that all manufacturing processes for the construction material occurred in the United States.

The Buy America preference only applies to articles, materials, and supplies that are consumed in, incorporated into, or affixed to an infrastructure project. As such, it does not apply to tools, equipment, and supplies, such as temporary scaffolding, brought to the construction site and removed at or before the completion of the infrastructure project. Nor does a Buy America preference apply to equipment and furnishings, such as movable chairs, desks, and portable computer equipment, that are used at or within the finished infrastructure project, but are not an integral part of the structure or permanently affixed to the infrastructure project.

For further information on the Buy America preference, please visit www.doi.gov/grants/BuyAmerica. Additional information can also be found at the White House Made in America Office website: www.whitehouse.gov/omb/management/made-in-america/.

Waivers

When necessary, recipients may apply for, and the Department of the Interior (DOI) may grant, a waiver from these requirements, subject to review by the Made in America Office. The DOI may waive the application of the domestic content procurement preference in any case in which it is determined that one of the below circumstances applies:

1. Non-availability Waiver: the types of iron, steel, manufactured products, or construction materials are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality;
2. Unreasonable Cost Waiver: the inclusion of iron, steel, manufactured products, or construction materials produced in the United States will increase the cost of the overall project by more than 25 percent; or
3. Public Interest Waiver: applying the domestic content procurement preference would be inconsistent with the public interest.

There may be instances where an award qualifies, in whole or in part, for an existing DOI general applicability waiver as described at: www.doi.gov/grants/BuyAmerica/GeneralApplicabilityWaivers. If the specific financial assistance agreement, infrastructure project, or non-domestic materials meets the criteria of an existing general applicability waiver within the limitations defined within the waiver, the recipient is not required to request a separate waiver for non-domestic materials.

If a general applicability waiver does not already apply, and a recipient believes that one of the above circumstances applies to an award, a request to waive the application of the domestic content procurement preference may be submitted to the financial assistance awarding officer in writing. Waiver requests shall include the below information. The waiver shall not include any Privacy Act information, sensitive data, or proprietary information within their waiver request. Waiver requests will be posted to www.doi.gov/grants/buyamerica and are subject to public comment periods of no less than 15 days. Waiver requests will also be reviewed by the Made in America Office.

1. Type of waiver requested (non-availability, unreasonable cost, or public interest).
2. Requesting entity and Unique Entity Identifier (UEI) submitting the request.
3. Department of Interior Bureau or Office who issued the award.
4. Federal financial assistance listing name and number (reference block 2 on DOI Notice of Award)
5. Financial assistance title of project (reference block 8 on DOI Notice of Award).
6. Federal Award Identification Number (FAIN).
7. Federal funding amount (reference block 11.m. on DO Notice of Award).
8. Total cost of Infrastructure expenditures (includes federal and non-federal funds to the extent known).
9. Infrastructure project description(s) and location(s) (to the extent known).
10. List of iron or steel item(s), manufactured goods, and construction material(s) the recipient seeks to waive from Buy America preference requirements. Include the name, cost, countries of origin (if known), and relevant [PSC](#) or [NAICS](#) code for each.
11. A certification that the recipient made a good faith effort to solicit bids for domestic products supported by terms included in requests for proposals, contracts, and nonproprietary communications with the prime contractor.

12. A statement of waiver justification, including a description of efforts made (e.g., market research, industry outreach) by the recipient, in an attempt to avoid the need for a waiver. Such a justification may cite, if applicable, the absence of any Buy America-compliant bids received in response to a solicitation.
13. Anticipated impact if no waiver is issued.

Approved waivers will be posted at www.doi.gov/grants/BuyAmerica/ApprovedWaivers; recipients requesting a waiver will be notified of their waiver request determination by an awarding officer.

Questions pertaining to waivers should be directed to the financial assistance awarding officer.

Definitions

“Construction materials” includes an article, material, or supply that consists of only one of these items:

- Non-ferrous metals;
- Plastic and polymer-based products (including polyvinylchloride, composite building materials, and polymers used in fiber optic cables);
- Glass (including optic glass);
- Fiber optic cable (including drop cable);
- Optical fiber;
- Lumber;
- Engineered wood; and
- Drywall.

“Construction Materials” does **not** include cement and cementitious materials, aggregates such as stone, sand, or gravel, or aggregate binding agents or additives.

“Domestic content procurement preference” means all iron and steel used in the project are produced in the United States; the manufactured products used in the project are produced in the United States; or the construction materials used in the project are produced in the United States.

“Infrastructure” includes, at a minimum, the structures, facilities, and equipment for, in the United States, roads, highways, and bridges; public transportation; dams, ports, harbors, and other maritime facilities; intercity passenger and freight railroads; freight and intermodal facilities; airports; water systems, including drinking water and wastewater systems; electrical transmission facilities and systems; utilities; broadband infrastructure; and buildings and real property. Infrastructure includes facilities that generate, transport, and distribute energy.

“Project” means the construction, alteration, maintenance, or repair of infrastructure in the United States.

Contractors and subcontractors must submit the “AML-003 – Contractor Certificate of Compliance with Build America, Buy America Provisions for Federally Assisted Contracts” form, to the awarding entity. Contractors and subcontractors certify that no federal financial assistance funding for infrastructure projects will be provided unless all the iron, steel, manufactured projects, and construction materials used in the project are produced in the United States. Contractors and subcontractors shall also disclose any use of federal financial assistance for infrastructure projects that do not ensure compliance with BABA domestic preference requirement. Such disclosures shall be forwarded to the awarding entity who in turn will forward the disclosures to the Division of Abandoned Mine Lands, the awarding agency.”

REQUIRED SELF-CERTIFICATIONS

For AML financial assistance programs subject to BABA, subrecipients must sign and submit their own certification form, “AML-002 – Subrecipient Report of Compliance with Build America, Buy America Provisions for Federally Assisted Contracts”, Figure 1. This form, which can be found in Appendix B, shall be submitted with each payment request to the awarding agency.

In addition, contractors and subcontractors must sign and submit the “AML-003 – Contractor Certificate of Compliance with Build America, Buy America Provisions for Federally Assisted Contracts” form, Figure 2. This form, which can also be found in Appendix C, shall be submitted with each payment request to the awarding agency.

FORM AML-002

TEAM KENTUCKY
ENERGY AND ENVIRONMENT CABINET

**SUBRECIPIENT REPORT OF COMPLIANCE
WITH BUILD AMERICA, BUY AMERICA PROVISIONS
FOR FEDERALLY ASSISTED CONTRACTS**

This form is to be submitted with each request for reimbursement of funding by the subrecipient and as requested by the Energy and Environment Cabinet during the project.

SUBRECIPIENT NAME			
CONTRACT NUMBER			
PROJECT DESCRIPTION			
BILLING PERIOD		TO	

Subrecipient Statement:
I confirm to the best of my knowledge and belief that we are in compliance with the requirements of Pub. L. No. 117-58, §§ 70901-27 as referenced in the following requirements of the Build America, Buy America (BABA) Act and the grant agreement between the Department of Interior (DOI) and the Commonwealth of Kentucky.

Signature (Subrecipient Representative)

Title

Date

The Build America, Buy America Act, enacted under Division G, Title IX of the Infrastructure Investment and Jobs Act (IIJA), applies a domestic content procurement preference requirement (Buy America Requirement) to federally funded public "infrastructure projects". Per Section 70914 of the IIJA funds may not be obligated for an "infrastructure project" unless all of the iron and steel, manufactured products, and construction materials used in the project was produced in the United States or an applicable a waiver to the domestic content procurement preference requirement is used.

Subrecipient Responsibility
The subrecipient is responsible for ensuring the Buy America Requirement flows down to all contracts, subcontracts, and purchase orders for work performed under the proposed infrastructure project. Subrecipients of awards containing the Buy America Requirement must ensure that absent a waiver none of the funds provided under their award may be used for a project for infrastructure unless:

1. All iron and steel used in the project are produced in the United States. This means all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States;
2. All manufactured products used in the project are produced in the United States. This means the manufactured product was manufactured in the United States, and the cost of the components of the manufactured product that are mined, produced, or manufactured in the United States is greater than 55 percent of the total cost of all components of the manufactured product, unless another standard that meets or exceeds this standard has been established under applicable law or regulation for determining the minimum amount of domestic content of the manufactured product; and
3. All construction materials are manufactured in the United States. This means that all manufacturing processes for the construction material occurred in the United States.

The first page of the AML-002 form contains information related to the project and invoice period and signature area.

Language for certifying compliance.

FORM AML-002

TEAM KENTUCKY
ENERGY AND ENVIRONMENT CABINET

The Buy America Requirement only applies to articles, materials, and supplies that are consumed in, incorporated into, or permanently affixed to an infrastructure project. As such, it does not apply to tools, equipment, and supplies brought into the construction site and removed at or before the completion of the infrastructure project. Nor does a Buy America Requirement apply to equipment and furnishings that are used at or within the finished infrastructure project but are not an integral part of the structure or permanently affixed to the infrastructure project.


Compliance Verification
Buy America requirements must flow down to all contracts, subcontracts and purchase orders for work performed under the infrastructure project; therefore, subrecipients must maintain certifications or equivalent documentation for proof of compliance that those articles, materials, and supplies that are consumed in, incorporated into, affixed to, or otherwise used in the infrastructure project, not covered by a waiver or exemption, are produced in the United States.

The Certificate of Compliance form (Form AML-003) must be provided by contractor and subcontractors from the suppliers or manufacturers of the iron and steel, manufactured products, and construction materials and flow up from all contractors and subcontractors to the subrecipient.

Subrecipients must keep these certifications with the award/project files and be able to produce upon request from Department of Interior, Energy and Environment Cabinet, auditors or Office of Inspector General. Copies of the Certificate of Compliance form (Form AML-003) may be requested from the Energy and Environment Cabinet.

The second page contains more compliance certification language.

Figure 1



**CONTRACTOR CERTIFICATE OF COMPLIANCE
WITH BUILD AMERICA, BUY AMERICA PROVISIONS
FOR FEDERALLY ASSISTED CONTRACTS**

FORM AML-003

Prime Contractors and subcontractors should complete and sign a copy of this form and submit with each payment request to the Division of Abandoned Mine Lands. Prime contractors must also attach receipts and/or other documentation with this form showing evidence of Buy America compliance.

CONTRACTOR NAME			
CONTRACTOR ADDRESS			
PROJECT NAME			
INVOICE PERIOD		TO	
CONTRACT NUMBER			
CONTRACT AMOUNT			

This certification is to be utilized by prime contractors and subcontractors who have been awarded contracts funded through Abandoned Mine Lands Program Grant Funds and subject to the Buy America provisions of the Infrastructure Investment and Jobs Act (Pub. L. No 117-58). Buy America provisions state:

- (1) All iron and steel used in the project are produced in the United States. This means all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States;
- (2) All manufactured products used in the project are produced in the United States. This means the manufactured product was manufactured in the United States, and the cost of the components of the manufactured product that are mined, produced, or manufactured in the United States is greater than 55 percent of the total cost of all components of the manufactured product, unless another standard that meets or exceeds this standard has been established under applicable law or regulation for determining the minimum amount of domestic content of the manufactured product; and
- (3) All construction materials are manufactured in the United States. This means that all manufacturing processes for the construction material occurred in the United States.

MATERIALS/MANUFACTURED GOOD(S) BEING USED FOR PROJECT (Please List)

TYPE OF GOOD	MAKE & MODEL	MANUFACTURING LOCATION

CERTIFICATE OF COMPLIANCE WITH BUY AMERICA

I hereby certify that all of the iron and steel, manufactured products, and construction materials supplied or provided by our company for use on this project was manufactured in the United State of America, unless an applicable waiver applies.

or

I am relying on the following Buy America waiver(s) (check all that apply):

De Minimis Waiver
Iron and steel, manufactured products, and construction materials supplied/provided by our company equal no more than 5 percent of the total applicable project costs of the iron and steel, manufactured products, and construction materials used in and incorporated into this project.

Small Grants Waiver
The total cost of the award/subaward is less than \$250,000 and is not subject to the provisions of Buy America.

Representative Name

Representative Signature

Title

Date

The first page of the AML-003 form contains information related to the project and invoice period.

It also requires a listing of materials/ manufactured goods that were used for the invoicing period.

The second page of the AML-003 form contains language for certifying compliance and signature area.

Figure 2

MANUFACTURER CERTIFICATIONS

As an additional step to ensure compliance when purchasing products for the project, AML award recipients or subrecipients may request a certification letter from the product manufacturer to demonstrate compliance with BABA requirements. Although requesting manufacturer certifications is not required, AML recommends this step as a best practice for documenting compliance with BABA. AML recommends that certification letters contain five essential elements, which include:

- A reference to the project;
- Specific product information;
- Compliance with BABA reference;
- Location of manufacturer; and
- A company representative signature.

The certification letter should be maintained as part of the project record to be made available to AML if requested. Below are examples of two types of manufacturer certifications: Step Certification and Final Certification.

Step Certification

A step certification is a type of certification process under which each handler (supplier, fabricator, manufacturer, processor, etc.) of the subject products and materials certifies that their step in the process was domestically performed. Each time a step in the manufacturing process takes place, the manufacturer delivers its work along with a certification of its origin. Step certification creates a paper trail which documents the location of the manufacturing process involved with the production of subject products and materials. Figure 3 gives an example of language to include in a step certification letter.

SAMPLE STEP CERTIFICATION LETTER:

Company letterhead.

Date

Company Name

Company Address

City, State Zip

Subject: Build America, Buy America Act Step Certification for Project (XXXXXXXXXX)

I, (**company representative**), certify the (**melting, bending, coating, galvanizing, cutting, etc.**) process for (**manufacturing or fabricating**) the following products and/or materials shipped or provided for the subject project is in full compliance with the Build America, Buy America (BABA) Act requirement as mandated in the Infrastructure Investment and Jobs Act (IIJA) Pub. L. No. 117-58, §§ 70901-27.

Item, Products and/or Materials:

1. XXXX
2. XXXX
3. XXXX

Such process took place at the following location: _____.

If any of the above compliance statements change while providing material to this project, we will immediately notify the prime contractor and the engineer.

Signed by company representative

Figure 3

Final Certification

Although obtaining step certification is a best practice, if not possible, AML award recipients and subrecipients may consider requesting a final manufacturer certification letter. For a final certification letter, the final manufacturer that delivers the product to the worksite, vendor, or contractor provides a certification asserting that all manufacturing processes occurred in the United States. While this type of certification may be acceptable, it may not provide the same degree of assurance, and therefore additional documentation may be needed if the certification is lacking important information. Sample final certification language is included below. Figure 4 gives an example of language to include in a step certification letter.

SAMPLE FINAL CERTIFICATION LETTER:

Company letterhead.

Date

Company Name

Company Address

City, State Zip

Subject: Build America, Buy America Act Certification for Project (XXXXXXXXXX)

I, (**company representative**), certify that the following products and/or materials shipped/provided to the subject project are in full compliance with the Build America, Buy America (BABA) Act requirement as mandated in the Infrastructure Investment and Jobs Act (IIJA) Pub. L. No. 117-58, §§ 70901-27.

Item, Products and/or Materials:

1. XXXX
2. XXXX
3. XXXX

Such process took place at the following location: _____.

If any of the above compliance statements change while providing material to this project, we will immediately notify the prime contractor and the engineer.

Signed by company representative

Figure 4

4. WAIVERS

Pursuant to section 70914(b) of BABA and 2 CRF 184.7, the Department of the Interior (DOI) has the authority to waive the Buy America Preference when: (1) applying the requirement is inconsistent with the public interest (a “public interest waiver”); (2) types of iron, steel, manufactured products, or construction materials are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality (a “nonavailability waiver”); or (3) inclusion of iron, steel, manufactured products, or construction materials produced in the United States will increase the cost of the overall project by more than 25% (an “unreasonable cost waiver”). If a project cannot comply with the Buy American Preference requirements, recipients and subrecipients must seek a waiver from DOI. There are two categories of waivers: General Applicability Waivers and Project Specific Waivers.

GENERAL APPLICABILITY WAIVERS

The term “general applicability waiver” refers to a waiver that applies generally across multiple Federal agencies or awards. A general applicability waiver can be “product-specific” (e.g., applies only to a product or category of products) or “non-product specific” (e.g., applies to all “manufactured products”). Award recipients and subrecipients subject to Buy American Preference may use general applicability waivers and do not require a separate application or approval by DOI prior to use. These may cover categories of products known to be unavailable domestically or are intended to ease the burden of compliance.

To date, DOI has approved two General Applicability Waivers of importance:

1. **De Minimis Purchases Waiver** – This waiver is critical to ensure that infrastructure project purchases below a de minimis threshold funded through financial assistance agreements sustain progress while reducing the burden on recipients.

This waiver covers infrastructure project purchases, totaling up to 5 percent of the total applicable project costs, up to a maximum of \$1,000,000.00. Applicable project costs are defined as material costs subject to the Buy America preference.

This waiver, which can be found in Appendix D, was approved by DOI on February 21, 2023 and expires on February 20, 2028.

2. **Small Grant Waiver** – This waiver is critical to ensure that agency small infrastructure projects conducted through small grants sustain progress and reduce the burden on recipients, many of whom are small organizations operating in rural or disadvantaged communities.

This waiver permits the use of non-domestic iron, steel, manufactured products, and construction materials in such projects that may otherwise be prohibited under section 70914(a) during the specified period of time for small grants that meet the following standard:

- The total award amount does not exceed the Simplified Acquisition Threshold of currently \$250,000.00;
- The award amount is not anticipated to exceed the Simplified Acquisition Threshold for the life of the grant.

This waiver, which can be found in Appendix E, was approved by DOI on February 21, 2023 and expires on February 20, 2028.

PROJECT-SPECIFIC WAIVERS


Project-specific waivers are for the use of a specified non-domestic product for a single project. An assistance recipient and subrecipient may request a waiver from DOI through their DOI grant representative. **DOI must approve waiver requests before a DOI funded project can permanently incorporate a non-domestic product.** Due to waiver requests being both project- and product-specific, any other assistance recipient and subrecipient who wishes to use a waiver for a similar product must apply for a separate waiver based on specific project circumstances.

WAIVER SUBMISSION

First, check the DOI [Financial Assistance Waivers](#) and the OMB [Made in America Office \(MIAO\) Waiver](#) website to determine if your project or materials meet the criteria of one of the already approved waivers. If the criteria are met, a separate waiver is not required.

If your project or materials do not meet the general applicability waiver criteria or an approved Buy America waiver, you may submit a waiver request directly to DOI. The waiver request justification should include a detailed justification for the use of goods, products, or materials mined,

produced, or manufactured outside the United States and a certification that a good faith effort was made to solicit bids for domestic products supported by terms included in requests for proposals, contracts, and nonproprietary communications with potential suppliers. To assist DOI with processing your request, note that the below information must be included (to the greatest extent practicable) on your waiver request. You may contact AML for assistance with bullet items 3 thru 7.



NOTE: before officially submitting the waiver request to DOI, it should be submitted to AML for their agreement.

- Waiver type (public interest, non-availability, or unreasonable cost).
- Recipient or subrecipient name and Unique Entity Identifier (UEI).
- Department of Interior Bureau or Office who issued the award.
- Federal financial assistance listing name and number (reference block 2 on DOI Notice of Award).
- Federal financial assistance program name (reference block 8 on DOI Notice of Award).
- Federal Award Identification Number (FAIN) (if available or applicable).
- Federal financial assistance funding amount (reference block 11.m. on DO Notice of Award).
- Total estimated infrastructure expenditures, including all Federal and non-Federal funds (to the extent known).
- Infrastructure project description(s) and location(s) (to the extent known).
- List of iron or steel item(s), manufactured products, and construction material(s) proposed to be excepted from Buy America requirements, include name, cost, country(ies) of origin (if known), and relevant Product and Service Code ([PSC](#)) and North American Industry Classification System ([NAICS](#)) code for each.

- A description of efforts made (e.g., market research, industry outreach, etc.) by the recipient or subrecipient, in an attempt to avoid the need for a waiver. Such a description may cite, if applicable, the absence of any Buy American-complaint bids received in response to a solicitation.
 - Market research, where applicable, should include relevant details, including who conducted the market research, when it was conducted, sources that were used, and the methods used to conduct the research.
- Anticipated impact if no waiver is issued.

The purpose of the information is to demonstrate the recipient or subrecipient's due diligence, and provide the DOI and MIAO with sufficient information to determine whether the proposed waiver is consistent with law and policy. Information provided for public review should help interested manufacturers gauge the demand for products for which agencies are considering waiving a Buy America preference.

Recipients or subrecipients applying for a waiver shall not include any Privacy Act information, sensitive data, or proprietary information within their waiver requests.

WAIVER APPROVAL

If DOI determines that your waiver request (in whole or in part) appears to meet the legal and policy criteria of Buy America, and in accordance with Section 70914 (c), the DOI will post its proposed waiver justification for public comment for a period of not less than 15 days to the DOI [Proposed Buy America Waiver Requests, Available for Public Comment](#) page. On a case-by-case basis when circumstances warrant, for example when a waiver covers items of special importance to American supply chains (such as those identified in section 3(b) of the Executive Order 13953) or involves a substantial amount of Federal funding, waivers may be subject to a minimum 30 day public comment period.

Before finalizing a waiver, DOI must submit the waiver determination to the OMB MIAO for final review pursuant to Executive Order 14005 and sections 70923(b)(2) and 70937 of the Infrastructure Investment and Jobs Act. After final review, the waivers are subject to a minimum 30-day public comment period.

DOI will post approved waivers on the DOI [Approved Buy America Requests](#) page, and AML will notify you if your waiver request was approved.

5. COMPLIANCE OVERSIGHT

SUBRECIPIENT COMPLIANCE RESPONSIBILITIES

Subrecipients bear much of the responsibility for ensuring compliance with BABA. Furthermore, subrecipients have a vested interest in ensuring that BABA compliance is met. If the contractor is not following BABA, this may mean that the subrecipient's valuable funds are being used improperly.

The following tasks make up the subrecipient's BABA compliance oversight role and may be performed by the subrecipient or by a designated representative such as a consultant:

- Include BABA language in construction contract(s)
- Verify required BABA certificate of compliance form
- Check manufacturer certifications, if applicable
- Process waivers, if applicable

INCLUDING BABA LANGUAGE

Subrecipients are responsible for including the BABA provisions language, page 5 through page 7, into all construction contracts, as well as language that requires contractors to include BABA provisions in subcontracts.

VERIFYING CERTIFICATIONS

When a contractor/subcontractor submits a request for payment, they are required to self-certify that all material or manufactured goods for the billing period complies with Buy America, page 8. Subrecipients are responsible for reviewing the AML-003 self-certification report, Figure 2, for accuracy.

Subrecipients are responsible for ensuring the first page of the form is completely filled out and all materials or manufactured goods being requested for reimbursement are listed on the form. The second page must have at least one of the check boxes marked and signed by the contractor/subcontractor authorized representative.

In addition to the AML-003 form, subrecipients must themselves self-certify that all material or manufactured goods for the billing period complies with Buy America, page 8. Subrecipients are responsible for completing the AML-002 self-certification report, Figure 1. Subrecipients should ensure the first page of the form is completely filled out and signed by an authorized representative.

CHECKING MANUFACTURER CERTIFICATIONS

While this step is not required, it is recommended as an extra level of compliance. If applicable, subrecipients are responsible for obtaining a manufacturer certification letter, page 11 or page 13, from the contractor/subcontractor.

Subrecipients are responsible for ensuring that the language similar to the examples in Figure 3 and Figure 4 is contained in the certification; but at a minimum, the form must contain a reference to the law, a list of materials/items, the city and state where the materials/items were manufactured, and a signature from the manufacturer's representative.

PROCESSING WAIVERS

A subrecipient or contractor/subcontractor may wish to submit a waiver for certain materials or manufactured goods, page 14. If applicable, the subrecipient or contractor/subcontractor are responsible for developing the waiver, with assistance from AML. It will be the subrecipients or contractors/subcontractors responsibility to file the waiver with DOI; however, before officially submitting the waiver request to DOI, it should be submitted to AML for their agreement.

6. DOCUMENTS AND FORMS TO BE SUBMITTED TO AML

- **REQUEST FOR PAYMENT**

Requests for payment shall be submitted monthly, without exception, to either Phil Bowling at phil.bowling@ky.gov or Barry Butcher at barry.butcher@ky.gov. This will include the need to submit a \$0 request if no payment is needed. Below are supplemental documents, for Buy America compliance, that are to accompany requests for payments.

- **MONTHLY REPORT**

Submit a monthly report detailing the work performed during the billing period.

- **SUBRECIPIENT REPORT OF COMPLIANCE**

Submit the “AML-002 – Subrecipient Report of Compliance with Build America, Buy America Provisions for Federally Assisted Contracts” form (Appendix B) to certify Buy America compliance.

- **CONTRACTOR/SUBCONTRACTOR CERTIFICATE OF COMPLIANCE**

Submit the “AML-003 – Contractor Certificate of Compliance with Build America, Buy America Provisions for Federally Assisted Contracts” form (Appendix C) to certify Buy America compliance.

- **MANUFACTURER CERTIFICATIONS**

If applicable and if requested, submit the certifications (page 11 and page 13) to either Phil Bowling at phil.bowling@ky.gov or Barry Butcher at barry.butcher@ky.gov.

- **WAIVERS**

If applicable, submit waiver requests (page 14) to DOI; however, before officially submitting the waiver to DOI, submit a copy to either Phil Bowling at phil.bowling@ky.gov or Barry Butcher at barry.butcher@ky.gov for their agreement.

You may find it useful to use the Build America, Buy America Act Compliance Checklist for Subrecipients (Appendix F) as a tool to insure proper and timely document submission.

7. SUMMARY

If you have never administered a project with BABA requirements, it can be overwhelming at first. This handbook was developed to familiarize and assist you with these requirements.

It is recommended you read this handbook several times and study the figures/appendices. Everything you need to succeed is in this handbook.

However, even the greatest of guidance document will not make you an expert on the subject; that takes practice and repetition. That is why you should feel free to reach out to us if you have any questions, concerns, or need further clarification.

- For BABA specific questions, you may contact the Build America, Buy America Act Compliance Review officer at eecpayrollcert@ky.gov or by calling (502) 782-7024.
- For questions related to the project itself, you may contact either Phil Bowling at phil.bowling@ky.gov or by calling 502-782-2471 or Barry Butcher at barry.butcher@ky.gov or by calling 502-782-9465.

8. APPENDICES

APPENDIX A

- BABA REQUIREMENT FLYER

APPENDIX B:

- FORM AML-002 - REPORT OF COMPLIANCE BABA

APPENDIX C:

- FORM AML-003 - CERTIFICATE OF COMPLIANCE BABA

APPENDIX D:

- DE MINIMIS WAIVER

APPENDIX E:

- SMALL GRANT WAIVER

APPENDIX F:

- BABA COMPLIANCE CHECKLIST

APPENDIX A

THREE KEY REQUIREMENTS FLYER

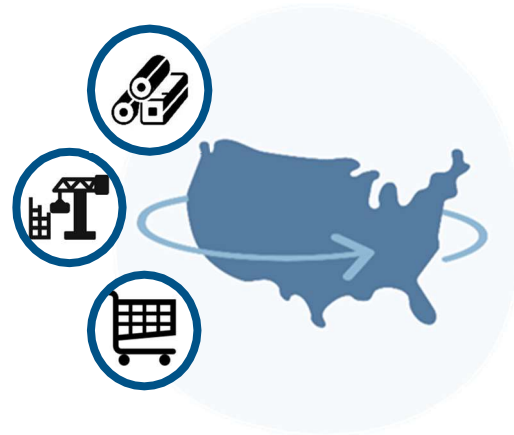
Build America, Buy America Act

Three Key Requirements

The Build America, Buy America (BABA) Act requires subrecipients, contractors, and subcontractors of certain financial assistance programs to follow three key requirements for their infrastructure projects:

1. Domestic Preferences

Subrecipients, contractors, and subcontractors must ensure that all iron and steel, manufactured products, and construction materials used in their infrastructure projects are produced in the United States.



2. Contract Language

Contracts and subcontracts must include a contract provision explaining the BABA requirements and a self-certification of compliance with the domestic preference requirements. Consult the BABA Handbook for more information and sample language.

3. Waivers

Subrecipients, contractors, and subcontractors may request a waiver from the Federal awarding agency if the circumstances meet the criteria for an allowable waiver type. The allowable waiver types include nonavailability, unreasonable cost, and public interest. Follow the steps and checklist outlined in the BABA Handbook to ensure timely review of the waiver request.



APPENDIX B

FORM AML-002

**SUBRECIPIENT REPORT OF COMPLIANCE
WITH BUILD AMERICA, BUY AMERICA PROVISIONS
FOR FEDERALLY ASSISTED CONTRACTS**



**SUBRECIPIENT REPORT OF COMPLIANCE
WITH BUILD AMERICA, BUY AMERICA PROVISIONS
FOR FEDERALLY ASSISTED CONTRACTS**

This form is to be submitted with each request for reimbursement of funding by the subrecipient and as requested by the Energy and Environment Cabinet during the project.

SUBRECIPIENT NAME			
CONTRACT NUMBER			
PROJECT DESCRIPTION			
BILLING PERIOD		TO	

Subrecipient Statement:

I confirm to the best of my knowledge and belief that we are in compliance with the requirements of Pub. L. No. 117-58, §§ 70901-27 as referenced in the following requirements of the Build America, Buy America (BABA) Act and the grant agreement between the Department of Interior (DOI) and the Commonwealth of Kentucky.

Signature (*Subrecipient Representative*)

Title

Date

The Build America, Buy America Act, enacted under Division G, Title IX of the Infrastructure Investment and Jobs Act (IIJA), applies a domestic content procurement preference requirement (Buy America Requirement) to federally funded public “infrastructure projects”. Per Section 70914 of the IIJA funds may not be obligated for an “infrastructure project” unless all of the iron and steel, manufactured products, and construction materials used in the project was produced in the United States or an applicable a waiver to the domestic content procurement preference requirement is used.

Subrecipient Responsibility

The subrecipient is responsible for ensuring the Buy America Requirement flows down to all contracts, subcontracts, and purchase orders for work performed under the proposed infrastructure project. Subrecipients of awards containing the Buy America Requirement must ensure that absent a waiver none of the funds provided under their award may be used for a project for infrastructure unless:

1. All iron and steel used in the project are produced in the United States. This means all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States;
2. All manufactured products used in the project are produced in the United States. This means the manufactured product was manufactured in the United States, and the cost of the components of the manufactured product that are mined, produced, or manufactured in the United States is greater than 55 percent of the total cost of all components of the manufactured product, unless another standard that meets or exceeds this standard has been established under applicable law or regulation for determining the minimum amount of domestic content of the manufactured product; and
3. All construction materials are manufactured in the United States. This means that all manufacturing processes for the construction material occurred in the United States.



The Buy America Requirement only applies to articles, materials, and supplies that are consumed in, incorporated into, or permanently affixed to an infrastructure project. As such, it does not apply to tools, equipment, and supplies brought into the construction site and removed at or before the completion of the infrastructure project. Nor does a Buy America Requirement apply to equipment and furnishings that are used at or within the finished infrastructure project but are not an integral part of the structure or permanently affixed to the infrastructure project.

Compliance Verification

Buy America requirements must flow down to all contracts, subcontracts and purchase orders for work performed under the infrastructure project; therefore, subrecipients must maintain certifications or equivalent documentation for proof of compliance that those articles, materials, and supplies that are consumed in, incorporated into, affixed to, or otherwise used in the infrastructure project, not covered by a waiver or exemption, are produced in the United States.

The Certificate of Compliance form (Form AML-003) must be provided by contractor and subcontractors from the suppliers or manufacturers of the iron and steel, manufactured products, and construction materials and flow up from all contractors and subcontractors to the subrecipient.

Subrecipients must keep these certifications with the award/project files and be able to produce upon request from Department of Interior, Energy and Environment Cabinet, auditors or Office of Inspector General. Copies of the Certificate of Compliance form (Form AML-003) may be requested from the Energy and Environment Cabinet.

APPENDIX C

FORM AML-003

**CONTRACTOR CERTIFICATE OF COMPLIANCE
WITH BUILD AMERICA, BUY AMERICA PROVISIONS
FOR FEDERALLY ASSISTED CONTRACTS**



CERTIFICATE OF COMPLIANCE WITH BUY AMERICA

I hereby certify that all of the iron and steel, manufactured products, and construction materials supplied or provided by our company for use on this project was manufactured in the United State of America, unless an applicable waiver applies.

or

I am relying on the following Buy America waiver(s) (check all that apply):

De Minimis Waiver
Iron and steel, manufactured products, and construction materials supplied/provided by our company equal no more than 5 percent of the total applicable project costs of the iron and steel, manufactured products, and construction materials used in and incorporated into this project.

Small Grants Waiver
The total award amount does not exceed the Simplified Acquisition Threshold of currently \$250,000.00 and is not anticipated to exceed the Simplified Acquisition Threshold for the life of the award and is not subject to the provisions of Buy America.

Representative Name

Title

Representative Signature

Date

APPENDIX D

DE MINIMIS WAIVER

DEPARTMENT OF THE INTERIOR

TITLE:

GENERAL APPLICABILITY WAIVER FOR DE MINIMIS PURCHASES

1. Summary

Agency: Department of the Interior

Proposed Waiver: The Department of the Interior (DOI) is establishing a general applicability waiver of the requirements of section 70914 of the Build America, Buy America Act (Buy America preference) included in the Infrastructure Investment and Jobs Act (Pub. L. No. 117-58) for “De Minimis Purchases,” having determined such waiver to be in the public interest. This waiver is critical to ensure that infrastructure project purchases below a de minimis threshold funded through financial assistance agreements sustain progress while reducing the burden on recipients. The waiver will remain in effect for all DOI Federal financial assistance infrastructure projects for a period of five years from the date of final approval and will be reviewed as often as necessary.

DOI is proposing a waiver for otherwise covered infrastructure project purchases, totaling up to 5 percent of the total applicable project costs¹, up to a maximum of \$1,000,000.00. For example, if a recipient will expend \$4,000,000.00 in costs that are subject to Buy American preference under an infrastructure project, then up to \$200,000.00 (5%) would be exempt from the Buy America preference. If a recipient’s applicable costs are \$20,000,000.00 or greater, this waiver is capped at \$1,000,000.00 total in otherwise covered project purchases. Once a Federal financial assistance recipient’s total purchases of materials otherwise covered by the Buy America preference reach 5 percent or \$1,000,000.00, whichever is lower, all other applicable project purchases must comply with the Buy America preference.

DOI posted a proposed waiver for public comment on December 22, 2022. The comment period ended on January 6, 2023.

2. Background

The Buy America preference set forth in section 70914 of the Build America, Buy America Act included in the Infrastructure Investment and Jobs Act (Pub. L. No. 117-58), requires all iron, steel, manufactured products, and construction materials used for infrastructure projects under Federal financial assistance awards be produced in the United States.

Under section 70914(b), and in accordance with the Office of Management and Budget’s (OMB) April 18, 2022 initial implementation guidance memorandum on the subject (M-22-11), the Department of the Interior may waive the application of the Buy America preference, in any case in which it finds that: applying the domestic content procurement preference would be inconsistent with the public interest; types of iron, steel, manufactured products, or construction

¹ Applicable project costs are defined as material costs subject to the Buy America preference.

materials are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality; or the inclusion of iron, steel, manufactured products, or construction materials produced in the United States will increase the cost of the overall project by more than 25 percent. All waivers must have a written explanation for the proposed determination; provide a period of not less than 15 calendar days for public comment on the proposed waiver; and submit the proposed waiver to the Office of Management and Budget Made in America Office for review to determine if the waiver is consistent with policy.

OMB Memorandum M-22-11 provided guidance for agencies to consider whether a general applicability public interest waiver should apply to infrastructure project purchases below a de minimis threshold to reduce the administrative burden for recipients and agencies. OMB directs agencies to 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.

This waiver advances the Buy America preference by reducing the administrative burden to potential financial assistance recipients. DOI's infrastructure projects vary widely across DOI's 309 financial assistance programs ranging from small community projects to large regional infrastructure projects. DOI infrastructure projects often contain a variety of miscellaneous, generally low-cost products that are essential to the project. With this waiver, recipients can devote their resources to Buy America compliance with larger purchases, rather than diverting resources to sourcing the many miscellaneous, low-cost products. Failure to provide recipients such flexibilities could result in project delays and additional project costs as financial assistance recipients must exert considerable effort to account for the sourcing of miscellaneous, low-cost items. DOI remains committed to implementing Buy America preference to cultivate the domestic manufacturing base for a range of products. For this reason, DOI is including a cost cap of \$1,000,000.00 for this waiver.

This waiver seeks to reduce the administrative burden on financial assistance recipients by exempting a small share (up to 5% of the total applicable project costs) of otherwise covered purchases from the Buy America preference. Providing a waiver at this "de minimis" level will allow recipients of DOI funds to focus their compliance efforts on the major components for a project, rather than minor components up to a set cap, after which all infrastructure project purchases must comply with Buy America, unless subject to additional waiver. This empowers recipients to prioritize their compliance efforts and scale such efforts to the relative purchase prices of otherwise covered items.

3. Waiver Justification

The DOI requested inputs from its bureaus to identify the full scope and impact of the Buy America preference across all its 309 programs, including programs that have a broader purpose other than infrastructure. Based on the feedback gathered from its Bureaus, the DOI has determined that waivers for de minimis infrastructure project purchases are in the public interest in order to allow DOI financial assistance recipients to focus their efforts on ensuring domestic sourcing of major components of their projects. This waiver seeks to significantly reduce the administrative burden for DOI recipients and avoid unnecessary costs and delays to projects by exempting a small share (5% or less) of otherwise covered purchases up to \$1,000,000.00. This will also allow DOI to focus compliance efforts on major components while continuing efforts to

identify critical supply chains where increased U.S. manufacturing can best advance our economic and national security during the early phases of Buy America preference implementation.

Infrastructure projects often contain a relatively small number of high-cost products incorporated into the overall project. These high-cost products are generally described within technical specifications for a project, or the detailed project budget submitted as part of the recipient's project application. For these major products, recipients are generally familiar with the conditions of availability, the potential alternatives for each detailed specification, the approximate cost, and the country of manufacture of the available components. Infrastructure projects also involve the use of potentially miscellaneous, generally low-cost products that are essential for construction and are incorporated into the physical structure of the project, many of which are or will be subject to Buy America preference.

This de minimis purchase waiver ensures that DOI and its financial assistance community does not devote significant public resources toward compliance activities where there is limited public benefit and ensures that requests for product-specific waivers for larger infrastructure project purchases can be responded to in a timely fashion. Failure to grant this waiver creates significant administrative burden for DOI and recipients. Absent this de minimis purchases waiver, the following concerns have been expressed by DOI's financial assistance community:

- **Delays to Necessary Projects:** DOI infrastructure projects could experience substantial delays in project implementation and completion due to the additional timeframe necessary to locate domestic sources for minor materials and submit and process waivers when domestic materials are not available. This could have a significant impact on agreements with more urgent timelines, such as projects mitigating the historic Western drought. Absent the waiver, staff focus on critical drought infrastructure projects will expend resources inefficiently, potentially failing to deliver on the additional funding Congress has appropriated in the Bipartisan Infrastructure Law and Inflation Reduction Act for the compelling drought conditions in the Western US.
- **Increased Project Timelines:** Projects will be completed at a slower rate, potentially delaying project timelines as individualized waivers for more numerous, minor infrastructure project purchases will need to be submitted and processed.
- **Recipient Compliance Costs:** There will be an increased burden for the DOI financial assistance community who now must put forth resources to identify and maintain domestic sources of supply for potentially long lists of minor components, along with applicable documentation, for the sake of single audit compliance.

A de minimis purchase waiver will enable better use of limited resources for both recipients and government staff. A waiver will also provide recipients flexibilities needed to ensure project success at a time when recipients are already facing increased barriers, such as recovery from COVID, rising costs for materials, inflation, and material transportation delays. Due increased

funding from the Bipartisan Infrastructure Law and Inflation Reduction Act, it is estimated that DOI will issue approximately \$2 billion per year in financial assistance agreements for infrastructure related projects over the next five years. A de minimis waiver affords these large infrastructure projects a workable compromise, enabling recipients to concentrate their efforts on sourcing the majority of their materials domestically, rather than all materials. This approach will assist recipients in achieving long term Buy America preference compliance in phases, without further delaying project implementation with project waiver requests that are broad in scope.

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

Under OMB Memorandum M-22-11, agencies are expected 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” as appropriate before granting a public interest waiver. DOI’s analysis has concluded that this assessment is not applicable to this waiver, as this waiver is not based on the cost of foreign-sourced products.

5. Summary of Comments

Proposed Waiver: This notice was posted on December 22, 2022 to satisfy the requirement to publish proposed Buy America waivers and provide the public with a reasonable period of time for notice and comment. The Department of the Interior sought public and industry comment from all interested parties. In particular, the Department of the Interior sought comment regarding whether 5 percent of the applicable project cost is an appropriate threshold for a de minimis waiver, or whether a different threshold would be more appropriate. Furthermore, the DOI sought public feedback on the definition of “applicable project cost” or whether a different base, such as “total project cost” should be considered. The DOI was also interested in whether \$1 million is an appropriate dollar cap. Relevant information and comments were requested to help understand completely the facts surrounding the waiver requests and the agency’s proposal. The notice closed for comments on January 6, 2023.

20 entities provided a response to this proposed waiver. A summary of the comments received are as follows:

- 9 entities responded with concurrence with the waiver as is.
- 10 entities concurred with a small financial assistance agreement waiver, but requested the waiver be expanded also eliminate individual projects under \$250,000 that would not otherwise be covered under other DOI waivers.
- 3 of the responses received also requested more clarity be provided around the definition of “total applicable project costs”
- 1 Disagreed with the waiver in its entirety stating it goes against the intent of BABA.

In response to the comments received, a determination was made by the DOI to proceed with the waiver as written. The majority of the comments requested the waiver be expanded to include individual infrastructure projects under \$250,000.00 to allow for additional flexibilities of small projects. DOI considered the suggestions provided will refer these

recipients to our small grant waiver.² In addition, the DOI will seek to provide guidance to our financial assistance awarding offices to clarify the definition of “total applicable project costs”.

² For purposes of the small grant waiver, grants encompass all forms of DOI’s financial assistance including cooperative agreements and grants.

APPENDIX E

SMALL GRANTS WAIVER

DEPARTMENT OF THE INTERIOR

TITLE:

GENERAL APPLICABILITY WAIVER FOR SMALL GRANTS¹

1. Summary

Agency: Department of the Interior

Proposed Waiver: The Department of the Interior (DOI) is establishing a general applicability waiver of the requirements of section 70914 of the Build America, Buy America Act included in the Infrastructure Investment and Jobs Act (Pub. L. No. 117-58) (Buy America preference) for small grants, having determined such waiver to be in the public interest. This waiver is critical to ensure that agency small infrastructure projects conducted through small grants sustain progress and reduce the burden on recipients, many of whom are small organizations operating in rural or disadvantaged communities. The waiver will remain in effect for all eligible DOI Federal grants for a period of five years from the date of final approval, and will be reviewed as often as necessary.

This proposed waiver action permits the use of non-domestic iron, steel, manufactured products, and construction materials in such projects that may otherwise be prohibited under section 70914(a) during the specified period of time for small grants that meet the following standard:

- The total award amount does not exceed the Simplified Acquisition Threshold² of currently \$250,000.00;
- The award amount is not anticipated to exceed the Simplified Acquisition Threshold for the life of the grant.

DOI posted a proposed waiver for public comment from December 22, 2022. The comment period ended on January 6, 2023.

2. Background

The Buy America preference set forth in section 70914 of the Build America, Buy America Act included in the Infrastructure Investment and Jobs Act (Pub. L. No. 117-58), requires all iron, steel, manufactured products, and construction materials used for infrastructure projects under Federal financial assistance awards be produced in the United States.

Under section 70914(b), and in accordance with the Office of Management and Budget's (OMB) April 18, 2022 initial implementation guidance memorandum on the subject (M-22-11), the Department of the Interior may waive the application of the Buy America preference, in any case in which it finds that: applying the domestic content procurement preference would be inconsistent with the public interest; types of iron, steel, manufactured products, or construction materials are not produced in the United States in sufficient and reasonably available quantities

¹ For purposes of this waiver, grants encompass all forms of Federal financial assistance that DOI administers including cooperative agreements and grants.

² Simplified Acquisition Threshold is defined in [48 C.F.R. §2.101](#). As of the date of this waiver, the threshold is \$250,000.00.

or of a satisfactory quality; or the inclusion of iron, steel, manufactured products, or construction materials produced in the United States will increase the cost of the overall project by more than 25 percent. All waivers must have a written explanation for the proposed determination; provide a period of not less than 15 calendar days for public comment on the proposed waiver; and submit the proposed waiver to the Office of Management and Budget Made in America Office for review to determine if the waiver is consistent with policy.

OMB Memorandum M-22-11 provides guidance to agencies to consider whether a general applicability public interest waiver should apply to “small grants,” such as grants below the Simplified Acquisition Threshold. OMB directs agencies to 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.

This waiver reduces the administrative burden to potential grant recipients. DOI’s infrastructure projects vary widely across DOI’s 309 financial assistance programs ranging from small community projects to large regional infrastructure projects. While only 13 of DOI’s 309 financial assistance programs are deemed to be “infrastructure programs,” individual infrastructure projects still occur from time to time under other programs.

In fiscal year 2022, DOI issued more than \$5 billion across over 6,000 grants, inclusive of small projects to assist in a variety of efforts benefitting small and disadvantaged communities or non-profit organizations providing services and employment to local youth, veterans, or older Americans. This small grant waiver provides flexibility to potential recipients to help prevent the perpetuation of systemic barriers to opportunities. In addition, this waiver will help to prevent project delays and project costs associated with the additional recipient effort needed to account for the sourcing of potentially non-compliant items associated with small projects.

3. Waiver Justification

A small grant waiver is critical to reduce the administrative burden to recipients where the costs of compliance with the Buy America preference would significantly negate the benefits of these small projects. Based on recent historical data, DOI issues approximately 4,000 grants per year for projects under the Simplified Acquisition Threshold. An analysis of the entities that receive DOI small grants found that many of these recipients (approximately 62%) were either non-profit institutions, private landowners, or tribes, many of which are also recipients within small and disadvantaged communities with limited capacity to manage compliance with the Buy America preference. Examples of FY22 small financial assistance projects funded by the DOI include:

- 792 small grants to non-profit organizations for the purpose of promoting and stimulating education, job training, and community involvement for young adults and veterans. These grants are typically short-term, seasonal projects providing rehabilitation and restoration of public lands.
- 781 small grants for habitat restoration projects, many of which are issued to private landowners voluntarily working with the government, for purposes of conserving, protecting, and enhancing habitats for fish, wildlife, and plants.

- 484 small grants were used for cooperative research purposes to facilitate multi-disciplinary scientific research, assistance, and education to address natural and cultural resource management across the Department of the Interior.
- 408 small grants issued to native America tribes or tribally controlled colleges or universities for a variety of projects ranging from historic preservation initiatives to economic development of the tribes.
- 155 small grants issued to Minority Serving Institutions that serve minority populations across the country to provide education skills needed to overcome racial discrimination and limited economic opportunities.

DOI awards that contained more significant construction (yielding a higher Buy America preference benefit) were found to be predominantly above the \$250,000.00 threshold.

Without a waiver in place for these small grants, small projects that do contain minor construction could be subject to project delays and greater costs associated with the need to ensure compliance with the Buy America preference. This could result in significant administrative costs for each individual grant. The impact associated with the Buy America preference is substantial for small grant recipients, many of whom do not have experience in applying domestic content preferences. A small grant waiver ensures that DOI and its financial assistance community do not devote significant public resources toward compliance activities where there is limited public benefit and ensures that requests for project-specific waivers for larger projects can be responded to in a timely fashion. Absent a small grant waiver, the following concerns have been expressed by DOI's financial assistance community:

- **Delays to Necessary Projects:** Small grant projects may experience substantial delays in project implementation and completion due to the additional time required to research and locate domestic sourced materials and submit and process waivers when domestic materials are not available. This would have a significant impact on shorter-term grants, such as water drought projects, farming and ranching projects containing minor construction, projects with seasonal constraints, seasonal internships, and youth programs, where implementation delays associated with a waiver could jeopardize the overall project.
- **Recipient Compliance Costs:** There will be an increased burden for the DOI financial assistance community who now must put forth resources to identify and maintain domestic sources of supply along with applicable documentation for the sake of single audit compliance.

A small grant waiver will enable better use of limited resources for both recipients and government staff, particularly in the early years of BABA implementation when DOI and recipients are learning new rules and processes to promote the use of American-made goods in Federally funded infrastructure projects.

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

Under OMB Memorandum M-22-11, agencies are expected 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” as appropriate before granting a public interest waiver. DOI’s analysis has concluded that this assessment is not applicable to this waiver as this waiver is not based on the cost of foreign-sourced products.

5. Solicitation of Comments

Proposed Waiver: This notice was posted on December 22, 2022, to satisfy the requirement to publish any proposed Buy America waiver and provide the public with a reasonable period of time for notice and comment. The Department of the Interior sought public and industry comment from all interested parties. In particular, the Department of the Interior sought comment regarding whether the Simplified Acquisition Threshold (currently \$250,000.00) is an appropriate threshold for a small grant waiver, or whether a different threshold would be more appropriate. Relevant information and comments were requested to help understand completely the facts surrounding the waiver requests and the agency’s proposal. This notice closed for comments on January 6, 2023

19 entities provided a response to this proposed waiver. A summary of the comments received are as follows:

- 8 entities responded with concurrence with the waiver as is.
- 11 entities concurred with a small grant waiver, but requested the waiver threshold be based on individual projects rather than individual grants to allow for the waiver to apply to larger grants consisting of multiple smaller infrastructure projects.
- 3 of the entities also requested the waiver threshold be increased to \$500,000.00
- None of the responses received expressed disagreement with the waiver.

In response to the comments received, a determination was made by the DOI to proceed with the waiver as written. The majority of the comments requested the threshold be based on individual infrastructure projects rather than the amount of the grant and/or an increase in the threshold amount. DOI considered the suggestions provided but feel the requested adjustments will make the waiver overly broad as the Department continues to promote investment in our domestic manufacturing base.

APPENDIX F

BABA COMPLIANCE CHECKLIST

ABANDONED MINE LANDS
BUILD AMERICA, BUY AMERICA ACT COMPLIANCE CHECKLIST FOR SUBRECIPIENTS



**ABANDONED MINE LANDS
BUILD AMERICA, BUY AMERICA ACT
COMPLIANCE CHECKLIST FOR SUBRECIPIENTS**

Bipartisan Infrastructure Law (BIL) funds used for transactions involving contracts for any activity related to the construction, alteration, maintenance, or repair of infrastructure in the United States must comply with the Build America, Buy America (BABA) Act. This checklist provides an overview of the requirements established by BABA, and is not a substitute for the detailed provisions of Public Law No. 117-58, §§ 70901-27. Subrecipients should keep the completed checklist for their records, but do not need to submit to Abandoned Mine Lands (AML).

CONTRACTOR/SUBCONTRACTOR:	
AWARD NUMBER:	
PROJECT TITLE:	
DATE:	

QUESTION	EXPLANATION/INSTRUCTION	STATUS		
		YES	NO	N/A
INCLUSION OF BABA LANGUAGE				
1. Was the BABA language included in all contracts and/or purchase orders?	You must incorporate the federal BABA language in all construction contracts and purchase orders for projects using funds from the Bipartisan Infrastructure Law (BIL).	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
2. Did the contractor include the BABA language in all subcontracts and/or purchase orders?	<p>You must ensure that that your contractor incorporated the federal BABA language in all subcontracts and purchase orders for projects using funds from the Bipartisan Infrastructure Law (BIL).</p> <p>While it is not required, it is recommended you request the contractor to submit copies of their subcontracts and purchase orders so you may verify the correct language was included.</p>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
VERIFICATION OF MANUFACTURER CERTIFICATIONS				
3. Has the contractor and their subcontractors obtained manufacturer certifications for material and product purchases?	<p>Although obtaining manufacturer certifications is not required, it is recommended as a best practice for documenting compliance with BABA.</p> <p>In addition, if your contractor and their subcontractors have obtained manufacturer certifications, it is recommended, but not required, that you ensure all applicable language was contained in the certifications.</p>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

PROCESSING OF WAIVERS				
4. Was the waiver submitted to AML before being submitted to DOI?	Whether you or the contractor/subcontractor is seeking the waiver, it must first be submitted to AML for their agreement. After receiving AML’s agreement of the waiver, you must submit the waiver to DOI.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
REQUEST FOR PAYMENT				
5. Are requests for payment being submitted on a monthly basis?	Requests for payment must be submitted to AML every monthly, without exception.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
6. If no work was performed during a monthly pay period, was a \$0 request submitted?	Since requests for payment must be submitted to AML every month, if no payment is needed a \$0 pay request must be submitted.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
7. Was a monthly report included with the request for payment?	A monthly report detailing the work performed during the billing period must be submitted to AML with each request for payment.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
8. Was the “AML-002 – Subrecipient Report of Compliance with Buy America Provisions for Federally Assisted Contracts” form included in the request for payment?	This form must be submitted by the recipient to AML every month.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
9. Was the “AML-003 – Contractor Certificate of Compliance with Build America, Buy America Provisions for Federally Assisted Contracts” form submitted by the contractor and their subcontractors?	This form must be submitted by the contractor and their subcontractors to AML every month.	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>

