

U.S. Department of Veterans Affairs
Waiver of Section 70914(a) of P.L. 117-58,
Buy America, Build America Act
for
National Cemetery Administration
Veterans Cemetery Grants Program

Waiver Request Overview

The Department of Veterans Affairs (VA), National Cemetery Administration (NCA) is providing notice to waive the application of Build America, Buy America Act (BABAA) requirements for all grant awards issued during the four-month period from the date of waiver. This adjustment period waiver is in the public's interest to meet Veteran burial needs without disruption and applies to all BABAA requirements for infrastructure projects, including the requirements for iron and steel, manufactured products, and construction materials be manufactured in the United States.

Introduction

NCA manages the Veterans Cemetery Grants Program (VCGP) to establish, expand, and improve Veteran cemeteries owned and operated across states, counties, U.S. territories, and federally recognized tribal governments. In fiscal year (FY) 2022, there are 121 VA-assisted, Veteran cemeteries in 46 states, territories, tribal trust lands, including Guam, Saipan, and Puerto Rico.

Millions of Americans that served in the U.S. Armed Forces are buried in Veteran cemeteries across the country. Added burial benefits to Veterans include gravesites, government headstones, burial flags, a Presidential Memorial Certificate, and the Veterans Legacy Memorial that publishes online pages onto which photographs, biographies, and other tributes to our nation's Veterans. The benefits provided by the VCGP ensure that those who once served our country are honored appropriately for their sacrifices and service.

Establishment, expansion, and improvement projects for Veteran cemeteries include design, construction, and maintenance efforts, much of which utilizes steel, iron, concrete, and other construction materials – which makes the VCGP a covered program under the requirements of BABAA.

Application Process

Title 38 U.S.C. § 2408 authorizes and 38 CFR Part 39 implements VCGP. Prescribed by 38 CFR Part 39, VCGP operates a grants process – “for a State or Tribal Organization to obtain a grant for the establishment, expansion, or improvement of a State or Tribal veterans cemetery:

- (1) the VA must approve its preapplication for the grant under § 39.31(e);
- (2) Its project must be ranked sufficiently high on the priority list in § 39.3 for the applicable fiscal year so that funds are available for the project;
- (3) the VA must approve its plans and specifications for the project under § 39.32;
- (4) The State or Tribal Organization must meet the application requirements in § 39.34; and
- (5) Other requirements specified in §§ 39.6, 39.10, and 39.33 must be satisfied.”

To meet the preapplication requirements, a State or Tribal Organization must respond to, at a minimum, the 13 requirements outlined in § 39.31 by July 1. Examples of the 13 requirements include: an estimate of the total project costs sought for VA grant funding, program narrative, and design concept. By October 1, VCGP prioritizes all conforming pre-applications on an annual Priority List. Based on VCGP’s funds availability, pre-applications that rank sufficiently high on the priority VCGP offers Grant opportunities and places those projects onto each fiscal year’s Operation Plan. Projects on the Operation Plan advance their preapplications to the final application phase by developing Final architectural, civil, and structural engineering plans, specifications, and detailed cost estimates. After VCGP reviews and approves the final application, VCGP awards grants based on contractor bids received and the VA and grantee execute a Memorandum of Agreement (MOA) of Federal grant funds.

Current Status of Program and Applications

Since enactment, VA has been working to implement BABAA preference requirements. Additionally, we have been coordinating across the Department to better understand the applicability of BABAA requirements to VA’s Federal financial assistance programs and the potential use of funds for projects that include infrastructure as defined by BABAA.

Pursuant to the Office of Management and Budget’s Memorandum M-22-11, (Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure), VA is developing a website where stakeholders can learn about the requirements of BABAA. VA plans to use the website to list proposed waivers for public comment.

As of FY22 Q4, VCGP is in the final application phase of 12 State projects, which VCGP intends to award by September 30, 2022; the end of the FY. Unless VCGP can obligate funds for these 12 projects that do not meet current BABAA requirements, cemetery expansions for Veteran burial options will be significantly delayed, possibly risking gravesite depletion and temporary pauses on certain types of burial at these cemeteries.

VCGP will use the waiver period, to continue socializing BABAA requirements to the VCGP grant-specific stakeholder community. At the conclusion of the adjustment period waiver for VCGP, VA expects that all VCGP grant awards will comply with BABAA requirements.

In addition, VA, including the VCGP, will continue to communicate and educate future

potential award recipients and industry stakeholders on BABAA requirements more proactively.

Waiver Request Details

As stated in the Waiver Request Overview, VA's proposed four-month public interest general applicability waiver would waive the application of BABAA requirements on all grant awards issued during the adjustment period. The proposed waiver applies for a four-month period from date of waiver issuance. Section 70921(b)(2)(A) requires agencies to assess whether a significant portion of any cost advantage of a foreign-sourced project is the result of the use of dumped steel, iron, or manufactured products, or the use of injuriously subsidized steel, iron, or manufactured products. Implementation Guidance at p. 10. Because this waiver is not based on the cost of foreign-sourced products, we concluded that this assessment is not applicable to this waiver. VA will perform additional market research as it implements the BABAA requirements to better understand the market and to limit the use of waivers caused by dumping of foreign-sourced products.

Waiver Justification

Departmental Efforts to Implement BABAA: Since enactment, VA has been working to understand the application of BABAA requirements to VA's financial assistance portfolio. Throughout the implementation process, VA identified an increasing risk in effectively understanding and implementing BABAA financial assistance requirements, specifically on VA's grants portfolio. To mitigate the risk, VA proposed establishing a centralized grants function. If approved, the centralized grants function will help support VA's grants community in implementing BABAA requirements in addition to the following activities: drafting agency-wide BABAA grants policy, procedures, and standard operating procedures; supporting the establishment of standard BABAA language in Notice of Funding Opportunity and Grant Award Terms and Conditions; developing a website where stakeholders can learn about the requirements of BABAA on grants and where VA can post proposed and approved grant waivers; and designing, implementing, and documenting an agency-level BABAA grants waiver process.

VGCP Efforts to Implement BABAA: VA is fully committed to ensuring compliance with Executive Order 14005, Ensuring the Future is Made in All of America by All of America's Workers and the Build America, Buy America Act, Pub. L. No. 117-58, §§ 70901-52. Currently, we will inform FY23 VCGP grant pre-applicants of the BABAA requirements, with which they must comply as a condition of receiving a cemetery grant. We will also amend VCGP regulations in 38 CFR Part 39 to reference the BABAA requirements in Sections 70901-52 and include enforcement provisions for VA to ensure those requirements are being met. Although VA proposes to waive the application of BABAA requirements on all grant awards issued during the adjustment period, grantees that receive a grant, at the conclusion of the four-month waiver period will be subject to BABAA requirements for future awards or have a project or product specific waiver.

Also, VA through this notice acknowledges the need for a four-month “waiver in the public interest [...] where an agency determines that other important policy goals cannot be achieved consistent with the Buy America requirements established by the Act.” Id. at p. 10. The guidance also recognizes several instances in which Federal agencies may consider issuing a public interest, adjustment period waiver, where the time limited waivers would allow recipients and agencies to transition to new Buy America preferences, rules, and processes. Id. At p. 11.

As described in the “Anticipated Impacts Absent a Waiver” section below, there are several public interest factors that support VA’s request for a short-term adjustment period waiver. While we acknowledge and support the competing public interest that the BABAA provides for supporting US manufacturing, the limited impacts of a short-term delay in implementing new BABAA policies in the VCGP will be significantly less detrimental than delaying the award of 12 Veterans cemetery grants in during the four-month adjustment period.

In addition to waiving BABAA requirements for grants issued during the waiver period, VCGP will use the four-month waiver adjustment period to prepare for compliance with the BABAA by asking for information from grantees and pre-applicants. To assess the potential scope of BABAA impact, VCGP will collect information from States, Tribal Organizations and Territories to identify categories of construction materials, manufactured products, as well as iron and steel that have sufficient domestic availability to support VA-assisted infrastructure projects and meet existing Buy America compliance measures for its contractors.

VCGP will also request information from States, Tribal Organizations and Territories on challenges with and potential solutions for implementing BABAA to support an efficient transition to the procurement and certification processes of BABAA compliant materials. VCGP will also engage in Tribal consultations during the waiver period, consistent with Biden Administration policy. Data gathered during this time will inform VA’s decisions on implementing BABAA requirements for grantees to domestically source construction materials used in VCGP funded projects and necessary amendments to VCGP’s existing regulation. Notably, the FY22 grants issued during the waiver period will be awarded for cemetery expansion and improvement projects, which generally involve the construction of columbarium niches, pre-placed crypts, in-ground cremation gravesites, and improvement projects (building energy efficiency, roads, landscape, and irrigation). Typical construction materials and manufactured products include, steel, iron, pre-fabricated concrete columbarium niches and crypts, pre-cast concrete, natural stone, stormwater drainage pipes, grates, inlets and manholes, windows, lighting fixtures, insulation, irrigation materials and components, asphalt concrete, and site furnishings.

Anticipated Impacts Absent a Waiver

There are several expected impacts if no waiver is issued for the four-month requested timeframe including:

1. Disruption in Burial Services to Veterans and their Families.

2. Undue Delays, Increased Costs, and Disruption of Work.
3. Hasty Implementation of Other New VCGP Requirements Along with New BABAA Requirements.

Disruption in Burial Services to Veterans: All 12 projects to be awarded grants during the waiver period are expansion or expansion and improvement grants. VCGP tracks burial depletion rates and without a waiver, cemetery expansions for Veteran burial options will be significantly delayed, possibly risking gravesite depletion and temporary pauses on certain types of burial at these cemeteries.

Undue Delays, Increased Costs, and Disruption of Work: For FY22, VCGP already notified nine States that their pre-applications ranked high enough on the priority list to receive a grant if they met the final application requirements by the end of the fiscal year. A total of 12 projects from nine States met the requirements. Without a waiver from BABAA requirements, States will need to re-evaluate proposed expansion and improvement of projects, creating undue delays. All nine States already solicited or received contractor bids for the 12 proposed projects. Bid expiration will require grantees resolicit the projects that met previous Buy American requirements in the Federal Acquisition Regulation 52-225-9. Because VCGP did not provide notice to State applicants of new BABAA requirements at the beginning of the grant cycle (July 1, 2021), States did not have adequate time to adjust their budgets to meet new BABAA requirements. States have expressed to VCGP administrators the hardships they would face without the waiver of BABAA requirements, primarily the adverse impact on their ability to meet Veteran burial needs. Additionally, with the rising cost of materials and labor, resoliciting the projects will result in higher bid amounts, even lower bidder response, and a greater cost to the public. To avoid undue cost increases, VCGP needs to award grants and obligate funds for the 12 projects so grantees can execute contracts with contractors for which the cost of labor and materials between the two parties has been agreed. Furthermore, based on the availability of domestic materials and the potential need to identify new supply chains to source domestic materials, implementing BABAA has the potential to disrupt proposed work. States may face challenges related to swiftly procuring domestic products, items, materials, etc. necessary to complete projects. To eliminate undue delays, increases in project costs, and disruption of work there is significant public interest in waiving BABAA requirements.

Hasty Implementation of Other New VCGP Requirements Along with New BABAA Requirements: In January 2021 and March 2022, the VCGP was expanded to include new grant awards to counties, training grants, outer burial receptacle benefits, and burial eligibility for non-veterans. See Public Law 116-315, Sec. 2203, 2205, 2206, 2208; Public Law 117-103, Div. CC. Amendment of VA regulations in Parts 38 and 39 are needed to implement these new authorities, which are in various stages of development and review, in addition to BABAA requirements. This additional workload on the VCGP and its effect on grantees will require time to implement and may necessitate States and Tribes to amend their governance laws to meet new program requirements.

Waiver Response

On Friday, August 5, 2022, VCGP posted the proposed waiver which included a 15-day public comment period, commencing on Friday, August 5 and ending on Monday, August 22, 2022. We provided a dedicated email address (VCGS@va.gov) for electronic submission of comments and a mailing address (Veterans Cemetery Grants Service, National Cemetery Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW, Room 45C, Washington, DC 20420) for comments. No public comments on the proposed waiver were received.

Conclusion

Due to the critical need to establish, expand, and improve VA grant-funded cemeteries in a timely and cost-effective manner, BABAA requirements on grantees established during the four-month waiver period is not in the public's interest. Given the timing of awards by the end of FY22, a four-month public interest waiver supports VCGP in avoiding disruption in the provision of burial services in VA grant-funded cemeteries to grantees that do not meet BABAA requirements. After the waiver period, VA will have amended our Grants.gov notice to include BABAA requirements and will revise the MOA for grantees to agree with BABAA requirements as a condition of grant compliance. We do not anticipate a need for a second waiver request for an adjustment period because we are implementing measures to apply and enforce BABAA requirements for future grantees. However, this would not affect VA's need to issue other types of waivers, such as product or project specific waivers, in the future. The waiver of BABAA requirements on FY22 projects awarded during the four-month waiver period will allow time for VA and its future grantees to effectively meet BABAA requirements, in addition to implementing other newly mandated program authorities.

/s/

Denis McDonough
Secretary of Veterans Affairs
September 2022