



**FEMA**

**February 21, 2023**

**Re: Public Interest: Small Projects General Applicability Waiver of Section 70914(a) of P.L. 117-58, Build America, Buy America Act, 2021 for Federal Emergency Management Agency (FEMA) Financial Assistance Awards**

**AGENCY:** Grant Programs Directorate, FEMA

**ACTION:** Notice

**SUMMARY:** In accordance with the Build America, Buy America Act (BABAA), this notice advises that FEMA grants a general applicability waiver to the Buy America Domestic Content Procurement Preference (“Buy America preference”) as applied to small projects, where projects under a FEMA federal financial assistance award or subaward is less than the [federal simplified acquisition threshold](#) (currently set at \$250,000). A FEMA federal financial assistance award may be comprised of multiple projects with varying levels of cost. The waiver would be applicable to any project under the financial award that meets the federal simplified acquisitions threshold (currently \$250,000 or less). Guidance outlining the application of the small projects waiver is forthcoming.

**DATES:** This waiver will be effective upon approval date, which is **February 21, 2023**, and will remain in effect for recipients and subrecipients of FEMA financial assistance infrastructure projects for five years from the issue date. As FEMA develops efficient waiver review capabilities, FEMA will review this waiver within five years of the date on which the waiver was issued or more often as appropriate to determine its continued utility, applicability and relevance with FEMA’s missions and goals consistent with the Infrastructure Investment and Jobs Act (IIJA), and the Office of Management and Budget [\(OMB\) Memorandum M-22-11](#),

[Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure.](#)

**SUPPLEMENTARY INFORMATION:**

**I. Build America, Buy America**

The Build America, Buy America Act (BABAA) was enacted on Nov. 15, 2021, as part of the Infrastructure Investment and Jobs Act (IIJA). Pub. L. 117-58. BABAA establishes a domestic content procurement preference, the Buy America preference, for federal infrastructure programs. Section 70914(a) of BABAA establishes that no later than 180 days after the date of enactment, FEMA must ensure that none of the funds made available for infrastructure projects may be obligated by FEMA unless it has taken steps to ensure that the iron, steel, manufactured products, and construction materials used in a project are produced in the United States. In section 70912, BABAA further defines a project to include “the construction, alteration, maintenance, or repair of infrastructure in the United States” and includes within the definition of infrastructure those items traditionally included along with buildings and real property.

**II. Waivers**

Under section 70914(b), FEMA has authority to waive the application of a domestic content preference when (1) application of the preference would be contrary to the public interest; (2) the materials and products subject to the preference are not produced in the United States at a sufficient and reasonably available quantity or satisfactory quality; or (3) inclusion of domestically produced materials and products would increase the cost of the overall project

by more than 25%. Section 70914(c) provides that a waiver under 70914(b) must be published by the agency with a detailed written explanation for the proposed determination and provide a public comment period of not less than 15 days. Information on this waiver may be found on FEMA's website at <https://www.fema.gov/grants/policy-guidance/buy-america>.

### **III. Public Interest in a General Applicability Waiver of Buy America Provisions for Small Projects**

The purpose of this waiver is to reduce the administrative burden to recipients and subrecipients, which include small and disadvantaged communities, where the costs of compliance with the BABAA requirements could significantly negate the benefits of the smallest projects. Failure to issue this small projects waiver could undermine the opportunities and benefits to such communities requiring FEMA financial assistance, limiting the Agency's ability to deliver critical resources equitably and efficiently. The BABAA requirements apply to [23 FEMA financial assistance programs](#). To understand the scope of this waiver, FEMA reviewed awards for FY2020 and determined that under FEMA's Hazard Mitigation Assistance programs (which include FEMA's largest financial assistance programs subject to BABAA), \$1.7 billion in project costs would be subject to BABAA. Of those \$1.7 billion, approximately \$10.2 million would be exempt under a small projects waiver, which represents 0.6% of total project costs subject to BABAA. These figures support that a small projects waiver is appropriate for FEMA programs because it would reduce administrative burden for smaller projects while still requiring the vast majority of FEMA funding to be subject to the domestic preference requirements of BABAA.

FEMA exercises oversight over the projects undertaken by award and subaward

recipients. Under FEMA's Hazard Mitigation Assistance Programs, each subaward represents a discrete construction project. FEMA reviews and approves each subrecipient's application to determine whether the individual project meets program criteria including technical feasibility, cost effectiveness and Environmental and Historic Preservation review and is eligible for funding.

Many of the resources and benefits delivered by these programs support projects in communities with limited technical and financial expertise to comply with complex, domestic preference requirements. Furthermore, FEMA will allocate additional personnel to process project-specific waivers. A small projects waiver allows the Agency to dedicate critical personnel to the compliance activities of larger projects and to successfully implement the BABAA requirements.

To date, FEMA has taken the actions below to implement the BABAA requirements:

1. Promulgated Agency-wide policy;
2. Developed Agency website on BABAA;
3. Ensured Notices of Funding Opportunity and awards were updated, as appropriate, with applicable terms and conditions;
4. Engaged in Tribal consultations;
5. Established process for waiver review and routing;
6. Developed outreach strategy plan to provide guidance and training to FEMA staff and recipients, subrecipients, and stakeholders; and
7. Developed contract provision and self-certification for recipients and subrecipients to

include in their contracts and subcontracts funded by FEMA federal financial assistance for infrastructure.

In addition to the actions above, a small projects waiver focused on reducing administrative burden on recipients and subrecipients is also a key part of FEMA's implementation.

#### **IV. 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. FEMA has concluded that this assessment is not applicable to this waiver, as this waiver is not based on the cost of foreign-sourced products. FEMA will perform additional market research during the duration of the waiver and consult with International Trade Administration (ITA) to better understand the market to limit the use of waivers caused by dumping of foreign-sourced products.

#### **V. Limited Duration of Waiver**

FEMA is committed to the successful implementation of the Buy America preference across its programs providing covered federal financial assistance for infrastructure projects and will move swiftly toward completing the processes outlined in this notice. This waiver will be effective upon approval date, which is **February 21, 2023**, and will remain in effect for all awards or funding obligated to recipients and subrecipients of FEMA financial assistance infrastructure projects for five years from the issue date. As FEMA develops efficient waiver

review capabilities, FEMA will review this waiver within five years of the date on which the waiver was issued or more often as appropriate to determine its continued utility, applicability and relevance with FEMA's missions and goals consistent with the IIJA, and the Office of Management and Budget (OMB) Memorandum M-22-11, *Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure*.

## **VI. Public Comments**

FEMA solicited public comments on the waiver as required under Section 70914 of BABAA. In particular, FEMA invited interested parties to comment on the length, purpose, and scope of the waiver to allow FEMA to make an informed final determination on this waiver. A total of four comments were received in response to the proposed waiver. FEMA thoroughly reviewed and considered each of the comments in determining to move forward with the issuance of this waiver as published in this Final Notice. The comments generally favored a Small Projects waiver as proposed.

Two commenters expressed support for a larger monetary threshold for the waiver, suggesting that the amount should be increased to \$500,000 or \$1,000,000 rather than the proposed \$250,000 threshold. One commenter opposed the proposed small projects waiver noting that the waiver should not be tied to the Federal simplified acquisition threshold. FEMA appreciates the perspectives commenters provided during their review of the Small Projects Waiver and believes that the small projects waiver monetary threshold is set to the appropriate level to balance the intent of the Act with understood limitations and barriers associated with smaller projects.

Additionally, one commenter expressed opposition to BABAA due to projected cost burdens associated with domestic materials. The commenter noted that waivers helped alleviate the burden, however their continued efforts to progress cost-beneficial projects may result in challenges in project delivery due to BABAA requirements. FEMA appreciates the input the commenter provided and will continue to evaluate how BABAA requirements may place financial burdens and challenges for its partners, however, at this time, FEMA and other required federal agencies must adhere to requirements set forth by BABAA.

As an extension to public comment on the waivers, FEMA conducted a Request for Information (RFI) in July 2022 to solicit feedback from FEMA Headquarters and Regional personnel regarding impacts of waivers and needs for additional waivers for grant programs. Results from the RFI revealed that stakeholders supported the development of the small projects waiver for projects under the federal simplified acquisition threshold (currently \$250,000).

At this time, after reviewing submitted comments, FEMA is issuing this Small Projects waiver with no substantive changes described herein and with other minor, inconsequential grammatical revisions.



---

Pamela S. Williams  
Assistant Administrator, Grant Programs Directorate  
FEMA

**Attachment:** *Table A: FEMA Federal Financial Assistance Programs Subject to BABAA Buy America Preference*

**Table A: FEMA Federal Financial Assistance Programs Subject to BABAA Buy America Preference**

#	FEMA Grant Program Office	Assistance Listing Number	FEMA Grant Program
1.	GPD	97.044	Assistance to Firefighters Grant Program (AFG)
2.	FIMA	97.047	Building Resilient Infrastructure and Communities (BRIC)
3.	NPD	97.040	Chemical Stockpile Emergency Preparedness Program (CSEPP)
4.	ORR	97.024	Emergency Food and Shelter Program (EFSP – Regular & Humanitarian)
5.	GPD	97.042	Emergency Management Performance Grant Program (EMPG)
6.	GPD	97.052	Emergency Operations Center Grant Program (EOCGP)
7.	GPD	97.044	Fire Prevention & Safety (FP&S)
8.	FIMA	97.029	Flood Mitigation Assistance (FMA) (including Swift Current)
9.	GPD	97.067	Homeland Security Grant Program (HSGP)
10.	GPD	97.057	Intercity Bus Security Grant Program (IBSGP)
11.	GPD	97.075	Intercity Passenger Rail (IPR)
12.	NCP	TBD	Next Generation Warning System (NGWS)
13.	GPD	97.008	Nonprofit Security Grant Program (NSGP)
14.	GPD	97.056	Port Security Grant Program (PSGP)
15.	FIMA	97.047	Pre-Disaster Mitigation (PDM)
16.	FIMA	97.041	Rehabilitation of High Hazard Potential Dams (HHPD)
17.	FIMA	97.139	Safeguarding Tomorrow Through Ongoing Risk Mitigation Revolving Loan Fund (Safeguarding Tomorrow RLF)
18.	GPD	97.083	Staffing for Adequate Fire and Emergency Response (SAFER)
19.	GPD	97.137	State and Local Cybersecurity Grant Program (SLCGP)
20.	GPD	97.075	Transit Security Grant Program (TSGP)
21.	GPD	97.137	Tribal Cybersecurity Grant Program (TCGP)
22.	GPD	97.067	Tribal Homeland Security Grant Program (THSGP)
23.	ORR	97.025	Urban Search & Rescue (US&R)

**Legend for FEMA Grant Program Offices:**

- FIMA- Federal Insurance and Mitigation Administration
- GPD- Grant Programs Directorate
- NCP- National Continuity Programs
- NPD- National Preparedness Directorate
- ORR- Office of Response and Recovery