

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Docket No.: DOT-OST-2024-0129

Waiver of Buy America Requirements for the Pacific Island Territories and the Freely Associated States

ACTION: Notice; Request for Comments.

SUMMARY: The Department of Transportation (DOT) is finalizing a general applicability public interest waiver of the requirements of Section 70914(a) of the Build America, Buy America Act (BABA) and related domestic preference statutes administered by DOT and its Operating Administrations (OAs) for federal financial assistance awarded for infrastructure projects located in the Commonwealth of Northern Mariana Islands (CNMI), Guam, and American Samoa, collectively referred to as the Pacific Island territories. The waiver would also apply to discretionary grant assistance provided by DOT to the Freely Associated States (the Republic of Palau, Republic of the Marshall Islands, and Federated States of Micronesia) in the Pacific that is subject to a domestic preference statute (which does not include BABA, as that statute only applies to the United States and its territories). The waiver will remain in effect for five years after the effective date of the final waiver. This action also terminates the previously issued temporary general applicability waiver for this region.

DATES: The waiver is applicable to awards that are obligated on or after January 10, 2025, until January 9, 2030.

FOR FURTHER INFORMATION CONTACT: For questions about this notice, please contact Elizabeth Fox, DOT Office of the Assistant Secretary for Transportation Policy, at elizabeth.fox@dot.gov or at 202-366-4540. For legal questions, please contact Jennifer Kirby-McLemore, DOT Office of the General Counsel, 405-446-6883, or via e-mail at jennifer.mclemore@dot.gov.

SUPPLEMENTARY INFORMATION:

Background

The Buy America preferences set forth in Section 70914(a) of BABA¹ require that all iron, steel, manufactured products, and construction materials used for infrastructure projects in the United States 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 (OMB)'s Guidance Memorandum M-24-02, *Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure*, DOT may waive the application of BABA requirements in any case in which it finds that: (i) applying the domestic content procurement preference would be inconsistent with the public interest; (ii) types of iron, steel, manufactured products, or construction materials are not produced in the U.S. in sufficient and reasonably available quantities or of a satisfactory quality; or (iii) the inclusion of iron, steel, manufactured products, or construction materials produced in the U.S. will increase the cost of the overall project by more than 25 percent.

BABA also provides that the preferences under Section 70914 apply only to the extent that a domestic content procurement preference as described in Section 70914 does not already apply to iron, steel, manufactured products, and construction materials. IIJA § 70917(a)–(b).

¹ The Build America, Buy America Act was included as title XI, subtitle A of the Infrastructure Investment and Jobs Act (IIJA) (Pub. L. 117-58).

Federal financial assistance programs administered by DOT’s Operating Administrations (OAs)² are subject to a variety of mode-specific statutes that apply particular Buy America³ requirements to iron, steel, and manufactured products, including 49 U.S.C. § 50101(a) (FAA); 23 U.S.C. § 313 (FHWA); 49 U.S.C. § 5323(j) (FTA); and 46 U.S.C. § 54101(d)(2) (MARAD). Recent annual appropriations acts have also required DOT to apply the Buy American Act (41 U.S.C. Chapter 83) to funds appropriated under those acts,⁴ where a mode-specific statute is not in place. These statutes also allow for waivers of the Buy America requirements to be issued when the Department determines that doing so is in the public interest.

DOT and its OAs provide financial assistance to the three Pacific Island territories of Guam, American Samoa, and CNMI through both discretionary grants and allocated programs, including assistance programs for highways and bridges, public transportation, airports, and port facilities. The Freely Associated States (the Republic of Palau, Republic of the Marshall Islands, and Federated States of Micronesia) in the Pacific region are also eligible recipients of discretionary grants under FAA’s Airport Improvement Program (AIP).

During FY 2024, DOT OAs provided more than \$132.7 million in financial assistance for at least 20 capital projects in the Pacific Island territories under various programs where infrastructure is an eligible activity and may be subject to BABA or other DOT existing Buy America requirements. DOT also provided \$47.6 million in AIP discretionary grants to the Freely Associated States in the Pacific region for 3 projects during that time.

² DOT OAs that provide or administer financial assistance covered under this waiver include the Federal Aviation Administration (FAA); Federal Highway Administration (FHWA); Federal Transit Administration (FTA); and the Maritime Administration (MARAD).

³ In this notice, references to “Buy America” include domestic preference laws referred to “Buy American” that apply to DOT financial assistance programs.

⁴ For example, Section 409 of the Transportation, Housing and Urban Development, and Related Agencies Appropriations Act, 2024 states that “no funds appropriated pursuant to this Act may be expended by an entity unless the entity agrees that in expending the assistance the entity will comply with sections 2 through 4 of the Act of March 3, 1933 (41 U.S.C. §§ 8301-8305, popularly known as the ‘Buy American Act’).”

On April 29, 2024, DOT issued a temporary general applicability waiver of the requirements of Section 70914(a) of BABA and related domestic preference statutes administered by DOT and its OAs. The DOT waiver was part of an interagency effort, led by the OMB, to provide time for DOT and other infrastructure agencies to collect and analyze evidence to determine if a long-term waiver of these requirements is in the public interest and allow time for DOT and its OAs to offer technical assistance to potential assistance recipients in the remote communities in the Pacific Island territories and Freely Associated States.

During the temporary general applicability waiver period, DOT has worked with OMB's Made in America Office (MIAO) and with other infrastructure agencies to better understand the local manufacturing environment, consider how to best balance the equities for residents of the Pacific Island territories and domestic suppliers, and explore ways to potentially ease supply chain challenges for infrastructure projects in those territories. The Pacific Islands are over 5,000 miles from the mainland United States and must import products via air or sea. These economies have few local heavy manufacturers and largely rely on regional supply chains from east Asia, Australia, and New Zealand. Most goods, equipment, materials, and supplies are imported and rely on shipping with extended timelines and unpredictable shipping cost fluctuations. Moreover, materials sourced from the mainland U.S. lead to additional shipping fees and longer lead times, thus significantly extending construction activity schedules.

Along with other Federal agencies, DOT has reviewed the U.S. International Trade Commission's 2023 report *U.S.-Pacific Islands Trade and Investment: Impediments and Opportunities*, which noted the geographic isolation, high costs of shipping, dependence on imports, regulatory barriers, limited economies of scale, and environmental challenges as persistent barriers that the Pacific Island territories face. Additionally, the lack of available land

on the Pacific Island territories creates barriers for developing new manufacturing and assembly facilities. Those infrastructure products readily available and produced locally on the Pacific Islands, such as aggregates and cement products, are mostly statutorily exempt from BABA requirements. For these reasons, the DOT remains concerned that complying with the domestic sourcing requirements may increase already elevated project time and costs.

In considering this waiver, DOT consulted with the relevant Federal assistance programs in the respective OAs, including the regional offices in those agencies that directly administer DOT funding programs in the Pacific Island territories and Freely Associated States. DOT also relied on other communications that it has received from stakeholders in those territories. For example, CNMI and Guam have cited their isolated location in the Western Pacific and reliance on ocean freight as the only mode of transporting commodities to the island as creating significant challenges in obtaining materials from domestic sources, with impacts on both project costs and delivery schedules. The two territories have also indicated that shipping construction materials from the continental United States raises shipping costs by approximately 30 percent above the cost to ship directly to the islands from Asia.

In August 2024, the U.S. Department of the Interior (DOI) hosted the third Territorial Climate and Infrastructure Workshop in Honolulu, HI, which included many representatives from various territorial agencies and departments. During the workshop, DOI and DOT led a session on the Build America, Buy America Act, during which many participants described the structural challenges the territories face in complying with Buy America requirements and the desire for relief due to the significant cost increases and delays in project timelines that would ensue. In addition, in February 2023, DOI hosted the Interagency Group on Insular Areas, at which the governors of the Territories expressed concerns related to BABA implementation and

potential project delays and requested that federal agencies be flexible in these requirements, including consideration of waivers.

Additionally, representatives from American Samoa have indicated to the Federal Emergency Management Agency that “As a containerized community, our territories depend on goods, equipment, materials, and supplies to be imported.” They further stated that “we can purchase equipment from foreign countries closer to American Samoa and with reasonable prices and shorter shipping time.” American Samoa representatives also noted that availability of materials from nearby foreign countries such as New Zealand and Australia would result in a significant cost savings to the grantors.

Issuance of Waiver and Discussion of Comments Received

On December 16, 2024, DOT published a proposed Buy America waiver for projects located within Pacific Island territories of CNMI, Guam, or American Samoa and funded under DOT-administered financial assistance programs in the Federal Register (89 FR 101688). DOT received 12 comments on the proposed waiver from individuals and government representatives in both the Pacific Island territories and the Freely Associated States and from the general public, a steel manufacturer, and a trade organization. Ten of the comments received were supportive of the waiver as proposed, while two expressed opposition to the waiver.

Supportive comments noted the difficulties in complying with domestic content requirements that the distance from the mainland US creates. Shipping materials from the U.S. mainland incurs additional costs and lengthy delays that, in turn, imperil project timelines and budgets, with one commenter citing cost increases of 50-100%. Supportive commenters also noted that the small size of the infrastructure projects can also create compliance issues noting difficulties contractors face in obtaining Buy America certifications from manufacturers for small orders. Additionally, the length of the waiver was supported by more than one commenter,

noting that the time will help entice contractors to bid on their projects and ensure projects are completed on time and on budget.

One commenter requested that the waiver cover specific types of vehicles and associated infrastructure. DOT appreciates this comment and notes that as the waiver would apply to both manufactured products and iron and steel, vehicles should be covered, regardless of which category they fall into. Another supportive commenter requested that the waiver apply standards to the items procured. DOT notes that the waiver only applies to the domestic content requirements, and that the materials procured must still meet the necessary performance criteria and be suitable for their intended applications, regardless of their manufacturing location.

One commenter raised concerns that the proposed waiver would result in tax dollars being utilized for the sourcing of iron and steel, manufactured products, and construction materials produced in countries of concern or by entities of concern. The commenter also raised concerns that the proposed waiver would render the territories' projects less resilient because they could foster a reliance on regional, rather than allied trading partners. Though DOT acknowledges this concern, DOT is confident that, through the implementation of existing prohibitions and the exclusion of the specified list of items provided in the waiver, this concern is addressed to the fullest extent possible under available legal authorities. With respect to existing prohibitions, various DOT OAs have prohibitions against use of funds for rolling stock purchases from certain entities found at 49 U.S.C. 5323(u) and 49 U.S.C. 50101(d). This waiver does not impact such prohibitions. Furthermore, DOT notes that the waiver applies only to domestic sourcing requirements; thus, all other restrictions on the use of Federal funding must still be followed, including any funding specific restrictions on purchases outside the Buy American statutes, and any limitations on funding imposed by the notice of funding opportunity

or grant agreements. Lastly, the list of products excluded from this waiver was crafted with this concern in mind; accordingly, DOT incorporated this list of excluded products in this waiver to protect against related national security concerns. Taken together, these safeguards will ensure that the Pacific Island territories are able to rely on nearby allied trading partners for their purchases of materials, thereby improving resilience for their critical infrastructure projects.

One commenter questioned DOT’s conclusion that the assessment required under OMB Memorandum M-24-02 regarding dumping or injuriously subsidized products is not applicable to this waiver. To mitigate this concern, DOT has added language noting that the cost considerations driving this public interest waiver are not due to the use of dumped steel, iron, or manufactured products or of injuriously subsidized steel, iron, or manufactured products but rather to the increased costs of shipping domestic items from the mainland U.S.

A commenter also questioned DOT’s authority to issue a waiver for a “deficient program,” as defined in sections 70912 and 70913(c) of BABA. However, DOT notes the identification of a program as “deficient” under the BABA statute does not have any bearing on the agency’s ability to issue new waivers of Buy America requirements under the respective statutes applicable to those programs.⁵ The commenter also indicated that they were “unaware of any instance in which the 1933 BAA has been deemed applicable to federally assisted building and infrastructure construction.” DOT notes that provisions included in annual appropriations acts in recent fiscal years provide the basis for applying Buy American Act requirements to financial assistance programs administered by DOT.⁶

⁵ For more discussion of “deficient programs,” see *DOT’s Identification of Federal Financial Assistance Infrastructure Programs Subject to the Build America, Buy America Provisions of the Infrastructure Investment and Jobs Act*, January 2022, available at <https://www.transportation.gov/office-policy/transportation-policy/made-in-america/build-america-buy-america-60-day-report>.

⁶ See, for example, section 409 of the Transportation, Housing and Urban Development, and Related Agencies Appropriations Act, 2024.

Some of the commenters, both supporting and opposing, either directly or indirectly referenced the temporary waiver issued by DOT on April 29, 2024, apparently viewing the proposed waiver as an extension of that waiver. In the Findings section below, DOT is clarifying that this is a new, longer-duration waiver with a different public interest basis and justification, and the temporary waiver issued April 29, 2024, is being terminated concurrent with issuance of this waiver.

Finally, one commenter stated that the 15-day comment period on the proposed waiver was insufficient. DOT notes that the comment period provided for this waiver is consistent with the requirements of BABA and related statutes for new Buy America waivers.

Finding on Waiver and Termination of Temporary Waiver

DOT is using its authority under Section 70914(b)(1) to waive the Act's Buy America preferences for iron and steel, manufactured products, and construction materials used in infrastructure projects located within the Pacific Island territories of CNMI, Guam, or American Samoa and funded under DOT-administered financial assistance programs, on the basis that doing so would be in the public interest. The waiver applies to all awards obligated after the effective date and, in the case of awards obligated prior to the effective date, the waiver applies to all expenditures for non-domestic iron, steel, manufactured products, and construction materials incurred after the effective date. The waiver does not apply to the following products that have been identified by OMB as critical supply chains that warrant special consideration:

- Telecommunications infrastructure:
 - Telecommunications equipment used to transmit and receive digital signals across constructed networks (e.g., vaults, cabinets, routers, switches, optical line terminals (OLTs), optical network terminals (ONTs), wi-fi capable customer

equipment, and other electronic hardware used to connect the network). This includes:

- Video surveillance equipment, including any equipment that is used in fixed and mobile networks that provides advanced communications service in the form of a video surveillance service, provided the equipment includes or uses electronic components. This encompasses any equipment that can be used in a fixed or mobile broadband network to enable users to originate and receive high quality voice, data, graphics, and video telecommunications using technology with connection speeds of at least 200 kbps in either direction.⁷
- Broadcasting equipment, including radio frequency devices contained in electronic-electrical products that are capable of emitting radio frequency energy by radiation, conduction, or other means. These products have the potential to cause interference to radio services operating in the radio frequency range of 9 kHz to 3000 GHz.⁸
- Broadband equipment (e.g., fiber/coax cable, conduit, pedestals, handholes, tower structures, and other physical components used to connect to telecommunication equipment)
- Grid-connected utility-scale energy generation and stationary storage (> 5MW)

⁷ <https://www.fcc.gov/laboratory-division/equipment-authorization-approval-guide/equipment-authorization-system#step2>

⁸ <https://www.fcc.gov/oet/ea/rfdevice>

- Cargo handling equipment, including cranes, that are manufactured by or contain any networks, operating systems, or software identified in U.S. Maritime Advisory 2024-0026 or successor advisories⁹

While these items are excluded from this general waiver, DOT recognizes that purchases of these items from non-domestic sources as part of a federally-assisted project may be warranted in certain circumstances. For those individual projects, DOT and its OAs will consider requests for potential waivers of BABA or other Buy America requirements on a case-by-case basis, with special attention to any strategic security issues that may be associated with those purchases.

Separately, DOT also notes that the waiver does not waive the requirements of 49 U.S.C. 50101(d) or 49 U.S.C. 5323(u), or any other requirements for federal financial assistance. Because many DOT-administered financial assistance programs are also subject to program-specific domestic preference requirements, the waiver would also apply to those requirements. Specifically, the waiver would also be an exercise of DOT's authority to issue public interest waivers under 23 U.S.C. § 313(b)(1), 49 U.S.C. § 5323(j), 46 U.S.C. § 54101(d)(2)(B)(i)(I), 49 U.S.C. § 50101(b)(1), and 41 U.S.C. Chapter 83. Under those DOT authorities, the waiver also applies to projects in the Freely Associated States (the Republic of Palau, Republic of the Marshall Islands, and Federated States of Micronesia).¹⁰

⁹ 2024-002-Worldwide-Foreign Adversarial Technological, Physical, and Cyber Influence
<https://www.maritime.dot.gov/msci/2024-002-worldwide-foreign-adversarial-technological-physical-and-cyber-influence>

¹⁰ The proposed waiver under section 70914(b)(1) of BABA excludes projects in the Freely Associated States because the requirements under section 70914(a) are applicable only to infrastructure projects "in the United States" and, therefore, the BABA requirements do not apply to projects in the Freely Associated States. However, airports located in the Freely Associated States are eligible recipients under FAA's Airport Improvement Program, and the Buy American requirements specific to that program would thus also apply to the Freely Associated States.

The duration of the waiver will be for five years, from its effective date of January 10, 2025, until January 9, 2030. The Department will periodically review this waiver to assess whether it remains necessary to the fulfillment of DOT's missions and goals and consistent with applicable legal authorities, such as the IIJA, Executive Order 14005, and OMB M-24-02. The Department may, based on the results of that review, terminate the waiver, or take action to develop a new waiver in consultation with the MIAO.

This action is a new public interest waiver being issued on the basis of the unique circumstances and ongoing challenges faced by the Pacific Island territories and Freely Associated States due to their remote location. Accordingly, effective with the issuance of the new waiver on January 10, 2025, DOT is also terminating the existing temporary general applicability waiver for the Pacific Island Territories, which DOT issued on April 29, 2024, to provide time to collect and analyze evidence to determine if a more targeted waiver of these requirements would be in the public interest.

Under OMB Memorandum M-24-02, 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. DOT's analysis has not found that the cost considerations driving this public interest waiver are due to the use of dumped steel, iron, or manufactured products or of injuriously subsidized steel, iron, or manufactured products but rather to the increased costs of shipping domestic items from the mainland U.S.

Pursuant to Section 117 of the SAFETEA-LU Technical Corrections Act of 2008 (Pub. L. 110-244, 122 Stat. 1572), if FHWA makes a finding that a waiver is appropriate under 23

U.S.C. § 313(b), FHWA will also invite public comment on this finding for an additional five days following the date of publication of the finding. Comments received during that period will be reviewed, but the finding will continue to remain valid. Those comments may influence DOT/FHWA's decision to terminate or modify a finding.

Issued in Washington, DC on January 10, 2024

Polly E. Trottenberg,

Deputy Secretary.