

Federal Emergency Management Agency (FEMA)

General Applicability for Public Interest Waiver of the Build America, Buy America Act Requirements of Financial Assistance Agreements to the US Territories of the Commonwealth of the Northern Mariana Islands (CNMI), Guam, and American Samoa

Pacific Island Territories Waiver

1. Summary

Agency: Grant Programs Directorate, FEMA

Proposed Waiver: FEMA is proposing a temporary general applicability public interest waiver of the requirements of Section 70914(a) of the Build America, Buy America Act (BABA), which was included in the Infrastructure Investment and Jobs Act (IIJA) (Pub. L. No. 117-58), for federal financial assistance awarded for infrastructure projects located in the U.S. Pacific Island territories of the Commonwealth of Northern Mariana Islands (CNMI), Guam, and American Samoa, collectively referred to as the Pacific Island territories.

This waiver would provide the time for the agency to collect and analyze evidence to determine if a more targeted waiver of these requirements is in the public interest. The waiver would also allow time for the agency to offer technical assistance to potential assistance recipients in the remote communities in the Pacific Island territories. The waiver will remain in effect for 18 months after the effective date of the final waiver and will be reviewed as often as necessary.

Applicability: This waiver proposes to permit the use of non-domestic iron, steel, manufactured products, and construction materials in infrastructure projects located within the Pacific Island territories of CNMI, Guam, or American Samoa when the total project cost exceeds the Simplified Acquisition Threshold of \$250,000. FEMA proposes to apply the waiver to all awards obligated after the effective date and, in the case of awards obligated prior to the effective date, all expenditures for non-domestic iron, steel, manufactured products, and construction materials incurred after the effective date.

The comment period for this waiver will be open for 15 days after the publication date of this notice. Comments must be received by June 15, 2023. FEMA will determine whether to modify or finalize the proposed waiver after the comment period. Further information on this waiver may be found on FEMA's website at <https://www.fema.gov/grants/policy-guidance/buy-america>.

2. Background

The Buy America preference set forth in section 70914(a) of BABA 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 (OMB)'s Guidance Memorandum M-22-11, *Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure*, FEMA may waive the BABA application 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. All waivers must have a written explanation for the proposed determination; provide a period of not less than fifteen (15) calendar days for public comment on the proposed waiver; and submit the proposed waiver to the OMB Made in America Office for review to determine if the waiver is consistent with policy.

FEMA provides grants to the three Pacific Island territories, Guam, American Samoa, and CNMI. Most of this funding is for Hazard Mitigation Assistance (HMA) projects that are awarded to the Pacific Islands territorial government entities, including territorial agencies and instrumentalities. In FY 2019, the Pacific Island territories received \$8,118,567 dollars through FEMA's various grant programs where infrastructure projects are an eligible activity and may be subject to BABA. This funding supported 3 projects that would have required individual BABA waivers.

3. Waiver Justification

FEMA is proposing a public interest waiver to waive BABA requirements in infrastructure projects located within the Pacific Island territories of CNMI, Guam or American Samoa. The proposed duration of the waiver is 18 months from the effective date of the final waiver.

Economies in 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 established regional supply chains from east Asia, Australia, and New Zealand. Most goods, equipment materials and supplies are imported and rely on shipping with associated timelines and unpredictable shipping fuel costs fluctuations. Moreover, materials sourced from the United States lead to additional shipping fees and longer lead times, thus significantly extending construction activity schedules. Lastly, ongoing gaps in supply chain availability impact lead times for materials, increasing project timelines. For these reasons, the agency is concerned that complying with the domestic sourcing requirements in BABA may increase already elevated project time and costs—particularly in the short run—and seeks time to better understand the local manufacturing footprint and the balance of equities for residents of the Pacific Island territories. The agency is aware that substantial changes to shipping and supply chains to incorporate domestic sourcing requirements in the Pacific Island territories could take multiple years to establish.

These economic and logistical constraints were also confirmed by the market research that FEMA performed. In early 2023, FEMA conducted research through Requests for Information

(RFI) from the Pacific Island territories which include CNMI, Guam, and American Samoa to assess the impacts of BABA.

CNMI and Guam responded that shipping costs from Asia are lower due to geographic distance and other cost efficiencies. They commented that there is a general lack of supply chains from the U.S. compared to Asia resulting in longer lead times from the U.S. for product delivery which leads to longer construction timelines. Standard products like typhoon-rated glass windows and aluminum shutters cost significantly more if sourced domestically. For example, representatives stated, “the cost of aluminum is double if sourced from the U.S. Mainland” and “[t]he shipping cost from Korea or Asia for a 20-footer container is \$3,000 but shipping from the mainland United States is about \$12,000.”

Representatives from American Samoa responded that: “As a containerized community, our territories depend on goods, equipment, materials and supplies to be imported.” They said: “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 be a significant cost savings to the grantors.

FEMA proposes that it is in the public interest to waive the BABA requirements for Federal financial assistance awarded for infrastructure projects in the Pacific Island territories while we work to gather more information on supply chains, costs, and impacts. This proposed waiver is critical to provide the time for the agency to collect and analyze evidence to determine if a more targeted waiver of these requirements is in the public interest. The waiver would also allow time for the agency to offer technical assistance to reduce the administrative burden to potential assistance recipients in the remote communities in the Pacific Island territories where complying with the domestic sourcing requirements in BABA presents challenges. The agency is concerned that failure to provide these remote infrastructure projects such flexibilities could perpetuate systemic barriers to opportunities and benefits and limit the agency's ability to deliver resources and benefits equitably to all in these Pacific Island territories. Additionally, FEMA may need to dedicate significant staff and contractor time to assist extremely remote communities with implementing preference requirements for the first time and to support the increased workload to process project-specific waivers. FEMA is interested in determining if these concerns justify a targeted waiver and whether its initial assessment may or may not be borne out by evidence.

4. Impact Absent the Waiver

Without the waiver, infrastructure projects located within the Pacific Island territories will experience challenges with product delivery, availability, reliability, and project scheduling. Infrastructure project schedules rely on readily available products delivered within reasonable timeframes. Due to the extreme distances that manufacturers for products produced in the mainland United States would have to ship products to the Pacific Island territories and due to the lack of existing local product supply networks for these products, manufacturers may not be able to assure on-time delivery of compliant products and associated projects in the Pacific Island territories could potentially face unreasonable scheduling uncertainty.

On the other hand, the proposed waiver will likely help grant recipients establish rules and procedures to manage the BABA requirements. Furthermore, the waiver will provide recipients more options to efficiently complete projects.

Uncertainties regarding capacity, shipping, and supply networks make domestic sourcing in the Pacific Island territories challenging for assistance recipients, shippers, and FEMA staff in the short run. FEMA is engaging to understand opportunities to leverage existing shipping and transportation processes to make domestic sourcing feasible over the longer term.

6. 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’s analysis has concluded that this assessment is not applicable to this waiver.

7. Duration of Waiver

The proposed duration of the waiver is 18 months after the effective date of the final waiver. FEMA will review this waiver in 12 months to assess whether it remains necessary to the fulfillment of FEMA’s missions and goals and consistent with applicable legal authorities, such as the IJJA, Executive Order 14005, and OMB M-22-11. FEMA may, based on the results of that review, terminate the waiver, or take action to develop a new waiver in consultation with the MIAO.

8. Solicitation of Comments

This notice posted on May 31, 2023, satisfies the requirement under section 70914 of BABA to publish any proposed BABA waiver and provide the public with a reasonable period of time for notice and comment. FEMA seeks public comment from all interested parties. In particular, FEMA seeks comment regarding the scope of this waiver. Relevant information and comments will help FEMA to understand completely the facts surrounding the waiver requests and the agency’s proposal. This notice will be closed for comments on June 15, 2023.

Comments can be sent to FEMA-grants-buyamerica@fema.dhs.gov. Please reference the associated waiver title in the subject line of the email. Comments received prior to the public comment closing date will be reviewed and considered by FEMA.

For more information on the Build America, Buy America preference, please reference <https://www.fema.gov/grants/policy-guidance/buy-america> or [MadeinAmerica.gov](https://www.madeinamerica.gov).