



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF WATER

MEMORANDUM

SUBJECT: Supplemental Questions and Answers for Build America, Buy America Act Implementation Procedures for Office of Water Federal Financial Assistance Programs

OVERVIEW

Subsequent to issuing the Build America, Buy America Act Implementation Procedures for Office of Water Federal Financial Assistance Programs (Implementation Procedures), the U.S. Environmental Protection Agency (EPA) received additional inquiries from recipients and key stakeholders. EPA is providing these supplemental questions and answers to respond to new topics brought to the agency's attention through its outreach. The Implementation Procedures, dated November 3, 2022, are available at: www.epa.gov/system/files/documents/2022-11/OW-BABA-Implementation-Procedures-Final-November-2022.pdf. Because the Implementation Procedures ended with Section 7, the supplemental questions and answers below begin with Section 8.

QUESTIONS AND ANSWERS

SECTION 8: SUPPLEMENTAL TOPICS

- Q8.1: Adjustment Period Waivers. If an assistance recipient covered by the Temporary Public Interest Waiver for Selected EPA Funding Programs was awarded EPA funding for an infrastructure project on or after May 14, 2022, but before the six-month adjustment period waiver was approved, would the project be subject to Build America, Buy America Act (BABA) requirements?
 - A8.1: It depends on the timing of expenditures. The project is covered by the waiver if the assistance recipient of EPA funding for the project did not expend EPA funds (purchased BABA covered products) prior to waiver approval, provided it meets the terms of the waiver. The project is not covered if an assistance recipient expended these funds prior to the waiver approval.
- Q8.2: Product Coverage. Are products and materials that purposefully decay or decompose (such as biodegradable coir material used for erosion control) considered permanently affixed items that are subject to the BABA requirements?

- A8.2: No, BABA requirements do not apply to purposefully decaying and decomposing items, such as coir mats, or temporary shoring items not intended to be permanently affixed to or incorporated into a structure. According to the OMB Guidance (M-22-11), BABA “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 or permanently affixed to the structure.”
- Q8.3: Projects on Private Property. Do BABA requirements apply to federal financial assistance provided to eligible private entities for a project solely for private use? For example, would BABA requirements apply to a grant provided to a rancher to construct fencing intended to restrict stream access (in order to improve that stream’s water quality) by livestock on private property?
 - A8.3: No, eligible private entities receiving assistance for projects solely designated for private use are not “infrastructure” covered by BABA. According to the OMB Guidance M-22-11, when determining if a particular type of construction project will meet the definition of “infrastructure” under BABA, OMB recommends that “[p]rojects consisting solely of the purchase, construction, or improvement of a private home for personal use, for example, would not constitute an infrastructure project.” This would include the private portion of a lead service line replacement, where the private single-family homeowner is not receiving any financial assistance from the water system to replace their portion of the lead service line.
- Q8.4: Waiver Applicability for Co-Funded Projects (EPA Funding Only). When a project receives funding from multiple EPA assistance programs, how will the agency determine which general applicability waivers or adjustment period waivers apply?
 - A8.4: Recognizing that funding from multiple EPA assistance programs may come at varying timelines for a project, EPA will use its discretion with respect to applicable waivers to ensure consistency in BABA implementation without unnecessary disruption to a project. For example, if a project is already operating under a waiver and receives additional funding from another EPA program, the original waiver will continue to apply to the project.
- Q8.5: Waiver Applicability for Co-Funded Projects (Multiple Agencies). When a project receives funding from Federal assistance programs in multiple agencies (e.g., EPA and USDA; EPA, FEMA, and DOT), how will potentially different general applicability or adjustment period waivers be implemented?
 - A8.5: Recognizing that sources of federal funding may come at varying timelines for a project, additional coordination will be needed between multiple funding agencies to ensure consistent implementation of BABA requirements. An assistance recipient should inform the EPA program when other federal programs are also funding or will fund the project so that EPA can coordinate with those co-funding agencies and determine the optimal implementation approach for the waivers without unnecessary disruption to the project.

- Q8.6: Use of Cognizant Agency in Co-Funded Projects. When a project receives funding from multiple assistance programs (within EPA or from separate agencies), which agency provides oversight for BABA implementation?
 - A8.6: OMB Guidance M-22-11 says: “the Federal agency contributing the greatest amount of Federal funds for the project *should* be considered the ‘Cognizant Agency for Made in America’ and should take responsibility for *coordinating* with the other Federal awarding agencies.” Section VII, p.8 (emphasis added).

Although the M-22-11 guidance only addresses BABA waivers received for projects with funding from separate federal agencies, EPA will apply the Cognizant Agency concept to other BABA implementation activities for a project if it helps minimize duplicative efforts among agencies and reduce the burden on recipients. In those cases, the Cognizant Agency will be responsible for oversight activities, such as providing BABA general provisions for contracts, oversight of certification of products, and inspection and field oversight of projects. Where situations arise that adhering to the Cognizant Agency concept would reasonably increase the potential for burden or significantly delay a project, agencies may coordinate with another agency to perform the oversight activities.

- Q 8.7: Use of Cognizant Agency in Waivers. When does Cognizant Agency apply to waivers?
 - A8.7: The Cognizant Agency concept applies to waiver requests submitted for co-funded projects, funded by *separate* federal agencies and applicable only to recipient-submitted waiver requests. OMB Guidance M-22-11 addresses this question only with respect to receiving and processing multiple waiver requests from projects co-funded across different Federal agencies in order to avoid duplicative efforts (i.e., the Cognizant Agency concept in Section VII, pg. 8 of OMB Guidance M-22-11).
- Q8.8: Additional Cost Obligations for Federally Funded Projects. For a project that is federally funded and did not originally need to comply with BABA, would additional cost obligations for that project (either through amendments to existing agreements, or new agreements) be subject to BABA requirements?
 - A8.8: If the original project was not subject to BABA and the additional funds are awarded for the same project, the requirements would not apply to the additional funds. A “project” consists of all construction necessary to complete the building or work regardless of the number of contracts or assistance agreements involved so long as all the contracts and assistance agreements awarded are closely related in purpose, time, and place (see Question 3.1 of the Implementation Procedures).