



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

JUL - 5 2023

THE ADMINISTRATOR

DECISION MEMORANDUM

SUBJECT: Public Interest: Pacific Island Territories General Applicability Waiver of Section 70914(a) of P.L. 117-58, Build America, Buy America Act, 2021 for U.S. Environmental Protection Agency Financial Assistance Awards

FROM: Michael S. Regan 

Introduction

President Joe Biden in November 2021 signed the Infrastructure Investment and Jobs Act, which included the Build America, Buy America Act. This is a transformational opportunity to build a resilient supply chain and manufacturing base for critical products in the United States that will catalyze new and long-term investment in American manufacturing jobs and businesses. Consistent with the policy direction of Executive Order 14005: Ensuring the Future is Made in All of America by All of America's Workers, section 70914 of Infrastructure Investment and Jobs Act establishes governmentwide Buy America conditions on all federally funded infrastructure projects funded after May 14, 2022.

The U.S. Environmental Protection Agency remains committed to implementing Build America, Buy America to cultivate the domestic manufacturing base for a range of products. This waiver would allow the EPA's remote recipients in the United States-Affiliated Pacific Island Territories to manage their federally funded activities more efficiently. For the purposes of this general applicability waiver, the Pacific Island territories are Guam, American Samoa and the Commonwealth of the Northern Mariana Islands. The EPA would waive Build America, Buy America Act requirements for recipients in the Pacific Island territories until manufacturing capacity and shipping challenges allow extremely remote financial assistance recipients to manage their federally funded activities more effectively and ensure compliance with federal environmental laws for infrastructure construction. The duration of this waiver is 18 months after the effective date of the final waiver.

Pacific Island Territories Waiver

The Office of Management and Budget's April 18, 2022, M-22-11 memorandum, *Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure*, encourages agencies to consider whether it is in the public interest to waive application of a Buy America preference for equity purposes. The EPA has identified a need for such a waiver in the Pacific Island territories in the initial years after enactment of the Infrastructure Investment and Jobs Act, but the agency anticipates that this waiver may be phased out as industrial capacity expands to better support remote recipients in the Pacific Island territories.

This waiver advances the Build America, Buy America Act by reducing the administrative burden to potential assistance recipients, including extremely remote communities in the Pacific Island territories, where complying with domestic sourcing requirements presents special obstacles and challenges and could significantly negate the benefits of their projects. Failure to provide assistance recipients such flexibilities could perpetuate systemic barriers to opportunities and benefits and could limit the agency's ability to deliver resources and benefits equitably to all in these territories.

The EPA provides grants to the three Pacific Island territories: Guam, American Samoa and the Commonwealth of the Northern Mariana Islands. Most of this funding is for drinking water and clean-water infrastructure projects that are awarded to the Pacific Islands' drinking water and wastewater utilities, as well as other EPA-funded infrastructure projects. In FY 2022 the Pacific Island territories will receive more than \$100 million dollars through the EPA's various grant programs where infrastructure is an eligible activity and may be subject to BABA. This funding will support approximately 60 individual projects that may require individual BABA waivers.

Anticipated Program Impacts Absent a Waiver

Economies in the Pacific islands, including Guam, American Samoa and the Commonwealth of the Northern Mariana Islands, are more than 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. For these reasons, the agency is concerned that complying with the domestic sourcing requirements in the Build America, Buy America Act 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.

The EPA finds that it is in the public interest to waive the Build America, Buy America Act 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 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 potential assistance recipients in the remote communities in the Pacific Island territories where complying with the domestic sourcing requirements presents challenges. The agency is concerned that failure to provide these remote recipients 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, the EPA 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 with increased workload to process project-specific waivers. The EPA is interested in determining if these concerns justify a targeted waiver and whether its initial assessment may be borne out by evidence.

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 ensure 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 waiver will likely help grant recipients establish rules and procedures to manage the Build America, Buy America Act requirements. Furthermore, the waiver will provide recipients more options to efficiently complete projects. Current shipping and supply networks make domestic sourcing impracticable in the Pacific Island territories. The EPA expects to receive requests for unreasonable cost waivers as the transport costs for every iron, steel, manufactured product or construction material produced in the United States would increase the overall cost of projects by more than 25 percent.

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. The EPA’s analysis has concluded that this assessment is not applicable to this waiver. The EPA will perform additional market research as it implements the Build America, Buy America Act requirements to better understand the market and to limit the use of waivers caused by dumping of foreign-sourced products.

Public Notice

The EPA proposed to issue this waiver on May 3, 2023, and the comment period was open until May 18, 2023. The agency received 30 comments during the public comment period. Twenty-nine commenters were generally supportive of the waiver with five requesting an extension of the waiver from 18 months to between 2-5 years. One commenter opposed the proposed waiver because they believed that the Build America, Buy America Act requirements should apply immediately to all steel used in infrastructure projects funded by the EPA and that there was not sufficient evidence of the additional shipping fees and longer lead times.

After reviewing these comments, the EPA concludes that the information provided to the agency supports a general applicability waiver for the Pacific Island territories.

Waiver Approval

Section 70914(b)(1) of the Infrastructure Investment and Jobs Act authorizes the Administrator to waive the requirements of Build America, Buy America if implementation would be inconsistent with the public interest. Due to the critical need to reduce the administrative burden for recipients and agencies to ensure recipients can effectively carry out the EPA-funded activity in a timely manner, the EPA determined that it is in the public interest to waive BABA requirements for recipients in the Pacific Island territories. The duration of the waiver is 18 months after the effective date of the final waiver. The EPA will review this waiver in 12 months to assess whether it remains necessary to the

fulfillment of EPA's missions and goals and consistent with applicable legal authorities. The EPA may, based on the results of that review, terminate the waiver or take action to develop a new waiver in consultation with the Made in America Office.

Questions about this memorandum should be directed to EPA_BABA_Waiver@epa.gov.