



OFFICE OF WASTEWATER MANAGEMENT

WASHINGTON, D.C. 20460

DECISION MEMORANDUM

SUBJECT: Project-Specific Public Interest Previously Planned Project Waiver of Build America, Buy America Act Requirements to the Milwaukee Metropolitan Sewerage District in Wisconsin, for the Aeration System Upgrade Project at the South Shore Water Reclamation Facility

FROM: Andrew Sawyers, Director

Decision

The U.S. Environmental Protection Agency is hereby issuing a project waiver pursuant to the Buy America Preference set forth in section 70914 of the Build America, Buy America Act (BABA) included in the Infrastructure Investment and Jobs Act (Pub. L. No. 117-58), under the authority of section 70914(b), to the Milwaukee Metropolitan Sewerage District in Milwaukee, Wisconsin (Applicant). This waiver permits the use of products manufactured outside of the United States, in the Aeration System Upgrade Project, because applying the domestic content procurement preference is inconsistent with the public interest for this previously planned project where significant design and planning took place prior to May 14, 2022, the effective date of BABA. The waiver is applicable to expenditures made for products on or after the effective date of the final waiver through completion of the project, anticipated to be November 2028.

This is a project-specific waiver. No other project or award may utilize this waiver.

Background

The Buy America Preference set forth in section 70914 of the BABA included in the Infrastructure Investment and Jobs Act (Pub. L. No. 117-58), requires all iron, steel, manufactured products, and construction materials used for infrastructure projects under Federal financial assistance awards be produced in the U.S. Under section 70914(b), the EPA may waive the application of the Buy America Preference, in any case in which it finds that: applying the domestic content procurement preference would be inconsistent with the public interest; types of iron, steel, manufactured products, or construction materials are not produced in the US in sufficient and reasonably available quantities or of a satisfactory quality; or 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 Office of Management and Budget's (OMB) Made in America Office for review to determine if the waiver is consistent with policy.

Summary

Waiver Type: Public Interest, Previously Planned Project – applying the domestic content procurement preference would be inconsistent with the public interest for this previously planned project where significant design and planning took place prior to May 14, 2022, the effective date of BABA.

Waiver Level and Scope: Project-level waiver for a single project. No other project or award will utilize the waiver.

Waiver Description: Project-specific waiver of BABA requirements to the Applicant for the Aeration System Upgrade Project at the South Shore Water Reclamation Facility.

Project Summary: The project scope includes design and construction for the removal and replacement of the aeration diffusers and piping in all 28 aeration basins. Specifically, the scope includes basin cleaning, removal of the existing ceramic plate containers and diffusers, removal of the existing membrane diffusers, removal of concrete false floors, installation of new membrane diffuser systems, constructing one selector zone in each basin, along with replacement of various air piping, valves, and appurtenances. In addition, the top portion of the concrete walls on select aeration basins will be removed and replaced, and the existing hand railing will be removed and either re-galvanized or replaced with aluminum. Electrical conduits and associated conductors embedded in the existing concrete walls will be replaced as needed, along with installation of new instrumentation and control equipment. The project will ensure ongoing ability of the South Shore Water Reclamation Facility to fully treat wastewater and maintain Wisconsin Pollutant Discharge Elimination System (WPDES) permit compliance, help minimize energy consumption in the aeration process, extend the life of the aeration basins, increase worker safety, and reduce the risk of air diffuser damage due to falling concrete. The total project cost is \$74,373,000 and completion is anticipated in late 2028. The value of products covered under this waiver is estimated to be approximately \$11 million.

The Applicant's project will still comply with the American Iron and Steel (AIS) requirements, which apply to all Clean Water State Revolving Fund (CWSRF) treatment works projects. Therefore, only products not otherwise covered by the AIS requirements will be waived. The following categories of products for which the BABA requirements apply and are waived will be permanently incorporated into the project:

- Adjustable Speed and Variable Frequency Drives
- Diffused Aeration System Equipment
- Electrical Isolation Products
- Electrical Materials and Systems
- Fabricated Metals (non-ferrous)
- Fiber-reinforced Plastic Baffle Wall System
- Gaskets, Waterstops, and Joint Sealants
- Instrumentation and Controls
- Pipe Casing, Wrap, and Insulation
- Non-ferrous Pipe and Fittings
- Polyethylene Fiber Reinforcement
- Uninterruptible Power System
- Process Instrumentation and Controls
- Sealants, Paints, Primers, and Coatings
- Submersible Mixers and Motors
- Valve Actuators

The Applicant initiated planning for the project in November 2019, and final design began on August 10, 2020, prior to the effective date of BABA. The project sought CWSRF funding from the Wisconsin Department of Natural Resources (WDNR) and anticipated funding would be available when processed by WDNR. While awaiting CWSRF funding, the Applicant assessed that they would be eligible for the original “Adjustment Period Waiver of Section 70914(a) of P.L. 117-58, Build America, Buy America Act, 2021 for SRF Projects that have Initiated Design Planning” (SRF Design Planning Waiver), which was in effect at that time, and proceeded to bid in March 2023, utilizing their own financing. Because the Applicant was eligible for the original SRF Design Planning Waiver, having satisfied several waiver eligibility conditions to demonstrate initiation of design planning prior to the effective date of the BABA requirements, the Applicant’s contract included the AIS requirements for SRF projects and did not include BABA requirements.

The applicant received construction contract bids for the project on May 18, 2023 – 21 days before the EPA proposed to amend the SRF Design Planning Waiver on June 8, 2023. In anticipation of CWSRF financing becoming available, the Applicant awarded the contract on July 24, 2023, in the amount of \$74,373,000. WDNR issued the project’s notice to proceed on August 22, 2023, and the Applicant initiated construction using their own funding. On November 13, 2023, the EPA amended the SRF Design Planning Waiver, limiting waiver eligibility to projects funded with federal appropriations from federal fiscal years 2022 and 2023. WDNR recently identified federal fiscal year 2024 funds that would be available for the project, rendering the Applicant unable to utilize the amended SRF Design Planning Waiver.

The Applicant asserts that its decision to proceed without the BABA requirements was made in good faith because it had no reasonable expectation that the SRF Design Planning Waiver would be amended to limit eligibility to funding appropriated in federal fiscal years 2022 and 2023. The EPA agrees with the assertion that the Applicant’s decision to exclude BABA requirements from the project was made in good faith based on all the information available along the project timeline and sees no evidence that the project proceeded with the intent to circumvent the BABA requirements. The EPA also notes the project was designed and planned to comply with AIS requirements, and those requirements will be preserved for this project.

Therefore, the EPA is hereby issuing a public interest previously planned project waiver because applying the domestic content procurement preference would be inconsistent with the public interest, and the circumstances of this project meet the conditions of a waiver in section 70914(b)(1).

Length of the waiver: From the effective date of the final waiver through completion of the project, anticipated to be November 2028.

Description of Efforts Made to Avoid the Need for a Waiver

At the time of preparing, evaluating, accepting, and initiating the construction contract, the Applicant had reason to believe the BABA requirements did not apply to the project. The EPA agrees with the Applicant’s assertions that no reasonable efforts to avoid a waiver were applicable prior to commencement of the project. In many cases, BABA requirements can be easily managed and accounted for during the early planning stages of a project, but compliance can be costly and complex past the design phase for infrastructure projects where significant design and planning took place prior to May 14, 2022, the effective date of BABA. Absent a waiver from the EPA, the Applicant would need to redesign the project and continue to incur interest and fees for interim financing and development costs, which continue to grow while construction is delayed. The EPA therefore believes issuing this waiver is in the public interest. During the period the waiver is active, the EPA encourages the Applicant,

to the greatest extent practicable, to seek to purchase, acquire, or use goods, products, or materials produced in the United States.

Assessment of Cost Advantage of a Foreign-Sourced Product

Under OMB 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. The EPA’s analysis has concluded that this assessment is not applicable to this waiver as the basis of the waiver is not related to the cost of foreign-sourced products.

Summary of Public Comments

A memorandum soliciting public comments was posted on the EPA’s public facing webpage and a notice of the waiver request was also posted to the Made in America website on September 17, 2024, to satisfy the requirement to publish any proposed project-specific waiver and provide the public with fifteen (15) days to submit comments. The EPA sought public and industry comment from all interested parties to submit comments. The comment period for the proposed waiver closed on October 1, 2024. The EPA received one (1) comment in response to the proposed waiver, in which the commenter, a national not-for-profit organization that represents the Clean Water and Drinking Water State Revolving Funds, asserted its full support of issuance of this waiver. The commenter expressed the view that approving this waiver would ensure equal application of the law. Additionally, the commenter asserted that requiring a project which initiated design planning prior to the effective date of BABA to comply would result in construction delays and significantly increase costs, jeopardizing public health and environmental protections. The EPA agrees that this waiver is in the public interest and necessary for this project to proceed without delays or incurring additional costs of redesign.

Description of Award

Recipient Name and/or Unique Entity Identifier: Milwaukee Metropolitan Sewerage District

Federal Financial Assistance Identification Number (FAIN): Pre-Award, Not Applicable

Federal Financial Assistance Listing Name: Clean Water State Revolving Fund

Federal Financial Assistance Listing Number: 66.458

Federal Financial Assistance Funding Amount: \$74,373,000

Total Cost of Infrastructure Expenditures: \$74,373,000