DENALI COMMISSION

General Applicability Waiver of Build America, Buy America Provisions

Agency-wide Public Interest Waivers of the Buy America Domestic Content Procurement Preference for: De Minimis Infrastructure Project Purchases, Small Grants, and Minor Components within Iron and Steel Products

Agency: Denali Commission (Commission)

Action: Notice

Summary: Congress passed the Build America, Buy America Act (BABA or Act), which includes strong and permanent domestic sourcing requirements across all Federal financial assistance programs. The Commission, in keeping with its mission to spur the development of rural Alaskan communities, is ready to lead on this important mission to catalyze domestic manufacturing, resilient supply chains, and job growth. The Commission will also help grow America's domestic production capacity while complying with BABA's requirements as much as possible – balancing equity, practicality, and implementation costs.

In accordance with BABA, this notice advises that the Commission is instituting Agency-wide public interest waivers of the Buy America domestic content procurement preference for de minimis infrastructure project purchases, small grants, and minor components within iron and steel products. The waivers apply to recipients of Commission Federal financial assistance awards and provides recipients a limited waiver from the application of the Buy America Domestic Content Procurement Preference provisions ("Buy America Preference") as applied to the iron and steel, manufactured products and construction materials incorporated into a Federal financial assistance project for infrastructure. The Commission determined that the de minimis, small grants, and minor components waivers are in the public interest as they will assist the Commission in keeping projects moving, prevent immediate delays to critically important projects, allow recipients to continue to provide economic opportunity through innovation, and support the timely development of critical domestic public infrastructure.

Dates: This waiver is effective upon the approval date, which is August 21, 2023, and will remain in effect for all awards or funding obligated to recipients and subrecipients of the Denali Commission for five years from the date of approval. The Commission will review this waiver every five years of the date on which the waiver was issued, or more often as necessary, to determine its continued applicability and relevance with the Commission's missions and goals consistent with the Infrastructure Investment and Jobs Act (IIJA), Executive Order 14005, Ensuring the Future Is Made in All of America by All of America's Workers, and the Office of Management and Budget (OMB) Memorandum M-22-11, Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure.

Supplementary Information:

Denali Commission

The Denali Commission Act of 1998 established the Denali Commission as an independent Federal agency whose mission is to support basic infrastructure throughout rural Alaska. Denali Commission Congressional appropriations of $15 million annually, a one-time appropriation of $75 million coming from the Infrastructure Investment and Jobs Act, and $20 million for an FY 2023 transportation appropriation may be used for infrastructure such as power plants, bulk fuel facilities, roads, and other critical infrastructure. (By comparison, the Infrastructure Investment and Jobs Act authorized $567 billion in transportation spending.) The Denali Commission provides support for the development of critical infrastructure in rural communities, including Tribal communities, throughout Alaska. For context, Alaska has 280 rural communities that are not on the contiguous road system and typically have fewer than 200 residents each (Alaska Department of Labor and Workforce Development Population Estimates). Rural Alaska is characterized by small, isolated communities dotting a vast landscape. Some communities supported by the Denali Commission lack in-home piped water and sewer systems. Residents of these so-called "unserved communities" experience more severe and adverse health outcomes as compared to Alaskans who have access to piped water and sewer systems. Even rural communities that do have critical infrastructure very often struggle to maintain facilities for power generation, drinking water, wastewater, and access routes that are in poor condition. Rural Alaskans face a disproportionate risk of harm as compared to non-rural Alaskans. Delays to critically important infrastructure projects unnecessarily increase this risk. The Denali Commission works to reduce this risk and improve quality of life throughout rural Alaska through its support of projects. The funds for such projects are disbursed as grants to Federal financial assistance award recipients (recipients).

Build America, Buy America: The Build America, Buy America Act (the Act) was enacted on November 15, 2021, as part of the Infrastructure Investment and Jobs Act (IIJA). Pub. L. 117-58. The Act establishes a domestic content procurement preference (BAP) for federal infrastructure programs. Section 709 14(a) of the Act establishes that no later than 180 days after the date of enactment, the Commission must ensure that none of the funds made available for infrastructure projects may be obligated by the agency unless it has taken steps to ensure that the iron, steel, manufactured products, and construction materials used in a project are produced in the United States. In Section 70912, the Act further defines a project to include "the construction, alteration, maintenance, or repair of infrastructure in the United States" and includes within the definition of infrastructure those items traditionally included along with buildings and real property.

The Commission's Progress in Implementation of the Act: Since the enactment of the Act, the Commission has worked diligently to implement the BAP including the following:

1) Commission Financial Assistance Awards terms and conditions have been updated to include BABA requirements.
2) The Commission has published its report as required by section 70913 and OMB M-22-08 listing all covered programs. https://www.federalregister.gov/documents/2022/08/22/2022-17988/denali-commissions-identification-of-federal-financial-assistance-infrastructure-programs-subject-to
3) The Commission had extensive discussions with existing and potential grantees to determine the impact of BABA requirements and start the process of identifying the specific components and products which pose the greatest procurement challenges.
4) The Commission has included a section on what types of projects are included as a requirement of the Act in the Commission's Recipient Guidelines and Requirements (RGR).
5) The Commission has sought to understand the path of other Federal agencies on an informal basis via interagency working groups by program area.

Waivers: Under Section 70914(b), the Commission has authority to waive the application of a domestic content procurement preference when (1) application of the preference would be contrary to the public interest, (2) the materials and products subject to the preference are not produced in the United States at a sufficient and reasonably available quantity or satisfactory quality, or (3) inclusion of domestically produced materials and products would increase the cost of the overall project by more than 25 percent. Section 70914(c) provides that a waiver under 70914(b) must be published by the agency with a detailed written explanation for the proposed determination and provide a public comment period of not less than 15 days. The proposed waiver was posted for comment on this website: https://www.denali.gov/

Public Interest Waivers for De Minimis Infrastructure Project Purchases, Small Grants, and Minor Components within Iron and Steel Products:

The Commission believes that waivers for de minimis infrastructure project purchases, small grants, and minor components within iron and steel products are in the public interest to allow Commission award recipients to focus their efforts on completing major components of their projects, prevent immediate delays to critically important projects, allow recipients to continue to provide economic opportunity through innovation, and support the timely development of critical domestic public infrastructure. The waivers are not an alternative to increasing domestic production; instead, they are valuable tools to promote investment in our domestic manufacturing base in the long term by allowing recipients to continue to make major improvements in infrastructure. The waivers are in the interest of efficiency, to ease burdens for Commission recipients, avoid unnecessary costs, and delays to projects. They will also allow the Commission to focus, particularly in the early phases of BABA implementation, on key products and critical supply chains where increased U.S. manufacturing can best advance our economic and national security and allow recipients to continue with projects. The absence of this waiver may cause the Commission to lose recipients who cannot bear the additional costs created by a minimal component of the project, increase financial and administrative burden for small projects, and impact the most high-need Americans served by the Commission Federal financial assistance awards if otherwise American-made products are excluded because of a minor component of the product. The Commission is implementing the following targeted and limited waivers:

• The de minimis waiver for otherwise covered infrastructure project purchases sets a threshold of 5% of total applicable project costs[1] used under the Federal award, up to a maximum of $1,000,000. For example, if the total cost of a recipient's project expenditures otherwise covered by BABA is $2,000,000,

[1] Applicable project costs are defined for the purpose of this waiver as material costs subject to the Buy America preference.

up to $100,000 of costs for iron and steel, manufactured products and construction materials would be exempt from BABA. Once a Federal financial assistance recipient's total purchases of materials otherwise covered by the Buy America preference (iron, steel, manufactured products, and construction materials) reach 5 percent of applicable project costs or $1,000,000, whichever is lower, all other applicable project purchases must comply with the Buy America preference. The Commission will not accept requests from recipients to apply this wavier where the total cost of all covered products exceeds these values, regardless of amount. This waiver will allow recipients of Commission Federal financial assistance awards to focus their compliance efforts on the major components for their projects. Moreover, the de minimis waiver will help to ensure that both recipients and the Commission make efficient use of limited resources and help to prevent against the cost of processing individualized BABA waivers exceeding the value of the items waived.

• The small grants waiver applies to Commission federal financial assistance awards equal to or less than the 2 CFR 200.1 Simplified Acquisition Threshold, which is currently $250,000. Approximately one-third of the Commission's grants are issued at or less than $250,000. The Commission anticipates that approximately less than $5,000,000 of grant funding will be impacted by this waiver. This waiver is critical to ensure that agency infrastructure projects conducted by the Commission financial assistance recipients sustain progress in communities across the state. No additional funds will be obligated to the existing award that would exceed the threshold. If Federal financial assistance provided by the Commission is combined with other Federal financial assistance from other Federal agency and the total amount of Federal financial assistance in a single project is greater than the Simplified Acquisition Threshold, then the waiver shall not apply to the Federal financial assistance provided by the Commission.

• The waiver will allow minor deviations for miscellaneous minor components which may be present in domestically produced iron and steel to come from foreign sources. The Denali Commission is waiving the application of the domestic content procurement preference (BAP) for Minor Components within iron and steel products, such that a cumulative total of no more than 5 percent of the total material cost of otherwise domestically produced iron and/or steel in which they are present. This waiver will not exempt the whole iron and steel product from the Buy America Preference, and the primary iron and steel components of the product must be produced domestically. Infrastructure projects use a variety of iron and steel items, manufactured goods, and construction materials. Typical iron and steel items subject to BABA preferences include structural and reinforcing steel incorporated into roads, bridges, and buildings; steel rail; rolling stock (vehicles); and other equipment. This waiver meaningfully reduces the compliance burden on the recipient, by eliminating the need to do a more granular review of these components every time they are used in a project. Recipients will be free to purchase domestically-produced iron and steel without the need to itemize each and every minor component present to determine BABA compliance. This will significantly reduce delays in recipient project execution by allowing iron and steel that is otherwise compliant to be used in most instances, rather than forcing recipients to reject this otherwise-conforming iron and steel because one or more minor components present were not domestically produced.

Anticipated Program and Project Impacts Absent Public Interest Waivers: De Minimis, Small Grants, and Minor Components

The Commission believes that the benefit to its recipients substantially outweighs the minimal impact these waivers will have on the Made in America objectives. The waiver will likely:

• Reduce burden for grant recipients, many of which have limited administrative and financial capacity to manage BABA requirements. Some smaller, disadvantaged recipients may be discouraged all together from competing for awards.

• Support broader implementation and staff and grantee resources.

• In addition to the Made in America Office resources and technical assistance offered, the Commission will provide additional technical assistance to recipients, particularly lower capacity recipients or those without experience applying BABA, in order to focus on meeting compliance requirements.

• Manufacturers who have not previously had similar requirements will need time to adjust their products and will need training to learn if their existing products comply with the requirements of BABA.

• Help smaller communities with limited resources. The proposed waivers are particularly necessary to support equity efforts, particularly among the socially vulnerable, distressed, and impoverished communities the Commission serves.

• Help Indian Tribes and other recipients with limited resources.

• Waivers will allow the Commission and recipients to focus on critical items to keep projects moving and ease the implementation learning curve.

Assessment of Cost Advantage of a Foreign-Sourced Product:

Under OMB Memorandum M-22-1 1, “Memorandum for Heads of Executive Departments and Agencies,” published on April 18, 2022, 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 Commission’s analysis has concluded that this assessment is not applicable to this waiver, as this waiver is not based in the cost of foreign-sourced products.

Effective Date and Duration of the Waiver

This waiver is effective upon issuance for all Commission recipients of Federal financial assistance for infrastructure. The waivers apply to all obligations of Federal financial assistance for infrastructure by the Denali Commission on or after the effective date, of August 21, 2023 and the waiver will be effective for a period of five years. For obligations of Federal financial assistance for infrastructure by the Denali

Commission that preceded issuance of the final waiver, the waiver only applies to expenditures incurred on or after the effective date of the final waiver. The Commission will review these waivers in five years of the date on which these waivers were issued, or more often as necessary, to determine its continued applicability and relevance with the Commission's mission and goals consistent with the IIJA, Executive Order 14005, and the OMB Memorandum M-22-11.

Solicitation of Public Comments for the Waiver

As required under Section 70914 of BABA, the Commission solicited comments from the public on the proposed wavier. Comments on the proposed BABA waiver were due on or before July 5, 2023. The Commission received one comment from the public in support of the waiver as proposed. No substantive changes were made to the final waiver by the Commission in response to comments received.

Approved.

Garrett Boyle Digitally signed by Garrett Boyle
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