



NATIONAL SCIENCE FOUNDATION
2415 Eisenhower Avenue • Alexandria, VA 22314

December 18, 2023

AGENCY: The National Science Foundation

ACTION: Notice of Final Waiver: General Applicability Public Interest Waiver under the Build America, Buy America Act for De Minimis Purchases, Small Grants, and Minor Components.

WAIVER NUMBER: 20240001

(P.L. 117-58 §§ 70901-70927) (BABA)

SUMMARY:

The National Science Foundation (NSF) is establishing a general applicability public interest waiver of the requirements of section 70914 of the Build America, Buy America Act (Buy America preference) included in the Infrastructure Investment and Jobs Act (Pub. L. No. 117-58). The waiver for de minimis purchases and small grants applies to iron, steel, manufactured products, and construction materials, while the minor components waiver applies to iron and steel products. NSF establishes this waiver as an important tool to implement the Buy America provisions in the most efficient manner. This waiver is in the public interest because the waiver will assist NSF's infrastructure grant programs in keeping projects moving forward and prevent immediate delays to critical projects. Additionally, the waiver will allow NSF and its recipients to focus on BABA implementation where it will have the greatest impact.

The waiver will remain in effect for all NSF Federal financial assistance funded infrastructure grant projects, for a period of five years from the date of final waiver approval. The waiver will be reviewed as often as necessary.

BACKGROUND:

The Buy America preference in section 70914 of the Build America, Buy America Act 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 United States.

Under section 70914(b), 2 CFR 184.7, and in accordance with the Office of Management and Budget's (OMB) Oct 25, 2023, implementation guidance memorandum on the subject (M-24-02), an agency 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. All waivers must have a written explanation for the proposed determination;

provide a period of not less than 15 calendar days for public comment on the proposed waiver; and submit the proposed waiver to the Office of Management and Budget Made in America Office for review to determine if the waiver is consistent with policy.

OMB Memorandum M-24-02 provides guidance for agencies to consider whether a general applicability public interest waiver should be issued to reduce the administrative burden for recipients and agencies. OMB directs agencies to ensure that recipients and Federal agencies make efficient use of limited resources, especially if the cost of processing the individualized waiver(s) would risk exceeding the value of the items waived.

WAIVERS:

The NSF has determined that waivers for de minimis purchases, small grants, and minor components within iron and steel products are in the public interest to allow recipients to focus compliance efforts on major components of their projects, prevent immediate delays to urgent and important projects, allow recipients to continue to provide economic opportunity through innovation, and support the timely development of critical domestic public infrastructure.

The NSF is establishing the following targeted and limited waivers:

- De Minimis Purchases: The NSF is establishing a waiver for otherwise covered infrastructure project purchases, totaling up to 5 percent of the total applicable project costs¹, up to a maximum of \$1,000,000. 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.
- Small Grants: The NSF is establishing a waiver of the Buy America domestic content procurement preference for small grants². The small grants waiver will apply to Federal financial assistance awards at or below the Simplified Acquisition Threshold³ (SAT), which is currently \$250,000, that meet the following criteria: (1) the total Federal award does not exceed the SAT, and (2) the Federal award amount, inclusive of other funding sources for the infrastructure project, is not anticipated to exceed the SAT for the life of the Federal award.

¹ For purposes of this waiver, "applicable project costs" are defined as material costs subject to the Buy America Preference

² For purposes of this waiver, "grants" encompasses all forms of Federal financial assistance that NSF administers including cooperative agreements, cooperative support agreements, and grant agreements.

³ The Simplified Acquisition Threshold is defined in [48 C.F.R. §2.101](#). As of the date of this waiver, the threshold is \$250,000.00.

- Minor Components: The NSF is establishing a waiver of Buy America domestic content procurement preference to allow minor deviations for miscellaneous minor components⁴ within iron and steel products. The minor components waiver will allow non-domestically produced miscellaneous minor components comprising no more than five (5) percent of the total material cost of an otherwise domestically produced iron and steel product. This waiver does not exempt an entire iron and steel product from the Buy America preference; the primary iron and steel components of the product must still be produced domestically.

WAIVER JUSTIFICATION:

This waiver allows recipients of NSF funds to continue with projects without jeopardizing performance goals and reduces the burden to ensure recipients and the agency make efficient use of limited resources while preventing against cost of processing individualized waivers exceeding the value of the items waived.

NSF's infrastructure projects vary across each of its 11 financial assistance programs. Most infrastructure projects funded through financial assistance are carried out through cooperative agreements that support multi-use research facilities or other infrastructure in science and engineering ranging from telescopes and research vessels to distributed instrumentation networks. To understand the scope of this waiver, NSF reviewed awards for FY23 and determined approximately \$1.2 billion in project costs, spread across 209 projects, may be subject to the Buy America preference. The NSF notes that most of these projects authorize a wide variety of activities in addition to infrastructure projects. Therefore, the impact of this waiver will be smaller than the total amount of funding provided for these programs. The overall impact to these programs will vary by year, but it is estimated that the small grant waiver will affect less than 1% of the federal financial assistance provided through these programs. For the remainder of the programs that are not covered by the small grant waiver, the de minimis waiver and minor component waiver will help reduce the administrative burden for smaller purchases while still requiring the vast majority of NSF funding to be subject to domestic preference requirements.

NSF infrastructure projects often contain a variety of miscellaneous, generally low-cost components that are essential to the project. NSF believes that the cost of items acquired by its infrastructure projects exercising these waivers would be low, but the administrative complexity of tracking them for compliance would be significant. With these waivers, recipients can devote their resources to Buy America compliance with larger purchases, rather than diverting resources to sourcing miscellaneous, low-cost products. These waivers help ensure that the NSF and its financial assistance community does not devote significant public resources toward compliance activities where there is limited public benefit. It also ensures that requests for product-specific waivers for larger infrastructure project purchases can be responded to in a timely fashion.

⁴ For purposes of this waiver, "minor component" means an article material, or supply, whether manufactured or non-manufactured, incorporated directly into an iron or steel product that comprises no more than 5 percent of the total material cost of the iron or steel product. Reference 2 C.F.R. §184.3.

The absence of a waiver will likely result in:

- **Increased Burden for Recipients:** Failure to grant this waiver creates administrative burden for NSF and its recipients, some of which have limited administrative and financial capacity to manage domestic procurement requirements. Smaller, disadvantaged recipients are especially impacted, leading to these entities being discouraged from participating in NSF awards.
- **Increased Project Timelines:** Projects will be completed at a slower rate, potentially delaying project timelines as individualized waivers for more numerous, minor infrastructure project purchases will need to be submitted and processed.
- **Delays to Necessary Infrastructure Projects:** NSF infrastructure projects could experience delays in project implementation and completion due to the additional timeframe necessary to locate domestic sources for minor materials and submit and process waivers when domestic materials are not available.
- **Impact to On-going Research.** When NSF infrastructure project experience delays in construction, alteration, or maintenance of research facilities, it results in subsequent domino impacts to NSF research activities which are meticulously planned around the availability of these facilities. These research initiatives are often planned and funded years in advance. Even small delays to the availability of facilities can result in research projects needing to be reduced or cancelled.

On the other hand, the subject waivers will:

- Help grant recipients establish rules and procedures to manage BABA requirements;
- Balance competitiveness;
- Provide recipients more options to efficiently complete projects;
- Assist recipients that are units of State or local government, which must follow well-defined procurement procedures that ensure competition and cost reasonability regardless of whether a waiver is granted or not; and
- Allow NSF award recipients to focus on critical items to keep projects moving and ease the implementation learning curve as NSF recipients transition to full implementation of the Buy America preference.

ASSESSMENT OF COST ADVANTAGE OF A FOREIGN-SOURCED PRODUCT:

Under OMB Memorandum 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. NSF’s analysis has concluded that this assessment is not applicable to this waiver, as this waiver is not based on the cost of foreign-sourced products.

SUMMARY OF COMMENTS AND AGENCY RESPONSE:

The notice of the proposed waiver was posted on November 20, 2023 to satisfy the requirement to publish proposed Buy America waivers and provide the public with a reasonable period of time for notice and comment. The NSF sought public and industry comment from all interested parties to help understand completely the facts surrounding the waiver requests and the agency's proposal. The notice closed for comments on December 5, 2023. No comments were received in response to the public posting of the proposed waiver and therefore no changes were made to the final waiver.

EFFECTIVE DATES OF THE WAIVER:

This waiver is effective 18 December, 2023, through 17 December 2028.