

Memorandum

Derek J. Schroeder
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DATE: **May 18, 2023**

WAP Memorandum 104

REPLY TO

ATTN OF: **Derek Schroeder, Acting Weatherization Assistance Program Manager**

SUBJECT: **Weatherization Assistance Program “Build America, Buy America” Requirement**

TO: **Weatherization Grantees and Subgrantees**

On November 15, 2021, the President signed into law the Infrastructure Investment and Jobs Act (Public Law 117-58), also referred to as the Bipartisan Infrastructure Law (BIL), which provides funding for the Department of Energy’s (DOE) Weatherization Assistance Program (WAP). BIL established a domestic content procurement preference for all federal financial assistance obligated for infrastructure projects after **May 14, 2022**, known as Build America, Buy America (BABA).

Awards made by DOE WAP after May 14, 2022, are subject to this law under specific circumstances:

- WAP Annual Formula Grants for Program Year (PY) 2022 and beyond
- WAP Bipartisan Infrastructure Law (BIL) Grants
- WAP Enhancement & Innovation (E&I) Grants
- WAP Sustainable Energy Resources for Consumers (SERC) Grants
- WAP Community Scale Pilot Program (CSPP) Grants

In accordance with Section 70914 of [BIL](#), project funds (including the federal share and the recipient cost share) may **NOT** be used for a project for infrastructure unless:

- (1) All iron and steel used in the project are produced in the United States—this means all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States;
- (2) All manufactured products used in the project are produced in the United States—this means the manufactured product was manufactured in the United States; and the cost of the components of the manufactured product that are mined, produced, or manufactured in the United States is greater than 55 percent of the total cost of all components of the manufactured product, unless another standard for determining the minimum amount of domestic content of the manufactured product has been established under applicable law or regulation; and,
- (3) All construction materials are manufactured in the United States— this means that all manufacturing processes for the construction materials occurred in the United States.

Construction materials includes an article, material, or supply that consists primarily of:

- Non-ferrous metals.
- Plastic and polymer-based products (including polyvinylchloride, composite building materials, and polymers used in fiber optic cables).
- Glass (including optic glass).
- Lumber.
- Drywall.

The term “Construction materials” does not include cement and cementitious materials, aggregates such as stone, sand, or gravel, or aggregate binding agents or additives.

Per BABA requirements, most projects typically addressed by WAP will ***not*** be subject to these requirements. ***Only weatherization on public housing, or on privately owned buildings that serve a public function are required to comply with the BABA requirements.***

Absent a project-specific waiver (see below), BABA requirements must flow down to all sub-awards, contracts, subcontracts and purchase orders for articles, materials, and supplies that are consumed in, incorporated into, or affixed to a DOE funded project. 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 do BABA requirements 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 the structure or permanently affixed to the infrastructure project.

SITE SPECIFIC WAIVERS: When necessary, recipients may apply for, and DOE may grant, a waiver from the Buy America Preference requirements. Requests to waive the application of the Buy America Preference must be in writing. Waiver requests are subject to public comment periods of no less than 10 days, as well as review by the Office of Management and Budget (OMB). Recipients should be advised that “best efforts” to determine that iron, steel, manufactured goods, and/or construction materials are BABA compliant cannot be accepted; recipients should consider contacting an item’s manufacturer, in writing (email or otherwise) to determine whether that product meets the BABA standard. If the manufacturer is unable or unwilling to certify the product as BABA compliant, resulting in the recipient needing to seek a BABA waiver, those communications will serve as the foundation of a waiver request.

Waivers must be based on one of the following justifications:

1. Applying the Buy America Preference would be inconsistent with the public interest (Public Interest);
2. The types of iron, steel, manufactured products, or construction materials are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality (Nonavailability); or
3. The inclusion of iron, steel, manufactured products, or construction materials produced in the United States will increase the cost of the overall project by more than 25 percent (Unreasonable Cost).

Requests to waive the Buy America Preference must be submitted through your DOE PO who will then route it to the Contracting Officer and include the following:

- Waiver type (Public Interest, Nonavailability, or Unreasonable Cost)
- Recipient name and Unique Entity Identifier (UEI)
- Detailed justification as to how the non-domestic item(s) is/are essential to the project
- Certification that the recipient made a good faith effort to solicit bids for domestic products supported by terms included in requests for proposals, contracts, and non-proprietary communications with potential suppliers—this is arguably one of the most crucial data points that must be provided. The recipient should describe the good faith effort(s) undertaken to locate BABA-compliant products in as much detail as possible. Waiver requests that lack detail on this item will very likely be sent back for additional detail(s)
- Total estimated project cost, with estimated Federal share and recipient cost share breakdowns
- Total estimated infrastructure costs, with estimated Federal share and recipient cost share breakdowns
- Brief description of the project, its location, and the specific infrastructure involved
- List and description of iron or steel item(s), manufactured goods, and/or construction material(s) the recipient seeks to waive from the Buy America Preference, including name, cost, country(ies) of origin, and relevant PSC and NAICS codes for each
- Justification statement—based on one of the applicable justifications outlined above (e.g., non-availability, unreasonable cost, or public interest)—as to why the items in question cannot be procured domestically, including the due diligence performed (e.g., market research, industry outreach) by the recipient to attempt to avoid the need for a waiver. This justification may cite, if applicable, the absence of any Buy America-compliant bids received for domestic products in response to a solicitation; and,
- Anticipated impact to the project if no waiver is issued.

DOE may request, and the recipient must provide, additional information for consideration of this waiver. The Agency's final determination regarding approval or rejection of the waiver request may not be appealed.

Regarding the justification statement: well-justified waiver requests citing non-availability or unreasonable cost are more likely to be granted, because these things can, to an extent, be verified by the data provided. Recipients seeking a waiver based on the "public interest" justification should be aware that such waivers will have much more difficulty being approved, because of the subjective nature of what is "in the public interest." Recipients are advised to plan their waivers accordingly.

The DOE WAP team is working closely with the BABA team to track policy determinations issued by OMB and will issue subsequent BABA guidance whenever updates to BABA policy are made.

If you have questions regarding the information in this Memorandum or the applicability in housing currently being considered, please contact your DOE Project Officer.