

U.S. Department of the Treasury

Public Interest Adjustment Period General Applicability Waiver of Build America, Buy America Provisions for County and Territory Recipients of the Local Assistance and Tribal Consistency Fund

ACTION: Notice of Final Waiver

SUMMARY: In accordance with the Build America, Buy America Act, this notice advises that the Department of the Treasury (Treasury) is issuing a six-month public interest adjustment period general applicability waiver from the Buy America Domestic Content Procurement Preference (BAP) as applied to federal financial assistance provided to non-Tribal government recipients of the Local Assistance and Tribal Consistency Fund (LATCF), including certain counties, the District of Columbia, the Commonwealth of Puerto Rico, Guam, and the U.S. Virgin Islands (county recipients).¹ The LATCF was established by section 605 of the Social Security Act as added by section 9901 of the American Rescue Plan Act. This waiver will cover all iron and steel, manufactured products, and construction materials used in infrastructure projects required by the Build America, Buy America Act. In accordance with the Build America, Buy America Act, Treasury believes that this public interest adjustment period general applicability waiver is in the public interest, as it allows recipients, manufacturers and contractors, as well as Treasury, sufficient time to prepare to implement the Act for the long-term while allowing critical projects to be funded in the meantime. Treasury is separately considering issuing a waiver that would apply to Tribal government recipients of the LATCF.

DATES: Comments on the proposed waiver were due on or before September 21, 2022. The waiver is effective from September 27, 2022 to March 26, 2023. Under this waiver, the BAP will not apply to LATCF award agreements entered into by recipients during the waiver period.

COMMENTS: Treasury did not receive any comments on this waiver.

FOR FURTHER INFORMATION CONTACT:

Please submit any questions, comments, or concerns to LATCF@treasury.gov.

¹ Section 605 (42 U.S.C. 805) provides for Treasury to make payments to “eligible revenue sharing counties,” which are defined to include certain counties to be determined by Treasury and the District of Columbia, the Commonwealth of Puerto Rico, Guam, and the U.S. Virgin Islands.

SUPPLEMENTARY INFORMATION:

I. Build America, Buy America

The Build America, Buy America Act was enacted on November 15, 2021, as part of the Infrastructure Investment and Jobs Act (IIJA), Pub. L. 117-58. The Build America, Buy America Act establishes a domestic content procurement preference, the BAP, for federal infrastructure programs. Under the Build America, Buy America Act and guidance issued by the Office of Management and Budget (OMB), the iron, steel, manufactured products, and construction materials used in an infrastructure project under a LATCF award must be produced in the United States. Section 70912 of the Build America, Buy America Act 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 Build America, Buy America Act’s requirements do not apply to expenditures using LATCF funds for infrastructure projects undertaken in response to the COVID-19 public health emergency or in response to or anticipation of other major disasters or emergencies declared by the President under the Stafford Act.²

II. Local Assistance and Tribal Consistency Fund

The American Rescue Plan Act appropriated \$2 billion to Treasury to provide payments from the LATCF to Tribal governments and eligible revenue sharing counties, defined to include the District of Columbia, the Commonwealth of Puerto Rico, Guam, and the U.S. Virgin Islands, for use on any governmental purpose except for a lobbying activity. Eligible recipients must submit a request for funding to receive their payments, and recipients must submit periodic reports to Treasury on their expenditures, but payments are made in full in advance of use by recipients, and Treasury does not pre-approve projects consistent with the requirements in section 605 of the Social Security Act as added by section 9901 of the American Rescue Plan Act.

The purpose of the LATCF program is to serve as a general revenue enhancement program. Many eligible revenue sharing counties and eligible Tribal governments have historically

² More specifically, as provided in OMB’s guidance, the requirements of the Buy America, Build America Act do not apply to expenditures made in anticipation of or in response to an event or events that qualify as an “emergency” or “major disaster” within the meaning of the Stafford Act, 42 U.S.C. § 5122(1), (2). See OMB Memorandum M-22-11, “Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure” (April 18, 2022) at 3-4, available at <https://www.whitehouse.gov/wp-content/uploads/2022/04/M-22-11.pdf>.

experienced fluctuations in their revenues, and this program is designed, in part, to supplement existing federal programs that augment and stabilize revenues for these communities. Treasury's allocations to recipients are required to take into account the economic conditions of recipients. Recipients have broad discretion on uses of funds, similar to the ways in which they may use funds generated from their own local revenue sources. Recipients may use these funds on any governmental purpose other than a lobbying activity.

Although at this point the program is limited to two tranches of funding, it is considered to be a pilot program to supplement and stabilize revenues of governments that have significant economic need. Treasury anticipates that its collection of information through program reporting as to how recipients use funds from the LATCF will inform further discussion as to whether to extend the program. Treasury also expects that this reporting will inform how, if LATCF is extended, BABA could be implemented effectively for LATCF or similar programs.

III. Treasury's Progress in Implementation of the Act

Since the enactment of the Build America, Buy America Act, Treasury has worked diligently to prepare to implement the BAP. To date, this work has primarily been led by Treasury's Office of Gulf Coast Restoration, which administers Treasury's awards under the Resources and Ecosystems Sustainability, Tourist Opportunities, and Revived Economies of the Gulf Coast States Act ("RESTORE Act"). The RESTORE Act Direct Component program administered by the Office of Gulf Coast Restoration is the other program administered by Treasury to which the BAP applies. As such, the LATCF will leverage the work done by the Office of Gulf Coast Restoration to implement the requirements of BABA for the LATCF program.

Treasury has held regular meetings with Departmental and programmatic offices and consulted with OMB to plan to implement the requirements of the BAP. Treasury has been an active participant in the Made in America Office's Buy America Preference Working Group. Treasury also proactively contacted the program offices for the Environmental Protection Agency (EPA) State Revolving Fund, which has implemented domestic content procurement preference requirements for iron and steel for water systems projects, to identify lessons learned and best practices. Discussions with EPA informed the proposal for a six-month public interest adjustment period general applicability waiver, as EPA indicated that even implementing the requirements for iron and steel requires significant staff and contractor resources, as well as robust policies, procedures, and systems. Treasury also learned through these discussions that few resources exist across the federal

government to support the implementation to evaluate the construction materials and manufactured products requirements of the Act. Treasury is reviewing the responses to the Request for Information (RFI) recently issued by OMB to identify domestic sources of construction materials.

To allow sufficient time to build resources and internal capacity that leverage these collaborative efforts, Treasury is issuing this six-month public interest adjustment period general applicability waiver for LATCF. This will allow Treasury to apply the lessons learned from other agencies' implementation of domestic content procurement preference requirements for iron and steel products, as well as the results of the RFI, and leverage best practices across Treasury. For example, to promote coordination with their recipients, the Treasury Office of Gulf Coast Restoration stood up a Treasury RESTORE Act Domestic Procurement Working Group to solicit suggestions from eligible recipients to develop the best approach for implementation of these new requirements, and to fill knowledge gaps and better understand and document the demand for domestically produced iron, steel, manufactured products, and construction materials. Treasury's Office of Recovery Programs, which implements the LATCF, is engaging with the Office of Gulf Coast Restoration on these matters and will leverage the experience and information developed by the Office of Gulf Coast Restoration should the LATCF be extended to provide for awards beyond the period of this waiver.

IV. Waiver

Under Section 70914(b) of the Build America, Buy America Act, Treasury has authority to waive the application of a domestic content procurement preference for projects undertaken by individual recipients 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.

V. Public Interest in a General Applicability (Non-Product Specific) Adjustment Period Waiver of Buy America Provisions Under the Local Assistance and Tribal Consistency Fund

Treasury is issuing a program-wide, public interest adjustment period general applicability (non-product specific) waiver of the BAP for county recipients of the LATCF. The waiver will last for six months from September 27, 2022 to March 26, 2023. The BAP will not apply to award agreements entered into by county recipients during the waiver period.³

Treasury believes that increasing domestic supply for infrastructure projects is in the long-term public interest; Treasury has already seen how supply chain disruptions have negatively impacted construction project schedules and budgets. However, in the near term, immediate application of these requirements would likely be inconsistent with the public interest for several reasons.

First and foremost, in issuing this waiver, Treasury recognizes the limited capacity of recipient governments to implement and comply with the requirements of the Act. Although Treasury has not yet determined which counties will be eligible recipients under the LATCF, Treasury expects that most county recipients will have very limited capacity, given the intent of the program to provide additional revenue support for counties that have suffered a negative revenue impact.

LATCF is a new program and recipients have not yet had the chance to assess the application of the BAP to their use of LATCF funds, including assessment of the extent to which the projects they will undertake using the funds will involve materials subject to the BAP requirements. Recipients have not yet considered the process for applying for project-specific waivers. The waiver period will allow recipients to develop an understanding of the BAP requirements, what information they will need to determine whether they are compliant with the BAP, what information they will need to determine whether to apply for a project-specific waiver, and what resources they will need to develop to ensure compliance and apply for waivers. The waiver period will also allow Treasury to determine how and to what extent it would be able to provide guidance to recipients regarding compliance with the BAP. Should the program be extended, then both recipients and Treasury will be in a better position to develop the resources needed to meet these requirements.

Although LATCF recipients may use these funds on any governmental purpose other than a lobbying activity, each infrastructure project funded using their LATCF payment could potentially involve hundreds or thousands of components qualifying as manufactured products or construction

³ The waiver will apply to any reallocations made pursuant to these award agreements.

materials, for which the timely availability of sufficient quantities of these categories of goods at a reasonable cost has yet to be determined. Many iron and steel products (including rebar, manhole covers, sheet metal, and steel beams) as well as lumber, PVC, and water treatment pumps are used commonly in construction projects, and the universe of possible construction materials and manufactured products is largely unknown because those categories of goods relative to LATCF are still being defined. Treasury is issuing the waiver to provide sufficient time to address these gaps in Treasury's knowledge base and anticipates that without an adjustment period waiver, there would be lengthy delays in recipient ability to meet critical needs.

Furthermore, the LATCF is structured as a general revenue enhancement financial assistance program rather than as a project-based grant program. As noted above, eligible recipients must submit a request for funding to receive their payments, and recipients must submit periodic reports to Treasury on their expenditures. However, consistent with the American Rescue Plan Act, payments are made in full in advance of use by recipients, and Treasury does not pre-approve projects or particular expenses. This structure makes it more difficult to engage with recipients on project specific waivers and would require recipients to themselves identify when a project would be subject to the BAP, to assess how the BAP's requirements would apply to the acquisition of particular materials for that project, and to assess whether a waiver would be appropriate. This will be especially difficult for entities with less capacity to engage with Treasury and may discourage take-up of the program which negatively impacts eligible recipients and would be inconsistent with legislative intent. Should Congress consider an extension of the program, the adjustment period will give Treasury the time it needs to engage with Congress on possible modifications of the program to address these challenges.

Treasury will use the waiver period to engage with recipients about the types of information that could be necessary to either request waivers or demonstrate compliance with the BAP requirements, the scope of other public interest waivers (e.g., small grant waivers, de minimis waivers), recipients' capacity for implementing and complying with the new requirements, their needs for additional guidance, and what new information collections might be necessary as relates to BAP requirements should the LATCF program be extended. In the event of an extension of the program, Treasury would use waivers as a balanced, practical, and efficient tool to ensure projects stay on time, on task, and on budget. By learning directly from recipients, Treasury will be well-informed so that waivers from BAP will be limited, targeted, and conditional where appropriate. With knowledge of specific supply chain limitations applicable to the particular circumstances of

counties, Treasury will be able to better plan for issuing waivers for specific items or specific periods of time to enable agencies, recipients, and the private market to build capacity. Additionally, as a result of engagement with stakeholders afforded by an adjustment period, Treasury will be equipped to provide recipients of LATCF payments with the opportunity to fully evaluate and comment on any proposed information collection for the implementation of the BAP requirements subject to the Paperwork Reduction Act clearance process.

In addition, Treasury considered the Office of Recovery Programs' internal capacity to implement the new requirements and how implementation may impact the Office's ability to efficiently carry out other policy and programmatic priorities in accordance with the public interest. The Office appreciates the opportunity to advance the Build America, Buy America Act's objectives for the long term and will use the adjustment period to determine what additional capacity would be needed should the LATCF program be extended and to request additional budget resources, as appropriate. Immediate implementation without capacity-building measures could hinder the Office's core mission to assist county governments with their responses to the public health emergency to ensure as robust and equitable a recovery as possible. The system development effort to implement BAP requirements would require substantial staff resources to ensure successful development, testing, data migration, user training, and system launch, further straining the Office's capacity to implement a major new statutory requirement.

VI. Assessment of Cost Advantage of a Foreign-Sourced Product

Under section 70921(b)(2) of the Build America, Buy America Act and OMB guidance, 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 issuing a public interest waiver.⁴ Treasury'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.

VII. Limited Duration of the Waiver

Treasury is issuing a waiver to be effective for six months from September 27, 2022 to March 26, 2023. The BAP will not apply to award agreements entered into by recipients during the

⁴ See OMB Memorandum M-22-11 at 12.

period which the waiver is in place.⁵ As discussed above, the waiver period will allow Treasury to meet the objectives outlined above.

VIII. Solicitation of Comments

As required under Section 70914 of the Build America, Buy America Act, Treasury completed the solicitation of comment from the public on this waiver. Please refer to the “DATES”, “FOR FURTHER INFORMATION CONTACT”, and “SUMMARY AND RESPONSE TO COMMENTS” sections of this notice for information on submission of comments.

⁵ The waiver will apply to any reallocations made pursuant to these award agreements.