



## Northern Border Regional Commission: Public Notice

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### Summary

This notice will serve as advisement that the Northern Border Regional Commission (NBRC) is instituting a *general applicability waiver* for a period of six months. The waiver is in the public interest in order to ensure administrative clarity and efficiency in the provision and administration of grants, and thus ultimately encouraging domestic production and sourcing of the iron, steel, manufactured products, and construction materials utilized as critical components of NBRC-funded infrastructure projects.

The NBRC posted a notice of its intent to institute this waiver for 15 days (September 26, 2022 – October 11, 2022) in order to solicit public comment with regard to the length, purpose, and scope. As of the conclusion of the public comment period, at 5PM on October 11, 2022, no comments were received. The final version of this waiver will remain posted for the duration of the waiver on the NBRC’s website: [nbrc.gov](http://nbrc.gov)

### Background

The Build America, Buy America Act (hereafter “BABAA”) – enacted on November 15, 2021 – sets forth a domestic content procurement preference (“Buy American Preference” hereafter referred to as “BAP”) for infrastructure programs funded with Federal dollars. As the NBRC routinely funds infrastructure projects as part of its State Economic & Infrastructure Development (SEID) grant program, and anticipates funding infrastructure projects as part of its Bipartisan Infrastructure Legislation (BIL) programs beginning in FY’23, BABAA governs future NBRC infrastructure investments.

Per guidance in M-22-11, “A Buy America preference...only applies to the iron and steel, manufactured products, and construction materials used for the infrastructure project under an award.” As such, the NBRC will continue to move forward with the obligation of funds for projects awarded funds under the SEID, BIL, or other programs, which are not impacted by the preference.

Specifically, Section 70914(a) of Pub. L. 117-58, instructs Federal agencies to ensure that “none of the funds made available for a Federal financial assistance program for infrastructure, including each deficient program, may be obligated for a project unless all of the iron, steel, manufactured product, and construction materials used in the project are produced in the United States.”

## **Actions to Date**

Thus far, the NBRC has taken the following actions to raise awareness among our grantees:

- Inserted relevant *Made in America* language into our grant compliance manual (see relevant Procurement section, pp. 3-12 of this document), which is utilized by both grantees and “Local Development Districts” (LDDs), to guide grant administration activities such as procurement.
- Inserted relevant *Made in America* language in our grant agreements, which serve as our contract with grantees (in FY’22, this language will replicate the language included in the compliance manual, pp. 3-12 of this document).
- Reinforced the aforementioned language in the Agency’s information sessions about our funding held earlier this year across the four states, as well as incorporated into materials for our new grantee and grant administration training efforts, which take place typically in the fall, following new grant awards.
- Liaised with near-peer Federal agencies, such as the Economic Development Administration (EDA), to understand the challenges and opportunities in their efforts to comply.
- Publicly posted the intent to institute a 6-month *general applicability waiver* in order to solicit comments from members of the public (September 26, 2022 – October 11, 2022; no comments were received).

## **Issuance of Waivers**

Section 70914(c) authorizes the Federal Agency head (in the case of the NBRC, the Federal Co-Chair) to waive the application of a Buy America preference under an infrastructure program when:

1. Applying the domestic content procurement preference would be inconsistent with public interest (“public interest waiver”);
2. The 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 waiver”);
3. 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 waiver”).

## **General Applicability Waiver**

This notice signifies that, as of 11-08-2022, the NBRC has instituted a General Applicability Waiver of the earlier-referenced BAP with respect to NBRC awards for infrastructure projects; specifically covering iron, steel, manufactured product, or construction materials that are components of NBRC-funded infrastructure projects. The purpose of the waiver is to determine the specific impacts of these provisions on NBRC projects, to prepare internal procedures to streamline compliance, to incorporate these procedures into grantee training and ongoing communications, and to develop a process for ongoing updates of assessments of cost advantage of foreign-sourced products. The NBRC anticipates making guidance available to grantees at the expiration of the Waiver period: 05-08-2023.

Full compliance by NBRC grantees to BAP provisions will undoubtedly enhance domestic availability of the materials referenced in this notice, and as such, the NBRC does not anticipate the need to continue the waiver period indefinitely.

Regarding potential impact, NBRC “Infrastructure” projects are defined specifically in **40 USC, Subtitle V, §15501** (a)(1-3)(7). Depending on the year, between 60-70% of the NBRC’s State Economic & Infrastructure Development (SEID) grant awards go to infrastructure projects. For a sense of scale, in FY’21, approximately \$12.7Million of the NBRC’s \$30Million appropriation was dedicated to infrastructure grant making (42%).

**Assessment of Cost Advantage of a Foreign-Sourced Product:**

OMB Memorandum M-22-11, “Memorandum for Heads of Executive Departments and Agencies,” indicates that Agencies should conduct an internal analysis to determine “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” prior to granting a public interest waiver.

The NBRC’s own analysis has determined that this assessment is not applicable to this waiver, but that the issue deserves ongoing vigilance and a posture of near-continual revision with regard to updated lists of dumped or injuriously subsidized products. Earlier in this document, the NBRC has indicated that developing an ongoing process for assessing this issue will be part of the Agency’s work during the waiver period.

Christopher Saunders  
NBRC Federal Co-Chair

Date of final approval of adjustment period waiver: 11-8-2022  
Expiration of 6-month adjustment period: 05-08-2023