

Build America, Buy America Act Waiver Request Instructions for Boards

General

These waiver request instructions are to be used in concert with the information and requirements in WD Letter 04-23, issued June 7, 2023, and titled “Build America, Buy America Act: Compliance under Vocational Rehabilitation Contracts with Local Workforce Development Boards.” The abbreviations and references to the Build America, Buy America Act (BABAA), the Infrastructure Investment and Jobs Act (IIJA); Office of Management and Budget Memorandum M-22-11, issued April 18, 2022, and titled “Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure” (M-22-11); and Executive Order 14005 have the meanings described in that letter.

Submission Instructions

The Waiver Types section in this attachment provides information about the types of waivers available and the justification required for each. To request a waiver under a Local Workforce Development Board’s (Board) Vocational Rehabilitation (VR) colocation (COL) contract, send a waiver request with the prescribed justification to bcm@twc.texas.gov. Texas Workforce Commission (TWC) staff members will send the request to other designated TWC personnel for review. If TWC agrees with the waiver request, TWC will submit the request to the federal agency responsible for reviewing and approving the request. Upon receiving the federal agency response, TWC will inform the Board whether the request was rejected or approved in whole or in part.

Submission Content

When sending a waiver request to TWC under a VR COL contract, use the email subject line, “BABAA Waiver Request–VR COL Contract.”

Include the following information in the email:

- The waiver type (nonavailability, unreasonable cost, or public interest)
- The total cost of infrastructure expenditures, including all federal and nonfederal funds (to the extent known)
- A description of the infrastructure project and location (to the extent known)
- A list of iron or steel items, manufactured products, and construction materials proposed to be excepted from BABAA Buy America requirements, including name, cost, country

of origin (if known), and relevant Product Service Code (PSC) and North American Industry Classification System (NAICS) code for each

- A certification that the Board made a good faith effort to solicit bids for domestic products supported by terms included in the requests for proposals, contracts, and nonproprietary communications with the prime contractor
- A statement of waiver justification, including a description of efforts (such as market research, industry outreach, and/or other efforts) made by the Board in an attempt to avoid the need for a waiver. Such a justification may cite, if applicable, the absence of any BABAA Buy America-compliant bids received in response to a solicitation.
- A description of the anticipated impact if no waiver is issued

M-22-11 also requires certain additional information that TWC will attach before TWC submits a Board's waiver request to the appropriate federal awarding agency.

Waiver Types

The following descriptions are based on information provided and cited in M-22-11.

Nonavailability Waiver

This waiver is reserved for circumstances when 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.

Before granting a nonavailability waiver, the federal agency may consider whether thorough market research was performed that adequately considered, where appropriate, qualifying alternate items, products, or materials. Waiver requests must describe the market research activities and methods used to identify domestically manufactured items capable of satisfying the BABAA Buy America preference requirement, including the timing of the research and conclusions reached on the availability of sources.

Unreasonable Cost Waiver

This waiver is reserved for circumstances when 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.

Federal agencies have been advised that before granting an unreasonable cost waiver, to the extent permitted by law, federal agencies should ensure that the request includes adequate documentation that no domestic alternatives are available within the 25 percent cost parameter.

Consistent with IJA §70937(c)(2)(B), M-22-11 requires that the justification for a waiver request that cites unreasonable cost as the statutory basis for the waiver must include, as applicable, a comparison of the cost of the domestic product to the cost of the foreign product or a comparison of the overall cost of the project with domestic products to the overall cost of the project with foreign-origin products, pursuant to the requirements of BABAA, except that publicly available cost comparison data may be provided in lieu of proprietary pricing information. Federal agencies are advised that unreasonable-cost waivers should be no broader than necessary.

Public Interest Waiver

This type of waiver is most likely to be requested by a federal agency or grant recipient rather than individual Boards. This waiver is reserved for circumstances when applying the BABAA Buy America preference would be inconsistent with the public interest.

All proposed waivers citing the public interest as the statutory basis must include a detailed written statement that addresses all appropriate factors and justifies why the requested waiver is in the public interest. (IJA §70937(c)(2)(C))

M-22-11, page 10, advises federal agencies that a public interest waiver may be appropriate when the federal agency determines that other important policy goals cannot be achieved consistent with the BABAA Buy America requirements, and the proposed waiver would not meet the requirements for a nonavailability waiver or unreasonable cost waiver.

M-22-11, page 10, also requires federal agencies to use public interest waivers judiciously, and, consistent with IJA §70935(a), requires public interest waivers to “be construed to ensure the maximum utilization of goods, products, and materials produced in the United States.” As with other waivers, M-22-11, page 10, advises that public interest waivers should be project-specific whenever possible, because what is in the public interest may vary depending upon the circumstances of the project, recipient, and specific items, products, or materials in question.

Finally, before granting a waiver in the public interest, to the extent permitted by law, federal agencies are required to assess whether a significant portion of any cost advantage of a foreign-sourced product is the result of the use of either dumped and/or injuriously subsidized steel, iron, or manufactured products. (Executive Order 14005 §5)

Refer to M-22-11 for examples of types of public interest waivers that a federal agency may consider issuing.