

## **UNITED STATES COAST GUARD**

### **Public Interest Waiver of Section 70914(a) of P.L. 117-58, Build America, Buy America Act, 2021 for NCGM Project**

**ACTION:** Final Approval

**DATES:** The effective date of the final waiver is August 31, 2023. USCG will review this waiver every three years, or more often as necessary, from the date on which the waiver was issued, to determine its continued applicability and relevance with USCG's missions and goals consistent with the Infrastructure Investment and Jobs Act (IIJA), Executive Order 14005, Ensuring the Future Is Made in All of America by All of America's Workers, and the Office of Management and Budget (OMB) Memorandum M-22-11, Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure.

**FOR FURTHER INFORMATION CONTACT:** For questions concerning the contents of this waiver, please contact LCDR Charlayne Holliday, Grant Manager, CG-09241 via email at NCGM-BABAA@uscg.mil.

#### **INTRODUCTION:**

The Infrastructure Investment and Jobs Act (IIJA), signed November 15, 2021, includes the Build America, Buy America (BABA or the Act) Act Pub. L. 117-58, sections 70901-52. BABA establishes strong and permanent domestic sourcing requirements across all Federal financial assistance programs for infrastructure. No later than May 14, 2022, the head of each covered Federal agency was to ensure "none of the funds made available for a Federal financial assistance program for infrastructure . . . be obligated for a project unless all of the iron, steel, manufactured products, and construction materials used in the project are produced in the United States." IIJA at 70914(a). BABA includes guidance and procedures for authorizing waivers to these requirements. IIJA at 70914(b) and 70923. On April 18, 2022, the Office of Management and Budget (OMB) issued memorandum M-22-11, "Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure" ("Implementation Guidance"). The Implementation Guidance provides that a "waiver in the public interest may be appropriate where an agency determines that other important policy goals cannot be achieved consistent with the Buy America requirements established by the Act." Implementation Guidance at p. 10.

The U.S. Coast Guard is proud to promote and support the implementation of BABA. The Act represents a historic shift in how the nation builds things and avoids supply chain disruptions in construction. The Coast Guard embraces this opportunity to help build a resilient supply chain and manufacturing base for critical products in the United States and to catalyze investment in good-paying American manufacturing jobs and businesses.

The National Coast Guard Museum (Museum) project is a novel project for the U.S. Coast Guard. The Coast Guard has no other opportunity to provide Federal Financial Assistance to public infrastructure projects outside of the Museum project. Through a unique Congressional appropriation, the Coast Guard is making a single financial assistance award to the National Coast Guard Museum Association (Association) to construct the Museum in the amount of \$50,000,000. It is in the public interest to honor Congressional intent in awarding these funds by proceeding to award to allow expeditious construction of the Museum.

This waiver was posted for 15 days for public comment as required by OMB's Implementation Guidance and the IIJA at 70914(c) and Implementation Guidance, p. 6. USCG did not receive any public comments, and therefore no substantive changes were made.

### **Project Specific Waiver**

The Coast Guard will grant a temporary targeted project waiver of the manufactured products requirement of Section 70914(a) of IIJA pursuant to section 70914(b)(I) (public interest) for the Museum infrastructure project, within one award to the Association. The Association initiated the project design planning several years ago, a multi-year effort that involved coordination with multiple agencies to satisfy and address environmental, historic, geographic, and engineering interests and requirements. The Association and its partners finalized the plan in late 2019, before May 14, 2022, the statutory effective date of the BABA requirements.

### **Conditional and Target-Limited**

This waiver covers the one-time grant award from USCG to the Association, and expenditures within the award for the Museum infrastructure project. At this time, USCG received the appropriated funds from Congress, but has not yet obligated the grant award to the recipient, and expects this will happen in May 2023. The Association initiated and completed design planning before May 14, 2022, the statutory effective date of the BABA requirements. Specifically, the Association completed, and the Coast Guard approved, design plans for the Museum in December 2019. These plans identified materials and elements agreed upon after several years of negotiation with stakeholders, including local, state, and tribal authorities. The waiver is limited to expenditures for the museum infrastructure project within one award to the Association. The recipient will be exempt from complying with manufactured product domestic sourcing requirements for the duration of the waiver. Manufactured products such as specialty building envelope cladding systems, certain door hardware, drywall accessory components, and various mechanical, electrical, plumbing equipment and system components will be exempt from BABA compliance. This is not an exhaustive list of all manufactured products that will be included in construction of the Museum and exempt from BABA compliance.

### **Effective Date and Duration of the Waiver:**

The waiver is applicable to the Museum infrastructure project expenditures within one award to be obligated by the United States Coast Guard to the Association. The total award amount to be obligated is \$50,000,000. The waiver is applicable to project expenditures from August 31, 2023 and for a period of three years thereafter. The award will be obligated in fiscal year 2023 and is known as the NCGM Construction Grant.

### **Anticipated Project Impacts Absent a Waiver**

The Association began planning the design of the Museum with no knowledge that Federal Financial Assistance would become available or that a future domestic sourcing requirement would apply to the project if it received Federal Financial Assistance. Without such knowledge, the Association did not have the opportunity to plan for such requirements. The Association spent several years negotiating with various state, federal and tribal organization and through several design iterations to arrive at the 2019 design plan. It would have to reevaluate design alternatives and potentially redesign elements of the project, investigate potential domestic products, revise engineering drawings and bid specifications, and resubmit plans and specifications for approval should it have to comply with BABA at this stage. This re-opening of the negotiated and agreed upon design plan would substantially delay the start of construction and would add to the cost of the project.

The Coast Guard determined that delaying the Museum project and increasing its costs would not be in the public interest and justified issuing a waiver of the manufactured product requirement. The waiver will allow the project to proceed as designed in 2019 and avoid incurring additional costs and delay to redesign the project to comply with BABA. Any design decisions made post-implementation of BABA as part of the grant project are expected to comply with BABA requirements.

The Coast Guard worked closely with the Association to determine the impact of implementing the BABA requirements on the Museum project. This evaluation sought to balance the agency's desire to support implementation of BABA as fully as possible without jeopardizing fulfillment of the Museum project in a reasonable time and without substantial increase in costs. Based on research into domestic availability of manufactured products specified in the design plan by the Association, its architect and construction manager, the Coast Guard determined that not waiving BABA requirements for manufactured products specifically would result in substantial delay of and cost increase for the Museum project because of design plan changes.

The Coast Guard determined the project would not be adversely impacted by implementation of BABA requirements for iron and steel and construction materials.

The Coast Guard has no other projects subject to BABA and has no other experience implementing BABA outside of the Museum project.

### *Re-evaluation of Design Decisions Could Conflict with Historic Preservation Requirements*

The Museum building design and selected materials result from lengthy negotiations with the State of Connecticut State Historic Preservation Office, New London Landmarks, and two local tribal nations regarding historic preservation requirements. The resulting design ensures the Museum is differentiated from and complimentary to the historic Waterfront District and adjacent Union Station. The Museum design and materials are sensitive to how the structure would interact with the historic downtown waterfront area. The materials provide a quieter and more sculptural expression while providing a neutral backdrop for the historic waterfront.

### *Re-evaluation of Design Decisions will Increase Project and Construction Costs*

Though project design began years before construction, it was influenced by and incorporated the expected availability of supplies, materials, manufactured products, equipment, packaged technological solutions, local budget approvals, and even siting options. Design of this project was a carefully choreographed and interdependent process. Imposing new conditions on the tail end of the process would require re-evaluating earlier decisions on which the whole project is established and include public approval processes. Furthermore, changes in design and materials could require the resubmittal of engineering plans and specifications for approved permits.

All completed environmental reviews and permit requirements are based on the 2019 design and the specific materials identified in those plans. The approved and final environmental assessments and reviews are based partly on the materials in the 2019 design plans. If the Association had to change the materials reflected in the 2019 design plan to meet BABA requirements, the project would have to submit those changes and request additional review causing further delay and increased cost.

Materials and funding to support the project have taken many years to secure; any significant design change will delay the project's completion. It is impractical to change the construction design and apply BABA purchasing requirements now that the ground has broken, and pre-building construction work has started. It is in the public interest for projects like the Museum, that are already designed and planned, to continue in accordance with previously approved and agreed upon construction and design plans. The public interest in this case aligns with the Coast Guard's, Congress and the State of Connecticut's interest to supplement the work of the Association with Federal financial assistance in an efficient manner, consistent with existing plans to construct the statutorily authorized National Coast Guard Museum. It would not be in the public interest to delay this project and the influx of capital in the community due to construction contracts and instead incur additional public costs due to delay.

### **Program Implementation Considerations**

Advancing Made in America objectives is a long-term effort, and as such, everything is not yet in place to enable a project already designed and planned. However, the Coast Guard wants to aid in the implementation of BABA requirements to the greatest extent possible and has determined in coordination with the Association that compliance with iron and steel and construction material requirements of BABA will not adversely impact the project. Therefore, this waiver does not waive the iron, steel, and construction material requirements as defined in BABA. For more information on construction materials, see IJJA at 70911(5), 70912 and 70915(b); Implementation Guidance at p. 13 (“construction materials’ includes an article, material, or supply— other than an item of primarily iron or steel; a manufactured product; cement and cementitious materials; aggregates such as stone, sand, or gravel; or aggregate binding agents or additives— that is or 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; or drywall”).

OMB directs agencies to ensure that recipients and federal agencies efficiently use limited resources. This waiver advances BABA by ensuring that an important infrastructure project proceeds expeditiously and is not subject to delays and cost increases that would come with a redesign or delayed awarding of funds.

The Association is a small non-profit created for the sole purpose of fundraising for and constructing the National Coast Guard Museum. As such, the Association is not able to confirm BABA compliance for the dozens of manufactured products incorporated into the project's physical structure. Determining the country of manufacture of manufactured products and their components and availability of alternatives is only sometimes readily or reasonably identifiable before procurement in the normal course of business. It is not in the public interest to divert the Association's limited resources to source every manufactured product associated with the construction of the Museum for BABA compliance. It creates a significant administrative burden for the Coast Guard and the Association as both must negotiate such products on a case-by-case basis, increasing the cost to the taxpayer and delaying procurement.

The Coast Guard ensures those items, like iron and steel and construction materials available domestically, will be sourced domestically and in compliance with BABA. The Coast Guard encourages manufacturers to post comments as part of the public notice advising it of the availability of other products. This waiver avoids costly delays and reduces the administrative burden on a small organization committed to completing a single project while substantially implementing BABA requirements.

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

Under the Implementation 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 granting a public interest waiver. The Coast Guard's analysis has concluded that this assessment does not apply to this waiver, as this waiver is not based on the cost of foreign-sourced products.

#### **Waiver Decision**

Section 70914(b)(1) of the IIJA authorizes the Commandant to waive the requirements of Section 70914 in any case or category of cases in which they find that applying subsection (a) would be inconsistent with the public interest. Due to the limited resources available, the unique nature of the project, and interest in constructing the NCGM in a timely and cost-effective manner, and for the foregoing reasons, imposing the manufactured product BABA requirements on the NCGM project that initiated project design planning before May 14, 2022, is not in the public interest.



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Steven D. Poulin, Admiral  
U.S. Coast Guard