DOT Waiver of Buy America requirements for De Minimis Costs and Small Grants
NHTSA FAQs

What is Buy America?

Buy America is a longstanding Federal policy that creates a domestic preference when purchasing manufactured products and materials with Federal funds. Today, there is no single "Buy America" statute. Instead, there are several statutes that prohibit the use of Federal funds to purchase foreign made goods. NHTSA grant funds are subject to 23 U.S.C. § 313, which prohibits these funds from being used to purchase foreign steel, iron, or manufactured products, unless the prohibition is waived by the Secretary of Transportation.

Why is there a new waiver?

The Infrastructure Investment and Jobs Act[1] (also known as the Bipartisan Infrastructure Law, or BIL) was enacted on November 15, 2021. Within BIL is the Build America, Buy America Act[2] (BABA). BABA expanded the applicability of Buy America requirements to all Federal financial assistance programs for infrastructure projects. NHTSA does not fund infrastructure projects. However, BABA also authorizes waivers in certain circumstances, including where an agency finds that applying the Buy America requirement "would be inconsistent with the public interest.[3]"

On August 16, 2023, the U.S. Department of Transportation (DOT) published a limited public interest waiver that applies to both the new BABA requirements and existing Buy America requirements under 23 U.S.C. § 313 applicable to NHTSA. DOT's new public interest waiver consists of two components – De Minimis Costs and Small Grants.

What is the De Minimis Costs waiver?

The De Minimis Costs waiver applies to the total value of the non-compliant products where the cost is no more than the lesser of $1,000,000 or 5% of total applicable costs for the project. Under the De Minimis Costs waiver, applicable costs are defined as the cost of materials (including the cost of any manufactured products) used in the project that are subject to the Buy America requirement.

What is the Small Grants waiver?

The Small Grants waiver applies when the total amount of Federal financial assistance applied to the project, through awards or subawards, is below $500,000. The Small Grants waiver may be applied to both financial assistance awards and subawards, where the subaward is made by a passthrough entity for a specific project. However, it is not applicable to a subaward made under an award of $500,000 or more if the scope of the subaward is not a separately identifiable, independent project.

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[1] Public Law 117–58.
[2] Public Law 117–58, div. G 70901–27.
[3] BIL 70914(b)(1).

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Questions and Answers for State Highway Safety Grant Recipients

1. Does the Department-wide De Minimis Costs and Small Grants Waiver apply to NHTSA funded projects?

Yes.

2. When does the De Minimis Costs and Small Grant Waiver become effective?

The waiver became immediately effective upon publication of DOT's notice on August 16, 2023. However, this waiver does not apply retroactively.

To be clear, the waiver applies to all FY24 grant funds (and subsequent fiscal year grant funds while the waiver is in place). The waiver also applies to FY23 grant funds in a limited way, specifically to subawards for specific projects entered into on or after August 16, 2023. The waiver would not apply to a grant award that has already been executed pre-waiver and the recipient now enters into a subaward with a subrecipient to carry out a portion of the already executed grant award. Instead, the waiver for subawards executed on or after August 16, 2023, is meant to apply in situations where an entity disburses smaller amounts as subawards for discrete projects.

3. What is Federal Financial Assistance?

Federal Financial Assistance (FFA) is assistance that non-Federal entities receive or administer in several different forms, including through grants and cooperative agreements.[4]

NHTSA awards grant funds to States primarily through formula grants authorized by 23 U.S.C. 402 and 23 U.S.C. 405. Additional grant funds include funds transferred under Sections 154 and 164, and separate grant funds provided under Section 1906.

4. How do FFA recipients apply for the De Minimis Costs and Small Grant Waiver?

DOT's public interest waiver is a general applicability waiver. This means that States and other entities do not need to apply for a separate waiver for items if they meet the requirements of either the De Minimis Costs or the Small Grants component of the waiver. No approval from NHTSA is needed and no paperwork must be submitted to make use of either waiver. If you are unsure whether you meet the criteria for a waiver, please reach out to NHTSA's Office of Regional Operations and Program Delivery for additional information.

5. How will NHTSA apply the De Minimis Costs and Small Grants Waiver to its funding?

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[4] See 2 CFR 200.1 "Federal financial assistance".

NHTSA awards formula grants to States on an annual basis. Therefore, the waiver will be applied to the projects established under the Annual Grant Agreement for each fiscal year.

6. What is a "project" for the purposes of the De Minimis Costs and Small Grants Waiver?

NHTSA defines project as "a discrete effort involving identified subrecipients or contractors to be funded, in whole or in part, with grant funds under 23 U.S.C. Chapter 4 or Section 1906 and that addresses countermeasure strategies identified in the triennial Highway Safety Plan." 23 C.F.R. §1300.3. Full grant awards under 23 U.S.C. Chapter 4 or Section 1906 (i.e., the entire Section 402 award from NHTSA to the State) are not considered projects themselves for the purposes of either waiver.

In most cases, States should be able to easily identify a project because projects are identified by a single project agreement number in the Annual Grant Application[5] and in vouchers.[6] However, if a State uses separate project agreements in split funded projects (i.e., projects using a mix of Section 402 and Section 405 funding), then the State must include all project agreements associated with a single project. For purposes of applying the Small Grants Waiver, a State must ensure that it has included and considered the costs of any other Federal funds used for the project, if any.

7. Should FFA recipients track De Minimis Costs and Small Grant Waiver use?

Yes. Although no approval is needed from NHTSA, States are responsible for ensuring that they and their subrecipients are properly applying the Buy America waiver and must maintain documentation supporting each use of a waiver. Unlike cost and nonavailability waivers, the Small Grant and De Minimis Costs waivers do not require application and approval. Instead, qualifying entities must document their eligibility to use the waiver.

DOT's waiver places the burden upon recipients to aggregate awards and track spending to ensure compliance with the terms of the waiver. Moreover, States certify compliance with the Buy America requirement at 23 U.S.C. § 313.[7] So, although there is no application process for these waivers, recipients will have to keep track of FFA awards and waiver use. NHTSA may request pertinent documentation to support any legal requirement.[8] NHTSA may review such documentation during ordinary oversight activities.

The Small Grants and De Minimis Costs waivers are general applicability waivers and their continued availability for use requires a review every five years under BABA. In addition, NHTSA's Regional Offices may review individual uses of these waivers by grant recipients

[5] See 23 C.F.R. §1300.12(b)(2).
[6] See 23 C.F.R. §1300.33(b)(1).
[7] See 23 C.F.R. §1300, Appendix A.
[8] See 2 C.F.R. §200.337 and 2 C.F.R. §200.334.

on a more frequent basis.[9] In anticipation of such Regional Office reviews, FFA recipients should track waiver use by the type of waiver (whether small grant or de minimis cost), the amount of grant funds used under the waiver, and the specific items purchased, and must maintain documentation supporting the use of the waiver.

8. What happens if the De Minimis Costs and Small Grants Waiver is applied incorrectly?

If waiver components are applied incorrectly, then NHTSA will not reimburse the recipient for non-compliant purchases or will seek repayment of the funds that were improperly used on ineligible projects. NHTSA has no discretion under law to accept non-compliant purchases.

9. What if a recipient does not qualify for the De Minimis Costs or Small Grants waiver?

FFA recipients that do not qualify for the Small Grants waiver may still apply for a waiver of Buy America under 23 U.S.C.§ 313.

The Buy America requirement prohibits the use of Federal highway safety grant funds to purchase steel, iron, or manufactured products, unless these products are produced in the United States.

Under 23 U.S.C.§ 313, NHTSA may waive the requirement if:

(1) its application would be inconsistent with the public interest,
(2) such materials and products are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality, or
(3) the inclusion of domestic material will increase the cost of the overall project contract by more than 25 percent.[10]

Recipients should note that unlike the Small Grants and De Minimis Costs waiver, these Buy America waivers require an application to be submitted to NHTSA. NHTSA will then review the submitted waiver application and coordinate within DOT and with the Office of Management and Budget for additional review. Proposed waivers will also be published for public notice and comment, following which a final decision will then be published in the Federal Register.

[9] Pub. L. 117-58, Sec. 70914(d)(1).
[10] 23 USC 313(b).

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NHTSA FAQs

Small Grants Waiver

10. What is the waiver limit under the Small Grants waiver?

Under the Small Grants waiver, the Buy America requirement does not apply to Federal funds for any project where total Federal Financial Assistance is below $500,000. Note that the Small Grants waiver applies to total Federal financial assistance, which includes all Federal funds (i.e., both NHTSA and non-NHTSA Federal funds) provided to the same project.

11. What if the award from NHTSA to the State is more than $500,000? Will the Small Grants waiver apply?

Because the Small Grants waiver is intended to apply on a project basis, a State that receives an award over the threshold may or may not be able to apply the waiver to subawards.

For example, if a State receives a grant of $500,000 or more and then, acting as a passthrough entity, awards all of those grant funds to a single subrecipient for a single project, then the Small Grants waiver will not apply to any of the funds because it applies to the total amount of Federal Financial Assistance available under the project and the cutoff for the waiver is $500,000.

However, if a State receives a grant of $500,000 or more and enters into a subaward that is under $500,000 with a subrecipient to carry out a project (and there are no other Federal funds used for that project from any source), then the Small Grants waiver may apply. This is permissible so long as the subaward is a separately identifiable and independent project under the grant (see Question 13 for more details).

12. What happens if a project goes to an entity that already receives funding from another Federal source?

DOT's waiver places the burden upon recipients to aggregate awards and to track spending to ensure compliance with the terms of the waiver. So, although there is no application process for these waivers, recipients will have to keep track of FFA awards to ensure compliance.

A recipient that receives multiple awards for a single project is responsible for aggregating the value of those awards and tracking whether the Small Grants waiver applies. This means that States are responsible for ensuring that their state projects and projects implemented by a subrecipient via subawards each apply the waiver requirements correctly. Likewise, if a project is expected to be completed in phases using multiple awards during the same fiscal year, then the value of those awards must be aggregated to determine whether the waiver applies.

For example, if a State receives $150,000 in assistance from NHTSA for a project and $250,000 in assistance from FTA for the same project, then the total amount of assistance

($400,000) would have to be considered when determining whether the Small Grants waiver is applicable. In this case, the waiver could apply because the total amount of available assistance is below the $500,000 threshold.

Conversely, if a subrecipient received $350,000 in NHTSA-grant funded assistance from the State for a project and $500,000 in DOJ-grant funded assistance from the State for the same project, then the total amount of available assistance ($850,000) would render the project ineligible for the Small Grants waiver because it exceeds the $500,000 threshold.

13. Can the Small Grants waiver be applied to subawards?

Yes. However, the Small Grants waiver is not applicable to a subaward from an award that is $500,000 or more unless the scope of the subaward is a separately identifiable, independent project. This applies to projects at every subaward level (i.e., subaward, sub-subaward, etc.).

In most cases, States should be able to easily identify a separately identifiable, independent project because projects are identified by a single project agreement number in the Annual Grant Application and in vouchers. However, States should not rely solely on project agreement numbers to distinguish between projects.

For example, a Highway Safety Office (HSO) receives a research grant for $900,000. The HSO, acting as a passthrough entity, awards $300,000 in grant funds to three separate subrecipients. The purpose of each award is to complete portions of the research on behalf of the HSO. Though each subrecipient project may have a separate project award number, this does not make the scope of each project separately identifiable and independent from the scope of the original award.

The scope of each subrecipient project, though different from each other, covers the same research that the original grant contemplated. In this case, these subrecipient projects would not be eligible for the Small Grants waiver because the scopes of the subrecipient projects are not separately identifiable and independent from the scope of the original award.

Passthrough entities, like the HSO in the previous example, cannot simply break up an ineligible project into smaller subrecipient projects to use the Small Grants waiver. To be eligible, subrecipient projects must have a scope that is separately identifiable and independent from the scope of the original award.

As another example, an HSO receives a Section 405(d) Impaired Driving incentive grant award of $4,000,000. The HSO, acting as a passthrough entity, awards $400,000 in grant funds to a subrecipient to enforce the State's impaired driving laws. The subrecipient's project is to improve blood alcohol and drug concentration screening and testing in "City A" (a specific region of the State) by purchasing a mass spectrometer. Though the subrecipient project may have a separate project award number, NHTSA does not recommend that States rely solely on this fact. Instead, States should further examine whether the scope of the subrecipient project is separately identifiable and independent from the scope of the original award.

In this case, the subrecipient project is probably eligible for the Small Grants waiver. Unlike the first example, this subrecipient project does not have the same project scope as the HSO project. The subrecipient project focuses on improving blood alcohol and drug concentration screening and testing in a specific area within the State through the purchase of specific equipment. This is different from the original Section 405(d) incentive grant award to the HSO, which specifies that funds are to be used for enforcement of the State's impaired driving laws. Though related, these two project scopes are separately identifiable and independent of each other.

De Minimis Costs Waiver

14. What is the "total value of non-compliant products" under the De Minimis Costs waiver?

The De Minimis Costs waiver is applied to *the total value of non-compliant products* where the cost is no more than the lessor of $1,000,000 or 5% of the total applicable costs of the project. The total value of the non-compliant products is the total product cost, not just the non-compliant components of that product. This means the total non-compliant cost of the product could include compliant (i.e., domestic) components, and, therefore, both foreign and domestic components could count towards the de minimis threshold.

Note that this total does *not* include the value of products subject to another, separate Buy America Waiver.

15. What are "total applicable costs for the project" under the De Minimis Costs waiver?

As a reminder, the De Minimis Costs waiver is applied on a project basis. Specifically, the waiver is applied to the total value of non-compliant products where the cost is no more than the lesser of $1,000,000 or 5% of the *total applicable costs of the project*. Total applicable costs are defined as the cost of materials (including the cost of any manufactured products) used in the project that are subject to a domestic preference requirement (including materials that are within the scope of an existing waiver). The waiver applies to the actual cost of the materials, not the anticipated cost of those materials. To make use of the waiver, an awardee will need to track material costs of a project separately from other project costs.

For example, an HSO receives $15,000,000 in Section 402 assistance from NHTSA. The HSO, acting as a passthrough entity, awards $350,000 to a subrecipient for the purpose of reducing injuries and deaths resulting from persons driving motor vehicles while impaired by alcohol or a controlled substance. As part of this project, the subrecipient will purchase a foreign-made mass spectrometer.

The De Minimis Costs waiver is applied on a project basis and as noted in Question 6, full grant awards under 23 U.S.C. Chapter 4 and Section 1906 are not considered projects themselves for the purposes of either waiver. This means that in the scenario above, the De Minimis Costs waiver could not be applied to the $15,000,000 Section 402 award; instead, the waiver would apply to the $350,000 subaward.

The De Minimis Costs waiver applies to the total value of non-compliant products where the cost is no more than the lesser of $1,000,000 or 5% of the total applicable costs of the project. Here, the total value of non-compliant products is $350,000 and the total applicable costs of the project are also $350,000. Five percent of the total applicable costs of the project is less than $1,000,000, so $17,500 can be waived (i.e., 5% of $350,000).

Under the Small Grants waiver, the subrecipient could have the entire cost of the mass spectrometer waived so long as the project meets all applicable requirements (see Questions 10-13).