



OFFICE OF WASTEWATER MANAGEMENT

WASHINGTON, D.C. 20460

SOLICITATION OF PUBLIC COMMENT FOR PROJECT-SPECIFIC BUILD AMERICA, BUY AMERICA ACT PUBLIC INTEREST WAIVER PROPOSAL

SUBJECT: UNDER EVALUATION: Project-Specific Public Interest Previously Planned Project Waiver of Build America, Buy America Act (BABA) Requirements to the Milwaukee Metropolitan Sewerage District in Wisconsin (Applicant), for the Aeration System Upgrade Project at the South Shore Water Reclamation Facility

Intro

This solicitation of public comment by the U.S. Environmental Protection Agency (EPA) is to evaluate a BABA waiver request submitted by a Clean Water State Revolving Fund (CWSRF) assistance recipient based on the public interest for this previously planned project that completed significant design and planning prior to May 14, 2022, the effective date of BABA. The project is expected to comply with American Iron and Steel (AIS) requirements.

This solicitation of public comment does not represent a final agency decision. The purpose of this proposal is to examine if the application of the BABA requirements to the project is in the public interest or whether other factors should be considered in the evaluation of a waiver.

Public comments are requested for 15 days (specific dates noted on the EPA's website). Through this public comment period, commenters may provide information that indicates a waiver may not be needed. Please submit comments to BABA-OW@epa.gov. Please include information in the subject of the email identifying it as a public comment on this waiver request, such as "Waiver Comment: Milwaukee Public Interest Waiver" or similar.

Background

The Buy America domestic preference set forth in section 70914 of the BABA, included in the Infrastructure Investment and Jobs Act (Pub. L. No. 117-58), requires all iron, steel, manufactured products, and construction materials used for infrastructure projects under federal financial assistance awards be produced in the United States.

Under section 70914(b), the EPA may waive the application of the Buy America domestic preference in any case in which it finds that: (1) applying the domestic content procurement preference would be inconsistent with the public interest; (2) types of iron, steel, manufactured products, or construction materials are not produced in the US in sufficient and reasonably available quantities or of a satisfactory quality; or (3) the inclusion of iron, steel, manufactured products, or construction materials produced in the U.S. will increase the cost of the overall project by more than 25 percent. All waivers must have a written explanation for the proposed determination, provide a period of not less than fifteen (15) calendar days for public comment on the proposed waiver, and submit the proposed waiver to the Office of Management and Budget's (OMB) Made in America Office for review to determine if the waiver is consistent with policy.

Summary

Proposed Waiver: The EPA is soliciting comments regarding whether to issue a project-specific waiver of the requirements of section 70914 of the BABA, included in the Infrastructure Investment and Jobs Act (Pub. L. No. 117-58), for the Aeration System Upgrade Project funded through the Clean Water State Revolving Fund.

Waiver Type: Public Interest, Previously Planned Project – applying the domestic content procurement preference would be inconsistent with the public interest for this previously planned project where significant design and planning took place prior to May 14, 2022, the effective date of BABA.

Waiver Level and Scope: Project level waiver for a single project. No other project or award will utilize the waiver.

Proposed Waiver Description: Project-specific waiver of BABA requirements to the Milwaukee Metropolitan Sewerage District in Wisconsin, for the Aeration System Upgrade Project at the South Shore Water Reclamation Facility.

Length of the Waiver: From the effective date of the final waiver through completion of the project, anticipated to be November 2028.

Project Summary: The project scope includes design and construction for the removal and replacement of the aeration diffusers and piping in all 28 aeration basins. Specifically, the scope includes basin cleaning, removal of the existing ceramic plate containers and diffusers, removal of the existing membrane diffusers, removal of concrete false floors, installation of new membrane diffuser systems, constructing one selector zone in each basin, along with replacement of various air piping, valves, and appurtenances. In addition, the top portion of the concrete walls on select aeration basins will be removed and replaced and the existing hand railing will be removed and either re-galvanized or replaced with aluminum. Electrical conduits and associated conductors embedded in the existing concrete walls will be replaced as needed, along with installation of new instrumentation and control equipment. The project will ensure ongoing ability of the South Shore Water Reclamation Facility to fully treat wastewater and maintain Wisconsin Pollutant Discharge Elimination System (WPDES) permit compliance, help minimize energy consumption in the aeration process, extend the life of the aeration basins, increase worker safety, and reduce risk of air diffuser damage due to falling concrete. The total project cost is \$74,373,000 and completion is anticipated in late 2028. The value of products covered under this waiver is estimated to be approximately \$11 million. The Applicant's project will still comply with the American Iron and Steel (AIS) requirements, which applies to all CWSRF projects. Therefore, only products not otherwise covered by the AIS requirements will be waived. The following categories of products for which the BABA requirements apply and are

proposed to be waived will be permanently incorporated into the project:

- Adjustable Speed and Variable Frequency Drives
- Diffused Aeration System Equipment
- Electrical Isolation Products
- Electrical Materials and Systems
- Fabricated Metals (non-ferrous)
- Fiber-reinforced Plastic Baffle Wall System
- Gaskets, Waterstops, and Joint Sealants
- Instrumentation and Controls
- Pipe Casing, Wrap, and Insulation
- Non-ferrous Pipe and Fittings
- Polyethylene Fiber Reinforcement
- Uninterruptible Power System
- Process Instrumentation and Controls
- Sealants, Paints, Primers, and Coatings
- Submersible Mixers and Motors
- Valve Actuators

Summary of the Project Timeline and Background for the Waiver: The Applicant initiated planning for the project in November 2019 and final design began on August 10, 2020, prior to the effective date of BABA. The project sought CWSRF funding from the Wisconsin Department of Natural Resources (WDNR) and anticipated funding would be available when processed by WDNR. While awaiting CWSRF funding, the Applicant assessed that they would be eligible for the original “Adjustment Period Waiver of Section 70914(a) of P.L. 117-58, Build America, Buy America Act, 2021 for SRF Projects that have Initiated Design Planning” (SRF Design Planning Waiver), which was in effect at that time, and proceeded to bid in March 2023, utilizing their own financing. Because the Applicant was eligible for the original SRF Design Planning Waiver, having satisfied several waiver eligibility conditions to demonstrate initiation of design planning prior to the effective date of the BABA requirements, the Applicant’s contract included the American Iron and Steel requirements for SRF projects and did not include BABA requirements.

The applicant received construction contract bids for the project on May 18, 2023 – 21 days before the EPA proposed to amend the SRF Design Planning Waiver on June 8, 2023. In anticipation of CWSRF financing becoming available, the Applicant awarded the contract on July 24, 2023, in the amount of \$74,373,000. WDNR issued the project’s notice to proceed on August 22, 2023, and the Applicant initiated construction using their own funding. On November 13, 2023, the EPA amended the SRF Design Planning Waiver, limiting waiver eligibility to projects funded with federal appropriations from federal fiscal years 2022 and 2023. WDNR recently identified federal fiscal year 2024 funds that would be available for the project, rendering the Applicant unable to utilize the amended SRF Design Planning Waiver.

The Applicant asserts that its decision to proceed without the BABA requirements was made in good faith because it had no reasonable expectation that the SRF Design Planning Waiver would be amended to limit eligibility to funding appropriated in federal fiscal years 2022 and 2023. The EPA agrees with the assertion that the Applicant’s decision to exclude BABA requirements from the project was made in good faith based on all of the information available along the project timeline and sees no evidence that the project proceeded with the intent to circumvent the BABA

requirements. The EPA also notes the project was designed and planned to comply with American Iron and Steel requirements, and AIS requirements will be preserved for this project.

Therefore, the EPA proposes that a public interest previously planned project waiver be issued, and the BABA requirements for the project be waived because applying the domestic content procurement preference would be inconsistent with the public interest and meets the conditions of a waiver in section 70914(b)(1).

Description of Efforts Made to Avoid the Need for a Waiver

At the time of preparing, evaluating, accepting, and initiating the construction contract, the Applicant had reason to believe the BABA requirements did not apply to the project. The EPA agrees with the Applicant's assertions that no reasonable efforts to avoid a waiver were applicable prior to commencement of the project. In many cases, BABA requirements can be easily managed and accounted for during the early planning stages of a project, but compliance can be costly and complex past the design phase for infrastructure projects where significant design and planning took place prior to May 14, 2022, the effective date of BABA. Absent a waiver from the EPA, the recipient would need to redesign the project and continue to incur interest and fees for interim financing and development costs, which continue to grow while construction is delayed. The EPA therefore believes this request is in the public interest. During the period the waiver is active, the EPA encourages the recipient, to the greatest extent practicable, seek to purchase, acquire, or use goods, products, or materials produced in the United States.

Assessment of Cost Advantage of a Foreign-Sourced Product

Under OMB M-24-02, 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 EPA's analysis has concluded that this assessment is not applicable to this waiver as the basis of the waiver is not related to the cost of foreign-sourced products.

Description of Award

Recipient Name and/or Unique Entity Identifier: Milwaukee Metropolitan Sewerage District

Federal Financial Assistance Identification Number (FAIN): Pre-Award, Not Applicable

Federal Financial Assistance Listing Name: Clean Water State Revolving Fund

Federal Financial Assistance Listing Number: 66.458

Federal Financial Assistance Funding Amount: \$74,373,000

Total Cost of Infrastructure Expenditures: \$74,373,000