



## **Request for Statement of Qualifications**

**For**

**Job Order Contracting Services for Citywide Construction**

**Facilities/Vertical Work**

### **MAYOR AND COUNCIL:**

Phil Goode, Mayor  
Connie Cantelme, Council Member  
Lois Fruhwirth, Council Member  
Ted Gambogi, Council Member  
Patrick Grady, Council Member  
Brandon Montoya, Council Member  
Eric Moore, Council Member

### **CITY CLERK:**

Sarah M. Thornhill

### **RECREATION SERVICES DIRECTOR:**

Kristy Diaz-Trahan

## **Request for Statement of Qualifications**

### **Job Order Contracting Services for Citywide Construction Facilities/Vertical Work**

DESCRIPTION: The City of Prescott, Arizona, solicits interest from qualified persons or contractors to provide a Statement of Qualification (SOQ) for Job Order Contracting on Vertical Construction Projects. Only contractors capable of providing the requested services will receive consideration.

BID OPENING: Thursday, September 18, 2025, at 2:00p.m. City Council Chambers 201 N. Montezuma Street, 1<sup>st</sup> Floor, Prescott, Arizona 86301.

In accordance with local and State law, sealed SOQs will be received by the Office of the City Clerk at 201 N. Montezuma Street, Suite 302, Prescott, Arizona 86301, until 2:00p.m. on the date specified above, for the services specified herein. Statements will be opened and read aloud at the above noted date, time, and location. Any submittals received at or after 2:00p.m. on the referenced date will be returned unopened.

The City of Prescott reserves the right to accept or reject any or all submittals, and waive any informality deemed in the best interest of the City and to reject the submittals of any persons who have been delinquent or unfaithful in any contract with the City.

Copies of the Request for Statement of Qualifications and Contract Documents are available free of charge on the City's website at <https://prescott-az.gov/budget-and-finance/purchasing/>.

PUBLISH: August 24 and 31, 2025

# **Request for Statement of Qualifications**

## **Job Order Contracting Services for Citywide Construction Facilities/Vertical Work**

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## **GENERAL INFORMATION**

The City of Prescott (hereinafter “City”) invites interested and qualified persons or contractors (hereinafter “Contractors”) to submit a written request for Statement of Qualifications (SOQ) for Job Order Contracting (JOC) on Vertical Construction Projects. Only contractors capable of providing the requested services will receive consideration.

Contracts shall be awarded based on demonstrated competence and qualifications pursuant to A.R.S. § 34-604, Buy American Build America, WIFA and Grant requirements.

All contracts awarded will commence once awarded and will expire June 30, 2030, pursuant to A.R.S. § 34-605(G)1 and may be amended to expire December 31, 2030. The value of these contracts will vary based on projected City needs, and available budget. Contracts may be awarded to multiple Contractors, although selection and award of a contract is not a guarantee of work. There currently is no specific list of projects.

To be eligible for consideration, contractors must submit a single SOQ demonstrating appropriate competence, qualifications, and relevant experience.

The City will apply a one-step process to select the successful contractors under this procurement. The one-step process will involve review and evaluation of the SOQ to establish a final list. The final list will consist of not less than three (3), depending on submissions but no more than five (5) of the highest ranked contractors. As project needs arise, contractors from this list may be contacted to determine interest and availability for specific tasks. The final list will remain in effect until December 31, 2030, pursuant to A.R.S. § 34-605(G)1.

### **A. DESCRIPTION OF WORK**

The City periodically has a need for vertical construction projects as identified by Staff. Projects may include, but are not limited to, new construction, and building and infrastructure renovations for vertical construction. “Vertical Construction” is for a broad range of building, altering, maintaining, repairing, improving, or demolishing any public structure or building of various scopes and sizes on an as-needed basis at various project locations throughout the City of Prescott. For projects determined by the City to be appropriate for this JOC, the City will request the contractor prepare a scope of work, cost proposal, and project schedule. If acceptable, the City will issue an individual job order agreement and direct the contractor to proceed with the work. The City anticipates that awarded contractors will be issued work, the contractor is neither guaranteed a minimum amount of work nor jobs. The City reserves the right to issue job order contracting agreements based on the ability of the contractor to meet the City’s work schedule, the availability of trades and expertise in relation to each project.

The City operates multiple facilities including Prescott Regional Airport, City Hall, Parks and Recreation Centers, Prescott Rodeo Grounds, two (2) Wastewater Treatment Plants, seven (7) Water Wells, over one hundred (100) Water and Wastewater Pump Stations, Police Stations, multiple Fire Stations, Public Works and Engineering Facility, and Library.

The Scope of work will include work tasks as requested and described below relating to a variety of citywide construction projects. These projects will include any or all of the following: earthwork and landscaping, structural, electrical, mechanical, plumbing, HVAC, drywall, painting, and any other related general contracting functions.

The following activities may be included in individual projects. If the contractor does not have direct expertise in some of these areas, they must demonstrate the knowledge needed to act as the general contractor utilizing specialty subcontractors for specific work elements.

Work Activities (including but not limited to):

- a. Permit Management: The attainment of permits from any and all jurisdictions which the project may require, including but not limited to the City of Prescott and Yavapai County.
- b. Construction: The physical construction of the work, through competitive subcontractor selection/bidding and/or self-performance as dictated by the unique needs of each individual project.
- c. Cost Proposals: Upon the request of the owner, project cost proposals may be submitted either as a lump sum or as a Guaranteed Maximum Price (GMP). GMP cost proposals shall be “open book” with full transparency provided to the Owner and any project allowance savings will be returned to the Owner at the end of the project.
- d. Federal Compliance: Where federal monies are utilized, the scope shall include prevailing wage compliance as per the Davis Bacon Act and submission of weekly certified payroll. The City of will notify the contractor if federal grants are utilized.
- e. Project Close-Out: The preparation, maintenance, or modification of the Owner’s project close-out documentation including, but not limited to: RLS certified survey as-built, CAD updates to as-built documents, operations and maintenance manuals, warranty manuals, turnover of certified payroll documentation (federal projects only), City, County, State, or Federal agency special close-out requirements, and maintenance personnel training (if applicable). Preparation of construction estimates. City staff may desire to use the contractor during capital project planning or design stages to perform construction estimates.

A Job Order Contract (JOC) is an indefinite quantity contract pursuant to which the Contractor will perform an ongoing series of individual projects (Job Orders) at different locations, often simultaneously, throughout the City. A Scope of Work for each Job Order discipline may be provided by the City to a number of contractors to solicit competitive price proposals. The actual assignment of projects may vary, and no guarantee is made as to the quantity of work to be awarded.

The maximum amount per Job Order can be up to two million dollars (\$2,000,000.00) with an annual cap (City of Prescott Fiscal Year July 1 – June 30) per Contractor of four million dollars (\$4,000,000.00).

Contractor agrees to perform any or all (but not limited to) the following services which will be specifically enumerated on individual JOC Construction Contracts and amendments to this contract:

- Provide preconstruction services.
- Serve as the general contractor during construction.
- Coordinate and manage subcontractors during construction.
- Coordinate with all utilities.
- Attend public meetings and issue notifications (when required).
- Arrange for procurement of materials and equipment.
- Schedule and manage site operations.
- Continue use of a collaborative process.
- Provide quality controls.
- Insure the construction.
- Comply with all federal, state, and local permitting requirements.
- Acquire all applicable permits.
- Maintain a safe work site for all project participants.
- Commissioning.
- Prepare and provide record drawings (when required).
- Provide operations and maintenance manuals (when required).

All work performed by the contractor shall meet all applicable federal, state, and local codes and the Contractor shall be required to obtain all required permits and inspections.

For all of City's projects, the following order of precedence shall govern:

- Special Provisions.
- Construction Plans and Addenda.
- General Provisions.
- The Contractor may be required to attend a scoping meeting for each project and be prepared to discuss the following topics:
  - The general scope of the work.
  - Applicable designs or sets of plans that guide the project.
  - Methods and alternatives for accomplishing the work and value engineering.
  - Access to the site and protocol for admission/access.
  - Hours of construction operation.
  - Staging area.
  - Specific quality requirements for equipment and material.
  - Requirements for catalog cuts, technical data, samples, shop drawings and incidental design.
  - The presence of hazardous materials.
  - Temporary services and shutoffs.
  - Safety issues/concerns and procedures.
  - Construction duration.
  - Date on which price proposal is due.
  - Provide Subcontractors List.

When a particular project is offered to the contractor, the contractor shall provide a written price proposal for a specific scope of work including a complete list of quantities and prices of parts and materials to be utilized, total labor cost to be broken down by trade, hours for each trade, hourly cost per trade, total dollar cost and Project Schedule and Subcontractor List. The project price proposal shall be all-inclusive with any cost overruns to be absorbed by the Contractor unless change orders are pre-approved by the City.

By executing a price proposal, the Contractor represents that the contractor has visited the project site(s) and become familiar with the construction documents and the local conditions under which the work is to be performed. The City does not undertake to represent or warrant the site or local conditions.

The City will require a subcontract list for each project and reserves the right to reject the contractor's selection of subcontractors on individual projects. Failure to include the subcontractor list in the price proposal submitted for each project shall be cause for rejection of the price proposal as non-responsive.

The City reserves the right to request Job Order proposals from more than one JOC contractor for competitive purposes. The City reserves the right to determine the pricing method on a project-by-project basis.

A separate amendment to the contract must be issued for each Job Order before the commencement of any work by the contractor. The amendment will reference the detailed Scope of Work and amount of compensation.

The contractor shall commence work on the date set forth in the Notice to Proceed. Time being of the essence to the project, the contractor shall therefore prosecute the work diligently, using such means and methods of construction to assure final completion within the time specified in the written price proposal.

The contractor shall supervise and direct the work, using the best skills and attention. They shall be solely responsible for all construction means, methods, techniques, sequences, procedures and for coordinating all portions of the work under the project.

The contractor shall keep on site, during the performance of all work, a competent superintendent who is fluent in English and any necessary assistants, all satisfactory to the City. The superintendent shall represent the contractor and have authority to act for the contractor. The contractor or qualified representative shall attend meetings with the City, at a frequency as determined by the City, for the purpose of coordinating or expediting the work.

## **B. PROPOSED SCHEDULE**

Milestones are estimated to be as follows:

- |  |                        |
|--|------------------------|
| • Request for Statement of Qualifications Advertised | August 24 and 31, 2025 |
| • Questions Due by 5:00p.m.                          | September 5, 2025      |
| • SOQ Due Date/Opening                               | September 18, 2025     |
| • Award of Contract                                  | October 14, 2025       |

All milestones are the earliest dates for planning purposes only and shall not represent any contractual commitment whatsoever on the part of the City.

### **C. REQUESTS FOR INFORMATION**

Contractors who desire clarification of the procurement terms, selection criteria or submittal requirements shall restrict their inquiries to written communications only. All communications (other than delivery of the proposal as defined below) shall be addressed to the City project representative at the following:

Jaimie Sventek  
Contracts Coordinator  
City of Prescott – Purchasing  
contracts@prescott-az.gov

Requests for information must be received by the project representative prior to 5:00p.m on Friday, September 5, 2025. Responses, or addenda as required, will be issued no later than 12:00p.m. on Tuesday, September 9, 2025. Receipt of addenda must be acknowledged on the required form in the Contractor's submission. It is the submitter's sole responsibility to check the City's website for periodic updates or addenda.

## **II. REQUEST FOR STATEMENT OF QUALIFICATIONS EVALUATION CRITERIA**

Responses to this request must be in the form of a Statement of Qualifications (SOQ), as outlined in this document.

### **A. GENERAL REQUIREMENTS**

Interested Contractors are required to submit information relative to their qualifications, experience, project delivery approach, ability to meet a project's goals and objectives, and other criteria as listed. All information must be provided as requested for all Contractor members and their key personnel to be assigned to a project.

The SOQ shall address the evaluation criteria and shall include the following:

- Cover letter indicating interest in providing services.
- Location of the Contractor.
- Statement of the Contractor's understanding of the purpose and scope.
- Description of specific technical capabilities, qualifications, and years of prior experience.
- Brief resume for key project team members outlining their credentials and experience.
- Description of at least three (3) but no more than five (5) municipal projects in which the Contractor participated as the primary Contractor. Describe the Contractor's role in the project and scope of work that demonstrates the Contractor's expertise. Provide the name and contact information for each project.
- List of applicable Arizona professional licenses held, including license numbers, and note whether licenses are held by Contractors or individuals.
- List and provide a brief description of projects currently under contract with other government agencies.

The City reserves the right to cancel this request, reject in whole or in part any and all submittals, waive or decline to waive irregularities in any submittals, or determine not to enter into one or more of the multiple contracts as specified if determined by the City to be



in the City's best interests. The City assumes no liability for the cost of preparing a response to this request.

**B. PROPRIETARY INFORMATION**

All materials submitted in response to the solicitation, including samples, shall become the property of the City and are therefore subject to public release, upon request, after the Contract award. Contractors shall clearly mark any proprietary information contained in its submittal with the words "Proprietary Information". Contractors shall not mark any Solicitation Form as proprietary. Marking all or nearly all of a submittal as proprietary may result in rejection of the submittal.

Contractors should be aware that the City is required by law to make its records available for public inspection. All Contractors, by submission of materials marked proprietary, acknowledge, and agree that the City will have no obligation to advocate for non-disclosure in any form nor will the City assume any liability to the Contractors in the event that the City must legally disclose these materials.

**C. SUBMITTAL REQUIREMENTS**

Statements shall be submitted as one original submittal along with a flash drive with same submittal which must conform to this request.

The SOQ shall be limited to no more than ten (10) pages. Pages shall be letter size (8½ x 11 inches), single-sided, with a minimum font size of 12. Combinations of text and graphic material may be used at the Contractor's discretion to appropriately communicate facts and qualifications. Five (5) additional pages of appendices are allowed which may include graphs, charts, photos, or additional resumes.

The cover letter shall not exceed two (2) pages and is not a part of the page count limitation for the SOQ above. The cover letter shall be on the company's letterhead and shall be signed by an officer or principal of the company with contracting authority.

Within the submittal package (preferably on the SOQ cover or within the cover letter), provide all contact information including the Contractor's name, address(es), email address(es), website address, phone, and name(s) of principals. This information will be utilized for all correspondence related to this request. Notification of the final list and assignment of contracts will be delivered to the contact information as provided in the SOQ.

**Do not** include any fees, pricing, or additional copies of the RSOQ in the submittal. These materials will not be considered at this time and failure to comply with this provision will result in the rejection of the submittal.

**D. DELIVERY OF SUBMITTALS**

Sealed SOQs will be received **before 2:00p.m. on Thursday, September 18, 2025**, at the **City Clerk's Office, 201 N. Montezuma Street, Suite 302, Prescott, Arizona 86301**, at which time all submittals will be publicly opened in the City Council Chambers.

Any submittals received at or after 2:00p.m. on the above-stated date will be returned unopened. Contractors are solely responsible for the delivery of their submittals to the above location by the time and date specified. The City is not responsible for lateness of mail, carrier, etc. The time and date stamp in the City Clerk's Office shall be the official

time of receipt. Electronic or facsimile submittals will not be considered. Modifications to submittals will not be considered after the 2:00p.m. deadline.

The outside of the submittal envelope shall indicate the name and address of the respondent; shall be addressed to the City Clerk, City of Prescott, at the above address; and shall be clearly marked:

**Request for Statement of Qualifications:  
Job Order Contracting Services for Citywide Construction  
Facilities/Vertical Work  
Due before 2:00p.m. on September 18, 2025**

**E. MINIMUM TEAM QUALIFICATIONS**

Contractors shall possess the qualifications and Arizona licenses as required by law, in addition to having extensive knowledge, expertise and experience for the construction services. Selected Contractors will be required to execute and meet the terms of the City's standard Construction Contract, including insurance requirements, in a form acceptable to the City Attorney. Approval of the City Council will also be required for award of a contract. A sample agreement is provided with this request.

**III. EVALUATION CRITERIA**

The SOQ shall clearly and accurately display the capability, knowledge, and experience of the Contractor to meet the technical requirements of the request. Qualifications shall be prepared simply and economically, providing a straightforward, concise description of the Contractor's ability to meet the requirements of this request. Emphasis shall be on quality, completeness, clarity of content, responsiveness to the requirements, and understanding of the City's needs.

The SOQs will be evaluated by a Review Committee appointed by the City according to the following criteria:

**A. GENERAL INFORMATION**

10 points possible

- Brief overview of the Contractor and legal organization of the company
- Applicable licenses held.
- Submission requirements met.
- Identify the location of the Contractor's principal office and local office (if applicable).

**B. EXPERIENCE AND QUALIFICATIONS OF THE CONTRACTOR AND KEY PERSONNEL**

50 points possible

A key element to successful partnerships is the availability and accessibility of selected Contractors to City staff and local citizens. Contractors must demonstrate that the necessary personnel are available within a reasonable time to attend meetings, conduct field investigations and complete other local services as may be required.

- Demonstrate understanding of the purpose and scope.
- Demonstrate years of experience, specific technical capabilities, and qualifications.
- List of comparable projects with work performed and reference information.

- Names and locations of the key personnel proposed for delivering services.
- Brief resume for each key team member describing their experience, background, and notable projects.

#### **C. VALUE ADDED KNOWLEDGE AND EXPERIENCE**

##### 30 points possible

The Contractors hired by the City must be familiar with local community needs, standards, historical challenges, local codes, and site conditions.

- Explain why your company is particularly qualified to perform the required services in the Prescott area. Demonstrate the Contractor's knowledge of local geology, climate practices, rules, regulations, and procedures as they relate to the construction services.
- Specific experience of the Contractor within Arizona.
- Specific experience of the Contractor with the City of Prescott.

#### **D. OVERALL EVALUATION**

##### 10 points possible

This is to be determined by the Review Committee. No submittal response is required. Information obtained from the SOQ and from any other relevant source, in addition to past experience with the City, may be used in the evaluation and scoring process for this item.

- Overall quality of the SOQ evidencing interest in providing services.
- Overall evaluation of the Contractor and its perceived ability to provide the required services.

### **IV. EVALUATION AND SELECTION PROCESS**

To qualify for evaluation, the SOQ must be submitted on time and materially satisfy all requirements identified in this request. If, in the judgment of the City, an SOQ does not conform to the format specified herein, or if any section is absent or significantly incomplete, the City reserves the right to reject the submittal.

#### **A. OVERVIEW**

This is a qualifications-based selection process as authorized by A.R.S. § 34-604. The process will involve an evaluation and scoring of each Contractor's qualifications and relevant experience, as indicated in its SOQ. A Review Committee appointed by the City for this procurement will individually evaluate the SOQs according to the criteria and weighting as indicated for each category. Following evaluation of the SOQs, a final list of the highest ranked Contractors will be determined.

#### **B. FINAL RANKING AND CONTRACT NEGOTIATION**

Using the individual Review Committee member's scores from the SOQs, the committee shall rank the Contractors to generate a final list of at least three (3) but no more than five (5) Contractors. The City will then notify each of the candidates of the final rankings.

Selected Contractors will be required to execute and meet the terms of the City's standard construction contract including insurance requirements (Exhibit A) in a form acceptable to the City Attorney. Approval of the City Council may also be required for award of a contract.

As project needs arise, multiple Contractors may be contacted to determine interest and availability for specific tasks. Upon successful negotiation of a scope and fee for work, the City will issue an authorization for performing the specified tasks.

**C. TERM OF CONTRACT**

Award of a contract is not a guarantee of work but is utilized to expedite the process of negotiating specific services as the needs arise. All contracts awarded will commence once awarded and will expire June 30, 2030, pursuant to A.R.S. § 34-605(G)1 and may be amended to expire December 31, 2030.

**D. TERMINATION OF CONTRACT**

The City reserves the right to terminate any part of or the entirety of any contract that may result from this proposal, without cause and at any time with thirty (30) calendar days written notice. In such case, the consultant shall be paid for services rendered through the date of the termination notice, and the results of all such work through that date shall become the property of the City.

**E. COOPERATIVE USE OF CONTRACT**

This contract may be extended for use by other municipalities, school districts and government agencies in the State of Arizona with the approval of the contracted contractor. Any such usage by other entities must be in accordance with the statutes, codes, ordinances, charter and/or procurement rules and regulations of the respective government agency.

**F. PROTEST POLICY**

Any protest to the solicitation or award must be filed with the City Clerk's Office by 4:00p.m. up to ten (10) days after issuance of the final list. All such protests shall be in writing and contain the following: 1) Name, address, email address and telephone number of the interested party; 2) Signature of the interested party or its representative; 3) Identification of the purchasing department and Project name; 4) Detailed statement of the legal and factual grounds for protest including copies of relevant documents; and 5) Form of relief requested. Protesting parties must demonstrate as part of their protest that they made every reasonable effort within the schedule and procedures of this solicitation to resolve the basis or bases of their protest during the solicitation process, including asking questions, seeking clarifications, requesting addenda, and otherwise alerting the City to perceived problems so that corrective action could be taken prior to the selection of the successful Contractors. The City will not consider any protest based on items which could have been or should have been raised prior to the deadline for submitting questions or requesting addenda. The filing of a protest shall not prevent the City from executing an agreement with any other proposer.

**V. ATTACHMENTS**

**A. SAMPLE CONSTRUCTION CONTRACT**

**B. INSURANCE REQUIREMENTS**

**C. FINAL PAYMENT ACKNOWLEDGEMENT**

**D. CONTRACTOR'S AFFIDAVIT REGARDING SETTLEMENT OF CLAIMS AND CERTIFICATE OF COMPLETION OF WARRANTIES**

**E. FEDERAL GRANT PROVISIONS**

**F. BUILD AMERICAN BUY AMERICAN ACT**



## CONSTRUCTION CONTRACT

**\*\*Project**

**Contract No. 20\*\*-\*\*\***

THIS AGREEMENT made and entered into this \*\* day of \*\*, 20\*\*, by and between \*\* of the city of \*\*, county of \*\*, state of \*\*, hereinafter designated "Contractor", and the City of Prescott, a municipal corporation, organized and existing under and by virtue of the laws of the State of Arizona, hereinafter designated "City".

WITNESSETH: That the said Contractor, for and in consideration of the sum to be paid by the said City, and of the other covenants and agreements herein contained, and under the penalties expressed in the bonds provided, hereby agrees, for him/herself, his heir, executors, administrators, successors and assigns as follows:

**ARTICLE I - SCOPE OF WORK:** The Contractor shall furnish any and all labor, materials, equipment, transportation, utilities, services and facilities, required to perform all work for the construction of the project described as City of Prescott: \*\* Project and install the material therein for the City, in a good and workmanlike and substantial manner and to the satisfaction of the City through its engineers and under the direction and supervision of the Recreation Services Director, or their properly authorized agents and strictly pursuant to and in conformity with the Plans and Specifications prepared by the engineers for the City, and with such written modifications of the same and other documents that may be made by the City through the Recreation Services Director or their properly authorized agents, as provided herein.

**ARTICLE II - CONTRACT DOCUMENTS:** The Notice Inviting Bids, Project Plans and Specifications, Special Provisions, Addenda, Contractor's Affidavit Regarding Settlement of Claims and Certification of Completion of Warranties, Contractor Bid Proposal as accepted by the Mayor and Council per Council Minutes of \*\*, 20\*\*, Proposal Guarantee, Performance Bond, Payment Bond, Certificates of Insurance and required Endorsements, Contract Allowance Authorizations and Contract Amendments, are by this reference made a part of this Contract to the same extent as if set forth herein in full.

**ARTICLE III - TIME OF COMPLETION:** The Contractor hereby agrees to commence work on or before the tenth (10th) day after written notice to do so, unless such commencement of work is mutually agreed to be extended by the parties due to material unavailability and delayed lead times. The Contractor will complete the work within \*\* (\*\*) calendar days after the date of the written notice to commence work, subject to such extensions of time. The contract will close 60 days after the substantial completion date, to finalize the payment process.

**ARTICLE IV - COMPENSATION:** Contractor shall be paid, pursuant to the provisions as set forth in the Contract Documents, a not to exceed amount of \*\*                      dollars and \*\*                      cents (\$\*\*), plus any approved contract amendments, for the full and satisfactory completion of all work as set forth in the Project Plans, Specifications and Contract Documents. Retention shall be in accordance with A.R.S. § 34-221. If the Contractor claims that any instructions involve additional/extra cost, it shall give the Director written notice thereof within forty-eight (48) hours after the receipt of such instructions, and in any event before proceeding to execute the services/work. No such claim shall be valid unless so made. The Contractor shall do such additional/extra services/work upon receipt of an accepted Contract Amendment or other written order of the Director. In the absence of such Contract Amendment or other written order of the Director, the Professional shall not be entitled to payment for such additional/extra services/work. In no case shall services/work be undertaken without written notice from the Director to proceed with the services/work. All Contract Amendments shall be approved by the Director, but Contract Amendments over \$50,000 must also be approved by City Council.

**ARTICLE V – CONFLICT OF INTEREST:** Pursuant to A.R.S. § 38-511, the City may cancel this contract, without penalty or further obligation, if any person significantly involved in initiating, negotiation, securing, drafting or creating the contract on behalf of the City is, at any time while the contract or any extension of the contract is in effect, an employee or agent of any other party to the contract in any capacity or a consultant to any other party of the contract with respect to the subject matter of the contract. In the event of the foregoing, the City further elects to recoup any fee or commission paid or due to any person significantly involved in initiating, negotiation, securing, drafting or creating this contract on behalf of the City from any other party to the contract, arising as a result of this contract.

**ARTICLE VI - AMBIGUITY:** This Agreement is the result of negotiations by and between the parties. Although it has been drafted by the Prescott City Attorney, it is the result of the negotiations between the parties. Therefore, any ambiguity in this Agreement is not to be construed against either party.

**ARTICLE VII - NONDISCRIMINATION:** The Contractor, with regard to the work performed by it after award and during its performance of this contract, will not discriminate on the grounds of race, color, national origin, religion, sex, disability or familial status in the selection and retention of subcontractors, including procurement of materials and leases of equipment. The Contractor will not participate either directly or indirectly in the discrimination prohibited by or pursuant to Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, Section 109 of the Housing and Community Development Act of 1974, the Age Discrimination Act of 1975, the Americans With Disability Act (Public Law 101-336, 42 U.S.C. 12101-12213) and all applicable federal regulations under the Act, and Arizona Governor Executive Orders 99-4, 2000-4 and 2009-09 as amended.

**ARTICLE VIII - INDEPENDENT CONTRACTOR STATUS:** It is expressly agreed and understood by and between the parties that the Contractor is being retained by the City as an independent contractor, and as such the Contractor shall not become a City employee and is not entitled to payment or compensation from the City or to any fringe benefits to which other City employees are entitled other than that compensation as set forth in Article IV - Compensation above. As an independent contractor, the Contractor further acknowledges that he is solely responsible for payment of any and all income taxes, FICA, withholding, unemployment insurance, or other taxes due and owing any governmental entity whatsoever as a result of this Agreement. As an independent contractor, the Contractor further agrees that he will conduct

himself in a manner consistent with such status, and that he will neither hold himself out nor claim to be an officer or employee of the City by reason thereof, and that he will not make any claim, demand or application to or for any right or privilege applicable to any officer or employee of the City, including but not limited to workmen's compensation coverage, unemployment insurance benefits, social security coverage, or retirement membership or credit.

**ARTICLE IX - CITY FEES:** Prior to final payment to the Contractor, the City shall deduct therefrom any and all unpaid privilege, license and other taxes, fees and any and all other unpaid moneys due the City from the Contractor and shall apply to those moneys to the appropriate account. Contractor shall provide to the City any information necessary to determine the total amount(s) due.

**ARTICLE X - LIQUIDATED DAMAGES:** All time limits stated in the Contract Documents are of the essence and should the Contractor fail to complete the work required to be done on or before the time of completion as set forth in these Contract Documents, including any authorized extension of time, it is mutually agreed and understood by and between the parties that the public will suffer great damages; that such damages, from the nature of the project, will be extremely difficult and impractical to fix; that the parties hereto wish to fix the amount of said damages in advance; and that the sum of \$\*\*\$.00 per day for each and every day's delay in completion and acceptance of the work required to be done by the Contractor subsequent to the time of completion, including any authorized extensions of time, is the nearest and most exact measure of damages for such breach that can be fixed now or could be fixed at or after such breach and that, therefore, the Owner and Contractor agree to fix said sum of \$\*\*\$.00 per day for each and every said day's delay as liquidated damages, and not as a penalty or forfeiture for the breach of the agreement to complete the work required to be done by the Contractor on or before the time of completion and acceptance and, in the case of such breach, the Owner shall deduct said amount from the amount due the Contractor under the contract. In the event the remaining balance due the Contractor is insufficient to cover the full amount of assessed liquidated damages, then the Contractor or the surety on the bonds shall pay the difference due the Owner.

**ARTICLE XI - OTHER WORK IN PROJECT AREA:** The City, any other contractors, whether under contract with the City, a third party, and/or utilities, may be working within the project area while this Contract is in progress. The Contractor herein acknowledges that delays and disruptions may, and in all likelihood, will occur due to other work. The Contractor's bid shall be deemed to have recognized and included costs arising from and associated with other work in the project area disclosed by the Contract Documents or which would be apparent to an experienced contractor exercising due diligence during inspection of the project documents, the question-and-answer session in the pre-bid process or during site inspection. No payment will be made for any delays or disruptions in the work schedule that are wholly the fault of the Contractor, its agents, employees, or any of the Contractor's subcontractors. In the event the Contractor encounters delay or disruption in the project schedule due to factors not wholly the fault of the Contractor or within the Contractor's control then the Contract may be adjusted pursuant to the Delay's and Extension of Time provisions of this Contract and a timely request submitted for Contract Amendment. Failure to submit a timely request for Contract Amendment shall be deemed a waiver of any entitlement to additional compensation.

## **ARTICLE XII - BONDS:**

- A. On or before the execution of the contract, the Contractor shall obtain in an amount equal to the full contract price a performance bond pursuant to A.R.S. § 34-222, conditioned upon the faithful performance of this contract in accordance with the plans, specifications, and conditions herein. The bonds shall be solely for the protection of the City. A copy of this bond shall be filed with the Finance Department.
- B. Contractor shall also obtain a payment bond, pursuant to the provisions of A.R.S. § 34-222, in an amount equal to this full contract price herein, said bond to be solely for the protection of claimants supplying labor or materials to the Contractor or his subcontractors in the prosecution of the work provided for in this contract. A copy of this bond shall be filed with the Finance Department.
- C. All bonds must be written by an insurance company authorized to do business in the State of Arizona, to be evidenced by a Certificate of Authority as defined in A.R.S. § 20-217, a copy of which certificate is to be attached to the applicable bid bond, payment bond and performance bond. In addition, depending upon the nature of the contract and amount thereof, the City Manager may also require insurance companies and/or bonding companies to have an "A" rating or better with Moody's or A.M. Best Company, and/or to be included on the current list of "Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds and as Acceptable Reinsuring Companies" as published in Circular 570 (as amended) by the audit staff, Bureau of Accounts, US Treasury Department.

## **ARTICLE XIII – SUBCONTRACTORS:**

- A. During performance of this Agreement, the Contractor may engage such additional subcontractors as may be required for the timely completion of the construction. The addition of any Subcontractors shall be subject to prior written approval by the City. In the event of sub-contracting, the sole responsibility for fulfillment of all terms and conditions of this Agreement rests with the Contractor.
- B. The Contract Amount includes payment for any and all services to be rendered by the Contractor or Subcontractors which the Contractor may employ for this Agreement. It is expressly agreed by and between the parties that the Contractor is solely responsible for all payment to such any other Contractors or Subcontractors retained by the Contractor. The Contractor agrees to indemnify and save harmless the City of Prescott against any and all liens, claims of liens, suits, actions, damages, charges and expenses whatsoever, which said City may suffer arising out of the failure to pay for all labor performance and materials furnished for the performance of said project when completed.

**ARTICLE XIV – INDEMNITY:** The Contractor shall defend, indemnify and hold harmless the City, its departments, officers, officials, agents, and employees (hereinafter referred to as "Indemnatee") from and against any and all claims, actions, liabilities, damages, losses, or expenses (including court costs, attorneys fees and costs of claim processing, investigation and litigation) (hereinafter referred to as "Claims") for bodily injury or personal injury (including death), or loss or damage to tangible or intangible property caused, or alleged to be caused, in whole or in part, by the negligent or willful acts or omissions of the Contractor or any of the Contractor's owners, officers, directors, agents, employees or subcontractors. This indemnity includes any claim or amount arising out of or recovered under Worker's Compensation Law or arising out of failure of such Contractor to conform to any Federal, State, or local law, statute,



ordinance, rule, regulation, or court decree. It is the specific intentions of the parties that the Indemnatee shall, in all instances, except for Claims arising solely from the negligent or willful acts of Indemnatee, be indemnified by the Contractor from and against any and all claims. In consideration of the award of this contract, the Contractor agrees to waive all rights of subrogation against the City, its departments, officers, officials, agents, and employees for losses arising from the work performed by the Contractor for the City.

**ARTICLE XV – RIGHT TO ASSURANCE:** If the City in good faith has reason to believe that the Contractor does not intend to or is unable to perform or continue performing under this Contract, the Recreation Services Director may demand in writing that the Contractor give a written assurance of intent to perform. Failure by the Contractor to provide written assurance within the number of days specified in the demand may, at the City's option, be the basis for terminating the Contract.

**ARTICLE XVI – TERMINATION FOR CONVENIENCE:** The City reserves the right to terminate the Contract, in whole or in part at any time, when in the best interests of the City without penalty or recourse. Upon receipt of the written notice, the Contractor shall stop all work, as directed in the notice, notify all subcontractors of the effective date of the termination, and minimize all further costs to the City. In the event of termination under this paragraph, all documents, data, and reports prepared by the Contractor under the Contract shall become the property of and be delivered to the City upon demand. The Contractor shall be entitled to receive just and equitable compensation for work completed, and materials accepted before the effective date of the termination.

**ARTICLE XVII - COOPERATIVE USE OF CONTRACT:** This contract may be extended for use by other municipalities, school districts and government agencies in the State of Arizona and as part of the Strategic Alliance for Volume Expenditures (S.A.V.E.) with the approval of the contracted vendor. Any such usage by other entities must be in accordance with the statutes, codes, ordinances, charter and/or procurement rules and regulations of the respective government agency.

**ARTICLE XVIII - MISCELLANEOUS:**

- A. All pay applications need to have these items contract number, pay application number, dates of service and date submitted. They need to be submitted to the project manager for review. Once they review and sign off, they will submit to our accounts payable department for payment processing.
- B. The parties hereto expressly covenant and agree that in the event of a dispute arising from this Agreement, each of the parties hereto waives any right to a trial by jury. In the event of litigation, the parties hereby agree to submit to a trial before the Court. The Contractor further agrees that this provision shall be contained in all subcontracts related to the project, which is the subject of this Agreement.
- C. Final Payment Acknowledgement to be signed by the contractor and sent in with the final pay application. This is to further certify that the project is completed to acceptable standards as defined in the plans and specifications per the Project Contract Agreement. Any changes to the plans have been noted on the Construction As-built Mylar Drawings certified by the Engineer of Record. The revised As-built Drawings have been delivered and approved by the Recreations Services Department. All materials used and workmanship performed are expressly warranted to be free of defects for a period of twenty-four (24) months from the date of final acceptance by the City of Prescott.

- D. Contractor's Affidavit Regarding Settlement of Claims and Certification of Completion of Warranties is to be signed and returned at the end of the two-year warranty period that is determined per the warranty letter sent out when the project has been completed.
- E. The parties hereto expressly covenant and agree that in the event of litigation arising from this Agreement, neither party shall be entitled to an award of attorney fees, either pursuant to the Contract, pursuant to A.R.S. § 12-341.01(A) and (B), A.R.S. §34-301, §34-302 and §34-321 or pursuant to any other state or federal statute, court rule, case law or common law. The Contractor further agrees that this provision shall be contained in all subcontracts related to the project that is the subject of this Agreement.
- F. In the event of default, neither party shall be liable for incidental, special, or consequential damages.
- G. Any notices to be given by either party to the other must be in writing, and personally delivered or mailed by prepaid postage, at the following addresses:

City of Prescott  
201 N. Montezuma Street  
Prescott, AZ 86301  
contracts@prescott-az.gov

\*\*\*  
\*\*\*  
\*\*\*  
\*\*\*

- H. This Agreement shall be construed under the laws of the State of Arizona.
- I. This Agreement represents the entire and integrated Agreement between the City and the Contractor and supersedes all prior negotiations, representations, or agreements, either written or oral. This Agreement may be amended only by written instrument signed by both the City and the Contractor. Written and signed amendments shall automatically become part of the Agreement, and shall supersede any inconsistent provision therein; provided, however, that any apparent inconsistency shall be resolved, if possible, by construing the provisions as mutually complementary and supplementary.
- J. In the event any provision of this Agreement shall be held to be invalid and unenforceable, the remaining provisions shall be valid and binding upon the parties. One or more waivers by either party of any provision, term, condition, or covenant shall not be construed by the other party as a waiver of a subsequent breach of the same by the other party.
- K. No oral order, objection, claim or notice by any party to the other shall affect or modify any of the terms or obligations contained in this Agreement, and none of the provisions of this Agreement shall be held to be waived or modified by reason of any act whatsoever, other than by a definitely agreed waiver or modification thereof in writing. No evidence of modification or waiver other than evidence of any such written notice, waiver or modification shall be introduced in any proceeding.
- L. Contractor agrees that notwithstanding the existence of any dispute, the Contractor shall continue to perform the obligations required of Contractor during the negotiation and resolution of any such dispute unless specifically enjoined or prohibited by an Arizona Court of competent jurisdiction.
- M. In the event of a discrepancy between this Agreement and other documents incorporated into this Agreement, this Agreement shall control over Exhibit "A".

- N. Non-Availability of Funds: Fulfillment of the obligation of the City under this Agreement is conditioned upon the availability of funds appropriated or allocated for the performance of such obligations. If funds are not allocated and available for the continuance of this Agreement, this Agreement may be terminated by the City at the end of the period for which the funds are available. No liability shall accrue to the City in the event this provision is exercised, and the City shall not be obligated or liable for any future payments as a result of termination under this paragraph.
- O. Compliance with Federal and State Laws: All Services performed by the Contractor shall be performed in compliance with all applicable federal, state, county, or city laws, rules, regulations, and ordinances, including, without limitations, those set forth on the attached Exhibit C, if applicable. The Contractor, at the Contractor's expense, shall be responsible for obtaining all necessary licenses, permits and governmental authorizations required to perform the Services. The Contractor understands and acknowledges the applicability to it of the Immigration Reform and Control Act of 1986 and the Drug Free Workplace Act of 1989.
- P. Nondiscrimination and Equal Employment Opportunity: The Contractor and any Subcontractors are required to comply with all applicable provisions of Title VII of the Civil Rights Act, Sections 501 and 505 of the Rehabilitation Act, Section 109 of the Housing and Community Development Act, the Age Discrimination Act, the Americans With Disabilities Act, the Equal Pay Act, the Genetic Information Non-Discrimination Act, the Vietnam Era Veterans Readjustment Act, and all applicable federal regulations or executive orders related to these laws. Additionally, the Contractor and any Subcontractors are required to comply with Arizona law on nondiscrimination and equal employment opportunity, including the Arizona Civil Rights Act and Arizona Governor Executive Orders 99-4, 2000-4 and 2009-09, as amended. The Contractor agrees not to discriminate on the grounds of age, race, color, national origin, religion, sex, disability, pregnancy, veteran, familial status, or any other protected status in the selection and retention of employees and subcontractors, including procurement of materials and leases of equipment.
- Q. Employees on Public Works Construction Projects: E-Verify Requirements:
1. The Contractor shall comply with A.R.S. § 34-301, "Employment of Aliens on Public Works Prohibited", and A.R.S. § 34-302, "Residence Requirements for Employees", as amended.
  2. Under the provisions of A.R.S. § 41-4401, the Contractor hereby warrants to the City that the Contractor and each of its Subcontractors will comply with, and are contractually obligated to comply with, all Federal Immigration laws and regulations that relate to their employees and A.R.S. § 23-214(A) (hereinafter referred to as "Contractor Immigration Warranty"). The Contractor further understands and acknowledges that:
    - a. A breach of the Contractor Immigration Warranty shall constitute a material breach of this Agreement and shall subject the Contractor to penalties up to and including termination of this Agreement at the sole discretion of the City.
    - b. The City retains the legal right to inspect the papers of any Contractor or Subcontractors' employee to ensure that the Contractor or Subcontractor is

complying with the Contractor Immigration Warranty. The Contractor agrees to assist the City in regard to any such inspections.

- c. The City may, at its sole discretion, conduct random verification of the employment records of the Contractor and any of the Subcontractors to ensure compliance with the Contractor Immigration Warranty. The Contractor agrees to assist the City in regard to any random verification performed.
  - d. Neither the Contractor nor any Subcontractor shall be deemed to have materially breached the Contractor Immigration Warranty if the Contractor or Subcontractor establishes that it has complied with employment verification provisions prescribed by Sections 274A and 274B of the Federal Immigration and Nationality Act and the E-Verify requirements prescribed by A.R.S. § 23-214(A).
  - e. The provisions of this Article shall be included in any contract the Contractor enters with any and all of its Subcontractors who provide Services under this Agreement. “Services” are defined as furnishing labor, time, or effort in the State of Arizona by a Contractor or subcontractor. Services include construction or maintenance of any structure, building or transportation facility or improvement of real property.
- R. Israel: Contractor certifies that it is not currently engaged in and agrees for the duration of this Agreement that it will not engage in a “boycott”, as that term is defined in A.R.S. § 35-393, of Israel.
- S. Force Labor of Ethnic Uyghurs Certification: Pursuant to A.R.S. § 35- 394, Contractor certifies that the firm does not currently, and agrees for the duration of the contract that it will not, use:
- 1. The forced labor of ethnic Uyghurs in the People’s Republic of China
  - 2. Any goods or services produced by the forced labor of ethnic Uyghurs in the People’s Republic of China; and
  - 3. Any Contractor/subcontractors or suppliers that use the forced labor or any goods or services produced by the forced labor of ethnic Uyghurs in the People’s Republic of China.

If the Contractor becomes aware during the term of the Contract that the company is not in compliance with the written certification, the Firm shall notify the City of Prescott within five business days after becoming aware of the noncompliance. If the Contractor does not provide City of Prescott with a written certification that the Company has remedied the noncompliance within 180 days after notifying the City of Prescott of the noncompliance, this Contract terminates, except that if the Contract termination date occurs before the end of the remedy period, the Contract terminates on the Contract termination date.

- T. Contracting with small and minority firms, women’s business enterprise and labor surplus area firms:
- 1. The Company will take all necessary affirmative steps to assure that minority firms, women’s business enterprises, and labor surplus area firms are used when possible.
  - 2. Affirmative steps shall include:

- a. Placing qualified small and minority businesses and women's business enterprises on solicitation lists
- b. Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources.
- c. Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority business, and women's business enterprises.
- d. Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority business, and women's business enterprises.
- e. Using the services and assistance of the Small Business Administration, and the Minority Business Development Agency of the Department of Commerce.

SAMPLE

DATED: \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the date and year first set forth above.

\*\* (Company Name)

City of Prescott, a municipal corporation:

\_\_\_\_\_  
(Authorized Signature)

\_\_\_\_\_  
Philip R. Goode, Mayor

By: \_\_\_\_\_  
(Printed Name)

Title: \_\_\_\_\_

Email: \_\_\_\_\_

ATTEST:

APPROVED AS TO FORM:

\_\_\_\_\_  
Sarah M. Siep, City Clerk

\_\_\_\_\_  
Joseph D. Young, City Attorney

## **Construction Insurance Requirements**

Contractor and subcontractors shall procure and maintain until all of their obligations have been discharged, including any warranty periods under this Contract are satisfied, insurance against claims for injury to persons or damage to property which may arise from or in connection with the performance of the work hereunder by the Contractor, his agents, representatives, employees or subcontractors.

The insurance requirements herein are minimum requirements for this Contract and in no way limit the indemnity covenants contained in this Contract.

The City in no way warrants that the minimum limits contained herein are sufficient to protect the Contractor from liabilities that might arise out of the performance of the work under this Contract by the Contractor, his agents, representatives, employees, or subcontractors. The Contractor is free to purchase such additional insurance as may be determined necessary.

### **ADDITIONAL INSURANCE REQUIREMENTS:**

The policies shall include, or be endorsed to include the following provisions:

1. On insurance policies where the City of Prescott is named as an additional insured, the City of Prescott shall be an additional insured to the full limits of liability purchased by the Contractor even if those limits of liability are in excess of those required by this Contract.

**Additional Insured:  
City of Prescott  
201 N. Montezuma Street  
Prescott, AZ 86301**

2. The Contractor's insurance coverage shall be primary insurance and non-contributory with respect to all other available sources.

All certificates required by this Contract shall be emailed directly to [coi@prescott-az.gov](mailto:coi@prescott-az.gov). The City contract number and project name/description shall be noted on the certificate of insurance. The City reserves the right to require complete, certified copies of all insurance policies required by this Contract at any time. Any Renewal of insurance certificates with endorsements will need to be emailed to the above emails at least two weeks prior to expiration.

### **NOTICE OF CANCELLATION:**

With the exception of a ten (10) day notice of cancellation for non-payment of premium, and changes material to compliance with this contract in the insurance policies above shall require a thirty (30) day written notice.

### **ACCEPTABILITY OF INSURERS:**

Insurance is to be placed with insurers with a current A.M. Best's rating of no less than A-VII, unless otherwise approved by the City of Prescott. General liability, automobile liability, and worker's compensation insurance is to be placed with an insurer admitted in the state in which operations are taking place.

### **VERIFICATION OF COVERAGE:**

Contractor shall furnish the City with certificates of insurance (ACORD form or equivalent approved by the City) as required by this Contract. The certificates for each insurance policy are to be signed by a person authorized by that insurer to bind coverage on its behalf.

All certificates and any required endorsements are to be received and approved by the City before work commences. Each insurance policy required by this Contract must be in effect at or prior to commencement of work under this Contract and remain in effect for the duration of the project and warranty period as set forth in warranty letter. Failure to maintain the insurance policies as required by this Contract or to provide evidence of renewal is a material breach of contract.

The minimum limits of public liability and property damage liability shall be as follows:

1. Contractor shall provide coverage with limits of liability not less than those stated below. An excess liability policy or umbrella liability policy may be used to meet the minimum liability requirements provided that the coverage is written on a following form basis.

Commercial General Liability – Occurrence Form –

Policy shall include bodily injury, property damage, broad form, contractual liability and XCU coverage.

- General Aggregate \$ 3,000,000
- Products – Completed Operations Aggregate \$ 3,000,000
- Personal and Advertising Injury \$ 1,000,000
- Each Occurrence \$ 1,000,000
- Fire Legal Liability (Damage to Rented Premises) \$ 100,000 (if applicable)

The policy shall be endorsed to include the following additional insured language:

“The Contractor agrees to endorse the City of Prescott as an Additional Insured on the Commercial General Liability with the following Additional Insured endorsement, or similar endorsement providing equal or broader Additional Insured coverage, the CG 2010 10 01 Additional Insured - Owners, Lessees, or Contractors, or CG2010 07 04 Additional Insured – Owners, Lessees, or Contractors – Scheduled Person or Organization endorsement in combination with the additional endorsement of GC2037 10 01 Additional Insured – Owners, Lessees, or Contractors – Completed Operations shall be required to provide back coverage for the contractor’s “your work” as defined in the policy and liability arising out of the products-completed operations hazard.”

Business Automobile Liability: Bodily Injury and Property Damage for any owned, hired, and/or non-owned vehicles used in the performance of this Contract.

- Combined Single Limit (CSL) \$ 1,000,000

The policy shall be endorsed to include the following additional insured language:

“The City of Prescott shall be named as additional insured with respect to liability arising out of the activities performed by or on behalf of the Contractor, involving automobiles, owned, leased, hired, or borrowed by the Contractor.”

Worker’s Compensation and Employer’s Liability

Workers’ Compensation

Statutory



Employer's Liability

- |                             |             |
|-----------------------------|-------------|
| • Each Accident -           | \$1,000,000 |
| • Disease – each employee - | \$1,000,000 |
| • Disease – policy limit -  | \$1,000,000 |

Policy shall contain a waiver of subrogation against the City of Prescott for losses arising from work performed by or on behalf of the Contractor.

Professional Liability (Errors and Omissions Liability) – *if applicable*

- |                    |              |
|--------------------|--------------|
| • Each Claim       | \$ 1,000,000 |
| • Annual Aggregate | \$ 2,000,000 |

1. In the event that the professional liability insurance required by this Contract is written on a claims-made basis, Contractor warrants that any retroactive date under the policy shall precede the effective date of this Contract and that either continuous coverage will be maintained, or an extended discovery period will be exercised for a period of two (2) years at the time work under this contract is completed.
2. The policy shall cover professional misconduct or lack of ordinary skill for those positions defined in the Scope of Work of this contract.

Notice of Cancellation: With the exception of a ten (10) day notice of cancellation for non-payment of premium, any changes to material to compliance with this contract in the insurance policies above shall require thirty (30) day written notice.

Such policy shall not exclude coverage for the following:

1. Injury to or destruction of any property arising out of the collapse of/or structural injury to any building or structure due to grading of land, excavation, borrowing, filling, backfilling, tunneling, pile driving, cofferdam work or caisson work.
2. Injury to or destruction of wires, conduits, pipes, mains, sewers, or other similar property or any apparatus in connection therewith, below the surface of the ground, if such injury or destruction is caused by and occurs during the use of mechanical equipment for the purpose of grading of land, paving, excavating, drilling; or injury to or destruction of any property at any time resulting there from.
3. Injury to or destruction of any property arising out of blasting or explosion.
4. Motor vehicle public liability and property damage insurance to cover each automobile, truck, and other vehicle used in the performance of the Contract in an amount of not less than \$1,000,000.00 for one person, and \$1,000,000.00 for more than one person, and property damage in the sum of \$1,000,000.00 resulting from any one accident which may arise from the operations of the Contractor in performing the work provided for herein.

The Contractor shall carry and maintain fire and extended coverage with an endorsement for vandalism and malicious mischief in Contractor's name and also in the name of the City in an amount of at least ONE HUNDRED PERCENT (100%) of the Contract amount (if applicable).

The Contractor shall secure "all risk"-type builder's risk insurance for work to be performed. Unless specifically authorized by the City, the amount of such insurance shall not be less than ONE HUNDRED PERCENT (100%) of the contract price. Such policy shall include coverage for earthquake, landslide, flood, collapse, or loss due to the results of faulty workmanship, during the contract time and until final acceptance of work by the City (if applicable).

SAMPLE



## Final Payment Acknowledgement

To the City of Prescott, Arizona:

**\*\*Company Name\*\***

**\*\*Address**

**\*\*City, State, Zip**

**\*\*Email**

**\*\*Company Name**, has submitted the final pay application for the **\*\* project Contract No. 20\*\*\_\*\*\*** in the consideration of:

\$ \_\_\_\_\_  
(Total Final Project Amount)

as full and complete payment under the terms of the Contract. All materials used and workmanship performed are expressly warranted to be free of defects for a period of twenty-four (24) months from the date of final acceptance by the City of Prescott, as stated in the warranty letter to be provided.

The Undersigned further agrees to indemnify and save harmless the City of Prescott against any and all liens, claims of liens, suits, actions, damages, charges and expenses whatsoever, which said City may suffer arising out of the failure of the undersigned to pay for all labor performance and materials furnished for the performance of said project within the next 90 days.

Signed and dated this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
(Authorized Signature)

By: \_\_\_\_\_

Title: \_\_\_\_\_

State of \_\_\_\_\_ )

) ss.

County of \_\_\_\_\_ )

SUBSCRIBED AND SWORN to before me by \_\_\_\_\_

this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

\_\_\_\_\_  
Notary Public

\_\_\_\_\_  
Commission Expires



## **Attachment E**

### **FEDERAL GRANT PROVISIONS**

The Vendor and its Subcontractor shall comply with the following grant provisions, if applicable.

#### **Applicable Laws**

Compliance with all applicable Federal laws, regulations, executive orders, policies, guidelines, and requirements as they relate to the application, acceptance, and use of Federal funds for this grant including but not limited to the following:

#### **Federal Legislation**

- a. 49 U.S.C. subtitle VII, as amended.
- b. Davis-Bacon Act, as amended — 40 U.S.C. §§ 3141-3144, 3146, and 3147, et seq.
- c. Federal Fair Labor Standards Act - 29 U.S.C. § 201, et seq.
- d. Hatch Act 5 U.S.C. § 1501, et seq.
- e. Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. 4601, et seq.
- f. National Historic Preservation Act of 1966 - Section 106 - 54 U.S.C. § 306108.
- g. Archeological and Historic Preservation Act of 1974 - 54 U.S.C. § 312501, et seq.
- h. Native Americans Grave Repatriation Act - 25 U.S.C. § 3001, et seq.
- i. Clean Air Act, P.L. 90-148, as amended - 42 U.S.C. § 7401, et seq.
- j. Coastal Zone Management Act, P.L. 92-583, as amended – 16 U.S.C. § 1451, et seq.
- k. Flood Disaster Protection Act of 1973 - Section 102(a) - 42 U.S.C. § 4012a.
- l. Title 49 U.S.C. § 303, (formerly known as Section 4(f)).
- m. Rehabilitation Act of 1973 - 29 U.S.C. § 794.
- n. Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d et seq.) (prohibits discrimination on the basis of race, color, national origin).
- o. Americans with Disabilities Act of 1990, as amended, (42 U.S.C. § 12101 et seq.), (prohibits discrimination on the basis of disability).
- p. Age Discrimination Act of 1975 - 42 U.S.C. § 6101, et seq.
- q. American Indian Religious Freedom Act, P.L. 95-341, as amended.
- r. Architectural Barriers Act of 1968, as amended - 42 U.S.C. § 4151, et seq.
- s. Power plant and Industrial Fuel Use Act of 1978 - Section 403- 42 U.S.C. § 8373.
- t. Contract Work Hours and Safety Standards Act - 40 U.S.C. §3701, et seq.
- u. Copeland Anti-kickback Act - 18 U.S.C. § 874.
- v. National Environmental Policy Act of 1969 - 42 U.S.C. § 4321, et seq.
- w. Wild and Scenic Rivers Act, P.L. 90-542, as amended – 16 U.S.C § 1271, et seq.
- x. Single Audit Act of 1984 - 31 U.S.C. § 7501, et seq.
- y. Drug-Free Workplace Act of 1988 - 41 U.S.C. § 8101 through 8105.
- z. The Federal Funding Accountability and Transparency Act of 2006, as amended (P.L. 109-282, as amended by section 6202 of P.L. 110-252).
- aa. Civil Rights Restoration Act of 1987, P.L. 100-259.
- bb. Infrastructure Investment and Jobs Act, P.L. 117-58, Title VIII.
- cc. Build America, Buy America Act, P.L. 117-58, Title IX.
- dd. Endangered Species Act – 16 U.S.C. 1531, et seq.

- ee. Title IX of the Education Amendments of 1972, as amended – 20 U.S.C. 1681–1683 and 1685–1687.
- ff. Drug Abuse Office and Treatment Act of 1972, as amended – 21 U.S.C. 1101, et seq.
- gg. Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970, P.L. 91-616, as amended – 42 U.S.C. § 4541, et seq.
- hh. Alcohol Abuse and Alcoholism Prevention, Treatment and Rehabilitation Act of 1970, P.L. 91-616, as amended – 42 U.S.C. § 4541, et seq.
- ii. Appropriated Funds to Influence Certain Federal Contracting and Financial Transactions – 31 U.S.C. § 1352.

### **Executive Orders**

- a. Executive Order 11246 - Equal Employment Opportunity
- b. Executive Order 11990 - Protection of Wetlands
- c. Executive Order 11998 - Flood Plain Management
- d. Executive Order 12372 - Intergovernmental Review of Federal Programs
- e. Executive Order 12699 - Seismic Safety of Federal and Federally Assisted New Building Construction
- f. Executive Order 14005 - Ensuring the Future is Made in all of America by All of America's Workers
- g. Executive Order 14149 - Restoring Freedom of Speech and Ending Federal Censorship
- h. Executive Order 14151 - Ending Radical and Wasteful Government DEI Programs and Preferencing
- i. Executive Order 14154 - Unleashing American Energy
- j. Executive Order 14168 - Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government
- k. Executive Order 14173 - Ending Illegal Discrimination and Restoring Merit-Based Opportunity
- l. Executive Order 12898 - Environmental Justice
- m. Executive Order 13788 - Buy American and Hire American
- n. Executive Order 14151 - Ending Radical and Wasteful Government DEI Programs and Preferencing
- o. Executive Order 13858 - Strengthening Buy-American Preferences for Infrastructure Projects

### **Federal Regulations**

- a. 2 CFR Part 180 - OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement).
- b. 2 CFR Part 200 and 1201 - Uniform Administrative Requirements, Cost Principles, and Audit Requirements for Federal Awards.
- c. 2 CFR Part 1200 - Nonprocurement Suspension and Debarment.
- d. 14 CFR Part 13 - Investigative and Enforcement Procedures
- e. 28 CFR Part 35 - Discrimination on the Basis of Disability in State and Local Government Services.
- f. 28 CFR § 50.3 - U.S. Department of Justice Guidelines for Enforcement of Title VI of the Civil Rights Act of 1964.
- g. 29 CFR Part 1 - Procedures for Predetermination of Wage Rates.
- h. 29 CFR Part 3 - Contractors and Subcontractors on Public Building or Public Work Financed in Whole or in Part by Loans or Grants from the United States.

- i. 29 CFR Part 5 - Labor Standards Provisions Applicable to Contracts Covering Federally Financed and Assisted Construction (Also Labor Standards Provisions Applicable to Nonconstruction Contracts Subject to the Contract Work Hours and Safety Standards Act).
- j. 41 CFR Part 60 - Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor (Federal and Federally-assisted contracting requirements).
- k. 49 CFR Part 20 - New Restrictions on Lobbying.
- l. 49 CFR Part 21 - Nondiscrimination in Federally-Assisted Programs of the Department of Transportation - Effectuation of Title VI of the Civil Rights Act of 1964.
- m. 49 CFR Part 26 - Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs.
- n. 49 CFR Part 27 - Nondiscrimination on the Basis of Disability in Programs or Activities Receiving Federal Financial Assistance.
- o. 49 CFR Part 28 - Enforcement of Nondiscrimination on the Basis of Handicap in Programs or Activities conducted by the Department of Transportation.
- p. 49 CFR Part 30 - Denial of Public Works Contracts to Suppliers of Goods and Services of Countries That Deny Procurement Market Access to U.S. Contractors.
- q. 49 CFR Part 32 - Governmentwide Requirements for Drug-Free Workplace (Financial Assistance).
- r. 49 CFR Part 37 - Transportation Services for Individuals with Disabilities (ADA).
- s. 49 CFR Part 38 - Americans with Disabilities Act (ADA) Accessibility Specifications for Transportation Vehicles.
- t. 49 CFR Part 41 - Seismic Safety.

### **Debarment and Suspension**

Debarment and Suspension (Executive Orders 12549 and 12689)—A contract award (see 2 CFR 180.220) must not be made to parties listed on the governmentwide exclusions in the System for Award Management (SAM), in accordance with the OMB guidelines at 2 CFR 180 that implement Executive Orders 12549 (3 CFR part 1986 Comp., p. 189) and 12689 (3 CFR part 1989 Comp., p. 235), “Debarment and Suspension.” SAM Exclusions contains the names of parties debarred, suspended, or otherwise excluded by agencies, as well as parties declared ineligible under statutory or regulatory authority other than Executive Order 12549.

### **Buy American**

Unless otherwise approved in advance by the Federal Government (FAA, FEMA, or any other agency), the Sponsor will not acquire or permit any contractor or subcontractor to acquire any steel or manufactured products produced outside the United States to be used for any expense which funds are provided under this Grant.

### **Ban on Texting While Driving**

- a) In accordance with Executive Order 13513, Federal Leadership on Reducing Text Messaging While Driving, October 1, 2009, and DOT Order 3902.10, Text Messaging While Driving, December 30, 2009, the Sponsor is encouraged to:
  - i. Adopt and enforce workplace safety policies to decrease crashes caused by distracted drivers including policies to ban text messaging while driving when performing any work for, or on behalf of, the Federal government, including work relating to this Grant or subgrant.

- ii. Conduct workplace safety initiatives in a manner commensurate with the size of the business, such as:
  - 1) Establishment of new rules and programs or re-evaluation of existing programs to prohibit text messaging while driving; and
  - 2) Education, awareness, and other outreach to employees about the safety risks associated with texting while driving.
- b) The Sponsor must insert the substance of this clause on banning texting while driving in all subgrants, contracts and subcontracts.

### **Foreign Market Restrictions**

Funds provided under this Grant to be used to fund any activity that uses any product or service of a foreign country during the period in which such foreign country is listed by the United States Trade Representative as denying fair and equitable market opportunities for products and suppliers of the United States in procurement and construction.

### **Non-Discrimination**

The City, in accordance with the provisions of Title VI of the Civil Rights Act of 1964 (78 Stat. 252, 42 U.S.C. §§ 2000d to 2000d-4) and the Regulations, hereby notifies all bidders that it will affirmatively ensure that for any contract entered into pursuant to this advertisement, disadvantaged business enterprises and airport concession disadvantaged business enterprises will be afforded full and fair opportunity to submit bids in response to this invitation and will not be discriminated against on the grounds of race, color, or national origin in consideration for an award.

### **Contracting with small and minority firms, women's business enterprise and labor surplus area firms.**

- a. The Contractor will take all necessary affirmative steps to assure that minority firms, women's business enterprises, and labor surplus area firms are used when possible.
- b. Affirmative steps shall include:
  - i. Placing qualified small and minority businesses and women's business enterprises on solicitation lists
  - ii. Assuring that small and minority businesses, and women's business enterprises are solicited whenever they are potential sources.
  - iii. Dividing total requirements, when economically feasible, into smaller tasks or quantities to permit maximum participation by small and minority business, and women's business enterprises.
  - iv. Establishing delivery schedules, where the requirement permits, which encourage participation by small and minority business, and women's business enterprises.
  - v. Using the services and assistance of the Small Business Administration, and the Minority Business Development Agency of the Department of Commerce.

### **Equal Employment Opportunity**

Compliance with Equal Employment Opportunity. Except as otherwise provided under 41 CFR Part 60, all contracts that meet the definition of "federally assisted construction contract" in 41 CFR Part 60-1.3 must include the equal opportunity clause provided under 41 CFR 60-1.4(b), in accordance with Executive Order 11246, "Equal Employment Opportunity" (30 FR 12319, 12935, 3 CFR Part, 1964-1965 Comp., p. 339), as amended by Executive Order 11375, "Amending Executive Order 11246 Relating to Equal Employment Opportunity," and



implementing regulations at 41 CFR part 60, “Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor.”

### **Clean Air Act**

Compliance with the Clean Air Act (42 U.S.C. 7401-7671q.) and the Federal Water Pollution Control Act (33 U.S.C. 1251-1387), as amended—Contracts and subgrants of amounts in excess of \$150,000 must contain a provision that requires the non-Federal award to agree to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act (42 U.S.C. 7401-7671q) and the Federal Water Pollution Control Act as amended (33 U.S.C. 1251-1387). Violations must be reported to the Federal awarding agency and the Regional Office of the Environmental Protection Agency (EPA).

### **Byrd Anti-Lobbying Amendment**

Byrd Anti-Lobbying Amendment (31 U.S.C. 1352)—Contractors that apply or bid for an award exceeding \$100,000 must file the required certification. Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. 1352. Each tier must also disclose any lobbying with non-Federal funds that takes place in connection with obtaining any Federal award. Such disclosures are forwarded from tier to tier up to the non-Federal award.

### **Conflicts of Interest**

The City (grantee) and Contractor (subgrantees) will maintain a written code of standards of conduct governing the performance of their employees engaged in the award and administration of contracts. No employee, officer or agent of the grantee or subgrantee shall participate in selection, or in the award or administration of a contract supported by Federal funds if a conflict of interest, real or apparent, would be involved. Such a conflict would arise when:

- (i) The employee, officer, or agent,
- (ii) Any member of his immediate family,
- (iii) His or her partner, or

An organization which employs, or is about to employ, any of the above, has a financial or other interest in the firm selected for award. The grantee's or subgrantee's officers, employees or agents will neither solicit nor accept gratuities, favors or anything of monetary value from contractors, potential contractors, or parties to sub-agreements. Grantees and subgrantees may set minimum rules where the financial interest is not substantial, or the gift is an unsolicited item of nominal intrinsic value. To the extent permitted by State or local law or regulations, such standards or conduct will provide for penalties, sanctions, or other disciplinary actions for violations of such standards by the grantee's and subgrantee's officers, employees, or agents, or by contractors or their agents. The awarding agency may in regulation provide additional prohibitions relative to real, apparent, or potential conflicts of interest.

## **Copyrights**

Reports, maps, or other documents produced in whole or in part are works for hire and shall not be the subject of any application for copyright by or on behalf of the Contractor or its Subcontractor. The Contractor shall advise the City or its designee at the time of delivery of any copyrighted or copyrightable work furnished under this Agreement, or any adversely held copyrighted or copyrightable material incorporated in any such work and of any invasion of the right of privacy therein contained.

## **Rights to Inventions**

Rights to Inventions Made Under a Contract or Agreement. If the Federal award meets the definition of “funding agreement” under 37 CFR §401.2 (a) and the recipient or subrecipient wishes to enter into a contract with a small business firm or nonprofit organization regarding the substitution of parties, assignment or performance of experimental, developmental, or research work under that “funding agreement,” the recipient or subrecipient must comply with the requirements of 37 CFR Part 401, “Rights to Inventions Made by Nonprofit Organizations and Small Business Firms Under Government Grants, Contracts and Cooperative Agreements,” and any implementing regulations issued by the awarding agency.

## **Responsible Contractors**

The City will make awards only to responsible contractors possessing the ability to perform successfully under the terms and conditions of the proposed procurement. Consideration will be given to such matters as contractor integrity, compliance with public policy, record of past performance, and financial and technical resources.

## **Access and Retention of Records**

Access by the grantee, the subgrantee, the Federal grantor agency, the Comptroller General of the United States, or any of their duly authorized representatives to any books, documents, papers, and records of the contractor which are directly pertinent to that specific contract for the purpose of making audit, examination, excerpts, and transcriptions.

Retention of all required records for three years after grantees or subgrantees make final payments and all other pending matters are closed.



EXECUTIVE OFFICE OF THE PRESIDENT  
OFFICE OF MANAGEMENT AND BUDGET  
WASHINGTON, D.C. 20503

April 18, 2022

M-22-11

MEMORANDUM FOR HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: Shalanda D. Young  
Director

SUBJECT: Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure

On November 15, 2021, President Biden signed into law the Infrastructure Investment and Jobs Act (“IIJA”), Pub. L. No. 117-58, which includes the Build America, Buy America Act (“the Act”). Pub. L. No. 117-58, §§ 70901-52. The Act strengthens Made in America Laws<sup>1</sup> and will bolster America’s industrial base, protect national security, and support high-paying jobs. The Act requires that no later than May 14, 2022—180 days after the enactment of the IIJA—the head of each covered Federal agency<sup>2</sup> shall 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 products, and construction materials used in the project are produced in the United States.”<sup>3</sup>

The Act affirms, consistent with Executive Order 14005, *Ensuring the Future Is Made in All of America by All of America’s Workers* (“the Executive Order”), this Administration’s priority to “use terms and conditions of Federal financial assistance awards to maximize the use of goods, products, and materials produced in, and services offered in, the United States.”<sup>4</sup>

The Act provides statutory authorities for the Made in America Office (“MIAO”) in the Office of Management and Budget (“OMB”) to maximize and enforce compliance with Made in

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<sup>1</sup> “Made in America Laws” means all statutes, regulations, rules, and Executive Orders relating to Federal financial assistance awards or Federal procurement, including those that refer to “Buy America” or “Buy American,” that require, or provide a preference for, the purchase or acquisition of goods, products, or materials produced in the United States, including iron, steel, and manufactured products offered in the United States. Made in America Laws include laws requiring domestic preference for maritime transport, including the Merchant Marine Act of 1920 (Pub. L. No. 66-261), also known as the Jones Act. Exec. Order No. 14,005, 86 Fed. Reg. 7475, § 2(b) (Jan. 28, 2021), available at <https://www.federalregister.gov/documents/2021/01/28/2021-02038/ensuring-the-future-is-made-in-all-of-america-by-all-of-americas-workers>. Made in America Laws also include laws that give preference to Indian-owned and -controlled businesses, such as the Buy Indian Act (25 U.S.C. 47), that produce items in the United States.

<sup>2</sup> For the purposes of this guidance, the terms “Federal agency” and “agency” mean any authority of the United States that is an “agency” (as defined in section 3502 of title 44, United States Code), other than an independent regulatory agency (as defined in that section). IIJA, § 70912(3).

<sup>3</sup> IIJA, § 70914(a).

<sup>4</sup> Exec. Order No. 14,005 (see footnote 1).

America Laws.<sup>5</sup> MIAO aims to increase reliance on domestic supply chains and reduce the need for waivers through a strategic process aimed at: achieving consistency across agencies; gathering data to support decision-making to make U.S. supply chains more resilient; bringing increased transparency to waivers in order to send clear demand signals to domestic producers; and concentrating efforts on changes that will have the greatest impact.<sup>6</sup>

This memorandum provides implementation guidance to Federal agencies on the application of: (1) a “Buy America” preference<sup>7</sup> to Federal financial assistance programs for infrastructure; and (2) a transparent process to waive such a preference, when necessary. A Federal financial assistance program for infrastructure is any program under which an award may be issued for an infrastructure project, regardless of whether infrastructure is the primary purpose of the award. The term “project” means any activity related to the construction, alteration, maintenance, or repair of infrastructure in the United States.<sup>8</sup>

Agencies should determine how this guidance is best applied to their infrastructure programs and processes, and consult with OMB, as needed, on establishing criteria, processes, and procedures for applying a Buy America preference and issuing waivers. OMB may update or provide additional guidance, as appropriate, to further assist agencies in the implementation of a Buy America preference.

## **I. Application of a Buy America Preference**

By May 14, 2022, agencies must ensure that all applicable programs comply with section 70914 of the Act, including by the incorporation of a Buy America preference in the terms and conditions of each award with an infrastructure project.<sup>9</sup> The Act requires the following Buy America preference:

- (1) All iron and steel used in the project are produced in the United States. This means all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States.
- (2) All manufactured products used in the project are produced in the United States. This means the manufactured product was manufactured in the United States, and the cost of the components of the manufactured product that are mined, produced, or manufactured in the United States is greater than 55 percent of the total cost of all components of the manufactured product, unless another standard for determining the minimum amount of domestic content of the manufactured product has been established under applicable law or regulation.

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<sup>5</sup> IJA, § 70923(a) & (b)(1).

<sup>6</sup> OMB Memorandum M-21-26, Increasing Opportunities for Domestic Sourcing and Reducing the Need for Waivers from Made in America Laws available at: <https://www.whitehouse.gov/wp-content/uploads/2020/11/M-21-06.pdf>

<sup>7</sup> For the purposes of this guidance, a “Buy America” preference is a domestic content procurement preference as defined in IJA, § 70912(2).

<sup>8</sup> IJA, § 70912 (5) & (7).

<sup>9</sup> See Appendix I: Example of Award Term - Required Use of American Iron, Steel, Manufactured Products, and Construction Materials.

- (3) All construction materials are manufactured in the United States. This means that all manufacturing processes for the construction material occurred in the United States.<sup>10, 11</sup>

## **II. Applicability to Federal Financial Assistance Programs**

This guidance applies to all Federal financial assistance as defined in section 200.1 of title 2, Code of Federal Regulations<sup>12</sup>—whether or not funded through IIJA—where funds are appropriated or otherwise made available and used for a project for infrastructure. Federal financial assistance means assistance that non-Federal entities receive or administer in the form of grants, cooperative agreements, non-cash contributions or donations of property, direct assistance, loans, loan guarantees, and other types of financial assistance. The term “non-Federal entity” includes States, local governments, territories, Indian tribes, Institutions of Higher Education (IHE), and nonprofit organizations.<sup>13</sup>

For purposes of this guidance, for-profit organizations are not considered non-Federal entities. However, this guidance does not alter independent statutory authorities that agencies may have to include domestic content requirements in awards of Federal financial assistance issued to for-profit organizations.

Federal agencies are encouraged to consult with OMB if they are uncertain about the applicability of this guidance to any particular infrastructure program.

Before applying a Buy America preference to a covered program that will affect Tribal communities, Federal agencies should follow the consultation policies established through Executive Order 13175, *Consultation and Coordination with Indian Tribal Governments*, and consistent with policies set forth in the Presidential Memorandum of January 26, 2021, on Tribal Consultation and Strengthening Nation-Nation Relationships. Federal agencies should commence consultation promptly.

This guidance does not apply to “expenditures for assistance authorized under section 402, 403, 404, 406, 408, or 502 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170a, 5170b, 5170c, 5172, 5174, or 5192) relating to a major disaster or emergency declared by the President under section 401 or 501, respectively, of such Act (42 U.S.C. 5170, 5191) or pre and post disaster or emergency response expenditures.”<sup>14</sup> “[P]re and post disaster or emergency response expenditures” consist of expenditures for financial assistance that are (1) authorized by statutes other than the Stafford Act, 42 U.S.C. §§ 5121 et seq., and (2) made in anticipation of or response to an event or events that qualify as an “emergency” or “major disaster” within the meaning of the Stafford Act, *id.* § 5122(1), (2). Awards made to support the construction or improvement of infrastructure to mitigate the damage that may be caused by a non-imminent future emergency or disaster, such as awards

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<sup>10</sup> IIJA, § 70912 (2) & (6)(B)(ii).

<sup>11</sup> See Section VIII. of this guidance for more information on construction materials.

<sup>12</sup> IIJA § 70912(4)(A)

<sup>13</sup> See 2 C.F.R. § 200.1.

<sup>14</sup> IIJA § 70912(4)(B)

made under FEMA’s Flood Mitigation Assistance program,<sup>15</sup> do not qualify as “pre and post disaster or emergency response expenditures.”

Subawards should conform to the terms and conditions of the Federal award from which they flow.<sup>16</sup>

The IIJA’s definition of “infrastructure” encompasses public infrastructure projects. Thus, the term “infrastructure” includes, at a minimum, the structures, facilities, and equipment for, in the United States, roads, highways, and bridges; public transportation; dams, ports, harbors, and other maritime facilities; intercity passenger and freight railroads; freight and intermodal facilities; airports; water systems, including drinking water and wastewater systems; electrical transmission facilities and systems; utilities; broadband infrastructure; and buildings and real property.<sup>17</sup> Agencies should treat structures, facilities, and equipment that generate, transport, and distribute energy - including electric vehicle (EV) charging - as infrastructure.

When determining if a program has infrastructure expenditures, Federal agencies should interpret the term “infrastructure” broadly and consider the definition provided above as illustrative and not exhaustive. When determining if a particular construction project of a type not listed in the definition above constitutes “infrastructure,” agencies should consider whether the project will serve a public function, including whether the project is publicly owned and operated, privately operated on behalf of the public, or is a place of public accommodation, as opposed to a project that is privately owned and not open to the public. Projects with the former qualities have greater indicia of infrastructure, while projects with the latter quality have fewer. Projects consisting solely of the purchase, construction, or improvement of a private home for personal use, for example, would not constitute an infrastructure project. Federal agencies are strongly encouraged to consult with OMB when making such determinations.

Agencies should consult with MIAO regarding their readiness to apply the requirements of the Act to covered programs. Agencies with questions regarding the application of a Buy America preference to agency-specific programs, including questions about the possible use of waivers during adjustment periods as agencies work to implement the Act, are advised to reach out to MIAO for technical assistance and advice.

### **III. Consistency with International Agreements**

Pursuant to section 70914(e) of the Act, this guidance must be applied in a manner consistent with the obligations of the United States under international agreements.

### **IV. Avoid Unnecessary Disruption**

The Act makes clear that its preferences apply to a Federal financial assistance program for infrastructure only to the extent that a domestic content procurement preference as described

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<sup>15</sup> See 42 U.S.C. § 4104c.

<sup>16</sup> 2 CFR 200.101 (b) (2)

<sup>17</sup> IIJA, § 70912(5).

in section 70914 of the Act does not already apply to iron, steel, manufactured products, and construction materials.<sup>18</sup> Agencies should consider whether existing domestic content requirements meet the standards in the Act, as described in this memorandum. Agencies must make necessary changes to come into compliance with the Act's requirements, while preserving policies and provisions that already meet or exceed the standards required by the Act. For example, a program in which the standards for iron and steel already meet the standards in the Act may nevertheless be required to adopt new standards for manufactured products and construction materials. Maintaining current policies where appropriate avoids unnecessary disruption to programs, or elements of programs, that already meet or exceed Build America, Buy America requirements.

## **V. Effective Date for Awards**

Agencies must ensure that, starting on May 14, 2022, all Federal financial assistance programs for infrastructure comply with the requirements of section 70914 of the Act. Therefore, new awards made on or after May 14, 2022, must take appropriate steps to ensure financial assistance awards comply with these requirements, which may include appropriate terms and conditions<sup>19</sup> incorporating a Buy America preference. Renewal awards and amendments obligating additional funds to existing awards that are executed on or after May 14, 2022, must also include a Buy America preference. This means that agencies must include a Buy America preference in awards issued on or after May 14, 2022, even if Notices of Funding Opportunities for those awards did not include a Buy America preference. In these cases, agencies may consider whether public interest waivers may be needed to avoid undue increases in the time and cost of a project. Similarly, public interest waivers may be needed for awards and amendments made on or after May 14, 2022, where budgets for purchase of covered materials have already been agreed upon (including if materials have been ordered and construction has begun). Consistent with the guidance provided below, agencies should issue waivers judiciously and clearly communicate to recipients the limitations and conditions of any such waivers.

## **VI. Articles, Materials, and Supplies for Infrastructure**

A Buy America preference, as defined in section I of this guidance, only applies to the iron and steel, manufactured products, and construction materials used for the infrastructure project under an award. If an agency has determined that no funds from a particular award under a covered program will be used for infrastructure, a Buy America preference does not apply to that award. Similarly, for a covered program, a Buy America preference does not apply to non-infrastructure spending under an award that also includes a covered project. A Buy America preference applies to *an entire infrastructure project*, even if it is funded by both Federal and non-Federal funds under one or more awards.

A Buy America preference only applies to articles, materials, and supplies that are consumed in, incorporated into, or affixed to an infrastructure project. As such, it does not apply

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<sup>18</sup> IIJA, § 70917(a) &(b).

<sup>19</sup> See Appendix I: Example of Award Term - Required Use of American Iron, Steel, Manufactured Products, and Construction Materials for exemplary language.

to tools, equipment, and supplies, such as temporary scaffolding, brought to the construction site and removed at or before the completion of the infrastructure project. Nor does a Buy America preference apply to equipment and furnishings, such as movable chairs, desks, and portable computer equipment, that are used at or within the finished infrastructure project, but are not an integral part of or permanently affixed to the structure.

For the purposes of this guidance, an article, material, or supply should only be classified into *one* of the following categories: (1) iron or steel; (2) a manufactured product; or (3) a construction material. For ease of administration, an article, material, or supply should not be considered to fall into multiple categories. Agencies should apply the iron and steel test to items that are predominantly iron or steel, unless another standard applies under law or regulation.

Any waivers from these requirements must be in writing and meet the requirements of section 70914(b).

## **VII. Issuing Buy America Waivers**

Pursuant to Section 70914(c) of the Act, the head of a Federal agency may waive the application of a Buy America preference under an infrastructure program in any case in which the head of the Federal agency finds that—

- (1) applying the domestic content procurement preference would be inconsistent with the public interest (a “public interest waiver”);
- (2) 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 (a “nonavailability waiver”); or
- (3) 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 (an “unreasonable cost waiver”).

Federal agencies are responsible for processing and approving all waivers, including waivers requested by recipients and on behalf of subrecipients. To the greatest extent practicable, waivers should be targeted to specific products and projects.<sup>20</sup>

Before issuing a waiver, the head of the Federal agency must make publicly available on the agency’s website a detailed written explanation for the proposed determination to issue the waiver and provide at least 15 days for public comment on the proposed waiver.<sup>21</sup> General applicability waivers are subject to a minimum 30-day public comment period.<sup>22</sup> By April 29, 2022, agencies should provide the website address where they will be posting proposed waivers for public comment to [MBX.OMB.MadeInAmerica@omb.eop.gov](mailto:MBX.OMB.MadeInAmerica@omb.eop.gov). Pursuant to sections 70914(c) and 70937 of the Act, the waiver must be cross-posted to a centralized waiver transparency website managed by GSA, [BuyAmerican.gov](https://www.buyamerican.gov),<sup>23</sup> no later than November 15, 2022.

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<sup>20</sup> See Section VII of this guidance for information on waiver principles and criteria.

<sup>21</sup> Executive Order, § 4(b)(i)(2); IIJA, § 70914(c); IIJA, § 70937 (note that “Buy American” as used in this section also refers to Buy America preferences, per IIJA, § 70932(1)).

<sup>22</sup> IIJA § 70914(d)(2)(A)(ii). See Section VII of this guidance for information on general applicability waivers.

<sup>23</sup> [BuyAmerican.gov](https://www.buyamerican.gov) redirects to [MadeInAmerica.gov](https://www.madeinamerica.gov).



To minimize duplication and promote efficiency, MIAO and GSA will coordinate with agencies on the expansion of the existing website's functionality to display waivers for Federal financial assistance and provide further instructions to agencies as necessary.

Federal agencies are responsible for performing due diligence and approving or rejecting waivers consistent with the Act, this guidance, and any other applicable Buy America laws. Federal agencies should notify MIAO in advance of posting an award- or project-level proposed waiver for public comment. However, Federal agencies must consult with MIAO for proposed waivers with broader applicability (such as a general applicability waiver) before posting them for public comment. The purpose of the consultation is to identify any opportunities to structure the waiver in order to maximize the use of goods, products, and materials produced in the United States to the greatest extent possible consistent with law. Federal agencies should send proposed waivers for review to [MBX.OMB.MIAwaivers@omb.eop.gov](mailto:MBX.OMB.MIAwaivers@omb.eop.gov).

Federal agencies must submit to MIAO a proposed waiver for review after the public comment period has concluded. MIAO will review the proposed waiver to determine if it is consistent with applicable law and policy,<sup>24</sup> and will notify the Federal agency of its determination.

All waiver requests must include a detailed justification for the use of goods, products, or materials mined, produced, or manufactured outside the United States<sup>25</sup> and a certification that there was a good faith effort to solicit bids for domestic products supported by terms included in requests for proposals, contracts, and nonproprietary communications with potential suppliers.<sup>26</sup> In addition, at a minimum and to the greatest extent practicable, each proposed waiver submitted to MIAO should include the following information, as applicable:

- Waiver type (nonavailability, unreasonable cost, or public interest)
- Recipient name and Unique Entity Identifier (UEI)
- Federal awarding agency organizational information (e.g., Common Government-wide Accounting Classification (CGAC) Agency Code)
- Financial assistance listing name and number
- Federal financial assistance program name
- Federal Award Identification Number (FAIN) (if available)
- Federal financial assistance funding amount
- Total cost of infrastructure expenditures, including all Federal and non-Federal funds (to the extent known)
- Infrastructure project description and location (to the extent known)
- List of iron or steel item(s), manufactured products, and construction material(s) proposed to be excepted from Buy America requirements, including name, cost, country(ies) of origin (if known), and relevant PSC and NAICS code for each.
- A certification that the Federal official or assistance recipient made a good faith effort to solicit bids for domestic products supported by terms included in requests for proposals, contracts, and nonproprietary communications with the prime contractor.

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<sup>24</sup> Executive Order, § 4(c).

<sup>25</sup> IIJA, § 70937(c)(2)(A).

<sup>26</sup> IIJA, § 70937(c)(2)(D).

- A statement of waiver justification, including a description of efforts made (e.g., market research, industry outreach), by the Federal awarding agency and, in the case of a project or award specific waiver, by the recipient, in an attempt to avoid the need for a waiver. Such a justification may cite, if applicable, the absence of any Buy America-compliant bids received in response to a solicitation.
- Anticipated impact if no waiver is issued.
- Any relevant comments received through the public comment period.

The purpose of the information is to ensure that the agency has adequate information to perform due diligence, that MIAO has sufficient information to determine whether the proposed waiver is consistent with law and policy, and that sufficient information is available for public review. Information provided for public review should help interested manufacturers gauge the demand for products for which agencies are considering waiving a Buy America preference.

To avoid a need for duplicative waiver requests from entities that receive funding for one infrastructure project through multiple Federal agencies, the Federal agency contributing the greatest amount of Federal funds for the project should be considered the “Cognizant Agency for Made in America” and should take responsibility for coordinating with the other Federal awarding agencies. Such coordination will provide uniform waiver criteria and adjudication processes, minimize duplicative efforts among Federal agencies, and reduce burdens on recipients. The Cognizant Agency for Made in America shall be responsible for consulting with the other Federal awarding agencies, publicizing the proposed joint waiver, and submitting the proposed joint waiver for review to MIAO.

*a. Exceptions for Unforeseen and Exigent Circumstances*

In limited situations where there is an urgent need in an unforeseen and exigent circumstance, agencies have the authority to waive the application of Buy America preferences without submitting the waiver for public comment and MIAO determination.<sup>27</sup> As an exception to the public transparency requirements of the Act, agencies should exercise that authority only when necessary. Further, to ensure MIAO can fulfill its role as a central and transparent source of Made in America waivers, an agency that issues a waiver without first seeking public comment and MIAO approval must, within 30 days of the waiver’s issuance, submit a report to MIAO explaining its reliance upon the “unforeseen and exigent circumstance” exception.<sup>28</sup> MIAO will provide further instructions to agencies on how to submit those reports. Although public posting and MIAO review may be waived in exigent circumstances, agencies remain responsible for performing due diligence appropriate to the circumstances, consistent with the principles and criteria in paragraphs VII(b) and (c) below.

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<sup>27</sup> IIJA, § 70937(b)(2).

<sup>28</sup> This reporting process was established pursuant to Executive Order 14,005, § 4(d) and OMB Guidance on Improving the Transparency of Made in America Waivers available at: <https://www.whitehouse.gov/wp-content/uploads/2021/10/Guidance-Memo-Improving-the-Transparency-of-Made-in-America-Waivers.pdf>.

b. *Waiver Principles and Criteria*

To ensure they are scrupulously monitoring, enforcing, and complying with applicable Buy America Laws and minimizing the use of waivers,<sup>29</sup> agencies must apply standard criteria to determine whether to grant a waiver in a given circumstance. Agencies with existing criteria must review it for consistency with this guidance and update it as appropriate. All other agencies must establish criteria.

Agencies may reject or grant waivers in whole or in part. To the greatest extent practicable, waivers should be issued at the project level and be product-specific. Overly broad waivers undermine market signals designed to boost domestic supply chains, particularly for key articles, materials and supplies in critical supply chains (i.e., critical supply chains identified in Executive Order 14017, *America's Supply Chains*). When necessary, agencies may consider issuing a waiver that has applicability beyond a single project; however, agencies should always issue, construe, and apply waivers to ensure the maximum utilization of goods, products, and materials produced in the United States, consistent with applicable law. Federal agencies may consult with MIAO when establishing or modifying criteria for granting waivers. They may also work within the Made in America Council, a practice that will help to foster consistency across agencies to the greatest extent practical and appropriate, given agency and program missions.

Federal agencies should use the following principles before issuing a waiver of any type:

- **Time-limited:** In certain limited circumstances, a Federal agency may determine that a waiver should be constrained principally by a length of time, rather than by the specific projects to which it applies. Waivers of this type may be appropriate, for example, when an item that is “nonavailable” is widely used in projects funded by a particular program’s awards. When issuing such a waiver, the agency should identify a short, definite time frame (e.g., no more than one to two years) designed to ensure that, as domestic supply becomes available, domestic producers will have prompt access to the market created by the program.
- **Targeted:** Waivers that are not limited to particular projects should apply only to the item(s), product(s), or material(s) or category(ies) of item(s), product(s), or material(s) necessary. Waivers that are overly broad will tend to undermine domestic preference policies. Broader waivers will receive greater scrutiny from MIAO.
- **Conditional:** Federal agencies are encouraged to issue waivers with specific conditions that support the policies of the Act and the Executive Order.

These principles and criteria should be viewed as minimum requirements for the use of waivers by Federal agencies.<sup>30</sup>

### Nonavailability Waivers

Before granting a nonavailability waiver, agencies should consider whether the recipient has performed thorough market research, which may be accomplished with assistance from the agency, and adequately considered, where appropriate, qualifying alternate items, products, or

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<sup>29</sup> IJA § 70933(2).

<sup>30</sup> See Section IV. of this guidance for agencies that have existing regulations or guidance.

materials. Waivers should describe the market research activities and methods to identify domestically manufactured items capable of satisfying the requirement, including the timing of the research and conclusions reached on the availability of sources. Agencies are encouraged to engage with the Made in America Council to develop resource lists for common items, goods, or materials.

### Unreasonable Cost Waivers

An unreasonable cost waiver is available if 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. Before granting an unreasonable-cost waiver, to the extent permitted by law, agencies should ensure the recipient has provided adequate documentation that no domestic alternatives are available within this cost parameter. Agencies may assist recipients in gathering documentation.

For requests citing unreasonable cost as the statutory basis of the waiver, the waiver justification 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 the applicable Made in America law.<sup>31</sup> Publicly available cost comparison data may be provided in lieu of proprietary pricing information.<sup>32</sup> Unreasonable-cost waivers should be no broader than necessary.

### Public Interest Waivers

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 and the proposed waiver would not meet the requirements for a nonavailability or unreasonable cost waiver. Such waivers shall be used judiciously and construed to ensure the maximum utilization of goods, products, and materials produced in the United States.<sup>33</sup> To the extent permitted by law, determination of public interest waivers shall be made by the head of the agency with the authority over the Federal financial assistance award.<sup>34</sup>

Public interest waivers may have a variety of bases. As with other waivers, they should be project-specific whenever possible, as what is in the public interest may vary depending upon the circumstances of the project, recipient, and specific items, products, or materials in question.

Federal agencies may wish to consider issuing a limited number of general applicability public interest waivers in the interest of efficiency and to ease burdens for recipients. The agency remains responsible for determining whether such a waiver is appropriate to apply to any

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<sup>31</sup> IIJA, § 70937(c)(2)(B).

<sup>32</sup> IIJA, § 70937(c)(2)(B).

<sup>33</sup> IIJA, § 70935(a).

<sup>34</sup> IIJA, § 70935(b).

given project; the Made in America Office will not review each application of such a waiver. The following are examples of types of public interest waivers an agency may consider issuing.<sup>35</sup>

- **De Minimis:** Ease of administration is important to reduce burden for recipients and agencies. Federal agencies may consider whether a general applicability public interest waiver should apply to infrastructure project purchases below a de minimis threshold. An agency may consider whether a public interest waiver should apply when necessary to ensure that recipients and Federal agencies make efficient use of limited resources, especially if the cost of processing the individualized waiver(s) would risk exceeding the value of the items waived. Agencies may consider adopting an agency-wide public interest waiver that sets a de minimis threshold, for example, of 5 percent of project costs up to a maximum of \$1,000,000.
- **Small Grants:** Agencies may wish to consider whether it is in the public interest to waive application of a Buy America preference to awards below the Simplified Acquisition Threshold. This type of waiver may be particularly relevant in the initial years after enactment of IIJA, and may be phased out over time as agencies develop efficient waiver review capabilities.
- **Minor Components:** Agencies may wish to consider whether it is in the public interest to allow minor deviations for miscellaneous minor components within iron and steel products. A minor components waiver in the public interest may allow non-domestically produced miscellaneous minor components comprising no more than 5 percent of the total material cost of an otherwise domestically produced iron and steel product to be used. It would not be in the public interest to use a minor components waiver to exempt a whole product from the iron and steel requirements, or to allow the primary iron or steel components of the product to be produced other than domestically.
- **Adjustment Period:** Agencies should consider whether brief, time limited waivers to allow recipients and agencies to transition to new rules and processes may be in the public interest.
- **International Trade Obligations:** If a recipient is a State that has assumed procurement obligations pursuant to the Government Procurement Agreement or any other trade agreement, a waiver of a Made in America condition to ensure compliance with such obligations may be in the public interest.
- **Other Considerations:** A waiver may be in the public interest in one circumstance, but not in another, and considerations will depend upon the nature and amount of resources available to the recipient, the value of the items, goods, or materials in question, the potential domestic job impacts, and other policy considerations, including sustainability, equity, accessibility, performance standards, and the domestic content (if any) of and conditions under which the non-qualifying good was produced.

All proposed waivers citing the public interest as the statutory basis must include a detailed written statement, which shall address all appropriate factors, such as potential

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<sup>35</sup> The list is not exhaustive and no agency is required to issue the types of waivers noted as examples. As with other general applicability waivers, generally applicable public interest waivers must be reviewed at least every five years and more often as appropriate.

obligations under international agreements, justifying why the requested waiver is in the public interest.<sup>36</sup>

Before granting a waiver in the public interest, to the extent permitted by law, agencies shall 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.<sup>37</sup> Agencies may consult with the International Trade Administration (ITA) in making this assessment if the granting agency deems such consultation to be helpful. The agency shall integrate any findings from the assessment into its waiver determination as appropriate.<sup>38</sup> MIAO will work with ITA and agencies to develop standard processes to expedite this required assessment, such as by ensuring agencies know how to easily access lists of dumped or injuriously subsidized products.

*c. General Applicability Waivers*

The term “general applicability waiver” refers to a waiver that applies generally across multiple awards. A general applicability waiver can be “product-specific” (e.g., applies only to a product or category of products) or “non-product specific” (e.g., applies to all “manufactured products”).

General applicability waivers should be issued only when necessary to advance an agency’s missions and goals, consistent with IIJA, the Executive Order, and this guidance. For example, an agency might issue a general waiver for a product for which there are well-established domestic sourcing challenges. General applicability waivers will require appropriate justification from the Federal agency.

Federal agencies with one or more existing general applicability waivers, including public interest waivers, must review such waivers within five years of the date on which the waiver was issued. Agencies issuing new general applicability waivers must review such waivers at least every five years from the date of issuance. Agencies are encouraged to review general applicability waivers more frequently, when appropriate. In conducting a review of any general applicability waiver, the head of a Federal agency shall—

- (A) publish in the *Federal Register* a notice that—
  - (i) describes the justification for a general applicability waiver; and
  - (ii) requests public comments for a period of not less than 30 days on the continued need for a general applicability waiver; and
- (B) publish in the *Federal Register* a determination on whether to continue or discontinue the general applicability waiver, considering the comments received in response to the notice published under paragraph (A).<sup>39</sup>

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<sup>36</sup> IIJA, § 70937(c)(2)(C).

<sup>37</sup> Executive Order, § 5.

<sup>38</sup> Executive Order, § 5.

<sup>39</sup> IIJA, § 70914(d)(1) & (2).

For a period of five years beginning on the date of enactment of the Act, paragraphs (A) and (B) above shall not apply to any product-specific general applicability waiver that was issued more than 180 days before November 15, 2021.<sup>40</sup>

By no later than November 15, 2022, agencies with existing, non-product specific general applicability waivers that were issued more than five years before November 15, 2021 should promptly commence review of each such waiver by publishing a *Federal Register* notice as required in section 70914(d)(2)(A) of the IIJA. Should the review justify retaining the waiver, agencies should consider narrowing the waiver in a manner that would support supply chain resilience and boost incentives to manufacture key products domestically, as appropriate.

To ensure prompt commencement of projects funded by IIJA, MIAO plans to work with agencies to expedite consideration of general applicability waivers for products or categories of products for which domestic sourcing challenges have been well documented. Agencies should align such waivers with complementary policies, such as work to boost supply chain resiliency and domestic employment. General applicability waivers should include appropriate expiration dates designed to ensure that, once available, Buy America qualifying products receive appropriate consideration.

### **VIII. Preliminary Guidance for Construction Materials**

For construction materials, the Act requires that, not later than 180 days after November 15, 2021, OMB must issue standards that define the term “all manufacturing processes” in the case of construction materials. These standards must require that each manufacturing process required for the manufacture of the construction material and the inputs of the construction material occurs in the United States. They must also reflect efforts to maximize the direct and indirect jobs benefited or created in the production of the construction material.<sup>41</sup>

Although the deadline to issue such guidance has not yet passed, OMB is providing preliminary and non-binding guidance to assist agencies in determining which materials are construction materials so that agencies can begin applying Buy America requirements to those materials. This preliminary guidance addresses the requirements as set forth in section 70915(b) of the IIJA while providing sufficient time for OMB to receive additional stakeholder input.

The IIJA finds that “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<sup>42</sup>—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);

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<sup>40</sup> IIJA, § 70914(d)(3).

<sup>41</sup> IIJA, § 70915(b).

<sup>42</sup> IIJA, § 70917(c)(1).

- lumber; or
- drywall.<sup>43</sup>

To provide clarity to item, product, and material manufacturers and processors, we note that items that consist of two or more of the listed materials that have been combined together through a manufacturing process, and items that include at least one of the listed materials combined with a material that is not listed through a manufacturing process, should be treated as manufactured products, rather than as construction materials. For example, a plastic framed sliding window should be treated as a manufactured product while plate glass should be treated as a construction material.

Pending OMB's issuance of final standards on construction materials, and absent any existing applicable standard in law or regulation that meets or exceeds these preliminary standards, agencies should consider "all manufacturing processes" for construction materials to include at least the final manufacturing process and the immediately preceding manufacturing stage for the construction material. OMB is seeking additional stakeholder input before issuing further guidance identifying initial manufacturing processes for construction materials that should be considered as part of "all manufacturing processes."

Agencies should consult with MIAO, as needed, to ensure that any waiver issued for construction materials is explicitly targeted and time-limited, in order to send a clear market signal that additional standards for "all manufacturing processes" in the case of construction materials will be forthcoming.

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<sup>43</sup> See IJA, § 70911(5).



## **Appendix I: Example of Award Term - Required Use of American Iron, Steel, Manufactured Products, and Construction Materials**

Where applicable, the Federal agency must include appropriate terms and conditions in all awards, in accordance with applicable legal requirements and its established procedures, in order to effectuate the requirements of the Act and this guidance. The following is sample language.

To achieve the greatest possible consistency across agencies and programs, agencies should send their proposed terms and conditions to MIAO for review prior to incorporating them into applicable awards. Agencies should begin including appropriate language in NOFOs published *before* May 14, 2022 to provide applicants fair notice of the Buy America conditions that will apply to funds obligated on or after that date.

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Recipients of an award of Federal financial assistance from a program for infrastructure are hereby notified that none of the funds provided under this award may be used for a project for infrastructure unless:

- (1) all iron and steel used in the project are produced in the United States--this means all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States;
- (2) all manufactured products used in the project are produced in the United States—this means the manufactured product was manufactured in the United States; and the cost of the components of the manufactured product that are mined, produced, or manufactured in the United States is greater than 55 percent of the total cost of all components of the manufactured product, unless another standard for determining the minimum amount of domestic content of the manufactured product has been established under applicable law or regulation; and
- (3) all construction materials<sup>44</sup> are manufactured in the United States—this means that all manufacturing processes for the construction material occurred in the United States.

The Buy America preference only applies to articles, materials, and supplies that are consumed in, incorporated into, or affixed to an infrastructure project. As such, it does not apply to tools, equipment, and supplies, such as temporary scaffolding, brought to the construction site and removed at or before the completion of the infrastructure project. Nor does a Buy America preference apply to equipment and furnishings, such as movable chairs, desks, and portable computer equipment, that are used at or within the finished infrastructure project, but are not an integral part of the structure or permanently affixed to the infrastructure project.

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<sup>44</sup> Excludes cement and cementitious materials, aggregates such as stone, sand, or gravel, or aggregate binding agents or additives.

### *Waivers*

When necessary, recipients may apply for, and the agency may grant, a waiver from these requirements. The agency should notify the recipient for information on the process for requesting a waiver from these requirements.

- (a) When the Federal agency has made a determination that one of the following exceptions applies, the awarding official may waive the application of the domestic content procurement preference in any case in which the agency determines that:
- (1) applying the domestic content procurement preference would be inconsistent with the public interest;
  - (2) 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; or
  - (3) 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.

A request to waive the application of the domestic content procurement preference must be in writing. The agency will provide instructions on the format, contents, and supporting materials required for any waiver request. Waiver requests are subject to public comment periods of no less than 15 days and must be reviewed by the Made in America Office.

There may be instances where an award qualifies, in whole or in part, for an existing waiver described at [\[link to awarding agency web site with information on currently applicable general applicability waivers\]](#).

### *Definitions*<sup>45</sup>

“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<sup>46</sup>—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.

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<sup>45</sup> Federal agencies may choose to provide definitions on a public-facing website and reference that website in the terms and conditions, rather than including all definitions in the terms and conditions itself. If an agency chooses to do provide definitions on a public-facing website, it is not considered a deviation from the terms and conditions provided and does not need to be reviewed by OMB.

<sup>46</sup> IJIA, § 70917(c)(1).

“Domestic content procurement preference” means all iron and steel used in the project are produced in the United States; the manufactured products used in the project are produced in the United States; or the construction materials used in the project are produced in the United States.

“Infrastructure” includes, at a minimum, the structures, facilities, and equipment for, in the United States, roads, highways, and bridges; public transportation; dams, ports, harbors, and other maritime facilities; intercity passenger and freight railroads; freight and intermodal facilities; airports; water systems, including drinking water and wastewater systems; electrical transmission facilities and systems; utilities; broadband infrastructure; and buildings and real property. Infrastructure includes facilities that generate, transport, and distribute energy.

“Project” means the construction, alteration, maintenance, or repair of infrastructure in the United States.