

# **PHMSA Build America, Buy America (BABA)**

## **De Minimis Costs Waiver FAQ**

**Q1: Does the Department-wide De Minimis Costs Waiver apply to projects funded by the Natural Gas Distribution Infrastructure Safety and Modernization (NGDISM) grant program?**

**A:** Yes, projects funded by PHMSA's NGDISM grant program may make use of the De Minimis Costs Waiver.

**Q2: When does the De Minimis Costs Waiver apply?**

**A:** The De Minimis Costs Waiver applies to projects where the total value of non-compliant products used in the project is no more than the lesser of \$1,000,000 or 5% of total applicable costs for the project.

**Q3: How do I calculate the "total value of non-compliant products" used in my project?**

**A:** The value of an individual non-compliant product is the cost to you (or your contractor) of acquiring that product for use in the project. The "total value of non-compliant products" is the sum of these costs for all non-compliant products you use in the project.

You should not include in this calculation: (1) the costs of transporting non-compliant products to the project site; or (2) the cost of acquiring any non-compliant product that is covered by a separate Buy America waiver.

**Q4: How are "total applicable costs for the project" defined?**

**A:** The "total applicable costs for the project" are defined as the cost of all products used in the project that are subject to a domestic preference requirement, *including products that are within the scope of an existing waiver*.

In determining the cost of an individual product, you should use the cost to you (or your contractor) of acquiring that product for use in the project. The "total applicable costs for the project" are the sum of these costs for all products you use in the project that are subject to a domestic preference requirement.

Note that the acquisition cost of a product that is covered by a separate Buy America waiver should be included in this calculation. However, the acquisition costs of any Section 70917(c) materials, as defined in 2 C.F.R. § 184.3 (cement, cementitious materials; aggregates such as stone, sand, or gravel; or aggregate binding agents or additives) should *not* be included in this calculation because they are statutorily exempt from domestic preference requirements. Additionally, the costs of transporting products to the project site should not be included.

**Q5: Can you provide an example of how to apply the De Minimis Costs Waiver?**

**A:** A project receives NGDISM funding to replace cast iron distribution mains and services with new polyethylene pipe. The cost of acquiring new polyethylene mains and services is \$2,000,000. The cost of leasing excavation equipment is \$500,000. The cost of labor to install the polyethylene pipe is \$1,000,000. The cost of acquiring asphalt to repave the road at the conclusion of the project is \$250,000.

The project proponent wants to use some miscellaneous non-compliant parts (risers, meters, tracer wire, etc.) in the project. The total cost of acquiring the non-compliant products is an additional \$50,000.

In this case, the “total applicable costs for the project” are \$2,050,000 because only the polyethylene pipe and the miscellaneous non-compliant parts are subject to a domestic preference requirement (the equipment and labor are not subject to Buy America requirements, and the asphalt is an exempt 70917(c) material). The “total value of non-compliant products” is \$50,000. The de minimis threshold of 5% is applied to \$2,050,000, which equals \$102,500. Because the value of the non-compliant products used in the project (\$50,000) is less than the de minimis threshold (\$102,500), the non-compliant products are covered by the De Minimis Costs Waiver and may be used in the project.

**Q6: How should I keep track of these costs as my project progresses? What happens if a change order or scope modification decreases my “total applicable costs” mid-project?**

**A:** You are encouraged to keep track of the “total applicable costs for the project” and the “total value of non-compliant products” in real time as construction progresses to ensure you are not exceeding the 5% de minimis threshold at any point during the project’s period of performance.

If you anticipate that a change order or scope modification will decrease your “total applicable costs” such that the value of your non-compliant products will exceed the 5% de minimis threshold, you should immediately notify the PHMSA Grants Management Specialist assigned to your project. In such an event, the administering agency must request and receive a waiver for all non-compliant construction materials incorporated into the project to be in compliance with Buy America requirements.

**Q7: Do I need to submit anything to PHMSA to apply the De Minimis Costs Waiver to my project?**

**A:** No, the De Minimis Waiver automatically applies to all NGDISM projects. However, although no approval is needed from PHMSA, you are responsible for ensuring that you are properly applying the Buy America waiver and must maintain documentation supporting each use of a waiver. You may also contact the Grants Management Specialist assigned to your project for additional assistance in applying the De Minimis Waiver.

You should also maintain cost records sufficient to show that the value of the non-compliant products used in your project has not exceeded the 5% de minimis threshold. PHMSA may periodically inspect your cost records to ensure compliance with Buy America requirements, including whether the De Minimis Costs Waiver may have been appropriately applied.