



WIFIA

P R O G R A M

BORROWER GUIDE TO FEDERAL REQUIREMENTS

LAST UPDATED: November 2022

DISCLAIMER

This document is intended as a guide for WIFIA borrowers to understand their general responsibilities for complying with federal requirements and is for informational purposes only. This document discusses several federal statutory and regulatory provisions and other federal requirements, but does not itself have legal effect, and is not a substitute for those provisions and any legally binding requirements that they may impose. It does not expressly or implicitly create, expand, or limit any legal rights, obligations, responsibilities, expectations, or benefits to any person.

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This guide is subject to change without notice to address any new laws and regulations that impact the WIFIA program and its borrowers. The guide contains links to third-party websites. Such links are only for the convenience of the reader, and EPA does not recommend or endorse the content of the third-party sites.

VERSION HISTORY

Below documents substantive content updates to this Borrower Guide since its initial release.

November 2022:

- Added Build America, Buy America Requirements section under *Latest Updates on Federal Requirements*.
- Added Suggested Contract Language for Build America, Buy America Requirements under *Appendix: WIFIA Specifications and Bid Contract Language*
- Clarifications to collaborative delivery projects and wage determinations under Davis Bacon Act based on additional guidance from Department of Labor under *Labor Laws and Standards*
- Additional clarifications to required contract language used for Equal Employment Opportunity (EEO) requirements in *Appendix: WIFIA Specifications and Bid Contract Language*
- Updated hyperlinks to outside sources.

October 2021:

- Added Table of Contents.
- Updated Environmental Authorities section, related to construction status of projects.
- Updated Economic and Miscellaneous Authorities section, related the Uniform Act and real property acquisition.
- Updated Labor Laws and Standards section, related to construction type generally used for water infrastructure projects.
- Updated hyperlinks to outside sources.

March 2021:

- Corrected hyperlinks to outside sources.

December 2020:

- Borrower Guide released.

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INTRODUCTION

Borrowers of loans provided under the Water Infrastructure Financing and Innovation Act (WIFIA), 33 U.S.C. § 3901 et seq., are required to comply with all federal laws and regulations. This document highlights important social and economic federal laws, regulations, and Executive Orders specifically listed in the WIFIA regulations (40 CFR Part 35 Subpart Q) as well as any relevant updates to the federal requirements. WIFIA borrowers have the prime responsibility for ensuring their staff and contractors comply with all federal requirements for a project. The project is subject to additional review of these federal requirements by the WIFIA Program during application processing and after loan execution.¹

This guide provides an overview of the following federal requirements and identifies key borrower responsibilities and additional resources that may be helpful to the borrower for implementing each requirement.

¹ Although the WIFIA program provides oversight on loans issued to state infrastructure financing authorities, the program does not conduct federal requirements reviews during application processing or loan monitoring for these borrowers. These requirements are monitored and managed through the individual SRF programs.

ENVIRONMENTAL AUTHORITIES

OVERVIEW

The **National Environmental Policy Act** (NEPA) and various environmental crosscutting authorities fall under the Environmental Authorities listed in the WIFIA regulations at 40 CFR Part 35 Subpart Q.

The NEPA of 1969, 42 U.S.C. § 4321, *et seq.* mandates that federal agencies consider the effects of their actions, including programs, regulations, policies, and grant-funded specific projects, on the quality of the human environment. The issuance of a loan under the WIFIA program constitutes an action that triggers an environmental review of the project scope covered by the loan. The status of NEPA determinations for WIFIA's loans is listed on the [WIFIA closed loan web page](#) under the environmental review status column.

Prior to issuing a loan, the WIFIA program must review the environmental impacts of the project and make an independent determination under NEPA. The Council of Environmental Quality has established NEPA implementing regulations at 40 CFR part 1500 for meeting these requirements and the WIFIA program is guided by EPA's implementing regulations at 40 CFR Part 6. The WIFIA program's environmental review considers project impacts and mitigation measures across various environmental crosscutting authorities, including but not limited to:

- Archaeological and Historic Preservation Act, as amended (54 U.S.C. §§ 312501-312508)
- Archaeological Resources Protection Act (16 U.S.C. § 470AA-MM)
- Bald and Golden Eagle Protection Act (16 U.S.C. §§ 668-668C)
- Cleans Water Act (Section 404)
- Clean Air Act Conformity (42 U.S.C. § 7506(C))
- Coastal Zone Management Act (16 U.S.C. §§ 1451-1466)
- Coastal Barrier Resources Act (16 U.S.C. §§ 3501-3510)
- Endangered Species Act (16 U.S.C. §§ 1531-1599)
- Environmental Justice (Executive Order 12898)
- Essential Fish Habitat Consultation Process under the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. §§ 1801-1891)
- Farmland Protection Policy Act (7 U.S.C. §§ 4201-4209)
- Fish and Wildlife Coordination Act (16 U.S.C. § 661, *et seq.*)
- Flood Plain Management (Executive Order 11988, as amended by Executive Order 12148)
- Marine Mammal Protection Act (16 U.S.C. §§ 1361-1407)
- Migratory Bird Treaty Act (16 U.S.C. §§ 703-712)
- National Historic Preservation Act (NHPA), as amended (54 U.S.C. § 300101, *et seq.*)
- Native American Graves Protection and Repatriation Act (25 U.S.C. § 3001, *et seq.*)
- Protection of Wetlands (Executive Order 11990, as amended by Executive Order 12608)
- Rivers and Harbors Act (Section 10)
- Safe Drinking Water Act (42 U.S.C. § 300F-300J-26)
- Wild and Scenic Rivers Act (16 U.S.C. §§ 1271-1287)
- Wilderness Act (16 U.S.C. § 1131, *et seq.*)

WIFIA borrowers do not need to have a completed environmental review prior to submitting a letter of interest to the program or when applying for a WIFIA loan; however, borrowers can expect to provide available environmental assessments, consultations, or other documentation to support the WIFIA program's review of environmental impacts and mitigation measures as part of application processing. WIFIA projects must comply with all environmental cross-cutting authorities. Compliance with cross-cutting authorities is reviewed and documented by the WIFIA program. The WIFIA program may conduct additional consultations related to federal cross-cutting authorities, as necessary for the environmental review. Compliance with the environmental cross-cutting authorities is particularly important for projects where construction is already in progress or will be starting prior to loan close. Experience has shown that successful and timely completion of consultations under Section 106 of the National Historic Preservation Act and Section 7 of the Endangered Species Act can be difficult when initiated too late in the project schedule. To document the completion of the NEPA environmental review, the WIFIA program will issue one of the following determinations for the loan:

- **Categorical Exclusion (CATEX):** EPA's list of actions that may be categorically excluded is available at 40 CFR 6.204. The issuance of a CATEX does not require a public comment period.
- **Finding of No Significant Impact (FONSI) under WIFIA's Programmatic Environmental Assessment (PEA):** The WIFIA program has analyzed the typical potential environmental impacts related to the issuance of credit assistance under WIFIA in the PEA and associated FONSI, related to certain WIFIA water and wastewater projects eligible under 33 U.S.C. § 3905 and described in Section 4 of the PEA. Based on information supplied by the WIFIA borrower and the borrower responses to the WIFIA PEA Questionnaire (included as an appendix to the WIFIA application), the WIFIA program will evaluate the applicability of the project under the PEA. An additional 30-day public comment period is not required for projects that fall under the PEA.
- **FONSI under Environmental Assessment (EA):** If the project does not qualify for a CATEX or the PEA because the environmental impacts or the significance of the impacts are unknown, the WIFIA borrower will be asked to submit an environmental information document (EID) with a scope and level of detail commensurate with the magnitude and significance of the project. If deemed sufficient and acceptable by the WIFIA program, the borrower may submit a draft EA and supporting documents in lieu of an EID, or the WIFIA program will draft an EA. A FONSI determination under an EA is subject to a 30-day public comment period before it is finalized. EPA's NEPA implementing regulations for environmental assessments are found at 40 CFR 6.205.
- **Environmental Impact Statement (EIS):** If significant impacts are anticipated for the project during the environmental assessment, the WIFIA borrower will partner with the WIFIA program to assist in the preparation of an EIS describing the environmental impacts and reasonable alternatives. EPA may enter into a third-party agreement with the applicant to hire a consulting firm to prepare the EIS. A draft EIS is subject to a 45-day public comment period and the final EIS is subject to a 30-day waiting period before it is finalized, and a record of decision (ROD) is issued for the project. EPA's NEPA implementing regulations for environmental impact statements are found at 40 CFR 6.207.

WHAT TO EXPECT

The WIFIA program has the responsibility to conduct an environmental review and issue a determination for the project scope covered by a WIFIA loan and to ensure any monitoring requirements are being implemented by the WIFIA borrower prior to and through construction. The WIFIA program must conduct an environmental review prior to issuance of a WIFIA loan. When the WIFIA project is co-funded with other federal or state programs, the WIFIA program may work collaboratively with co-funding agencies to ensure compliance with environmental cross-cutting authorities. WIFIA borrowers should clearly communicate project construction schedules to ensure the environmental compliance requirements can be or have been met prior to conducting ground-disturbing activities or activities that may diminish or alter the character of historic properties. Components of the WIFIA project that do not or cannot comply with environmental cross-cutting authorities may be excluded from the WIFIA project. As part of its compliance monitoring activities, the WIFIA program will conduct periodic document reviews and site walk-throughs during project construction, where applicable, to ensure specific requirements outlined in the WIFIA environmental documentation are met.

Prospective borrowers are not required to submit environmental documentation or findings when submitting their letters of interest (LOIs). However, as part of the WIFIA application, borrowers can expect to:

- ✓ Identify any consultations with cross-cutting agencies that have already been completed or are ongoing.
- ✓ Discuss the environmental review with the WIFIA program prior to submittal of the application. If it appears that the project may not qualify for a CATEX, the WIFIA program will request that the borrower submit a completed PEA Questionnaire along with the relevant supporting materials.

After the application is submitted, WIFIA applicants may be asked to:

- ✓ Provide additional materials relevant to the project environmental review, including project description and location, project maps, any reports, assessments, or consultations conducted for the project, NEPA determinations by other federal agencies or State Revolving Fund (SRF) programs, or other relevant documentation to support the environmental review.
- ✓ If an EA or EIS is required, consult with the WIFIA program to determine the scope and level of detail for the documentation, indicate any public meetings or hearings required as part of the process, and support the WIFIA program in responding to comments if the NEPA determination is subject to a public comment period.
- ✓ Verify accuracy of environmental review documents prepared by the WIFIA program and provided to the applicant at the completion of the environmental review. The signatory of the WIFIA application, or equivalent authority, must sign the Environmental Review Verification Memorandum to confirm the applicant's concurrence with the environmental documentation.

Environmental monitoring and reporting requirements prior to and during project construction will be outlined in the environmental review documents or the loan agreement. The WIFIA program has the responsibility to conduct checks on the borrower's environmental requirements during compliance

monitoring activities.

Key borrower responsibilities for implementation include:

- ✓ Execute the requirements outlined in the environmental review documents or specified in the loan agreement. These requirements vary based on the scope of the project and may include activities like submittal of approved environmental permits; use of construction methods to mitigate potential environmental impacts; environmental training for employees; submittal of biological assessments; or other requirements identified through consultations with other federal agencies.
- ✓ Notify the WIFIA program if the scope of activities under the existing environmental determination is modified and provide supporting documentation for the WIFIA program to initiate additional federal agency consultations, as needed, to maintain the borrower's environmental compliance with the project.

RESOURCES:

- [CEQ Regulations for Implementing NEPA](#) (40 CFR part 1500)
- [EPA Procedures for Implementing NEPA and Assessing Environmental Effects](#) (40 CFR Part 6)
- [PEA for the WIFIA Program](#)
- [WIFIA PEA Questionnaires](#) for WIFIA Credit Assistance Projects and SRF Programs

ECONOMIC AND MISCELLANEOUS AUTHORITIES

The following federal requirements fall under the Economic and Miscellaneous Authorities listed in the WIFIA regulations at 40 CFR Part 35 Subpart Q.

DEBARMENT AND SUSPENSION PROHIBITIONS RELATING TO VIOLATIONS OF CWA AND CAA WITH RESPECT TO FEDERAL CONTRACTS, GRANTS, OR LOANS

Executive Order 12549 provides for a governmentwide system for debarment and suspension. A person or business who is debarred or suspended is excluded from activities in which grants, cooperative agreements, contracts of assistance, loans, and loan guarantees are being used to fund the activity. Borrowers must ensure their contractors and subcontractors are not suspended or debarred prior to issuing contracts. For prime contractors, registration under the governmentwide System for Award Management (SAM) is required and borrowers must check their registration under SAM. For lower tier contracts (i.e., subcontracts), OMB guidance under 2 CFR Part 180 Subpart C allows the borrower to verify whether subcontractors are debarred or suspended from government-funded activities using one of three options: (1) check subcontractor status on SAM; (2) collect a certification from the subcontractor; or (3) add a clause or condition to the covered transaction with the subcontractor.

Additionally, Section 306 of the Clean Air Act (CAA) and section 508 of the Clean Water Act (CWA), as implemented by Executive Order 11738 (1973), prohibit performance of Federal assistance agreements at facilities disqualified due to certain violations of the CAA or CWA. As described in the respective CAA and CWA sections, a person or entity who has been convicted of a criminal offense or has a serious pattern of civil violations may be barred from receiving Federal government contracts, loans, and grants. Statutory debarments occur by operation of law following criminal conviction under CWA (Section 508) or CAA (Section 306). The ineligibility lasts until the Debarring Official certifies that the condition giving rise to conviction has been corrected.

WHAT TO EXPECT

The WIFIA program has the responsibility to check that its borrowers are not debarred or suspended from receiving federal funds.

In its LOI submittal, WIFIA prospective borrowers are asked to:

- ✓ Disclose to EPA if they are currently debarred or suspended; proposed for debarment or suspension; or indicted, convicted, or had a civil judgment rendered against it for any of the offenses listed in the regulations governing debarment and suspension at 2 CFR Part 180 and Part 1532; or declared ineligible or excluded from participating in federal contracts or contracts paid for with federal funds. This disclosure is completed as part of the certification submitted with the LOI.

During application processing, WIFIA applicants are asked to:

- ✓ Disclose their debarment and suspension status as part of the WIFIA application and prior to loan closing.

For all contracts used on the project, WIFIA borrowers are expected to:

- ✓ Communicate to potential contractors the requirement to certify that the contractor is not debarred or suspended and to require their subcontractors to similarly certify. This is generally provided in bid advertisements and executed contracts. Although no specific contract language is required, sample contract language in the WIFIA specifications package is available for use by the borrower (see Resources below).
- ✓ Verify that the contractor and its subcontractors are not debarred or suspended. For prime contractors, access SAM to verify the awarded prime contractor is not disqualified or excluded. For lower tier contracts, ensure the prime contractor has verified their subcontractors are not suspended or debarred either by (1) checking exclusions in SAM, (2) collecting a signed certification from the subcontractor, or (3) including a clause or condition for the covered transaction with the subcontractor.

RESOURCES

- [Debarment and Suspension](#) (EO 12549)
- [Providing for administration of the Clean Air Act and the Federal Water Pollution Control Act with respect to Federal contracts, grants, or loans](#) (EO 11738)
- [OMB Guidelines to Agencies on Governmentwide Debarment and Suspension](#) (2 CFR Part 180)
- [Non-procurement Debarment and Suspension](#) (2 CFR part 1532)
- [System for Award Management \(SAM\)](#)
- Sample Contract Language in [WIFIA Specifications Package](#)

NEW RESTRICTIONS ON LOBBYING

Recipients of federal grants, cooperative agreements, contracts, and loans are prohibited by 31 U.S.C. § 1352 from using federal funds to pay any person for influencing or attempting to influence any officer or employee of an agency, a member of Congress, an officer or employee of Congress, or an employee of a member of Congress with respect to the award, continuation, renewal, amendment, or modification of any of these instruments. This requirement also applies to the WIFIA program, which follows the EPA implementing regulations on lobbying restrictions prescribed at 40 CFR part 34.

WIFIA borrowers are required to certify that (1) they have not made, and will not make, such a prohibited payment, (2) they will be responsible for reporting the use of non-federal funds for such purposes, and (3) they will include these requirements in subsequent contracts and subcontracts that exceed \$100,000 and obtain necessary certifications from those entities.

WHAT TO EXPECT

The WIFIA program has the responsibility to check that its borrowers are not making prohibited payments related to lobbying using federal funds.

During application processing and prior to issuing a loan, WIFIA applicants are asked to:

- ✓ Provide completed “Certification Regarding Lobbying” (EPA Form 6600-06) form and if applicable, the “Disclosure of Lobbying Activities” (SF-LLL) form, which are included in the WIFIA Application. Use the WIFIA Loan ID as the EPA Project Control Number.
- ✓ Provide evidence of borrower communication to contractors and subcontractors of the need to also comply with restrictions on lobbying. This is generally provided in bid advertisements and executed contracts. Although no specific contract language is required, sample contract language in the WIFIA specifications package is available for use by the borrower (see Resources below).

Once a WIFIA loan is executed, key borrower responsibilities for implementation include:

- ✓ Continue to comply with and communicate to contractors and subcontractors of the need to comply with restrictions on lobbying. The WIFIA program will check advertised bids and executed construction contracts, which are a general reporting requirement of the loan, for this type of communication to contractors.

RESOURCES

- [Limitation on use of appropriated funds to influence certain Federal contracting and financial transactions](#) (31 U.S.C 1352)
- [New Restrictions on Lobbying](#) (40 CFR part 34)
- [Certification regarding lobbying](#) (EPA Form 6600-06)
- [Disclosure of Lobbying Activities](#) (SF-LLL)
- Sample Contract Language in [WIFIA Specifications Package](#)

UNIFORM RELOCATION ASSISTANCE AND REAL PROPERTY ACQUISITION POLICIES ACT

This authority applies to WIFIA borrowers who have acquired or will acquire real property, whether temporary or permanent, for the purpose of completing the WIFIA project. The acquisition itself does not need to be federally funded. If federal funds are used in any phase of the program or project, this statute applies.

The Uniform Relocation Assistance and Real Property Acquisition Policies Act (URA), 42 U.S.C 61, establishes a uniform policy for just compensation of acquired real property and for fair and equitable treatment of persons who are displaced from their homes, farms, or businesses to make way for federal or federally assisted projects. It provides basic guidelines for negotiating the acquisition of real property by the federal government. The URA also requires agencies to reimburse individuals for actual and reasonable expenses incident to relocation, such as moving costs, direct loss of tangible personal property associated with moving or discontinuing a business, and expenses involved in searching for a replacement home or business site. 49 CFR Part 24 is the government-wide regulation that implements the URA.

WHAT TO EXPECT

The WIFIA program has the responsibility to check that its borrowers comply with the requirements of the URA if land acquisition is relevant to the project.

During application processing and once the WIFIA loan is executed, WIFIA borrowers are asked to:

- ✓ Disclose to the WIFIA program if land acquisition has occurred or will occur.
- ✓ Certify that the acquisition complies with or will comply with the URA. This disclosure is completed as part of the certification submitted with the LOI and loan application and as part of disbursement requests to the WIFIA program.
- ✓ Provide evidence that URA requirements are met, if requested, which may include initial notification to the landowner, appraisal and appraisal reviews, and offer of just compensation related to the acquisition.

RESOURCES

- [URA implementing regulations for Department of Transportation](#), incorporated by reference in EPA regulations (49 CFR Part 24)
- [Guidance on Acquisition and Appraisal: Acquiring Real Property for Federal and Federal-Aid Programs and Projects](#), Federal Highway Administration Office of Real Estate Services
- [Federal-Aid Essentials for Local Public Agencies: Right of Way Requirements](#), Federal Highway Administration

DEMONSTRATION CITY AND METROPOLITAN DEVELOPMENT ACT

Executive Order 12372 and Section 204 of the Demonstration Cities and Metropolitan Development Act, 42 U.S.C 3301 *et seq.*, aim to foster an intergovernmental partnership between federal, state, tribal, and local governments. The executive order encourages federal coordination with local officials on the planning and construction of public facilities within their jurisdiction.

WHAT TO EXPECT

The WIFIA program is not identified as a program requiring intergovernmental review under this Executive Order.

The WIFIA program does not conduct compliance monitoring activities related to this Act after loan execution.

RESOURCES

- [Intergovernmental Review of Federal Programs](#) (Executive Order 12372)
- [EPA Financial Assistance Programs Subject to Executive Order 12372](#)

DRUG-FREE WORKPLACE ACT

Under the Drug-free Workplace Act of 1988, 41 U.S.C. § 8101 *et seq.*, federal contractors or any program receiving federal grants is required to establish a drug-free workplace policy. Governmentwide implementation of the Act is prescribed at 2 CFR Part 182, Subparts A through F.

WHAT TO EXPECT

The WIFIA program is a federal loan program and therefore is not covered by this Act.

The WIFIA program does not conduct compliance monitoring activities related to this Act after loan execution.

RESOURCES

- [Drug-free workplace programs](#), Substance Abuse and Mental Health Services Administration
- [Governmentwide requirements for Drug-free Workplace](#) (2 CFR Part 182)

CIVIL RIGHTS, NON-DISCRIMINATION, AND EQUAL EMPLOYMENT OPPORTUNITY AUTHORITIES

The following federal requirements fall under the Civil Rights, Nondiscrimination, and Equal Employment Opportunity Authorities listed in the WIFIA regulations at 40 CFR Part 35 Subpart Q.

AGE DISCRIMINATION ACT, SECTION 504 OF THE REHABILITATION ACT, AND TITLE VI OF THE CIVIL RIGHTS ACT OF 1964

Three important laws prohibit discrimination in the provision of services or benefits, on the basis of race, color, national origin, sex, handicap or age, in programs or activities receiving federal financial assistance. These laws are:

- Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, as amended, states that “No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.”
- Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 *et seq.*, as amended and supplemented by Executive Orders 11914 and 11250, states that “(n)o otherwise qualified individual with a disability in the United States...shall, solely by reason of his or her disability, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving federal financial assistance...,” and
- The Age Discrimination Act of 1975, 42 U.S.C. § 6101 *et seq.*, as amended, states that “(n)o person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving financial assistance...”

Borrower compliance with these laws is not limited to the project funded by the WIFIA program. These laws apply to the WIFIA borrower and its operations in its entirety.

WHAT TO EXPECT

The WIFIA program has the responsibility to check that its borrowers are complying with civil rights laws and are developing projects, programs, and activities on a non-discriminatory basis.

During application processing and prior to issuing a loan, WIFIA applicants are asked to:

- ✓ Provide a completed “Pre-Award Compliance Review Report” (EPA Form 4700-4), which is included in the WIFIA Application, and if requested, additional information on any outstanding civil actions against the applicant.
- ✓ Provide evidence of communication to contractors and subcontractors of the need to also comply with civil rights laws. This is generally provided in bid advertisements and executed contracts. Although no specific contract language is required, sample contract language in the WIFIA specifications package is available for use by the applicant (see Resources below).

Once a WIFIA loan is executed, key borrower responsibilities for implementation include:

- ✓ Continue to comply with and communicate to contractors and subcontractors of the need to comply with civil rights laws and regulations. The WIFIA program will check advertised bids and executed construction contracts, which are a general reporting requirement of the loan, for this type of communication to contractors.
- ✓ Notify the WIFIA program of new civil suits that have been filed against the borrower that may have material adverse effect.

RESOURCES

- [Civil Rights Pre-Award Compliance Review Report](#) (EPA Form 4700-4)
- [Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance](#) (40 CFR Part 5)
- [Nondiscrimination in Programs or Activities Receiving Federal Assistance from the Environmental Protection Agency](#) (40 CFR Part 7)
- Sample Contract Language in [WIFIA Specifications Package](#)

SECTION 13 OF THE CWA

As codified in 42 U.S.C. § 1251, Section 13 provides that “No person in the United States shall on the ground of sex be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance...” EPA implementing regulations for this provision of the CWA is prescribed in 40 CFR part 7 and enforced similarly to those already established for racial and other discrimination under Title VI of the Civil Rights Act of 1964.

WHAT TO EXPECT

The WIFIA program has similar borrower expectations outlined in *Age Discrimination Act, Section 504 of the Rehabilitation Act, and Title VI of the Civil Rights Act of 1964* for implementing CWA Section 13.

RESOURCES

- [Nondiscrimination in Programs or Activities Receiving Federal Assistance from the Environmental Protection Agency](#) (40 CFR Part 7)

EQUAL EMPLOYMENT OPPORTUNITY

Through a series of Executive Orders, and a decision by the Equal Employment Opportunity Commission, the federal government established a national policy related to discrimination based on race, color, sex, religion, and national origin to enhance hiring, training, and promotion opportunities for minorities and women in construction programs financed, in part, by federal dollars.

Chief among these directives is Executive Order 11246, which requires all federal contracting agencies to include certain nondiscrimination and "affirmative action" provisions in all contracts and to require the recipients of federal contracts to include these provisions in subcontracts. The provisions apply to WIFIA borrowers, contractors and subcontractors who receive more than \$10,000 in federal dollars a year and

commit these entities to maintaining a policy of non-discrimination in the treatment of employees, to make this policy known to employees, and to recruit, hire, and train employees without regard to race, color, sex, religion, or national origin.

Section 301 of Executive Order 11246 requires that WIFIA borrowers undertake and agree to incorporate into contracts and subcontracts specific language outlining the eight principals and directives found in Section 202 of the Executive Order.

Implementing guidelines can be found in the Department of Labor’s regulations at 41 CFR Part 60. Compliance with Executive order 11246 is based on implementation of the Equal Opportunity Clause, and specific affirmative action obligations required by the Standard Federal Equal Employment Opportunity Construction Contract Specifications, as set forth in 41 CFR Part 60-4.

WHAT TO EXPECT

The WIFIA program has the responsibility to check that its borrowers are complying with laws and regulations related to Equal Employment Opportunity.

During application processing and once the WIFIA loan is executed, WIFIA borrowers are asked to:

- ✓ Provide executed construction contracts (active and completed) that include specified EEO language. EEO law require specific language from Section 202 of Executive Order 11246 be included in bid documents and contracts. The specific language is included in the WIFIA specifications package, which is available for use by the borrower (see Resources below).
- ✓ In bid solicitations, provide an additional “Notice of Requirement for Affirmative Action to Ensure Equal Employment Opportunity” as described at 41 CFR Part 60-4. The specific language is included in the WIFIA specifications package.
- ✓ Prominently post “Equal Opportunity is the Law” posters where it is accessible to all applicants for employment, employees, contractors, and subcontractors.
- ✓ Notify the Department of Labor’s Office of Federal Contract Compliance Programs within 10 working days of award of a construction contract or subcontract in excess of \$10,000.

RESOURCES

- [Equal Employment Opportunity posters](#)
- [Executive Order 11246 and amendments](#)
- [DOL Construction Contract Technical Assistance Guide](#)
- [DOL Construction Contract Award Notification](#)
- Sample Contract Language in [WIFIA Specifications Package](#)

PARTICIPATION BY DISADVANTAGED BUSINESS ENTERPRISES IN PROCUREMENT UNDER ENVIRONMENTAL PROTECTION AGENCY (EPA) FINANCIAL ASSISTANCE AGREEMENTS

The Disadvantaged Business Enterprise (DBE) Program is an EPA outreach, education, and goal program designed to increase and encourage the utilization and participation of DBEs in procurements funded by EPA assistance programs (73 FR 15904). The implementing regulations can be found at 40 CFR Part 33. WIFIA borrowers are required to seek and encouraged to use small, minority and women-owned businesses for their procurement needs using EPA's six good faith efforts when contracting. The borrower must also ensure that its prime contractor(s) follow the same rules when subcontracting. The six good faith efforts include:

1. Ensure DBEs are made aware of contracting opportunities to the fullest extent practicable through outreach and recruitment activities. For Indian Tribal, State, and Local Government recipients, this will include placing DBEs on solicitation lists and soliciting them whenever they are potential sources.
2. Make information on forthcoming opportunities available to DBEs, arrange time frames for contracts, and establish delivery schedules, where the requirements permit, in a way that encourages and facilitates participation by DBEs in the competitive process. This includes, whenever possible, posting solicitations for bids or proposals for a minimum of 30 calendar days before the bid or proposal closing date.
3. Consider in the contracting process whether firms competing for large contracts could subcontract with DBEs. For Indian Tribal, State, and Local Government recipients, this will include dividing total requirements when economically feasible into smaller tasks or quantities to permit maximum participation by DBEs in the competitive process.
4. Encourage contracting with a consortium of DBEs when a contract is too large for one of these firms to handle individually.
5. Use the services and assistance of the SBA and the Minority Business Development Agency of the Department of Commerce.
6. If the prime contractor awards subcontracts, require the prime contractor to take the steps in items 1 through 5.

There are no specific requirements for implementing each of the efforts as long as the effort is shown. Aside from these efforts, WIFIA borrowers do not have other administrative or reporting requirements of the DBE program under a WIFIA loan.

WHAT TO EXPECT

In implementing EPA's DBE program, WIFIA borrowers are asked to:

- ✓ Apply the six good faith efforts when in the process of seeking a prime contractor and ensure that its prime contractors apply the six good faith efforts when in the process of seeking subcontractors.
- ✓ Maintain proper records demonstrating that the six good faith efforts were applied during contract procurement.

RESOURCES

- [DBE Implementing regulations](#) (40 CFR part 33)
- [DBE Program resources and fact sheets](#)
- Sample Contract Language in [WIFIA Specifications Package](#)

AMERICAN IRON AND STEEL (AIS) REQUIREMENT

OVERVIEW

This requirement is specified in the WIFIA statute at 33 U.S.C. § 3914 and implementation of the federal requirement mirrors Clean Water and Drinking Water SRF programs. See the *Latest Updates on Federal Requirements* section of this document for Build America, Buy America requirements that are effective starting May 14, 2022.

WIFIA borrowers must install iron and steel products that are produced in the U.S. for the project. Products covered under the AIS requirement include:

- Lined or unlined pipes and fittings
- Manhole covers and other municipal castings
- Hydrants
- Tanks
- Flanges
- Pipe clamps and restraints
- Valves
- Structural steel
- Reinforced precast concrete
- Construction materials

If the listed products are permanently incorporated into the project and are primarily iron and steel material, then borrowers should obtain and keep record of the manufacturer's certification of AIS compliance for that product. If a product does not fall within one of the listed product categories, it does not need to comply with the AIS requirements.

The WIFIA statute allows EPA to grant project waivers in specific circumstances: (1) if the requirement is inconsistent with the public interest; (2) if the products are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or (3) if the products will increase the cost of the project by 25% or more. **WIFIA borrowers can seek guidance from the program on waivers at any phase in project design and implementation to discuss borrower-specific circumstances and explore options to ensure compliance.**

Product availability waiver requests are most common because not all items covered under the AIS requirement may be produced in the U.S. Borrowers should notify the WIFIA program when product availability issues are identified and prior to product procurement and installation to ensure that the project maintains compliance with the AIS requirement. Although not required, identifying products during project design can help the borrower assess market availability and initiate a timely waiver process, where needed. The waiver process involves:

1. Independent product research. Before availability waivers are considered, the WIFIA program will conduct independent market review based on the borrower's technical specifications of the product.
2. Borrower assessment. The WIFIA program will notify the borrower of the results and confirm unavailability of the products or identify additional domestically available options for the borrower to assess against their project requirements. If there are feasible options, no further

steps are taken.

3. Preparation and submission of waiver request package. If there are no feasible options, borrowers will prepare a waiver request package. The WIFIA program reviews the request for adequacy and submits the package for review and approval on the borrower's behalf.
4. Public comment period. Waiver requests are subject to a 15-day comment period and will be posted on the AIS webpage under [Waiver Requests Received by EPA](#).
5. Approval and notification. Once all comments have been addressed, an approval package will be routed for review and approval through the Office of Water management team. The WIFIA program will post the approved waiver on the AIS webpage under [Approved Project Waivers](#) and notify the borrower.

Waivers should only be sought when all avenues of procuring AIS-compliant products have been exhausted. In many cases, a borrower may find that an availability waiver is not needed.

Public interest and cost waivers are less common. Borrowers should initiate further discussions with the WIFIA program if they believe their project could qualify for a public interest or cost waiver. The waiver process is the same for these waivers except product research and assessment (Steps 1 and 2) do not apply.

There are also national waivers that are immediately available for borrower use and do not require additional approval. The National De Minimis Waiver can be used at the borrower's discretion for incidental and low-cost items; it is ultimately the borrower who decides which items to include under this national waiver. If there is any uncertainty, seek assistance from the WIFIA program.

WIFIA cannot close a loan with previously incurred construction costs that are not compliant with the AIS requirement.

WHAT TO EXPECT

The WIFIA program has the responsibility to check that its borrowers understand the AIS requirements and that those requirements are being properly implemented for the entire project. WIFIA will conduct periodic document reviews and site walk-throughs during project construction to check AIS implementation as part of its compliance monitoring activities.

During application processing, WIFIA applicants may be asked to:

- ✓ Provide evidence of communication on AIS requirements to contractors and subcontractors. Although not statutorily required, applicants can easily achieve this by including notification in advertised bids and executed contracts. Sample contract language in the WIFIA specifications package is available for use by the borrower (see Resources below).
- ✓ If a project has not yet executed contracts, provide a plan for communication on AIS requirements to contractors and subcontractors.
- ✓ If the project includes previously incurred costs for construction activities, provide additional documentation to help the WIFIA program check that incurred costs are compliant with this requirement. This request may include: (1) a list of iron or steel products purchased and installed; (2) a sample of AIS certifications for those items; (3) related project waivers; and/or (4) results of

a third-party AIS audit.

WIFIA borrowers are asked to periodically submit documentation to demonstrate continued compliance with the AIS requirement. Key borrower responsibilities for implementation include:

- ✓ Communicate AIS requirements to contractors and ensure contractors are communicating the requirements to its subcontractors. This is generally included in advertised bids and executed contracts that are a general reporting requirement of the loan and checked by WIFIA. If communication is not included in the contract documents, provide additional evidence that communication has taken place.
- ✓ Submit draft or executed prime construction contracts for WIFIA review to ensure that adequate compliance language is included. The WIFIA program does not generally review subcontracts unless there is cause for further review.
- ✓ Identify products that must comply with AIS requirements and determine whether they can be procured domestically. Communicate to the WIFIA program when products cannot be procured domestically to initiate the program's independent market review and determine whether there is a need for an availability waiver. Submit additional documentation, such as technical specifications and product information, to support the WIFIA program's review and approval process, as needed.
- ✓ Maintain up-to-date records or frequently check with prime contractors on AIS certifications for products purchased and installed on the project. This can help the borrower prevent non-compliant products from being permanently incorporated into the project and triggering a non-compliance event. The WIFIA Program requires AIS documentation to be maintained for three years after project completion. **The key to borrower compliance is collecting adequate AIS documentation for installed products that are covered by the requirement.**
- ✓ Report any issue with noncompliance to the WIFIA program based on the borrower's review of purchased and installed products on contracts and subcontracts that must comply with the AIS requirement.

RESOURCES

- [AIS Implementation Memoranda](#) (four documents)
- [National Waivers](#), including [National De Minimis Waiver](#). See also [AIS Online Webinar on De Minimis](#), June 2020
- [Project Waiver Request Checklist](#)
- Sample Contract Language in [WIFIA Specifications Package](#)
- Sample Certification Letter (available in the AIS Implementation Memorandum, dated March 2014). See also [AIS Online Webinar on AIS Certification Letters](#), July 2020.

LABOR LAWS AND STANDARDS

OVERVIEW

This requirement is included in the WIFIA statute at 33 U.S.C. § 3909(e) by reference to Section 513 of the Federal Water Pollution Control Act (33 U.S.C. § 1372) and primarily covers requirements under the ***Davis-Bacon and Related Acts*** and the ***Contract Work Hours Safety Standards Act***. Implementation of the federal requirements under these Acts are consistent with guidance provided to Clean Water and Drinking Water State Revolving Loan Programs.

Borrowers must comply with federal prevailing wage laws, commonly referred to as Davis-Bacon. While the Davis-Bacon Act itself only requires compliance for federal contracting, WIFIA falls under “related acts” that are also subject to Davis-Bacon requirements. For all prime contracts above the \$2,000 threshold, borrowers must enclose specific Davis-Bacon language into the prime contracts and ensure the prime contractor includes the same language in all associated subcontracts. Contracted laborers and mechanics are subject to wages at a rate no less than those determined by the U.S. Department of Labor (DOL).

Borrowers must obtain the wage determination for the locality in which a covered activity will take place prior to issuing requests for bids, proposals, quotes, or other methods for soliciting contracts for activities subject to Davis-Bacon. The wage determinations for water infrastructure projects generally fall under the “Heavy” construction type, although the “Building” construction type may also apply. The wage determinations shall be incorporated into solicitations and subsequent contracts. Prime contracts must contain a provision requiring that subcontractors follow the wage determinations incorporated into the prime contract.

Force Account laborers and mechanics employed by a governmental agency or political subdivision are not covered under this Act. Further, under the Contract Work Hours Safety Standards Act, borrowers must ensure contractors are receiving overtime pay for work in excess of forty hours for all contracts above the \$100,000 threshold. To ensure proper wages are paid, borrowers must collect certified payrolls from contractors and periodically conduct personnel interviews to verify proper wages are being paid under a contract.

Many states also have their own prevailing wage laws; however, state prevailing wage laws are not a substitute for federal prevailing wage laws. Requirements for both laws must be met and the greater of the two wages should be applied to the contracts (where equivalent state labor categories can be discerned). Where contracts include incorrect wage determinations, the borrower must take steps to reissue or amend the contract to retroactively incorporate the proper wage determination to the beginning of the contract and compensate for any increases in wages resulting from the wage determination correction.

WIFIA cannot close a loan that is not compliant or is not in remediation to return to compliance with this requirement.

WHAT TO EXPECT

The WIFIA program has the responsibility to check that its borrowers understand the Davis-Bacon requirements and that those requirements are being properly implemented for the entire project. The WIFIA program will conduct periodic document reviews and site walk-throughs during project construction to check for implementation of Davis-Bacon requirements as part of its compliance monitoring activities.

During application processing, WIFIA applicants may be asked to:

- ✓ Provide executed construction contracts (active and completed) that include specified Davis-Bacon contract language. DOL regulations require specific language and relevant wage determinations be included in bid documents and contracts. **Note that the specified language under 29 CFR §5.5 has been modified for the WIFIA program to also identify borrowers as authorized representatives to ensure compliance with the statute.** The modified language is included in the WIFIA specifications package, which is available for use by the applicant (see Resources below).
- ✓ Provide executed construction contracts (active and completed) that include relevant wage determinations. DOL publishes wage determinations that specify the minimum wage (including fringe benefits) for a given construction type, labor category, and locality in which the work is conducted. These wages are updated regularly on their website. If state prevailing wages also apply, show evidence that a comparison of labor wage rates and categories have been conducted and that the higher of the wages apply to the contract.
- ✓ If a project has not yet executed contracts, provide sample front-end documents that will be used in all relevant bids and contracts issued for the project.
- ✓ If the project includes previously incurred costs for construction activities, provide additional documentation to help the WIFIA program check that incurred costs are compliant with this requirement. This request may include: (1) results of a third-party Davis-Bacon audit of the project or specific contract(s); (2) a random sample of certified payroll reports and personnel interviews collected for the contract(s); and/or (3) other borrower evidence of compliance checks for reporting and paid wages (including fringe benefits).

As a WIFIA program check on compliance after loan execution, WIFIA borrowers are asked to periodically submit documentation to demonstrate continued compliance with the labor laws and standards. Key borrower responsibilities for implementation include:

- ✓ Communicate Davis-Bacon requirements to contractors and ensure contractors are relaying the requirements to their subcontractors. Statutorily, this communication is required in advertised bids and executed contracts that are a general reporting requirement of the loan and checked by WIFIA. While the WIFIA program may check borrower's prime contracts for this language, the onus is on borrowers and prime contractors to verify the same contract language is applied to all relevant subcontracts and that the subcontracts also comply with this requirement.

- ✓ Identify the proper wage rates to apply in advertised bids and subsequently in executed contracts. During advertisement, borrowers should monitor and update the bid with the latest applicable version of DOL’s published wage determinations. Borrowers must award contracts within 90 days of bid close to “lock” the wage determinations included in the advertisement. Otherwise, an updated wage determination is required. Seek assistance from the WIFIA program on selecting proper wage determinations, as needed.
- ✓ For collaborative delivery contracts (e.g., Design-Build, Progressive Design-Build, Construction Management at Risk), the Department of Labor, Wage and Hour Division has interpreted each guaranteed maximum price (GMP) package as an additional obligation to the original contract agreement which is substantial enough to require an updated wage determination. According to DOL’s AAM157 guidance on ‘Application of DBA to Contracts with Options,’ if there is “substantial and segregable amount[s] of construction work” that can be exercised using amendments or addenda to the contracts, these types of contracts should include a current wage determination at the time an amendment - with the purpose of initiating construction on a package or phase of a project - is exercised. See DOL’s AAM157 guidance on ‘Application of DBA to Contracts with Options.’
- ✓ Submit draft or executed prime construction contracts for WIFIA program review to ensure that adequate compliance language and the appropriate federal wage rates are included. The WIFIA program does not generally review subcontracts unless there is cause for further review.
- ✓ If a borrower encounters a unique situation at a site that presents uncertainties regarding Davis-Bacon applicability, the borrower must discuss the situation with EPA before authorizing work on that site. This includes any borrower requests for wage conformances for labor classifications that may not exist in the wage determinations. A conformance request must be initiated by the borrower, submitted by EPA, and approved by DOL.
- ✓ If state prevailing wages also apply, ensure that the certified payrolls reflect paid wages that are also, at a minimum, equal to the corresponding federal prevailing wage rates for the contract.
- ✓ Post proper Davis-Bacon signage and make readily available the applicable prevailing wage determinations at the construction site(s).
- ✓ Maintain up-to-date records for at least three years after project completion. Records should include:
 - Certified payrolls. Borrowers must collect certified payrolls from contractors weekly and check that payroll reports are accurate and paid wages are consistent with the contract’s wage determination and overtime requirements.
 - Personnel interviews. Borrowers must conduct periodic interviews of workers to ensure proper wages are being paid and document the interviews by completing SF-1445: Labor Standards Interview. Although WIFIA does not require a specific number and frequency, interviews should occur throughout the course of construction and include a sufficient sample of job classifications represented on the job, as well as across various contracts.

- Apprenticeship and Trainee Programs. Borrowers must confirm apprentice and trainee program registrations and check that ratio requirements under the approved program(s) are met.

RESOURCES

- [Davis-Bacon regulations](#) (29 CFR Part 5)
- [U.S. Department of Labor On-line Wage Determinations](#)
- [U.S. Department of Labor Guides, Forms, and Posters for Davis Bacon and Related Acts](#) (with additional resources)
- [AAM157 guidance on 'Application of DBA to Contracts with Options'](#)
- Sample Contract Language in [WIFIA Specifications Package](#)

LATEST UPDATES ON FEDERAL REQUIREMENTS

The following federal requirements have been issued since the promulgation of the WIFIA implementation regulation (December 2016) and directly apply to EPA loan and grant programs, including WIFIA borrowers. The WIFIA program will periodically update this section with any notable laws and regulations and WIFIA's expectations for borrower compliance.

BUILD AMERICA, BUY AMERICA ACT (BABA)

In November 2021, Congress enacted the Investment in Infrastructure and Jobs Act (IIJA), also known as the Bipartisan Infrastructure Law (BIL) (Public Law, PL 117-58). As part of the IIJA, the Build America, Buy America Act (BABA) (Title IX of PL 117-58) establishes domestic preference requirements to maximize the purchase of goods produced in the U.S. BABA requirements apply to federal financial assistance awards, including loans issued through the WIFIA program, after May 14, 2022. The current interpretations of the statute and guidance indicated that BABA does not apply to for-profit organizations.

BABA requirements specify domestic preference requirements in three product categories: iron and steel, manufactured products, and construction materials. The iron and steel product category includes products that are primarily iron and steel. Construction materials include an article, material, or supply that consists primarily of non-ferrous metals, plastic or polymer-based products, glass, lumber, or drywall. All products used in water infrastructure projects will fall under one of the three product categories, except for cement and cementitious materials; aggregates such as stone, sand, or gravel; or aggregate binding agents or additives, which are specifically excepted by the BABA statute. Therefore, manufactured goods cover the remaining products that are not excepted or not classified in the iron and steel and construction materials product categories.

If the product is permanently incorporated on a project that is subject to BABA, these products must be produced in the U.S. and have accompanying BABA compliance documentation for the products. The criteria for "produced in the U.S." are separately defined for each product category.

- All iron and steel items used in covered projects must be 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.
- All manufactured products used in covered projects must be 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.
- All construction materials used in covered projects must be manufactured in the United States. This means that all manufacturing processes for the construction material occurred in the United States.

The Office of Management and Budget's Made in America Office is the lead office directing BABA implementation guidance across all federal agencies. The Office issued initial implementation guidance (OMB Guidance M22-11) to establish government-wide direction for BABA implementation. This

guidance is supplemented by EPA's BABA Implementation Procedures for Office of Water Financial Assistance Programs, which are both linked resources below. *Additional OMB guidance is forthcoming on manufactured goods and construction materials.*

BABA is different from the Buy American Act. Whereas the Buy American Act applies to direct federal procurement, BABA applies to federal financial assistance.

BABA is a separate requirement from AIS, which is a statutory requirement under WIFIA. Nevertheless, BABA requirements for primarily iron and steel products are equivalent to the requirements for covered iron and steel products listed under AIS. Compliance documentation for covered iron and steel products under AIS will also satisfy the BABA requirements, which eases implementation for projects that are subject to both AIS and BABA requirements.

BABA allows the WIFIA Program to grant waivers in specific circumstances, which are the same as and are described in the American Iron and Steel Requirement section of this document. The WIFIA Program will apply similar procedures under the BABA requirement with an additional required step that incorporates a review from the Made in America Office of the proposed waiver prior to its approval.

There are also national waivers that are immediately available for borrower use and do not require additional approval. The EPA National De Minimis Waiver can be used at the borrower's discretion to waive BABA requirements for products totaling up to 5 percent of total project costs; it is ultimately the borrower who decides which items to include under this national waiver.

As this requirement is still evolving, additional national waivers are being considered across the Agency. If there is any uncertainty in the availability and applicability of a national waiver or in the need for a project-specific waiver, seek assistance from the WIFIA program.

WIFIA cannot close a loan that is not compliant or is not in remediation to return to compliance with this requirement.

WHAT TO EXPECT

Note: On June 22, 2022, the WIFIA Program issued a program waiver that waives BABA requirements for projects that can demonstrate design planning efforts were initiated prior to May 14, 2022, the effective date of BABA. The WIFIA Program does not impose BABA requirements to projects that executed a WIFIA loan prior to May 14, 2022.

WIFIA staff will evaluate and communicate the applicability of this waiver for WIFIA Projects during the loan application and due diligence process. AIS requirements will still apply to these projects.

During application processing, WIFIA applicants may be asked to:

- ✓ Provide evidence of planning and design documents for the project elements included in the WIFIA loan to further evaluate the applicability of the WIFIA Program Waiver.
- ✓ Provide evidence of communication on BABA requirements to contractors and subcontractors. Although not statutorily required, applicants can easily achieve this by including notification in advertised bids and executed contracts. Sample contract language in the WIFIA specifications package is available for use by the borrower (see Resources below). **BABA requirements should be communicated to contractors and subcontractors for all projects subject to the**

requirement. However, also communicate in the contract language whether the WIFIA project is subject to the WIFIA Program Waiver so that contractors and subcontractors know if it is an approved pathway towards compliance for the project.

- ✓ If a project has not yet executed contracts, provide a plan for communication on BABA requirements to contractors and subcontractors.
- ✓ If a project has not yet executed contracts, provide a plan for communication on BABA requirements to contractors and subcontractors.

WIFIA borrowers are asked to periodically submit documentation to demonstrate continued compliance with the BABA requirement. Key borrower responsibilities for implementation include:

- ✓ Communicate BABA requirements to contractors and ensure contractors are communicating the requirements to its subcontractors. This is generally included in advertised bids and executed contracts that are a general reporting requirement of the loan and checked by WIFIA. If communication is not included in the contract documents, provide additional evidence that communication has taken place.
- ✓ Submit draft or executed prime construction contracts for WIFIA review to ensure that adequate compliance language is included. The WIFIA program does not generally review subcontracts unless there is cause for further review.
- ✓ Procure domestic products that will be permanently incorporated in the project. Communicate to the WIFIA program when products cannot be procured domestically to initiate the program's independent market review and determine whether there is a need for an availability waiver. Submit additional documentation, such as technical specifications and product information, to support the WIFIA program's review and approval process, as needed.
- ✓ Communicate to the WIFIA program if implementation of the BABA requirements results in project impacts for which a public interest waiver or cost waiver may be needed and provide supporting documentation demonstrating the need.
- ✓ Maintain up-to-date records or frequently check with prime contractors on BABA certifications for products purchased and installed on the project. This can help the borrower prevent non-compliant products from being permanently incorporated into the project and triggering a non-compliance event. **The key to borrower compliance is collecting adequate BABA documentation for installed products that are covered by the requirement.**
- ✓ Report any issue with noncompliance to the WIFIA program based on the borrower's review of purchased and installed products on contracts and subcontracts that must comply with the AIS requirement.

RESOURCES

- Office of Management and Budget, Made in America Office, [Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure](#), April 18, 2022

- U.S. EPA, Office of Water, [BABA Implementation Procedures Memo](#), November 3, 2022
- Approved BABA Waivers applicable to the WIFIA Program:
 - [WIFIA Program Waiver](#), June 22, 2022
 - [De Minimis General Applicability Waiver](#), October 21, 2022
 - *The WIFIA program will periodically update this waiver list as BABA requirements and implementation guidance evolve.*
- Sample Contract Language in [WIFIA Specifications Package](#)

PROHIBITION ON CERTAIN TELECOMMUNICATION AND VIDEO SURVEILLANCE SERVICES OR EQUIPMENT

In August 2018, the federal government enacted the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (Public Law, PL 115-232). Section 889(b)(1) of PL 115-232 prohibits an executive agency from obligating or expending loan or grant funds to procure or obtain or to enter into, extend, or renew a contract to procure or obtain “covered telecommunications equipment or services” that are substantial or essential to any system, or as critical technology to any system. Federal loan and grant programs are required to implement this requirement within two years of enactment.

“Covered telecommunications equipment or services” (PL 115-232, Section 889(f)(3)) include:

- Telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation (or any subsidiary or affiliate of such entities).
- For the purpose of public safety, security of government facilities, physical security surveillance of critical infrastructure, and other national security purposes, video surveillance and telecommunications equipment produced by Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology Company (or any subsidiary or affiliate of such entities).
- Telecommunications or video surveillance services provided by such entities or using such equipment.
- Telecommunications or video surveillance equipment or services produced or provided by an entity that the Secretary of Defense, in consultation with the Director of National Intelligence or the Director of the Federal Bureau of Investigation, reasonably believes to be an entity owned or controlled by, or otherwise connected to, the government of a covered foreign country.

The prohibition does not apply to:

- Procuring with an entity to provide a service that connects to the facilities of a third-party, such as backhaul, roaming, or interconnection arrangements.
- Telecommunications equipment that cannot route or redirect user data traffic or permit visibility into any user data or packets that such equipment transmits or otherwise handles.

Effective August 13, 2020, borrowers cannot submit these costs for WIFIA disbursement as they are no longer eligible costs and the WIFIA program, as a federal loan program, is prohibited from reimbursing for telecommunications equipment and services covered under this law.

WHAT TO EXPECT

To ensure compliance with this requirement, borrowers are asked to:

- ✓ Provide evidence of borrower communication to contractors and subcontractors of the need to comply with the prohibition. This is generally provided in bid advertisements and executed contracts. Although no specific contract language is required, sample contract language in the WIFIA specifications package is available for use by the borrower (see Resources below).
- ✓ Avoid procurement of “covered telecommunications equipment, services, and systems” on contracts that involve the use of federal funds. Access SAM to verify that entities providing telecommunications equipment, services, and systems on the WIFIA project are not listed on the

exclusion list.

RESOURCES

- [John S. McCain National Defense Authorization Act for Fiscal Year 2019](#) (PL 115-232)
- [System for Award Management \(SAM\)](#)
- Sample Contract Language in [WIFIA Specifications Package](#)

GENERAL GUIDANCE ON COMPLIANCE WITH FEDERAL REQUIREMENTS

The WIFIA program is committed to supporting its borrowers with complying with federal requirements. In any case of uncertainty with implementation, the WIFIA borrower should seek timely clarification and assistance by contacting their respective WIFIA points of contact.

- For general inquiries on federal requirements for the WIFIA program, email: wifia@epa.gov
- For borrowers processing their loan applications, email the WIFIA engineering or environmental contact assigned to the transaction.
- For borrowers with executed loans, email: wifia_portfolio@epa.gov

GUIDING PRINCIPLES FOR COMPLIANCE

Below are guiding principles to support the borrower in ensuring compliance with federal requirements:

UNDERSTAND THE FEDERAL REQUIREMENTS. Reading through this Borrower Guide is a good first step towards understanding the federal requirements that apply to WIFIA borrowers. These requirements are very similar to those that would apply to other federal funding programs. If there is borrower uncertainty on the WIFIA program's expectations for compliance, seek clarifications by contacting the borrower's respective WIFIA point of contact. Borrowers may find that developing a plan for compliance with federal requirements early in project planning can ensure that potential issues are identified and remedied early or are avoided entirely.

IDENTIFY AND COMMUNICATE EARLY. Defining lines of communications and decision-making roles is also important. WIFIA borrowers are responsible for ensuring compliance with federal requirements and should be the ultimate decision-maker for the project. As frequently noted in this guide, the WIFIA program expects borrowers to communicate federal requirements as part of bid solicitations and in executed contracts when WIFIA funding is anticipated. This is particularly beneficial for construction-related work to avoid the need to retroactively address federal requirements with contractors. Timely communication between the borrower and the WIFIA program, as well as between the borrower and its contractors/subs, can help avoid issues of non-compliance. Throughout the course of the WIFIA project, borrowers should not hesitate to communicate potential issues with compliance to the WIFIA program and collectively explore available options and remedies with them.

MAINTAIN GOOD DOCUMENTATION. Good documentation is key to compliance. If there is no evidence that the borrower has complied with federal requirements, the WIFIA program finds it difficult to verify that the borrower is compliant. The WIFIA program does not require any specific software for borrowers to document compliance. There is no single approach to recordkeeping, and it can be as simple or complex as is appropriate for the project.

Borrowers may want to consider the following when establishing recordkeeping procedures:

1. The borrower is responsible for checking and ensuring compliance for their contractors and subcontractors. Organize documents such that they are easy to internally review against federal requirements.

2. The WIFIA program periodically requests review of documents to ensure compliance. This may include document requests for contracts, environmental monitoring reports, AIS certifications for specific items, and certified payrolls and wage determinations. Although the WIFIA program's review may not be inclusive of all contracts and subcontracts, documents should be easy to locate during compliance monitoring activities.
3. Some federal requirements have a minimum duration for maintaining project records, including AIS and Davis-Bacon. Local and state requirements may be longer or shorter. Be aware of recordkeeping requirements to ensure recordkeeping requirements are fully met.

CO-FUNDING WITH OTHER FEDERAL AND STATE PROGRAMS

As a supplementary financing program, WIFIA borrowers may also receive funds from other federally financed programs.

Some of these programs may have overlapping federal requirements; however, each program will have a separate responsibility (and monitoring procedures) to ensure their borrowers comply with the federal requirements outlined for that program. To the extent possible and reasonable, the WIFIA program will work with other federal programs that are co-funding its borrowers to share information on federal compliance activities that may be relevant across the programs. For example, WIFIA borrowers may also receive funding from their SRF program for a project. To help gain efficiencies for both programs, the WIFIA program might coordinate environmental reviews where there are overlapping elements with the state environmental review process. The WIFIA program might also work collaboratively with the state SRF on AIS-related matters or with other federal agencies on BABA-related matters.

On the other hand, some of these federally financed programs may have similar but different requirements. WIFIA borrowers should evaluate these separate requirements in its entirety such that implementation will satisfy both sets of requirements. For example, WIFIA borrowers may also receive financing from the Department of Transportation, which may trigger Buy American requirements. AIS and Buy American requirements are separate and distinct. One does not replace the other. WIFIA borrowers will have to satisfy both these requirements.

STATE LAWS AND REGULATIONS

Federal and state laws and regulations do not replace each other. WIFIA borrowers should evaluate federal and state requirements in their entirety such that implementation will satisfy both sets of requirements. For example, the Davis-Bacon Act requires that laborers and mechanics are at least paid the federal prevailing wage laws. If the state prevailing wage law provides higher wages than the federal prevailing wage for the locality and for an equivalent labor category, then the use of the state prevailing wage for that locality and equivalent labor category can satisfy both federal and state prevailing wage law requirements for paid wages. However, the use of higher state wage rates does not preclude the WIFIA borrower from having to comply with other requirements under the Davis-Bacon Act.

PROFESSIONAL SERVICE CONTRACTS VS CONSTRUCTION CONTRACTS

All contracts issued for a project that is receiving a WIFIA loan are subject to a federal requirements review as part of the WIFIA program's compliance monitoring responsibilities. The review ensures that federal requirements are being communicated from borrower to contractors and from contractors to

subcontractors. During compliance monitoring, WIFIA targets this review on prime construction contracts as an initial assessment of the borrower's compliance; however, additional contracts may be requested if warranted.

Not all federal laws and regulations listed in this document apply to professional services contracts. In particular, contract language for American Iron and Steel requirements, Davis Bacon and Related Acts, and Equal Employment Opportunity (EEO), Executive Order 11246, do not apply to professional services contracts. On the other hand, professional services contracts do require reference to the economic and miscellaneous authorities listed in this document.

All contracts must abide by the civil rights and non-discrimination laws, whether they are referenced in contracts or not.

APPENDIX: WIFIA SPECIFICATION PACKAGE AND BID CONTRACT LANGUAGE

Last Updated: November 2022

This is a reference document that provides all necessary contract language for WIFIA funded projects. Please note that some of the contract language in this package is required and must be included verbatim and some is suggested. For *Suggested Contract Language*, you may use your own language so long as it still ensures that provisions are included to guarantee compliance with the federal requirements.

EPA MAKES NO CLAIMS REGARDING THE LEGALITY OF THE FEDERAL LANGUAGE PROVISIONS WITH RESPECT TO STATE OR LOCAL LAW.

ECONOMIC AND MISCELLANEOUS AUTHORITIES

DEBARMENT AND SUSPENSION AND PROHIBITIONS RELATING TO VIOLATIONS OF CWA AND CAA WITH RESPECT TO FEDERAL CONTRACTS, GRANTS, OR LOANS

Suggested Contract Language:

Debarment and Suspension. Contractor certifies that it will not knowingly enter into a contract with anyone who is ineligible under the 2 CFR part 180 and part 1532 (per Executive Order 12549, 51 FR 6370, February 21, 1986) or who is prohibited under Section 306 of the Clean Air Act or Section 508 of the Clean Water Act to participate in the [Project]. Suspension and debarment information can be accessed at <http://www.sam.gov>. Contractor represents and warrants that it has or will include a term or conditions requiring compliance with this provision in all of its subcontracts under this Agreement.

NEW RESTRICTIONS ON LOBBYING

Suggested Contract Language:

Federal Lobbying Restrictions (31 U.S.C 1352). Recipients of federal financial assistance may not pay any person for influencing or attempting to influence any officer or employee of a federal agency, a member of Congress, an officer or employee of Congress, or an employee of a member of Congress with respect to the award, continuation, renewal, amendment, or modification of a federal grant, loan, or contract. These requirements are implemented for USEPA in 40 CFR Part 34, which also describes types of activities, such as legislative liaison activities and professional and technical services, which are not subject to this prohibition. Upon award of this contract, Contractor shall complete and submit to the City the certification and disclosure forms in Appendix A and Appendix B to 40 CFR Part 34. Contractor shall also require all subcontractors and suppliers of any tier awarded a subcontract over \$100,000 to similarly complete and submit the certification and disclosure forms pursuant to the process set forth in 40 CFR 34.110.

CIVIL RIGHTS, NONDISCRIMINATION, AND EQUAL EMPLOYMENT OPPORTUNITY AUTHORITIES

AGE DISCRIMINATION ACT, SECTION 504 OF THE REHABILITATION ACT, TITLE VI OF THE CIVIL RIGHTS ACT OF 1964, AND SECTION 13 OF THE CLEAN WATER ACT

Suggested Contract Language:

CIVIL RIGHTS OBLIGATIONS. Contractor shall comply with the following federal non-discrimination requirements:

- a. Title VI of the Civil Rights Act of 1964, which prohibits discrimination based on race, color, and national origin, including limited English proficiency (LEP). (42 U.S.C 2000D, *et. seq*)
- b. Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination against persons with disabilities. (29 U.S.C. 794, supplemented by EO 11914, 41 FR 17871, April 29, 1976 and EO 11250, 30 FR 13003, October 13, 1965)
- c. The Age Discrimination Act of 1975, which prohibits age discrimination. (42 U.S.C 6101 *et. seq*)
- d. Section 13 of the Federal Water Pollution Control Act Amendments of 1972, which prohibits discrimination on the basis of sex.
- e. 40 CFR Part 7, as it relates to the foregoing.

EQUAL EMPLOYMENT OPPORTUNITY

Required Contract Language. *Note the requirements include three separate sections to include in contracts: EEO, Standard Federal Equal Employment Opportunity Construction Contract Specifications, and Segregated Facilities. This language must be included verbatim:*

Equal Employment Opportunity (EEO). The Contractor shall comply with Executive Order 11246, entitled 'Equal Employment Opportunity,' as amended by Executive Order 11375, and as supplemented in Department of Labor regulations (41 CFR Part 60). (EO 11246, 30 FR 12319, September 28, 1965)

Contractor's compliance with Executive order 11246 shall be based on implementation of the Equal Opportunity Clause, and specific affirmative active obligations required by the Standard Federal Equal Employment Opportunity Construction Contract Specifications, as set forth in 41 CFR Part 60-4.

During the performance of this contract, the contractor agrees as follows:

- 1) The contractor will not discriminate against any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity, or national origin. The contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, religion, sex, sexual orientation, gender identity, or national origin. Such action shall include, but not be limited to the following: employment, upgrading,

demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the contracting officer setting forth the provisions of this nondiscrimination clause.

- 2) The contractor will, in all solicitations or advancements for employees placed by or on behalf of the contractor, state that all qualified applicants will receive consideration for employment without regard to race, color, religion, sex, sexual orientation, gender identity, or national origin.
- 3) The contractor will not discharge or in any other manner discriminate against any employee or applicant for employment because such employee or applicant has inquired about, discussed, or disclosed the compensation of the employee or applicant or another employee or applicant. This provision shall not apply to instances in which an employee who has access to the compensation information of other employees or applicants as a part of such employee's essential job functions discloses the compensation of such other employees or applicants to individuals who do not otherwise have access to such information, unless such disclosure is in response to a formal complaint or charge, in furtherance of an investigation, proceeding, hearing, or action, including an investigation conducted by the employer, or is consistent with the contractor's legal duty to furnish information.
- 4) The contractor will send to each labor union or representative of workers with which he has a collective bargaining agreement or other contract or understanding, a notice, to be provided by the agency contracting officer, advising the labor union or workers' representative of the contractor's commitments under Section 202 of Executive Order No. 11246 of September 24, 1965, and shall post copies of the notice in conspicuous places available to employees and applicants for employment.
- 5) The contractor will comply with all provisions of Executive Order No. 11246 of Sept. 24, 1965, and of the rules, regulations, and relevant orders of the Secretary of Labor.
- 6) The contractor will furnish all information and reports required by Executive Order No. 11246 of September 24, 1965, and by the rules, regulations, and orders of the Secretary of Labor, or pursuant thereto, and will permit access to his books, records, and accounts by the contracting agency and the Secretary of Labor for purposes of investigation to ascertain compliance with such rules, regulations, and orders.
- 7) In the event of the contractor's noncompliance with the nondiscrimination clauses of this contract or with any of such rules, regulations, or orders, this contract may be cancelled, terminated, or suspended in whole or in part and the contractor may be declared ineligible for further Government contracts in accordance with procedures authorized in Executive Order No. 11246 of Sept. 24, 1965, and such other sanctions may be imposed and remedies invoked as provided in Executive Order No. 11246 of September 24, 1965, or by rule, regulation, or order of the Secretary of Labor, or as otherwise provided by law.
- 8) The contractor will include the provisions of paragraphs (1) through (8) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the Secretary of Labor issued pursuant to Section 204 of Executive Order No. 11246 of September 24, 1965, so that such provisions will be binding upon each subcontractor or vendor. The contractor will take such action with respect to any subcontract or purchase order as may be directed by the Secretary of Labor as a means of enforcing such provisions including sanctions for noncompliance: Provided, however, that in the event the contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor

as a result of such direction, the contractor may request the United States to enter into such litigation to protect the interests of the United States. [Sec. 202 amended by EO 11375 of Oct. 13, 1967, 32 FR 14303, 3 CFR, 1966–1970 Comp., p. 684, EO 12086 of Oct. 5, 1978, 43 FR 46501, 3 CFR, 1978 Comp., p. 230, EO 13665 of April 8, 2014, 79 FR 20749, EO 13672 of July 21, 2014, 79 FR 42971]

Standard Federal Equal Employment Opportunity Construction Contract Specifications. (41 CFR 60-4.3)

- 1) As used in these specifications:
 - a) “Covered area” means the geographical area described in the solicitation from which this contract resulted;
 - b) “Director” means Director, Office of Federal Contract Compliance Programs, United States Department of Labor, or any person to whom the Director delegates authority;
 - c) “Employer identification number” means the Federal Social Security number used on the Employer's Quarterly Federal Tax Return, U.S. Treasury Department Form 941.
 - d) “Minority” includes:
 - i) Black (all persons having origins in any of the Black African racial groups not of Hispanic origin);
 - ii) Hispanic (all persons of Mexican, Puerto Rican, Cuban, Central or South American or other Spanish Culture or origin, regardless of race);
 - iii) Asian and Pacific Islander (all persons having origins in any of the original peoples of the Far East, Southeast Asia, the Indian Subcontinent, or the Pacific Islands); and
 - iv) American Indian or Alaskan Native (all persons having origins in any of the original peoples of North America and maintaining identifiable tribal affiliations through membership and participation or community identification).
- 2) Whenever the Contractor, or any Subcontractor at any tier, subcontracts a portion of the work involving any construction trade, it shall physically include in each subcontract in excess of \$10,000 the provisions of these specifications and the Notice which contains the applicable goals for minority and female participation and which is set forth in the solicitations from which this contract resulted.
- 3) If the Contractor is participating (pursuant to 41 CFR 60-4.5) in a Hometown Plan approved by the U.S. Department of Labor in the covered area either individually or through an association, its affirmative action obligations on all work in the Plan area (including goals and timetables) shall be in accordance with that Plan for those trades which have unions participating in the Plan. Contractors must be able to demonstrate their participation in and compliance with the provisions of any such Hometown Plan. Each Contractor or Subcontractor participating in an approved Plan is individually required to comply with its obligations under the EEO clause, and to make a good faith effort to achieve each goal under the Plan in each trade in which it has employees. The overall good faith performance by other Contractors or Subcontractors toward a goal in an approved Plan does not excuse any covered Contractor's or Subcontractor's failure to take good faith efforts to achieve the Plan goals and timetables.
- 4) The Contractor shall implement the specific affirmative action standards provided in paragraphs 7 a through p of these specifications. The goals set forth in the solicitation from which this contract resulted are expressed as percentages of the total hours of employment and training of minority and

female utilization the Contractor should reasonably be able to achieve in each construction trade in which it has employees in the covered area. Covered Construction contractors performing construction work in geographical areas where they do not have a Federal or federally assisted construction contract shall apply the minority and female goals established for the geographical area where the work is being performed. Goals are published periodically in the Federal Register in notice form, and such notices may be obtained from any Office of Federal Contract Compliance Programs office or from Federal procurement contracting officers. The Contractor is expected to make substantially uniform progress in meeting its goals in each craft during the period specified.

- 5) Neither the provisions of any collective bargaining agreement, nor the failure by a union with whom the Contractor has a collective bargaining agreement, to refer either minorities or women shall excuse the Contractor's obligations under these specifications, Executive Order 11246, or the regulations promulgated pursuant thereto.
- 6) In order for the nonworking training hours of apprentices and trainees to be counted in meeting the goals, such apprentices and trainees must be employed by the Contractor during the training period, and the Contractor must have made a commitment to employ the apprentices and trainees at the completion of their training, subject to the availability of employment opportunities. Trainees must be trained pursuant to training programs approved by the U.S. Department of Labor.
- 7) The Contractor shall take specific affirmative actions to ensure equal employment opportunity. The evaluation of the Contractor's compliance with these specifications shall be based upon its effort to achieve maximum results from its actions. The Contractor shall document these efforts fully, and shall implement affirmative action steps at least as extensive as the following:
 - a) Ensure and maintain a working environment free of harassment, intimidation, and coercion at all sites, and in all facilities at which the Contractor's employees are assigned to work. The Contractor, where possible, will assign two or more women to each construction project. The Contractor shall specifically ensure that all foremen, superintendents, and other on-site supervisory personnel are aware of and carry out the Contractor's obligation to maintain such a working environment, with specific attention to minority or female individuals working at such sites or in such facilities.
 - b) Establish and maintain a current list of minority and female recruitment sources, provide written notification to minority and female recruitment sources and to community organizations when the Contractor or its unions have employment opportunities available, and maintain a record of the organizations' responses.
 - c) Maintain a current file of the names, addresses and telephone numbers of each minority and female off-the-street applicant and minority or female referral from a union, a recruitment source or community organization and of what action was taken with respect to each such individual. If such individual was sent to the union hiring hall for referral and was not referred back to the Contractor by the union or, if referred, not employed by the Contractor, this shall be documented in the file with the reason therefor, along with whatever additional actions the Contractor may have taken.
 - d) Provide immediate written notification to the Director when the union or unions with which the Contractor has a collective bargaining agreement has not referred to the Contractor a minority person or woman sent by the Contractor, or when the Contractor has other information that the

union referral process has impeded the Contractor's efforts to meet its obligations.

- e) Develop on-the-job training opportunities and/or participate in training programs for the area which expressly include minorities and women, including upgrading programs and apprenticeship and trainee programs relevant to the Contractor's employment needs, especially those programs funded or approved by the Department of Labor. The Contractor shall provide notice of these programs to the sources compiled under 7b above.
- f) Disseminate the Contractor's EEO policy by providing notice of the policy to unions and training programs and requesting their cooperation in assisting the Contractor in meeting its EEO obligations; by including it in any policy manual and collective bargaining agreement; by publicizing it in the company newspaper, annual report, etc.; by specific review of the policy with all management personnel and with all minority and female employees at least once a year; and by posting the company EEO policy on bulletin boards accessible to all employees at each location where construction work is performed.
- g) Review, at least annually, the company's EEO policy and affirmative action obligations under these specifications with all employees having any responsibility for hiring, assignment, layoff, termination or other employment decisions including specific review of these items with onsite supervisory personnel such as Superintendents, General Foremen, etc., prior to the initiation of construction work at any job site. A written record shall be made and maintained identifying the time and place of these meetings, persons attending, subject matter discussed, and disposition of the subject matter.
- h) Disseminate the Contractor's EEO policy externally by including it in any advertising in the news media, specifically including minority and female news media, and providing written notification to and discussing the Contractor's EEO policy with other Contractors and Subcontractors with whom the Contractor does or anticipates doing business.
- i) Direct its recruitment efforts, both oral and written, to minority, female and community organizations, to schools with minority and female students and to minority and female recruitment and training organizations serving the Contractor's recruitment area and employment needs. Not later than one month prior to the date for the acceptance of applications for apprenticeship or other training by any recruitment source, the Contractor shall send written notification to organizations such as the above, describing the openings, screening procedures, and tests to be used in the selection process.
- j) Encourage present minority and female employees to recruit other minority persons and women and, where reasonable, provide after school, summer and vacation employment to minority and female youth both on the site and in other areas of a Contractor's work force.
- k) Validate all tests and other selection requirements where there is an obligation to do so under 41 CFR part 60-3.
- l) Conduct, at least annually, an inventory and evaluation at least of all minority and female personnel for promotional opportunities and encourage these employees to seek or to prepare for, through appropriate training, etc., such opportunities.
- m) Ensure that seniority practices, job classifications, work assignments and other personnel practices, do not have a discriminatory effect by continually monitoring all personnel and employment related activities to ensure that the EEO policy and the Contractor's obligations

under these specifications are being carried out.

- n) Ensure that all facilities and company activities are non-segregated except that separate or single-user toilet and necessary changing facilities shall be provided to assure privacy between the sexes.
 - o) Document and maintain a record of all solicitations of offers for subcontracts from minority and female construction contractors and suppliers, including circulation of solicitations to minority and female contractor associations and other business associations.
 - p) Conduct a review, at least annually, of all supervisors' adherence to and performance under the Contractor's EEO policies and affirmative action obligations.
- 8) Contractors are encouraged to participate in voluntary associations which assist in fulfilling one or more of their affirmative action obligations (7a through p). The efforts of a contractor association, joint contractor-union, contractor-community, or other similar group of which the contractor is a member and participant, may be asserted as fulfilling any one or more of its obligations under 7a through p of these Specifications provided that the contractor actively participates in the group, makes every effort to assure that the group has a positive impact on the employment of minorities and women in the industry, ensures that the concrete benefits of the program are reflected in the Contractor's minority and female workforce participation, makes a good faith effort to meet its individual goals and timetables, and can provide access to documentation which demonstrates the effectiveness of actions taken on behalf of the Contractor. The obligation to comply, however, is the Contractor's and failure of such a group to fulfill an obligation shall not be a defense for the Contractor's noncompliance.
- 9) A single goal for minorities and a separate single goal for women have been established. The Contractor, however, is required to provide equal employment opportunity and to take affirmative action for all minority groups, both male and female, and all women, both minority and non-minority. Consequently, the Contractor may be in violation of the Executive Order if a particular group is employed in a substantially disparate manner (for example, even though the Contractor has achieved its goals for women generally, the Contractor may be in violation of the Executive Order if a specific minority group of women is underutilized).
- 10) The Contractor shall not use the goals and timetables or affirmative action standards to discriminate against any person because of race, color, religion, sex, sexual orientation, gender identity, or national origin.
- 11) The Contractor shall not enter into any Subcontract with any person or firm debarred from Government contracts pursuant to Executive Order 11246.
- 12) The Contractor shall carry out such sanctions and penalties for violation of these specifications and of the Equal Opportunity Clause, including suspension, termination and cancellation of existing subcontracts as may be imposed or ordered pursuant to Executive Order 11246, as amended, and its implementing regulations, by the Office of Federal Contract Compliance Programs. Any Contractor who fails to carry out such sanctions and penalties shall be in violation of these specifications and Executive Order 11246, as amended.
- 13) The Contractor, in fulfilling its obligations under these specifications, shall implement specific affirmative action steps, at least as extensive as those standards prescribed in paragraph 7 of these specifications, so as to achieve maximum results from its efforts to ensure equal employment opportunity. If the Contractor fails to comply with the requirements of the Executive Order, the

implementing regulations, or these specifications, the Director shall proceed in accordance with 41 CFR 60-4.8.

- 14) The Contractor shall designate a responsible official to monitor all employment related activity to ensure that the company EEO policy is being carried out, to submit reports relating to the provisions hereof as may be required by the Government and to keep records. Records shall at least include for each employee the name, address, telephone numbers, construction trade, union affiliation if any, employee identification number when assigned, social security number, race, sex, status (e.g., mechanic, apprentice trainee, helper, or laborer), dates of changes in status, hours worked per week in the indicated trade, rate of pay, and locations at which the work was performed. Records shall be maintained in an easily understandable and retrievable form; however, to the degree that existing records satisfy this requirement, contractors shall not be required to maintain separate records.
- 15) Nothing herein provided shall be construed as a limitation upon the application of other laws which establish different standards of compliance or upon the application of requirements for the hiring of local or other area residents (e.g., those under the Public Works Employment Act of 1977 and the Community Development Block Grant Program).

Segregated Facilities. (41 CFR 60-1.8) The contractor must ensure that facilities provided for employees are provided in such a manner that segregation on the basis of race, color, religion, sex, sexual orientation, gender identity, or national origin cannot result. The contractor may neither require such segregated use by written or oral policies nor tolerate such use by employee custom. The contractor's obligation extends further to ensuring that its employees are not assigned to perform their services at any location, under the contractor's control, where the facilities are segregated. This obligation extends to all contracts containing the equal opportunity clause regardless of the amount of the contract. The term "facilities," as used in this section, means waiting rooms, work areas, restaurants and other eating areas, time clocks, restrooms, wash rooms, locker rooms, and other storage or dressing areas, parking lots, drinking fountains, recreation or entertainment areas, transportation, and housing provided for employees; Provided, That separate or single-user restrooms and necessary dressing or sleeping areas shall be provided to assure privacy between the sexes.

Required EEO language in bid solicitations only (or equivalent). Goals for minority participation must be filled in for the locality of work.

Notice of Requirement for Affirmative Action to Ensure Equal Employment Opportunity (Executive Order 11246) located at 41 CFR § 60-4.2:

1. The Offeror's or Bidder's attention is called to the "Equal Opportunity Clause" and the "Standard Federal Equal Employment Specifications" set forth herein.
2. The goals and timetables for minority and female participation, expressed in percentage terms for the Contractor's aggregate workforce in each trade on all construction work in the covered area, are as follows:

Timetables	Goals for minority participation for each trade	Goals for female participation in each trade
	Insert goals for each year ²	6.9% ³

These goals are applicable to all the Contractor's construction work (whether or not it is Federal or federally assisted) performed in the covered area. If the contractor performs construction work in a geographical area located outside of the covered area, it shall apply the goals established for such geographical area where the work is actually performed. With regard to this second area, the contractor also is subject to the goals for both its federally involved and non-federally involved construction.

The Contractor's compliance with the Executive Order and the regulations in 41 CFR part 60-4 shall be based on its implementation of the Equal Opportunity Clause, specific affirmative action obligations required by the specifications set forth in 41 CFR 60-4.3(a), and its efforts to meet the goals. The hours of minority and female employment and training must be substantially uniform throughout the length of the contract, and in each trade, and the contractor shall make a good faith effort to employ minorities and women evenly on each of its projects. The transfer of minority or female employees or trainees from Contractor to Contractor or from project to project for the sole purpose of meeting the Contractor's goals shall be a violation of the contract, the Executive Order and the regulations in 41 CFR part 60-4. Compliance with the goals will be measured against the total work hours performed.

3. The Contractor shall provide written notification to the Director of the Office of Federal Contract Compliance Programs within 10 working days of award of any construction subcontract in excess of \$10,000 at any tier for construction work under the contract resulting from this solicitation. The notification shall list the name, address and telephone number of the subcontractor; employer identification number of the subcontractor; estimated dollar amount of the subcontract; estimated starting and completion dates of the subcontract; and the geographical area in which the subcontract is to be performed.
4. As used in this Notice, and in the contract resulting from this solicitation, the "covered area" is (insert description of the geographical areas where the contract is to be performed giving the state, county and city, if any).

² Goals can be found at: <https://www.dol.gov/agencies/ofccp/construction>

³ Nationwide goal for all covered areas

PARTICIPATION BY DISADVANTAGED BUSINESS ENTERPRISES IN PROCUREMENT UNDER EPA FINANCIAL ASSISTANCE AGREEMENTS

Note: The WIFIA program only requires use of the EPA DBE program's six good faith efforts during contract procurement. States may require additional DBE reporting.

Suggested Contract Language:

Disadvantaged Business Enterprises (DBE). The contractor must ensure that the DBE's six good faith efforts are used during the procurement of subcontractors for the [Project]. The six good faith efforts are found at: <https://www.epa.gov/grants/disadvantaged-business-enterprise-program-requirements#sixgoodfaithefforts>.

AMERICAN IRON AND STEEL (AIS) REQUIREMENT

Suggested Contract Language:

The Contractor acknowledges to and for the benefit of **[Insert WIFIA Borrower Name]** (“Purchaser”) and the United States Environmental Protection Agency (“EPA”) that it understands the goods and services under this Agreement are being funded with monies made available by the Water Infrastructure Finance and Innovation Act program of the EPA that has statutory requirements commonly known as “American Iron and Steel” that requires all of the iron and steel products used in the project to be produced in the United States (“American Iron and Steel Requirement”) including iron and steel products provided by the Contractor pursuant to this Agreement. The Contractor hereby represents, warrants and covenants to and for the benefit of the Purchaser and the EPA that (a) the Contractor has reviewed and understands the American Iron and Steel Requirement, (b) all of the iron and steel products used in the project will be and/or have been produced in the United States in a manner that complies with the American Iron and Steel Requirement, unless a waiver of the requirement is approved, and (c) the Contractor will provide any further verified information, certification or assurance of compliance with this paragraph, or information necessary to support a waiver of the American Iron and Steel Requirement, as may be requested by the Purchaser or the EPA. Notwithstanding any other provision of this Agreement, any failure to comply with this paragraph by the Contractor shall permit the Purchaser or the EPA to recover as damages against the Contractor any loss, expense, or cost (including without limitation attorney’s fees) incurred by the Purchaser or the EPA resulting from any such failure (including without limitation any impairment or loss of funding, whether in whole or in part, from the EPA or any damages owed to the EPA by the Purchaser). While the Contractor has no direct contractual privity with the EPA, as a lender to the Purchaser for the funding of its project, the Purchaser and the Contractor agree that the EPA is a third-party beneficiary and neither this paragraph (nor any other provision of this Agreement necessary to give this paragraph force or effect) shall be amended or waived without the prior written consent of the EPA.

LABOR LAWS AND STANDARDS

Note that the language below addresses Davis Bacon and Related Acts and incorporates the WIFIA borrower as an authorized representative, in accordance with the WIFIA loan agreement, to ensure compliance with this federal requirement.

Required Contract Language.

Compliance with Davis-Bacon and Related Acts.

(a) In any contract in excess of \$2,000 which is entered into for the actual construction, alteration and/or repair, including painting and decorating, of a public building or public work, or building or work financed in whole or in part from Federal funds or in accordance with guarantees of a Federal agency or financed from funds obtained by pledge of any contract of a Federal agency to make a loan, grant or annual contribution (except where a different meaning is expressly indicated), and which is subject to the labor standards provisions of any of the acts listed in 29 C.F.R. § 5.1, the following clauses (or any modifications thereof to meet the particular needs of the agency, provided that such modifications are first approved by the Department of Labor):

(1) Minimum wages.

(i) All laborers and mechanics employed or working upon the site of the work (or under the United States Housing Act of 1937 or under the Housing Act of 1949 in the construction or development of the project), will be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by regulations issued by the Secretary of Labor under the Copeland Act (29 CFR part 3)), the full amount of wages and bona fide fringe benefits (or cash equivalents thereof) due at time of payment computed at rates not less than those contained in the wage determination of the Secretary of Labor which is attached hereto and made a part hereof, regardless of any contractual relationship which may be alleged to exist between the contractor and such laborers and mechanics. Contributions made or costs reasonably anticipated for bona fide fringe benefits under section 1(b)(2) of the Davis-Bacon Act on behalf of laborers or mechanics are considered wages paid to such laborers or mechanics, subject to the provisions of paragraph (a)(1)(iv) of this section; also, regular contributions made or costs incurred for more than a weekly period (but not less often than quarterly) under plans, funds, or programs which cover the particular weekly period, are deemed to be constructively made or incurred during such weekly period. Such laborers and mechanics shall be paid the appropriate wage rate and fringe benefits on the wage determination for the classification of work actually performed, without regard to skill, except as provided in § 5.5(a)(4). Laborers or mechanics performing work in more than one classification may be compensated at the rate specified for each classification for the time actually worked therein: Provided that the employer's payroll records accurately set forth the time spent in each classification in which work is performed. The wage determination (including any additional classification and wage rates conformed under paragraph (a)(1)(ii) of this section) and the Davis-Bacon poster (WH-1321) shall be posted at all times by the contractor and its

subcontractors at the site of the work in a prominent and accessible place where it can be easily seen by the workers.

(ii)

(A) The WIFIA assistance recipient, [name of WIFIA borrower], on behalf of the U.S. Environmental Protection Agency (EPA), shall require that any class of laborers or mechanics, including helpers, which is not listed in the wage determination and which is to be employed under the contract shall be classified in conformance with the wage determination. The WIFIA assistance recipient shall approve an additional classification and wage rate and fringe benefits therefore only when the following criteria have been met:

(1) The work to be performed by the classification requested is not performed by a classification in the wage determination; and

(2) The classification is utilized in the area by the construction industry; and

(3) The proposed wage rate, including any bona fide fringe benefits, bears a reasonable relationship to the wage rates contained in the wage determination.

(B) If the contractor and the laborers and mechanics to be employed in the classification (if known), or their representatives, and the WIFIA assistance recipient agree on the classification and wage rate (including the amount designated for fringe benefits where appropriate), a report of the action taken shall be sent to the Administrator of the Wage and Hour Division (WHD Administrator), U.S. Department of Labor, Washington, DC 20210. The WHD Administrator, or an authorized representative, will approve, modify, or disapprove every additional classification action within 30 days of receipt and so advise the WIFIA assistance recipient or will notify the WIFIA assistance recipient within the 30-day period that additional time is necessary.

(C) In the event the contractor, the laborers or mechanics to be employed in the classification or their representatives, and the WIFIA assistance recipient do not agree on the proposed classification and wage rate (including the amount designated for fringe benefits, where appropriate), the WIFIA assistance recipient shall refer the questions, including the views of all interested parties and the recommendation of the WIFIA assistance recipient, to the WHD Administrator for determination. The WHD Administrator, or an authorized representative, will issue a determination within 30 days of receipt and so advise the WIFIA assistance recipient or will notify the WIFIA assistance recipient within the 30-day period that additional time is necessary.

(D) The wage rate (including fringe benefits where appropriate) determined pursuant to paragraphs (a)(1)(ii) (B) or (C) of this section, shall be paid to all workers performing work in the classification under this contract from the first day on which work is performed in the classification.

(iii) Whenever the minimum wage rate prescribed in the contract for a class of laborers or mechanics includes a fringe benefit which is not expressed as an hourly rate, the contractor shall either pay the benefit as stated in the wage determination or shall pay another bona fide fringe benefit or an hourly cash equivalent thereof.

(iv) If the contractor does not make payments to a trustee or other third person, the contractor

may consider as part of the wages of any laborer or mechanic the amount of any costs reasonably anticipated in providing bona fide fringe benefits under a plan or program, Provided, That the Secretary of Labor has found, upon the written request of the contractor, that the applicable standards of the Davis-Bacon Act have been met. The Secretary of Labor may require the contractor to set aside in a separate account assets for the meeting of obligations under the plan or program.

(2) Withholding. [name of WIFIA borrower], shall upon written request of the WIFIA Director or an authorized representative of the Department of Labor withhold or cause to be withheld from the contractor under this contract or any other Federal contract with the same prime contractor, or any other federally-assisted contract subject to Davis-Bacon prevailing wage requirements, which is held by the same prime contractor, so much of the accrued payments or advances as may be considered necessary to pay laborers and mechanics, including apprentices, trainees, and helpers, employed by the contractor or any subcontractor the full amount of wages required by the contract. In the event of failure to pay any laborer or mechanic, including any apprentice, trainee, or helper, employed or working on the site of the work (or under the United States Housing Act of 1937 or under the Housing Act of 1949 in the construction or development of the project), all or part of the wages required by the contract, the WIFIA Director may, after written notice to the contractor, sponsor, applicant, or owner, take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds until such violations have ceased.

(3) Payrolls and basic records.

(i) Payrolls and basic records relating thereto shall be maintained by the contractor during the course of the work and preserved for a period of three years thereafter for all laborers and mechanics working at the site of the work (or under the United States Housing Act of 1937, or under the Housing Act of 1949, in the construction or development of the project). Such records shall contain the name, address, and social security number of each such worker, his or her correct classification, hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents thereof of the types described in section 1(b)(2)(B) of the Davis-Bacon Act), daily and weekly number of hours worked, deductions made and actual wages paid. Whenever the Secretary of Labor has found under 29 CFR 5.5(a)(1)(iv) that the wages of any laborer or mechanic include the amount of any costs reasonably anticipated in providing benefits under a plan or program described in section 1(b)(2)(B) of the Davis-Bacon Act, the contractor shall maintain records which show that the commitment to provide such benefits is enforceable, that the plan or program is financially responsible, and that the plan or program has been communicated in writing to the laborers or mechanics affected, and records which show the costs anticipated or the actual cost incurred in providing such benefits. Contractors employing apprentices or trainees under approved programs shall maintain written evidence of the registration of apprenticeship programs and certification of trainee programs, the registration of the apprentices and trainees, and the ratios and wage rates prescribed in the applicable programs.

(ii) {no text here}

- (A) The contractor shall submit weekly for each week in which any contract work is performed a copy of all payrolls to [name of WIFIA borrower] . The payrolls submitted shall set out accurately and completely all of the information required to be maintained under 29 CFR 5.5(a)(3)(i), except that full social security numbers and home addresses shall not be included on weekly transmittals. Instead the payrolls shall only need to include an individually identifying number for each employee (e.g., the last four digits of the employee's social security number). The required weekly payroll information may be submitted in any form desired. Optional Form WH-347 is available for this purpose from the Wage and Hour Division Web site at <https://www.dol.gov/agencies/whd/forms/wh347> or its successor site. The prime contractor is responsible for the submission of copies of payrolls by all subcontractors. Contractors and subcontractors shall maintain the full social security number and current address of each covered worker, and shall provide them upon request to [name of WIFIA borrower], for transmission to the EPA, the contractor, or the Wage and Hour Division of the Department of Labor for purposes of an investigation or audit of compliance with prevailing wage requirements. It is not a violation of this section for a prime contractor to require a subcontractor to provide addresses and social security numbers to the prime contractor for its own records, without weekly submission to [name of WIFIA borrower]).
- (B) Each payroll submitted shall be accompanied by a "Statement of Compliance," signed by the contractor or subcontractor or his or her agent who pays or supervises the payment of the persons employed under the contract and shall certify the following:
- (1) That the payroll for the payroll period contains the information required to be provided under § 5.5 (a)(3)(ii) of Regulations, 29 CFR part 5, the appropriate information is being maintained under § 5.5 (a)(3)(i) of Regulations, 29 CFR part 5, and that such information is correct and complete;
 - (2) That each laborer or mechanic (including each helper, apprentice, and trainee) employed on the contract during the payroll period has been paid the full weekly wages earned, without rebate, either directly or indirectly, and that no deductions have been made either directly or indirectly from the full wages earned, other than permissible deductions as set forth in Regulations, 29 CFR part 3;
 - (3) That each laborer or mechanic has been paid not less than the applicable wage rates and fringe benefits or cash equivalents for the classification of work performed, as specified in the applicable wage determination incorporated into the contract.
- (C) The weekly submission of a properly executed certification set forth on the reverse side of Optional Form WH-347 shall satisfy the requirement for submission of the "Statement of Compliance" required by paragraph (a)(3)(ii)(B) of this section.
- (D) The falsification of any of the above certifications may subject the contractor or subcontractor to civil or criminal prosecution under section 1001 of title 18 and section 231 of title 31 of the United States Code.
- (iii) The contractor or subcontractor shall make the records required under paragraph (a)(3)(i) of this section available for inspection, copying, or transcription by authorized representatives of [name of the borrower, EPA, or the Department of Labor, and shall permit such

representatives to interview employees during working hours on the job. If the contractor or subcontractor fails to submit the required records or to make them available, the EPA may, after written notice to the [name of WIFIA borrower], take such action as may be necessary to cause the suspension of any further payment, advance, or guarantee of funds. Furthermore, failure to submit the required records upon request or to make such records available may be grounds for debarment action pursuant to 29 CFR 5.12.

(4) Apprentices and trainees –

- (i) Apprentices. Apprentices will be permitted to work at less than the predetermined rate for the work they performed when they are employed pursuant to and individually registered in a bona fide apprenticeship program registered with the U.S. Department of Labor, Employment and Training Administration, Office of Apprenticeship Training, Employer and Labor Services, or with a State Apprenticeship Agency recognized by the Office, or if a person is employed in his or her first 90 days of probationary employment as an apprentice in such an apprenticeship program, who is not individually registered in the program, but who has been certified by the Office of Apprenticeship Training, Employer and Labor Services or a State Apprenticeship Agency (where appropriate) to be eligible for probationary employment as an apprentice. The allowable ratio of apprentices to journeymen on the job site in any craft classification shall not be greater than the ratio permitted to the contractor as to the entire work force under the registered program. Any worker listed on a payroll at an apprentice wage rate, who is not registered or otherwise employed as stated above, shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any apprentice performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed. Where a contractor is performing construction on a project in a locality other than that in which its program is registered, the ratios and wage rates (expressed in percentages of the journeyman's hourly rate) specified in the contractor's or subcontractor's registered program shall be observed. Every apprentice must be paid at not less than the rate specified in the registered program for the apprentice's level of progress, expressed as a percentage of the journeymen hourly rate specified in the applicable wage determination. Apprentices shall be paid fringe benefits in accordance with the provisions of the apprenticeship program. If the apprenticeship program does not specify fringe benefits, apprentices must be paid the full amount of fringe benefits listed on the wage determination for the applicable classification. If the WHD Administrator determines that a different practice prevails for the applicable apprentice classification, fringes shall be paid in accordance with that determination. In the event the Office of Apprenticeship Training, Employer and Labor Services, or a State Apprenticeship Agency recognized by the Office, withdraws approval of an apprenticeship program, the contractor will no longer be permitted to utilize apprentices at less than the applicable predetermined rate for the work performed until an acceptable program is approved.
- (ii) Trainees. Except as provided in 29 CFR 5.16, trainees will not be permitted to work at less than the predetermined rate for the work performed unless they are employed pursuant to

and individually registered in a program which has received prior approval, evidenced by formal certification by the U.S. Department of Labor, Employment and Training Administration. The ratio of trainees to journeymen on the job site shall not be greater than permitted under the plan approved by the Employment and Training Administration. Every trainee must be paid at not less than the rate specified in the approved program for the trainee's level of progress, expressed as a percentage of the journeyman hourly rate specified in the applicable wage determination. Trainees shall be paid fringe benefits in accordance with the provisions of the trainee program. If the trainee program does not mention fringe benefits, trainees shall be paid the full amount of fringe benefits listed on the wage determination unless the WHD Administrator determines that there is an apprenticeship program associated with the corresponding journeyman wage rate on the wage determination which provides for less than full fringe benefits for apprentices. Any employee listed on the payroll at a trainee rate who is not registered and participating in a training plan approved by the Employment and Training Administration shall be paid not less than the applicable wage rate on the wage determination for the classification of work actually performed. In addition, any trainee performing work on the job site in excess of the ratio permitted under the registered program shall be paid not less than the applicable wage rate on the wage determination for the work actually performed. In the event the Employment and Training Administration withdraws approval of a training program, the contractor will no longer be permitted to utilize trainees at less than the applicable predetermined rate for the work performed until an acceptable program is approved.

(iii) Equal employment opportunity. The utilization of apprentices, trainees and journeymen under this part shall be in conformity with the equal employment opportunity requirements of Executive Order 11246, as amended, and 29 CFR part 30.

- (5) Compliance with Copeland Act requirements. The contractor shall comply with the requirements of 29 CFR part 3, which are incorporated by reference in this contract.
- (6) Subcontracts. The contractor or subcontractor shall insert in any subcontracts the clauses contained in 29 CFR 5.5(a)(1) through (10) and such other clauses as the EPA may by appropriate instructions require, and also a clause requiring the subcontractors to include these clauses in any lower tier subcontracts. The prime contractor shall be responsible for the compliance by any subcontractor or lower tier subcontractor with all the contract clauses in 29 CFR 5.5.
- (7) Contract termination: debarment. A breach of the contract clauses in 29 CFR 5.5 may be grounds for termination of the contract, and for debarment as a contractor and a subcontractor as provided in 29 CFR 5.12.
- (8) Compliance with Davis-Bacon and Related Act requirements. All rulings and interpretations of the Davis-Bacon and Related Acts contained in 29 CFR parts 1, 3, and 5 are herein incorporated by reference in this contract.
- (9) Disputes concerning labor standards. Disputes arising out of the labor standards provisions of this contract shall not be subject to the general disputes clause of this contract. Such disputes shall be resolved in accordance with the procedures of the Department of Labor set forth in 29 CFR parts 5, 6, and 7. Disputes within the meaning of this clause include disputes between the contractor (or any of its subcontractors) and [name of WIFIA borrower], EPA, the U.S.

Department of Labor, or the employees or their representatives. (10) Certification of eligibility.

- (i) By entering into this contract, the contractor certifies that neither it (nor he or she) nor any person or firm who has an interest in the contractor's firm is a person or firm ineligible to be awarded Government contracts by virtue of section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1).
- (ii) No part of this contract shall be subcontracted to any person or firm ineligible for award of a Government contract by virtue of section 3(a) of the Davis-Bacon Act or 29 CFR 5.12(a)(1).
- (iii) The penalty for making false statements is prescribed in the U.S. Criminal Code, 18 U.S.C. 1001.

(b) Contract Work Hours and Safety Standards Act. The following clauses set forth in paragraphs (b)(1), (2), (3), and (4) of this section shall be inserted in full in any contract in an amount in excess of \$100,000 and subject to the overtime provisions of the Contract Work Hours and Safety Standards Act. These clauses shall be inserted in addition to the clauses required by § 5.5(a) or § 4.6 of part 4 of this title. As used in this paragraph, the terms laborers and mechanics include watchmen and guards.

- (1) Overtime requirements. No contractor or subcontractor contracting for any part of the contract work which may require or involve the employment of laborers or mechanics shall require or permit any such laborer or mechanic in any workweek in which he or she is employed on such work to work in excess of forty hours in such workweek unless such laborer or mechanic receives compensation at a rate not less than one and one-half times the basic rate of pay for all hours worked in excess of forty hours in such workweek.
- (2) Violation; liability for unpaid wages; liquidated damages. In the event of any violation of the clause set forth in paragraph (b)(1) of this section the contractor and any subcontractor responsible therefor shall be liable for the unpaid wages. In addition, such contractor and subcontractor shall be liable to the United States (in the case of work done under contract for the District of Columbia or a territory, to such District or to such territory), for liquidated damages. Such liquidated damages shall be computed with respect to each individual laborer or mechanic, including watchmen and guards, employed in violation of the clause set forth in paragraph (b)(1) of this section, in the sum of \$25 for each calendar day on which such individual was required or permitted to work in excess of the standard workweek of forty hours without payment of the overtime wages required by the clause set forth in paragraph (b)(1) of this section.
- (3) Withholding for unpaid wages and liquidated damages. The [name of WIFIA borrower] shall upon its own action or upon written request of an authorized representative of the Department of Labor, or the EPA, withhold or cause to be withheld, from any moneys payable on account of work performed by the contractor or subcontractor under any such contract or any other Federal contract with the same prime contractor, or any other federally-assisted contract subject to the Contract Work Hours and Safety Standards Act, which is held by the same prime contractor, such sums as may be determined to be necessary to satisfy any liabilities of such contractor or subcontractor for unpaid wages and liquidated damages as provided in the clause set forth in paragraph (b)(2) of this section.
- (4) Subcontracts. The contractor or subcontractor shall insert in any subcontracts the clauses set forth in paragraph (b)(1) through (4) of this section and also a clause requiring the subcontractors

to include these clauses in any lower tier subcontracts. The prime contractor shall be responsible for compliance by any subcontractor or lower tier subcontractor with the clauses set forth in paragraphs (b)(1) through (4) of this section.

(c) In addition to the clauses contained in paragraph (b), in any contract subject only to the Contract Work Hours and Safety Standards Act and not to any of the other statutes cited in § 5.1, the contractor or subcontractor shall maintain payrolls and basic payroll records during the course of the work and shall preserve them for a period of three years from the completion of the contract for all laborers and mechanics, including guards and watchmen, working on the contract. Such records shall contain the name and address of each such employee, social security number, correct classifications, hourly rates of wages paid, daily and weekly number of hours worked, deductions made, and actual wages paid. Further, the EPA shall cause or require the [name of WIFIA borrower] to insert in any such contract a clause providing that the records to be maintained under this paragraph shall be made available by the contractor or subcontractor for inspection, copying, or transcription by authorized representatives of the [name of WIFIA borrower], EPA and the Department of Labor, and the contractor or subcontractor will permit such representatives to interview employees during working hours on the job.

LATEST UPDATES ON FEDERAL REQUIREMENTS

BUILD AMERICA, BUY AMERICA ACT

Other language may be included on contracts for clarity on this federal requirement if an applicable waiver applies. For example, if the WIFIA program has determined program waiver coverage, indicate in contract documents, “This Project is covered under the WIFIA Program Waiver (June 22, 2022), which waives BABA requirements.”

Suggested Contract Language:

Build America, Buy America (Effective May 14, 2022)

The Contractor acknowledges to and for the benefit of (“Purchaser”) and the United States Environmental Protection Agency (“EPA”) that it understands the goods and services under this Agreement are being funded with federal monies made available by the Water Infrastructure Finance and Innovation Act program of EPA that have statutory requirements commonly known as “Build America, Buy America;” that requires all of the iron and steel, manufactured products, and construction materials used in the project to be produced in the United States (“Build America, Buy America Requirements”) including iron and steel, manufactured products, and construction materials provided by the Contractor pursuant to this Agreement. The Contractor hereby represents and warrants to and for the benefit of the Purchaser and Funding Authority (a) the Contractor has reviewed and understands the Build America, Buy America Requirements, (b) all of the iron and steel, manufactured products, and construction materials used in the project will be and/or have been produced in the United States in a manner that complies with the Build America, Buy America Requirements, unless a waiver of the requirements is approved, and (c) the Contractor will provide any further verified information, certification or assurance of compliance with this paragraph, or information necessary to support a waiver of the Build America, Buy America Requirements, as may be requested by the Purchaser or the Funding Authority. Notwithstanding any other provision of this Agreement, any failure to comply with this paragraph by the Contractor shall permit the Purchaser or Funding Authority to recover as damages against the Contractor any loss, expense, or cost (including without limitation attorney’s fees) incurred by the Purchaser or Funding Authority resulting from any such failure (including without limitation any impairment or loss of funding, whether in whole or in part, from the Funding Authority or any damages owed to the Funding Authority by the Owner). If the Contractor has no direct contractual privity with the Funding Authority, as a lender or awardee to the Purchaser for the funding of its project, the Purchaser and the Contractor agree that the Funding Authority is a third-party beneficiary and neither this paragraph (nor any other provision of this Agreement necessary to give this paragraph force or effect) shall be amended or waived without the prior written consent of the Funding Authority.

PROHIBITION ON CERTAIN TELECOMMUNICATIONS AND VIDEO SURVEILLANCE SERVICES OR EQUIPMENT

Suggested Contract Language:

Prohibition on Certain Telecommunications and Video Surveillance Services or Equipment (Effective August 13, 2020). The John S. McCain National Defense Authorization Act for Fiscal Year 2019 (P.L. 115-232), at Section 889, prohibits EPA financial assistance recipients, including WIFIA borrowers, from expending loan funds to procure or obtain; extend or renew a contract to procure or obtain; or enter into a contract (or extend or renew a contract) to procure or obtain equipment, services, or systems that use covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system. As described in the Act, “covered telecommunications equipment or services” means:

- a) Telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation (or any subsidiary or affiliate of such entities).
- b) For the purpose of public safety, security of government facilities, physical security surveillance of critical infrastructure, and other national security purposes, video surveillance and telecommunications equipment produced by Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology Company (or any subsidiary or affiliate of such entities).
- c) Telecommunications or video surveillance services provided by such entities or using such equipment.
- d) Telecommunications or video surveillance equipment or services produced or provided by an entity that the Secretary of Defense, in consultation with the Director of the National Intelligence or the Director of the Federal Bureau of Investigation, reasonably believes to be an entity owned or controlled by, or otherwise connected to, the government of a covered foreign country.

The Act does not prohibit:

- a) Procuring with an entity to provide a service that connects to the facilities of a third-party, such as backhaul, roaming, or interconnection arrangements.
- b) Telecommunications equipment that cannot route or redirect user data traffic or permit visibility into any user data or packets that such equipment transmits or otherwise handles.