

December 2, 2016

Docket Management Facility
U.S. Department of Transportation
1200 New Jersey Avenue SE
Room W12-140
Washington, DC 20590

RE: Docket No. FHWA-2016-0028: Buy America Nationwide Waiver Notification for Commercially Available Off-the Shelf (COTS) Products with Steel or Iron Components and for Steel Tie Wire Permanently Incorporated in Precast Concrete Products

On behalf of the more than 6,000 members of the American Road and Transportation Builders Association (ARTBA), I respectfully offer comments on the Federal Highway Administration's (FHWA) proposed rulemaking regarding its Buy America Nationwide Waiver Notification for Commercially Available Off-the-Shelf (COTS) Products With Steel or Iron Components and for Steel Tie Wire Permanently Incorporated in Precast Concrete Products.

ARTBA's membership includes private and public sector members that are integral to the planning, designing, construction and maintenance of the nation's roadways, waterways, bridges, ports, airports, rail and transit systems. Our industry generates more than \$380 billion annually in U.S. economic activity and sustains more than 3.3 million American jobs. Above all, ARTBA members share the objectives of designing and building transportation improvement projects as safely, efficiently and timely as possible.

With transportation funding constrained on all levels of government, and with the federal highway program providing more than half of the capital investment for state departments of transportation nationwide, it is important to balance the effect of federal regulatory changes on underlying policy objectives versus potential added costs to federal-aid projects. While representing an important policy priority for Congress, the Buy America law can also inflate the costs of projects when its terms are interpreted to an extreme degree. Ultimately, this can result in the funding of fewer projects, and supporting of fewer American jobs by this federal investment.

The Buy America law, dating to the early 1980's, requires that steel or iron components "permanently incorporated" in federal-aid highway projects be manufactured in the United States, subject to possible waivers and exemptions. FHWA has proposed two exemptions to these requirements, one for "commercially available off-the-shelf" (COTS) products such as nuts, bolts and tie wires, and one for steel tie wire permanently incorporated permanently incorporated in precast concrete products. ARTBA supports both proposed exemptions.

In early 2012, ARTBA and some of our affiliated chapters expressed concern to FHWA about extreme interpretations of the Buy America rule by the agency's division offices in certain states, who were insisting that contractors provide detailed documentation of the origin of small and inexpensive components like nuts, bolts and tie wires. In many cases, these restrictive applications added costs and delays to the project. (We incorporate by reference the comments submitted by the Michigan Infrastructure & Transportation Association, for example, who dealt with this issue firsthand.)

In response to these concerns, FHWA issued a memo in December 2012 exempting manufactured products containing less than 90 percent steel or iron, as well as "miscellaneous steel or iron products," such as screws, bolts and other minor items. FHWA's clarification appeared to have quieted these outlying interpretations.

However, eight plaintiffs filed suit in federal court challenging the FHWA memo. The parties included manufacturers of steel and iron products, a related association and a union. On December 22, 2015, the U.S. District Court for the District of Columbia found the FHWA memo to be in violation of multiple elements of administrative law. The court held that FHWA had not provided any discernable basis for the 90 percent threshold for steel and iron manufactured products. Further, because FHWA used a numeric threshold, the court held the memorandum was tantamount to a rulemaking and should have gone through the public comment process. A similar view was taken with respect to the "miscellaneous steel or iron products" exemption, with the court again finding FHWA did not provide proper justification for its conclusion and also should have published a notice of its action in the *Federal Register*.

As a result of the court's decision, FHWA rescinded its 2012 memo on January 6, 2016, instructing its division offices to interpret the provisions of Buy America as best they could until the agency provided further direction. ARTBA, our chapters and members were once again concerned about the potential for inconsistencies and misguided interpretations of the rule, which could lead to project cost increases and delays. In February, ARTBA led a group of nine national trade associations in writing FHWA, asking the agency to undertake a formal rulemaking on this subject as soon as possible. It is therefore gratifying to see the agency finally undertake this formal rulemaking "to achieve greater nationwide uniformity in the application of its Buy America Requirements."

FHWA has posited a series of questions relating to each of the proposed waivers. ARTBA responds as follows:

Proposed Waiver for Commercially Available Off-the-Shelf (COTS) Products

- 1) *Does the COTS definition provide a reasonable description of commercially available off-the-shelf steel or iron items?* ARTBA is supportive of the proposed COTS definition. That said, FHWA should allow for the addition of items to the COTS classification if future conditions or innovations warrant doing so.

2) *Are there COTS products that should be on the covered steel or iron materials list? If so, why?* ARTBA has no additions to the list at this time. However, as noted above, there should be a minimally burdensome process by which products could be added to the list in the future.

3) *Should there be a per-item cost cap for COTS items? If so, what should the cap be?* Generally, ARTBA does not believe a per-item cost cap is necessary at this time. ARTBA believes establishing such a cap would add yet another regulatory burden to a process, potentially increasing costs and adding delays.

4) *What is the burden, time and cost associated with enforcing or complying with Buy America requirements for COTS items?* Multiple ARTBA members and state chapter affiliates have explained to ARTBA staff that requiring Buy America compliance for COTS items leads to situations where the administrative costs of compliance can outstrip the value of the products themselves. This, in turn, creates delays in the construction of transportation improvements and drives up overall project costs.

5) *Are clarifications and/or other documents available to allow owner agencies to track and verify domestic melting and manufacturing processes for steel or iron products?* While ARTBA is not aware of specific documentation, one of our state chapter affiliates has indicated such documentation exists for a “significant majority” of COTS items. However, trouble in documenting just a few such items – particularly those acquired on the secondary market – can lead to the aforementioned delays and outsized project cost increases, overwhelming any value in requiring domestic manufacture for them.

6) *Does your agency or company track costs associated with the administrative or compliance efforts associated with the Buy America requirements?* ARTBA does not conduct formal cost tracking for Buy America requirements. ARTBA does exchange information with our state chapter affiliates on how the Buy America program is working in their region. ARTBA also, on occasion, surveys our members on different topics and would be willing to do so on the Buy America issue if FHWA would find specific information helpful.

Proposed Temporary Waiver for Steel Tie Wire
Permanently Incorporated in Precast Concrete Products

7) *Is the temporary waiver for tie wire permanently incorporated into precast concrete necessary and appropriate and is one year the appropriate length?* ARTBA supports the proposed waiver and encourages FHWA to make the waiver permanent as opposed to only one year. Additionally, the waiver should be expanded to include tie wire in all steel reinforced concrete elements/products, pre-stressed concrete elements and precast concrete elements. Tie wire, as opposed to structural steel, reinforcing steel, etc., constitutes a minute amount of the overall steel used in projects regulated under Buy America. Tie wire is not, ARTBA believes, the type of steel the law was designed to target and should be exempted. Like COTS products, the cost of complying with Buy America requirements for tie wire vastly outweighs the benefits.

8) *Is domestically produced supply sufficient to meet demand for Buy America compliant lifting devices permanently incorporated into precast concrete?* At this time, ARTBA is not aware of any specific concerns regarding domestically produced supply being insufficient to meet the demand of lifting devices permanently incorporated into precast concrete.

9) *Does your agency or company have concerns regarding the administrative burden, time and cost associated with enforcing or complying with Buy America requirements on steel or iron products permanently incorporated into precast concrete products?* As previously noted throughout these comments, ARTBA believes a recurring flaw in the application of the Buy America program is application at such a minute level where costs outweigh benefits. Such can be the case with certain steel or iron products permanently incorporated into precast concrete products.

10) *Does your agency or company have concerns regarding the availability of materials and products that comply with Buy America requirements on steel or iron products permanently incorporated into precast concrete products?* Again, the focus should not be solely on availability here, but actual benefit and accomplishment of the Buy America program goals. For example, it is well-documented that much of the industry now installs tie wire via handheld machines available from Japan, utilizing tie wire spools from the same sources. In comparison to manual installation, this method is more efficient and safer in terms of avoiding repetitive stress injuries for construction workers. So while there may be ample tie wire available to comply with Buy America in the strictest sense, FHWA's proposed waiver will help maximize efficiency and safety on the project.

11) *Does your State DOT have data that document the relative use of steel or iron products incorporated into precast products in comparison with all steel/iron materials used in your highway program?* ARTBA is a national trade association based in Washington, D.C. ARTBA does have a Transportation Officials Division which includes multiple state DOTs and other public agencies as members. We would be happy to initiate a survey or roundtable to solicit their views if it would be helpful to FHWA.

In conclusion, ARTBA supports both proposed waivers as stated in our answers above. Further, we urge FHWA to continue its assessment of Buy America in an effort to ensure the program accomplishes its goals without unnecessarily increasing project costs and delays. In particular, we look forward to participating in a formal rulemaking on wider aspects of the rule, suggested by FHWA in July 2013. ARTBA stands ready to continue the dialogue about this important program.

Sincerely,



T. Peter Ruane
President & C.E.O