

February 23, 2016

Mr. Greg Nadeau
Administrator
Federal Highway Administration
1200 New Jersey Ave. S.E.
Washington, D.C. 20590-9898

Dear Administrator Nadeau:

As you know, federal Buy America requirements are a key area of compliance for federal-aid highway construction contractors and suppliers. Buy America requires a domestic manufacturing process for any steel or iron products, including protective coatings, that are permanently incorporated in a project funded under Title 23 of the U.S. Code. While the transportation construction industry recognizes the public policy objectives that underpin Buy America, we believe it is equally critical that the Federal Highway Administration (FHWA) and the state departments of transportation (DOTs) interpret and implement this rule on a clear and consistent basis. With highway and bridge investment constrained at all levels of government, confusion or inconsistencies in the implementation of Buy America can often result in cost increases and delays at the project level.

In December 2012, FHWA acknowledged this need for clarity by issuing a memorandum detailing the application of Buy America requirements to manufactured products. At the time, as the memo describes, some FHWA division offices were interpreting Buy America as applying to “nuts, bolts, washers, and other miscellaneous steel or iron parts used in common off-the-shelf products such as toilets and the filaments in light bulbs.” Members of our associations can attest to the fact this interpretation resulted in significant delays and administrative costs, as contractors were expected to document and certify these miscellaneous items were Buy America-compliant, no matter how incidental or inexpensive.

The 2012 memo from then-Associate Administrator for Infrastructure John Baxter quieted these concerns and, in our view, resulted in a more consistent and reasonable interpretation of Buy America across the FHWA division offices and state DOTs. The memo made clear Buy America did not apply to “miscellaneous steel or iron components and subcomponents that are commonly available as off-the-shelf products such as faucets, door hardware, and light bulbs,” and delineated a number of additional items falling under that description.

Unfortunately, the U.S. District Court for the District of Columbia invalidated FHWA’s memo in a decision handed down December 22, 2015. During the ensuing weeks, numerous members and chapters within our national associations have expressed concern over the uncertainty, cost increases and delays that could result from this decision, as FHWA division offices no longer have clear Buy America policy on which to rely.

The approaching construction season means the industry will soon be working at full force across all regions of the country. Everyone involved in federal-aid highway and bridge improvement projects will be seeking to maximize the value of new investments from the federal “Fixing America’s Surface Transportation (FAST) Act,” as well as increased transportation funding in many states. Inconsistent or extreme interpretations of Buy America at the state or project level can only undermine those efforts.

For all these reasons, we implore FHWA to take the most expeditious route possible in addressing the substantive void left by the court’s decision. Because the court objected to the process by which FHWA clarified its Buy America policy, we urge the agency to initiate a notice-and-comment rulemaking limited to the 2012 memo’s subject area as soon as possible. While we realize FHWA is exploring a full revision of the Buy America rule, we are very concerned such a process would take many months (if not years), leaving the issue of manufactured products unresolved during the coming construction season and potentially subsequent ones as well. A rulemaking limited to this issue will still take time, but we believe it is the only viable and timely option given the urgency of the situation.

As in the past, our associations are available to assist in this effort in any way possible. Should FHWA undertake a rulemaking on the topic of manufactured products, you can expect our full and enthusiastic participation. We will also remain in contact with FHWA staff to share information on related developments as they occur.

Thank you for considering these views.

Sincerely,

American Road & Transportation Builders Association

Associated General Contractors of America

American Concrete Pavement Association

American Concrete Pipe Association

American Concrete Pressure Pipe Association

Associated Equipment Distributors

National Electrical Contractors Association

National Utility Contractors Association

Precast/Prestressed Concrete Institute