



May 13, 2022

U.S. Department of Transportation
1200 New Jersey Ave SE
Washington, DC 20590

Re: Docket No.: DOT-OST-2022-0047, Notice of Proposed Temporary Waiver of Buy America Requirements for Construction Materials

Today I respectfully offer comments on the proposal by the U.S. Department of Transportation (U.S. DOT) to institute a temporary waiver for Buy America coverage of construction materials.

ARTBA supports the proposed waiver. We believe this is a necessary first step in implementing a key provision included within the “Build America, Buy America” title of the Infrastructure Investment & Jobs Act (IIJA).

ARTBA’s Buy America Policy

- ARTBA supports Buy America protection for a core list of covered materials that are permanently incorporated into transportation projects and which have been regularly enumerated by the Federal Highway Administration (FHWA) and Federal Transit Administration (FTA).
- ARTBA supports a common-sense interpretation of the Buy America rule so that the burden of compliance on transportation construction contractors does not lead to the likelihood of project cost increases and delays.
- ARTBA supports efforts by FHWA, FTA and other federal transportation agencies to develop nationwide waivers that would exempt commercially available off-the-shelf (COTS) products due to the burden of traceability of component materials in these products and their de minimis financial impact to total project value.
- Ideally, compliance with Buy America begins with a project design that has effectively vetted the specified materials to confirm that the covered materials and manufactured products are produced and available in the United States.
- ARTBA supports FHWA and FTA policy modifications that would require designers and specifiers of transportation projects to assess the availability of materials to be incorporated into the project and make all reasonable efforts to use available Buy America-qualified materials as the basis of design.

Expansion of Buy America to Construction Materials

While Buy America coverage has long applied to iron, steel and certain manufactured products permanently incorporated in federal-aid highway and transit projects, the IIJA expands that coverage to “construction materials,” which now must be “produced in the United States.”

According to U.S. DOT, the materials in question include non-ferrous metals; plastic and polymer-based products (including polyvinylchloride, composite building materials, and polymers used in fiber optic cables); glass (including optic glass); lumber; and drywall. The law explicitly exempts cement and cementitious materials; aggregates such as stone, sand, or gravel; and aggregate binding agents or additives. (ARTBA strongly supported this exclusion during the legislative process.)

On April 18, the White House Office of Management and Budget (OMB) released guidance to federal agencies for implementation of the “Build America, Buy America” title. The guidance included short-term options for agencies, including use of waivers, to ensure these new provisions are not disruptive to the process of delivering federal-aid projects.

The construction materials provision was to take effect on May 14. U.S. DOT is proposing to delay this implementation for 180 days through a temporary waiver. ARTBA supports the waiver and also urges the department to utilize other full or partial waivers at the end of that time period if needed.

ARTBA’s transportation contractor-members currently face a confluence of challenges, both welcome and unwelcome, shaping the environment in which U.S. DOT and its partner transportation agencies will implement the Buy America revisions. They include:

- Record federal transportation investment from the IIJA, with a strong industry commitment to putting that funding to work as soon as possible;
- The industry’s ongoing dedication to delivering projects while maximizing safety, efficiency and cost-effectiveness; and
- Unprecedented cost increases and delayed availability for key commodities used in transportation construction. According to ARTBA’s analysis of national data from the Bureau of Labor Statistics,¹ these costs have increased 21 percent over the past year. Among many other effects, a number of specialty contractors and suppliers – many of which are small businesses or participants in the Disadvantaged Business Enterprise (DBE) program – are confronting financial hardship as a result.

We have been gratified that administration officials – including those at the Made in America Office within OMB – have voiced their own commitment to ramping up “Build America, Buy America” while keeping projects on time and on budget. Moreover, indiscriminate short-term implementation of the new Buy America provisions has the potential of exacerbating the already-difficult market conditions described above. Immediately limiting the contractor’s options for materials could further increase costs and scarcity for many of them.

ARTBA believes appropriate use of waivers, such as that proposed by U.S. DOT, is part of a thoughtful and methodical means of implementing these new requirements. We contemplated

¹ <https://www.artba.org/economics/materials-dashboard/>

this approach in [previous comments](#) to the Made in America Office as they shaped their guidance.

Specifics on Construction Materials

U.S. DOT is looking for feedback on the extent to which the construction materials in question are currently domestically manufactured. The following are sample comments from ARTBA members queried:

- “For each product we considered, there will be ten that we did not. For that, six months is not long enough to figure this out. Current supply chain issues will compound this.”
- “Many of our utility owners have said it will take over a year to change suppliers if it is required, as they do utilize many foreign glass/ceramic and polymer elements.”
- “With PVC having a supply shortage today, this new requirement will compound the issue.”
- “Few, if any, electrical components are manufactured here, or could be. Same with cable – we are now importing copper from out of the USA to meet \$5.00 per pound copper demand.”
- “Many mechanical and electrical sub-components come from abroad. It is similar to the automobile chip manufacturing problem.”
- “We have a hard time getting composite lumber, piling and sheeting. We recently had to buy from Guyana.”
- “Stainless steel hardware is nearly impossible to get in the U.S.”
- “The administration should perform a comprehensive study of the availability of domestically produced products based on the demand for these products instead of placing the burden on industry to ask for exemptions.”
- “It is extremely difficult to know exactly what we will need waivers for right now. This is such a fluid environment; we won’t necessarily know which materials will be problematic until getting into the heart of construction season in the summer and fall. For this reason, I would advocate for a much longer waiver period. The availability of products can and is changing overnight.”
- “The manufacturers/suppliers of many types of materials do not typically worry about where their product is coming from. They do not currently track this and will struggle to

track this in the future. If something can be purchased at a local store such as Lowes/Home Depot/etc., then the contractor cannot get a certification.”

We also cite a [recent letter](#) from the American Association of Highway & Transportation Officials (AASHTO) to Secretary Pete Buttigieg, which addresses Buy America among several other IIJA implementation issues:

In general, the sections in the “Buy America Sourcing Requirements” could slow down [IIJA] implementation dramatically if not implemented in a reasonable fashion. If Buy America is truly applied to all “...iron, steel, manufactured products, or construction materials,” it will take years before everything is domestically available. A phased implementation approach will help to encourage industry development while minimizing disruptions to project delivery early on. FHWA should perform a market study on common items used in highway projects—especially in the new, broad category of “construction materials”—to determine where the most flexibility will be needed. Agencies will also need time to transition/expand processes to require some sort of certification to ensure they are in compliance. In addition, if the existing nationwide waiver is discontinued, FHWA needs to pursue an updated waiver rather than requiring individual waivers for specific manufactured products.

U.S. DOT’s proposed waiver, and potential extensions, will allow for appropriate consideration of issues such as these.

“Common Sense” Approach to Project-level Implementation

Finally, we again urge U.S. DOT to use a “common sense” approach to Buy America implementation on the project level, which will minimize potential cost increases and delays. The more unnecessarily expensive the project, the more limited will be the economic benefits (including employment opportunities) emanating from federal investment.

Nowhere is this approach more critical than with commercially-available, off-the-shelf (COTS) products. The resources and time required to trace and document these products can far outweigh their de minimis financial impact to the project’s total value. Given the low cost of these items, such an “extreme” interpretation of Buy America does little to achieve the law’s purpose of strengthening domestic manufacturing.

During the Obama administration, FHWA agreed with this viewpoint, issuing a [memorandum](#) seeking to clarify Buy America coverage in this regard. In that 2012 document, the agency concluded that including those types of products in Buy America coverage would not be cost-effective to administer. FHWA listed examples of COTS that typically turn up in highway, bridge and ancillary projects, including nuts, bolts, washers, faucets, door hardware, light bulbs, and other miscellaneous steel or iron parts used in common off-the-shelf products such as toilets and the filaments in light bulbs.

While subsequent legal action revoked the FHWA memorandum (based on process, not substance), it shows that reconciling the policy objectives of Buy America with the realities of COTS has long presented a persistent and perplexing challenge. The IJA's historic investment levels will only intensify this challenge, as more funding will mean more projects and more component parts needed to build them.

We look forward to a continued dialogue on appropriate waivers (including FHWA's longstanding nationwide waiver on manufactured products) relating to the COTS issue.


Conclusion

ARTBA supports U.S. DOT's proposed short-term waiver and will remain fully engaged in providing critical information to the department as "Build America, Buy America" implementation continues.

I am available as needed at rjuliano@artba.org and (202) 683-1004.

Thank you for your consideration.

Sincerely,

A handwritten signature in dark ink, appearing to read "R. Juliano", is positioned above the printed name.

Richard A. Juliano, CAE
General Counsel