



November 20, 2022

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

Re: Docket No. DOT-OST-2022-0124, Notice That the Build America, Buy America Requirement for Construction Materials Applies Effective November 10, 2022, and Notice of Proposed Waiver of Buy America Requirements for De Minimis Costs, Small Grants, and Minor Components

Re: Docket No. DOT-OST-2022-0123, Notice That the Build America, Buy America Requirement for Construction Materials Applies Effective November 10, 2022, and Notice of Proposed Waiver of That Requirement for a Narrow Category of Contracts and Solicitations

The American Road & Transportation Builders Association (ARTBA) respectfully offers these comments on the two groups of Buy America waivers proposed by the U.S. Department of Transportation (U.S. DOT). ARTBA has submitted comments to a series of inquiries and met with officials from U.S. DOT, the Federal Highway Administration (FHWA), Federal Transit Administration (FTA) and the White House Made in America Office (MIAO – part of the Office of Management and Budget) in recent months.

ARTBA supports the proposed groups of waivers, with the proviso that these agencies should continue working with state and local partners, industry and suppliers to address numerous – and critical – BABA implementation issues still pending.

Background

The “Build America, Buy America Act,” embedded in the Infrastructure Investment & Jobs Act (IIJA), has emerged as a significant implementation challenge in the law’s early months. ARTBA recognizes and supports the clear congressional intent to grow domestic manufacturing capacity in the long-term. Our concern relates to the potential for short-term disruptions of transportation improvement projects emanating from the IIJA’s new requirements in this area.

For more than 40 years, Buy America has required a domestic manufacturing process for iron, steel and certain manufactured products permanently incorporated into federal-aid highway and transit projects. The IIJA expanded Buy America coverage to five categories of construction materials (non-ferrous metals, plastic and polymer-based products, glass, lumber, and drywall). U.S. DOT deferred this new requirement for 180 days through a temporary waiver, but it expired and the requirement took effect on November 10, despite entreaties from ARTBA and

numerous other organizations to extend the waiver over concerns about the new mandate's administrability.

At the same time, the department proposes narrower waivers from Buy America for items falling under modest de minimis thresholds and for the smallest of federal-aid projects. It also proposes waiving the construction materials requirement for projects in advance stages of procurement or for which contracts were already in place by certain dates.

These waivers, while responsive to some issues ARTBA has raised during this rulemaking stage, nonetheless leave numerous unanswered questions, all of which underscore our concerns about disrupting IIJA-funded projects through unintended consequences emanating from BABA.

Temporary Waiver for Construction Materials

ARTBA fully supported the 180-day waiver deferring the new requirement for construction materials. At the time, we pointed out that transportation construction contractors faced unprecedented cost spikes and limited availability for numerous critical commodities, emanating from pandemic-related supply chain disruptions and slowdowns. Six months later, those conditions largely persist in the marketplace. (For example, ARTBA's National Materials Dashboard currently shows a 12.6 percent year-to-year increase in highway and street construction materials costs.¹) While these trends do not invalidate the IIJA's record investment levels, they do represent a major challenge for contractors putting that funding to work at the project level.

In supporting the temporary waiver, ARTBA stated, "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."

Our association's concerns remain unabated in this regard. This is why we supported (and continue to support) a full extension of the temporary waiver until U.S. DOT carries out some critical tasks collaboratively with its public and private sector partners. These include:

- Initiation of a centralized, national effort to account for and assess the availability of domestically-made products falling under the five categories of construction materials listed above, including further engagement with and knowledge transfer from stakeholder groups,
- Formulation and dissemination of clear guidance on the new requirements, to ensure consistent implementation by all FHWA division offices, FTA regional offices and state and local transportation agencies, and

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

- Implementation of a user-friendly, transparent and expeditious waiver process, especially addressing particular projects and products when needed, and minimizing ambiguities for the benefit of recipients, contractors and suppliers. This process should include forms and templates for common waiver submissions.
- Clearly delineating the distinction between construction materials and manufactured products. A common example, about which many ARTBA members have inquired, is the incorporation of glass beads in thermoplastics used for highway striping. While the glass beads appear covered by Buy America, the paint is arguably a manufactured product and exempt under a longstanding FHWA waiver. We are aware of ARTBA members and chapters who have submitted similar examples to the current docket, and would ask that U.S. DOT fully consider them.

Regarding the need for consistency in implementation across the states, ARTBA is aware of varied approaches already undertaken by state departments of transportation, who have been largely left to their own devices in interpreting the newest revisions to Buy America. This represents an acute risk for contractors working in multiple states, for whom consistent terms of compliance for federal regulations is a key task. Frankly, it is not one that they should have to face.

Ultimately, as described below, the newly-proposed waivers have merit, they do not obviate our position that the transportation construction market was and is not ready for a broad imposition of the construction materials requirement.

Proposed De Minimis Waivers

U.S. DOT proposes to waive Buy America requirements for federal-aid projects when:

- The total value of the non-compliant products is no more than the lesser of \$1,000,000 or 5% of total allowable costs under the Federal financial assistance award;
- The size of the Federal financial assistance award is below \$500,000; or
- The non-domestically produced miscellaneous minor components comprise no more than 5 percent of the total material cost of an otherwise domestically produced iron or steel product.

For many years, the industry has struggled with the potential for significant administrative costs and delays caused by commercially-available off-the-shelf (COTS) products. This arises when authorities interpret Buy America to encompass small, inexpensive components such as nuts, bolts, tie wires, washers and the like. It is difficult or impossible for contractors to document their origin and assure the project owner that these items are domestically-manufactured. In our dialogue with various federal officials, there appears to be consensus that carrying Buy America to this extreme does little to advance the law's core objective of strengthening domestic manufacturing. It is therefore important that Buy America regulations clearly reflect this belief.

While helpful, the first of these proposed “de minimis” exemptions (the lesser of \$1 million or five percent) does not adequately address every such scenario. ARTBA suggests the following areas for improvement:

- It is now common for many federal-aid projects to scale to such sizes that this waiver will only cover a portion of the project’s COTS items. For this reason alone, these thresholds should be higher. Also, items should be exempt under the higher of the dollar or percentage threshold, not the lower of the two, as in the proposal.
- Because of the persistent materials cost increases described above, the utility of these thresholds will begin to erode immediately. The de minimis provision would be more effective if regularly adjusted for inflation.
- Not all federal-aid projects will benefit equally from this provision. For example, this waiver may prove useful for a highway interchange project, which encompasses a limited number of these small components (subject to the waiver), but also numerous larger ones (such as structural steel) which are clearly covered by Buy America and more practical to document. Conversely, a highway rest area or traffic operations center will be replete with small, inexpensive items, making it much more likely the project will exceed the de minimis threshold and invoke administrative headaches.
- Finally, U.S. DOT should more clearly define the term “Federal financial assistance award” for purposes of applying this waiver.

Proposed Waivers for Narrow Categories of Contracts and Solicitations

U.S. DOT proposes to waive Buy America coverage of construction materials on federal-aid projects when the recipient has exercised pre-award authority to solicit construction contracts for projects, encompassing

1. Any contract entered into before November 10, 2022; and
2. Any contract entered into before March 10, 2023, if the contract results from a solicitation published prior to May 14, 2022.

ARTBA supports this group of waivers to the extent they will be helpful in short-term implementation of the construction materials requirement.

U.S. DOT should consider an additional waiver addressing a commonly-anticipated scenario. When use of a covered construction material will result in a project delay or cost increase beyond a certain, defined percentage of time or dollars, then the recipient and contractor should have the option of invoking a waiver applying to that product only. This will anticipate and provide an expeditious solution to a circumstance ARTBA members expect to encounter regularly. This type of product-specific waiver is not intended to be permanent, but rather

effective long enough to see improved domestically-manufactured availability of that troublesome product.


Conclusion

The IIJA's record investment should enhance opportunities in domestic manufacturing, as is the intent of Congress. However, disrupting federal-aid projects based on unclear (or unrealistic), short-term domestic preference objectives will undercut the bulk of economic benefits President Biden and Congress intended to derive from the legislation, while doing little to advance the purpose of "Build America, Buy America" itself.

U.S. DOT's newly-proposed waivers are but two pieces of a complex puzzle still being assembled. We urge a continued, meaningful dialogue with all parties to federal-aid projects and a measured approach to BABA's implementation, staying away from attempts to score short-term political points.

Thank you for your consideration. ARTBA remains available for this important discussion at any time.

Sincerely,

A handwritten signature in dark ink, appearing to read "R. Juliano", is centered below the word "Sincerely,".

Richard A. Juliano, CAE
General Counsel