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May 22, 2023

The Honorable Shailen P. Bhatt
Administrator
Federal Highway Administration
1200 New Jersey Avenue SE
Washington, DC 20590

Re: Docket No. FHWA–2022–0027, Notice and Request for Comment on FHWA’s Review of its General Applicability Waiver of Buy America Requirements for Manufactured Products

Dear Administrator Bhatt:

The American Road & Transportation Builders Association (ARTBA) respectfully offers these comments to the Federal Highway Administration (FHWA) on its general applicability waiver for manufactured products under Buy America waiver authorities.

ARTBA supports continued use of the manufactured products waiver. Our members consider this waiver critical to delivering federal-aid highway projects in a timely and cost-effective manner. Moreover, according to a new survey, **an overwhelming majority of transportation construction contractors believe repealing or rolling back this waiver will require additional time and cost** to document and certify Buy America compliance of the components within manufactured products.

Background

Buy America has long applied to federal-aid highway projects on which ARTBA members work (23 U.S.C. §313). For 45 years, statutes have required a domestic manufacturing process for steel or iron products permanently incorporated into these projects. Through the waiver in question, whose origins extend back to 1978, FHWA has exempted many manufactured products from Buy America requirements on the projects for which it provides financial assistance. As FHWA details in the current notice, the agency “does not currently apply the Buy America requirements to manufactured products except for predominantly steel and iron manufactured products and predominantly steel and iron components of manufactured products.”

FHWA has undertaken a review of this waiver pursuant to a recent change in law. The Infrastructure Investment and Jobs Act (IIJA) of 2021 included the Build America, Buy America (BABA) Act, which requires federal agencies to periodically review, and post for public comment, general applicability waivers. In addition, under an executive order issued by President Biden in January 2021, the Made in America Office (MIAO), newly created as part of

the White House Office of Management and Budget, reviews each such waiver and advises the originating department of its consistency with applicable law and policy.¹

BABA also reauthorized Buy America coverage of steel, iron and manufactured products, while adding five categories of construction materials: 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. Congress also explicitly exempted cement and cementitious materials; aggregates such as stone, sand, or gravel; or aggregate binding agents or additives from the definition of “construction materials” for this purpose.

The IJA’s Historic Investment

Implementation of these revised Buy America requirements comes amid the IJA’s historic, generational investment in highway, bridge and public transit infrastructure, among other sectors. In “Year One” (FY2022), the federal-aid highway program increased 38 percent. ARTBA members welcome the challenge of putting these funds to work, with the understanding that public officials at all levels, taxpayers, the media and other observers expect to see demonstrable results.

Through its Highway Dashboard², which utilizes data from the U.S. Department of the Treasury, ARTBA has reported that states leveraged \$53.5 billion in highway and bridge formula funds to support over 29,000 new projects during the law’s first fiscal year of 2022. Through the first five months of Fiscal Year 2023, states committed \$9.9 billion in formula funds to support more than 10,000 additional new projects.

With record funding comes the equally unprecedented, collective responsibility to administer these projects safely and efficiently, while ensuring fulfillment in all areas of compliance for federal-aid contracts, including Buy America. This obligation is the focus of ARTBA’s concerns about potential changes to the manufactured products waiver.

ARTBA’s Priorities for Implementation of Buy America

To be clear, ARTBA supports Buy America’s rationale of strengthening U.S. manufacturing. In fact, our members fully share the objective of developing domestic sources for – ideally – all the products they need for transportation construction. Moreover, nothing in this submission should be interpreted as seeking to undermine or evade its legal requirements.

At the same time, all participants in this process must take a clear-eyed look at current domestic manufacturing capability, the supply of needed products, and the cost of implementing Buy America requirements. Until domestic output meets our industry’s demand

¹ <https://www.govinfo.gov/content/pkg/FR-2021-01-28/pdf/2021-02038.pdf>, Sec. 4

² <https://www.artba.org/economics/highway-dashboard-ija/>

(and especially the new, higher plateau of demand powered by record-breaking federal-aid investment), ARTBA will focus on and seek to minimize Buy America-related delays and costs that may disrupt delivery of IIJA-funded projects. For that reason, in these comments and otherwise, we call attention to – and if necessary oppose – policies that could needlessly increase administrative costs or constrict availability for products already subject to rising costs or limited availability in domestic form.

Accordingly, ARTBA has submitted comments on Buy America in response to a lengthy series of inquiries and met with officials from the U.S. Department of Transportation (U.S. DOT), FHWA, Federal Transit Administration (FTA) and MIAO over the past several months.

We have also pointed out that the transportation construction industry has recently endured unprecedented cost spikes and delays for key materials. Again, ARTBA has closely tracked these trends, this time using data from the Bureau of Labor Statistics.³ Many items covered by BABA have been subject to these inflationary dynamics. For example, since the advent of the pandemic in March 2020, costs for PVC conduits and fittings have risen about 75 percent nationally.

If administered without sensitivity to these economic realities, Buy America can exacerbate them, undercutting the IIJA’s benefits, including good-paying jobs.

In envisioning a federal-aid highway program without the manufactured products waiver, we see likely difficulties and significant administrative costs in attempting to determine the origins of many such products’ components, especially those that are small, relatively inexpensive and hard to differentiate.

81 Percent of Contractors Anticipate More Time and Cost without the Waiver

To better understand the concerns of industry practitioners about the manufactured products waiver and other Buy America issues, ARTBA and the Associated General Contractors (AGC) of America conducted a survey of contractors from May 10-18, to which we received 300 responses nationwide.

We asked contractors about a potential scenario through which FHWA would “roll back or repeal the [manufactured products] waiver, which would require contractors and suppliers to document and certify Buy America compliance for many of the individual components within manufactured products. If this happens, how will it affect your upcoming projects?”

- **65 percent** agreed this would have a major effect on their projects, in that it “will require significant additional time and cost to document and certify the components within manufactured products.”

³ <https://www.artba.org/economics/materials-dashboard/>

- **16 percent** agreed this would have a minor effect on their projects, in that it “will require some additional time and cost to document and certify the components within manufactured products.”

Thus, **81 percent of respondents expressed concern about negative effects on projects** should FHWA alter or repeal the waiver. We also asked contractors to provide examples of manufactured products that would be most troublesome under this scenario. The appendix to these comments includes many of those responses.

Worsening the Risk and Uncertainty for Contractors

As previously noted, consideration of the manufactured products waiver comes as multiple federal agencies are still formulating policies and implementation strategies for the BABA requirements under the IIJA. We note the lack of final guidance from MIAO, as well as other directives which would facilitate consistent policies among state transportation agencies.

Regrettably, this process has resulted in frustration and uncertainty for many contractors. In our survey, nearly two-thirds of respondents were critical of current Buy America policy in their respective states, with 29 percent calling it “very confusing” and 33 percent considering it “somewhat confusing.”

This uncertainty, as well as needlessly expanded responsibilities for compliance (a result of eliminating the manufactured products waiver), increases risk for the contractor, which often leads to higher project costs. As one survey respondent explained it:

If we bid federal-aid work at all, we'll likely add significant contingency dollars since there's no clear process for meeting Buy America/Buy American standards. All the risk falls to the contractor. There should be requirements for suppliers and subs to certify to prime contractors. Plus, there is no timeline on waivers nor any certainty of receiving one. Basically, as the risk goes up, so does the price. There is ZERO certainty with this and therefore the risk is extremely high.

In the Notice and Request for Comment, FHWA acknowledges it would need to address several areas of policy in order to apply Buy America more widely to manufactured products. These include:

- A definition of “produced in the United States,” as would be applied to manufactured products.
- A method to determine the costs of a manufactured product’s components, should the agency start requiring that 55 percent (or another amount) of components be produced domestically.

- A threshold for determining if a manufactured product is “predominantly” comprised of steel or iron.

ARTBA would add these other implementation needs:

- A standard for distinguishing a manufactured product from a steel or iron product, or construction material.
- Market research on the domestic availability of key products used in highway and bridge construction.
- Intelligence on how manufacturers view the potential return on investment (ROI) from entering new markets. For example, ARTBA has been told there is currently little domestically-manufactured resin, and U.S. chemical producers have minimal interest in making it.

This compilation of unanswered questions, as well as the heightened urgency and scope of the federal-aid highway program under the IIJA, suggest this is the worst possible time to roll back or repeal the manufactured products waiver.

Such an action would also conflict with other policy objectives. For example, contractors, subcontractors and suppliers would bear the burden of significant increases in administrative costs, triggered by new requirements to trace the origins of and certify components within manufactured products. Disadvantaged Business Enterprises (DBEs), which are critical to each state’s federal-aid highway program, would experience particular difficulties in meeting these higher expectations for compliance. It should be noted that many of these firms have remained at risk because of unprecedented, pandemic-related cost spikes for products in their respective segments of the industry.

As another example, through the IIJA, FHWA is now working directly with numerous new recipients, such as local and tribal transportation agencies. Expecting such officials to dissect every manufactured product used on their projects, while having to learn about and comply with a litany of other federal-aid requirements, is simply not realistic.

Continued Uncertainty in Treatment of Commercially Available Off-the-Shelf (COTS) Products

One cannot discuss Buy America’s application to manufactured products without addressing the subset of commercially available off-the-shelf (COTS) products. Policy in this area has remained unsettled for nearly 15 years.

In December 2012, during the Obama administration, FHWA released the memorandum, “Clarification of Manufactured Products under Buy America.”⁴ As the memo explained, during implementation of the American Recovery and Reinvestment Act starting in 2009:

[I]t has been suggested that 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 must be Buy America compliant. Given these questions, the FHWA is concerned that such a reading of Buy America is inconsistent with the previous 1983 waiver decision [for manufactured products] and is not cost-effective to administer.

The document went on to address some of the exact questions noted above, which persist to the present day. For example:

The FHWA deems a product to be manufactured predominantly of steel or iron if the product consists of at least 90% steel or iron content when it is delivered to the job site for installation. For purposes of applying Buy America and determining whether a product is a steel or iron manufactured product, the job site includes the sites where any precast concrete products are manufactured.

Unfortunately, because of litigation successfully challenging the agency’s process for developing this policy (but not its substance), FHWA cancelled the memorandum in December 2015. A subsequent rulemaking on these issues was never concluded.

Over the past several months, federal officials have told us that exempting the smallest COTS products from Buy America would not undermine BABA’s overall purpose. Indeed, the administrative costs of covering “cabinets, covers, shelves, clamps, fittings, sleeves, washers, bolts, nuts, screws, tie wire, spacers, chairs, lifting hooks, faucets, door hinges” (as delineated in the 2012 memo) far outweigh any potential benefits to U.S. manufacturing.

Accordingly, it is time to revisit and enact these clarifications, to ensure consistency of Buy America implementation across all FHWA Division Offices and state transportation agencies, as well as remove a major source of uncertainty for the industry.

Moreover, on Nov. 15, U.S. DOT posted a proposed “de minimis” waiver for comment, which appears to target the COTS dilemma. The waiver would apply a Buy America exemption when:

- The total value of the noncompliant 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

⁴ <https://www.fhwa.dot.gov/construction/contracts/121221.cfm>

- 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.⁵

After more than six months since its posting, ARTBA urges enactment of this waiver at a minimum. U.S. DOT and FHWA should further recognize that the value of COTS products required for some types of federal-aid projects, like rest areas or traffic operations centers, will likely exceed these thresholds, suggesting that the limits be raised when needed.

Examples of Manufactured Products: A Compliance Nightmare in the Making

ARTBA members have provided a multitude of examples of manufactured products (many listed in Appendix A) that would be newly subject to Buy America compliance should FHWA not maintain the existing waiver. Given that countless components would need to be tracked, documented and certified as compliant, these examples would result in nothing less than a tidal wave of added paperwork, time sheets and project costs.

In perhaps the most egregious example of bureaucratic absurdity, we have attached as Appendix B the exploding diagram of a generator which one of our contractor members submitted. That firm was directed to consult a 110-page manual and analyze every component in this John Deere product for Buy America compliance. Beyond the considerable time and cost in doing so, the firm noted the impossibility of tracing every last component, which led to contractual issues on the project in question.

These examples demonstrate how quantifying any level of domestic content (be it 55 percent or otherwise) will often be prohibitive, suggesting again that FHWA keep the current waiver in place.

Respecting the Notice and Comment Process

In these comments and throughout the BABA implementation process, ARTBA has sought to treat all parties with respect and to provide tangible insights from the industry we proudly represent. Besides reviewing our submission, we urge FHWA to carefully consider comments from ARTBA's members, affiliated chapters and other allied organizations, who are also offering a first-hand understanding of how Buy America policies affect transportation project delivery. We will also share complete results of the ARTBA-AGC contractor survey in a separate document.

Regrettably, it appears not all outside participants have adopted this commitment to a respectful, substantive process. We are aware of at least one organization that initiated a widespread "spamming" campaign, in which thousands of (apparent) individuals took a few seconds to submit identical comments to FHWA's docket. The comments themselves, such as

⁵ <https://www.govinfo.gov/content/pkg/FR-2022-11-15/pdf/2022-24744.pdf>

they are, provide no fact-based reasons for repealing the waiver, other than noting its longevity and accusing proponents of trying to aid China and Russia. A sampling of on-line research shows “commenters” that have nothing to do with transportation construction and thus lack any first-hand understanding of the waiver’s rationale.

This misguided escapade is also disrespectful of FHWA’s mission in this regard, as well as staff who will have to sift through thousands of posts. The sponsoring organization should apologize for burdening FHWA with comments from individuals who actually listed their names as “sgadg adgadg” and “rrrwqwfqf frqwfaqaf” for the docket. All of these thousands of push-button submissions should be given the weight they deserve, which is to say none at all.⁶

Conclusion

In assessing the future of the manufactured products waiver, please listen to those who actually build the projects. They speak loud and clear, through our survey and otherwise. ARTBA is proud to present their views today and on an ongoing basis as BABA is implemented.

Rolling back or repealing the waiver will unleash new bureaucratic burdens on recipients, contractors, subcontractors, suppliers and small businesses just as all these parties are working most diligently to fulfill the IIJA’s promise.

Given that the IIJA requires review of general applicability waivers a maximum of every five years, FHWA can keep it in place for the immediate future, then review it again as – hopefully – BABA facilitates steady and long-term growth in domestic manufacturing capability for key products.

Thank you for considering these views and for continuing to include ARTBA in this critical conversation.

Sincerely,

A handwritten signature in black ink, appearing to read "Richard A. Juliano".

Richard A. Juliano, CAE
General Counsel

⁶ We would further note that the lead staff person for the organization in question publicly referred to transportation construction contractors as “helpless children” and characterized the industry and its agency partners as being “annoying.” See <https://www.washingtonpost.com/us-policy/2023/02/18/biden-buy-america-roads-bridges/>

Appendix A:
Potential Examples of Manufactured Products in Highway and Bridge Construction

- Admixtures
- Aesthetic Details
- BRITTON AIR HVAC LOUVER SUBMITTAL
- BRITTON AIR HVAC PACKAGE SUBMITTAL (DUCTWORK)
- BRITTON AIR HVAC PACKAGE SUBMITTAL (ENERGY RECOVER UNITS)
- BRITTON AIR HVAC PACKAGE SUBMITTAL (HVAC SYSTEM)
- BRITTON AIR HVAC PACKAGE SUBMITTAL (VENTS)
- BRITTON AIR LG DUCTLESS SPLIT SYSTEM #1
- BRITTON AIR LG DUCTLESS SPLIT SYSTEM #2
- Cable Distribution Submittal "Cooper"
- Circuit boards
- Conduit & Fittings
- CONDUIT AND LIGHT POLE BASES
- Conduit Fasteners
- CORBELS
- COTS Products
- DRYWALL / INSULATION PACKAGE (DRYWALL, MUD, BATT INSULATION)
- Dynamic message signs
- Electrical Devices (Receptacle & Switches)
- Epoxy overlays for bridge decks
- Falcon (Allegion) M.A. Series Class Room - MA 561-F-05
- Falcon (Allegion) M.A. Series Class Room Dead Lock - MA911 F29
- Falcon (Allegion) M.A. Series Cylinder & Competitor Key Way C607 (7 pin)
- Falcon (Allegion) M.A. Series Dormitory / Exit Lock MA 571-F13
- Falcon (Allegion) M.A. Series Interchangeable Cores MA 911 56221C
- Falcon (Allegion) M.A. Series Lever / Knob "Dane Gala (DG)
- Falcon (Allegion) M.A. Series Storeroom - MA 581-F07
- FDOT INDEX 530 SMALL PAVILION
- Fire Alarm Devices - Panel Box, Guts are made with Metal parts, i.e. screws, contacts, termination bars
- Fire Alarm Devices - Panel Box, Guts are made with Metal parts, i.e. screws, contacts, termination bars
- Fire Alarm Devices resubmittal on Compatibility
- Generators
- Geotextiles
- GULF TILE - TILE SELECTION SUBMITTAL

- Hager - inges AB8000
- Hager - 5" Panic Threshold 520S
- Hager - Concave Wall Stop 236W
- Hager - Concealed Leaf Hing 780-112HD
- Hager - Concealed Leaf Hing 780-112HD
- Hager - Door Protection Plate 190S
- Hager - Hinges AB8000
- Hager - Non Beveled Pull Plate A44
- Hager - Non Beveled Push Plates 40R
- Hager - Smoke Seal System 726
- ITS equipment
- LED Fixtures
- Light Poles & Luminar
- Light Poles Aluminum
- Light Poles Bases & Bolts
- Lighting Package #1
- Lighting Package #2
- Lighting Package Resubmittal
- Lightning Protection
- Load Center Component Enclosure
- Load Center Contactor
- Load Center CPT
- Load Center Enclosure
- Load Center Fuse
- Load Center H-O-A
- Load Center Main Breakers
- Load Center Meter Socket
- Load Center Neutral Kit
- Load Center Panelboard
- Load Center Photo Cell
- Load Center Safety Switch
- Load Center SPD
- Load Center Transformer
- MADER ELECTRIC MOTORS (LIFT STATION MOTORS, HATCH, TRASH BASKET, ACCESSORIES)
- MATCON MASONRY MISC. ITEMS (TEES, CHAIRS, JOINT POSITIONER, WIRE)
- MATCON MASONRY REBAR SUBMITTAL

- MATCON MASONRY SUBMITTAL (2) - REMAINING SUBMITTALS (TOPPING SLAB MIX, Revised CMU, Masonry Sand, Joint Reinforcement, Mix Designs for Concrete Masonry & Grout, Rebar Positioner, Ties, Joint Tie, Mesh Chairs)
- MATCON MASONRY SUBMITTAL (GROUT)
- MATCON MASONRY SUBMITTAL (Horizontal Joint Reinforcement)
- MATCON STAINLESS STEEL FLASHING, TERMINATION BAR, DRIP EDGE, SEALANT
- Metal Deck Shop Drawing (resubmittal)
- Metal Decking Accessories (Screws)
- Panel Boards, Transformer, Breakers / Disconnects
- Plumbing Misc. Items - Water Heater Resubmittal
- Plumbing Misc. Items (Hangers, Couplings, Copper Piping)
- PLUMBING PACKAGE (ANTI SIOHON WALL FAUCETS)
- PLUMBING PACKAGE (AO SMITH WATER HEATER)
- PLUMBING PACKAGE (CHICAGO MOP SINK HD FAUCET)
- PLUMBING PACKAGE (CHICAGO WALL MOUNTED MECHANICAL ROOM FAUCET)
- PLUMBING PACKAGE (DRAIN PAN 20")
- PLUMBING PACKAGE (ELKAY WATER FOUNTAINS)
- PLUMBING PACKAGE (MCGUIRE CHROME PLATE P TRAP)
- PLUMBING PACKAGE (MCGUIRE OPEN GRID P.O. PLUG)
- PLUMBING PACKAGE (MECHANICAL MIXING VALVE)
- PLUMBING PACKAGE (MOP HANGER)
- PLUMBING PACKAGE (RHEEM WATER HEATER)
- PLUMBING PACKAGE (SURE GRIP FLANGE)
- PLUMBING PACKAGE (THERMAL EXPANSION TANK)
- PLUMBING PACKAGE (ZURN FLOOD DRAIN -1)
- PLUMBING PACKAGE (ZURN FLOOD DRAIN -2)
- PLUMBING PACKAGE (ZURN FLUSH VALVE)
- PLUMBING PACKAGE (ZURN SINGLE BASIN SINK FAUCET)
- PLUMBING PACKAGE (ZURN URINAL FLUSH VALVE CACCUM BREAKER)
- PLUMBING PACKAGE (ZURN URINAL FLUSH VALVE)
- Pull Boxes
- Pumps
- Reflective Pavement Markings (including glass beads)
- RESTROOM BUILDING SIGNAGE
- Roof Truss Sections, Details & Calculations (INCLUDED ALL COMMENTS/ CORRECTIONS FROM FDOT & EOR)
- ROOFING NOA ENGINEERING
- ROOFING NOA ENGINEERING RESUBMITTAL INCLUDING SOFFIT
- ROOFING NOA ENGINEERING WITH SOFFIT

- ROOFING SUBMITTAL Roof Panels, Underlayment, Fasteners, Tape, & Insulation
- RUSTEOLUM TNEMIC LIFT STATION COATING
- SCOTTOS PLUMBING PACKAGE (ZURN FLOOD DRAIN -1)
- SEAWALL FDOT 5500IV NEW CONCRETE MIX
- Signal Heads
- SITE FURNISHINGS - ADA PICNIC TABLE & Non-ADA PICNIC TABLE - RESUBMITTAL
- SITE FURNISHINGS (SMOKERS OUTPOST, TRASH CAN, BIKE RACK, JOB BOARD)
- SITE LIGHTING PACKAGE 52.01, 52.02,52.03,52.04
- Street Lights
- SURE SEAL TRAP PRIMER
- Switch Boxes and Covers
- TILE ANTIFRACTURE MEMBRANE
- TOILET ACCESSORIES (ADA GRAB BARS)
- TOILET ACCESSORIES (ADULT CHANGING TABLE)
- TOILET ACCESSORIES (DOUBLE ROBE / COAT HOOKS)
- TOILET ACCESSORIES (HAND DRYERS)
- TOILET ACCESSORIES (MOP HOLDER)
- TOILET ACCESSORIES (NAPKIN DISPOSAL)
- TOILET ACCESSORIES (STAINLESS STEEL MIRROR)
- TOILET ACCESSORIES (STAINLESS STEEL MIRROR)
- TOILET ACCESSORIES (TOILET PAPER DISPENSER)
- TOILET ACCESSORIES (TOILET PARTITIONS)
- TOILET ACCESSORIES (WALL MOUNTED SOAP DISPENSER)
- TOILET ACCESSORIES (WALL MOUNTED WASTE RECEPTACLE)
- Traffic Signal Controllers
- Type C Fixture Resubmittal #1
- Type C Fixture Resubmittal #2
- UNITED STEEL ADDED TRUSS/ EMBED SHOP DRAWINGS (ADDED DETAIL 8 & 9 - NEEDED ADDITIONAL EMBED)
- UNITED STEEL TRUSS/ EMBED SHOP DRAWINGS (EMBEDS USED TO CONNECT CMU TO TRUSSES)
- Watermain parts
- WINDOW PACKAGE YKK (YHS50TU Aluminum Frames), Authorized Installer Certification
Screws are zinc plated steel
- Wire / Cable

Appendix B: Example of a Manufactured Product (Generator) and Its Components

CH440

GASKET SET
17 755 44-S

