



February 15, 2024

Hon. Rick Crawford
Chairman
Subcommittee on Highways and Transit
U.S. House of Representatives
Washington, DC 20515

Hon. Eleanor Holmes Norton
Ranking Member
Subcommittee on Highways and Transit
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Crawford and Ranking Member Norton:

The American Road & Transportation Association (ARTBA) appreciates your leadership in oversight of the “Build America, Buy America Act” (BABAA) provisions of the Infrastructure Investment and Jobs Act (IIJA), and your holding today’s hearing.

ARTBA’s diverse membership includes nearly 8,000 private sector firms and public agencies, many of whom work with Buy America requirements regularly. They include contractors building transportation improvement projects, as well as suppliers and manufacturers of vital products, and agencies (including more than 20 state departments of transportation) who plan, fund and own the infrastructure assets themselves. All share a common interest in effectively implementing BABAA while building projects safely, efficiently and cost-effectively, especially given the IIJA’s record federal investments. Similarly, all share a common concern that conflicting federal policy objectives can dilute the timely economic and safety benefits of those investments. This submission to your subcommittee reflects insights from across our membership in this context.

ARTBA’s Buy America Policy and Implementation Priorities

ARTBA wholeheartedly supports BABAA and the principle of strengthening domestic manufacturing. Our members would prefer a market through which they could always procure products made in the United States.

However, the short-term realities of that market reflect:

- Continued difficulties with elevated costs and lead times in procuring key materials.
- Inflation and supply chain difficulties following the COVID-19 pandemic.
- Particular challenges with domestic sourcing of construction materials newly covered by Buy America.
- Strong competition for materials across multiple sectors of construction and the broader economy.

ARTBA's priorities for our members in BABAA implementation include the following:

- The risk associated with Buy America compliance should not fall disproportionately on a project's contractor. Some agencies, like the Florida Department of Transportation, have adopted a collaborative approach in identifying and denoting Buy America-compliant products for use on their federal-aid projects. Regrettably, others have simply notified the industry of the new BABAA requirements while informing contractors of their unilateral responsibility to comply. Ultimately, contractors "price" risk in their bids. Unreasonable transfer of risk to contractors will often result in higher project costs, to the detriment of taxpayers.
- Buy America compliance should start during the design and specification stages. Incorporating domestic preference realities early in the project's lifespan can minimize the subsequent need for Buy America waivers and associated delays.
- The White House Office of Management and Budget (OMB) and its Made in America Office (MIAO) should focus on assessing materials markets and developing a common catalog of BABAA-compliant products. These offices are uniquely situated to work across agencies and with project partners including federal-aid recipients, contractors, manufacturers and suppliers. OMB and MIAO can take a proactive approach in identifying problem areas and anticipating the need for targeted waivers.
- Buy America requirements should be as clear and consistent as possible. Numerous construction firms work across multiple states and transportation modes. They should be able to maintain confidence in their BABAA compliance approach when working in any of those jurisdictions. This underscores the importance of comprehensive and accurate BABAA training for officials from state and local agencies. Moreover, because OMB has issued a series of iterations of BABAA guidance over the past two-plus years, some contractors' portfolios include projects being built under one or more of four different Buy America regimes.
- The Federal Highway Administration (FHWA) must maintain its longstanding Buy America waiver for manufactured products. FHWA is now completing its statutorily-required review of the waiver, and appears under political pressure to roll back or repeal it, including through a spam campaign conducted by an advocacy group prone to sensationalism and name calling while possessing no demonstrable understanding of transportation construction. In reality, altering or eliminating this waiver will result in enormous new administrative costs for recipients and contractors. It also risks significant new project delays, as these parties attempt to document (often futilely) the origins of infinite components comprising a panoply of

manufactured products used for transportation projects.¹ The bottom line will be fewer projects completed with IJJA dollars.

- Inexpensive commercially available off-the-shelf (COTS) products should not be subject to Buy America requirements. The origins of items such as nuts, bolts, tie wires, washers, and the like are as impossible to document as they are inexpensive to procure. Requiring their domestic sourcing does little to advance BABAA's principles, while again adding to project costs. A recent "de minimis" waiver implemented by the U.S. Department of Transportation (U.S. DOT) may help on a limited basis, but not for COTS-heavy projects such as rest areas and traffic operations centers.
- The Buy America waiver process must be timely and transparent. Under a new requirement established by President Biden through a 2021 executive order and codified in BABAA, the Made in America Office reviews proposed waivers from all federal agencies. This has added a major step to a process already fraught with delay and uncertainty among many agencies.
- BABAA compliance should not threaten the viability of small and disadvantaged businesses. Many of these firms do not maintain the resources to navigate compliance with Buy America requirements for a growing list of products. Others, such as specialty contractors and suppliers, were disproportionately harmed by the recent cost spikes for key products, as described above.

Industry Survey Details Its Concerns

In May 2023, ARTBA conducted a nationwide survey of transportation construction contractors.² The Associated General Contractors of America joined us in this project, to maximize the response. Several findings detail the concerns of the industry regarding BABAA implementation:

Construction Materials

- About two-thirds of contractors expected cost increases and/or delays on their projects because of new domestic preference requirements for plastics and non-ferrous metals.
- In addition, more than half of the respondents expected the new requirements to "significantly" worsen costs and availability for these products, given supply chain and inflationary pressures of the past several months.

¹ An attached "exploding diagram" of a generator used in a highway rest area illustrates the impossible task of fully documenting hundreds of inexpensive components to a common manufactured product.

² A summary of survey results is attached.

Manufactured Products

- Nearly two-thirds of contractors expected significantly negative effects on their projects if FHWA changes its policy on manufactured products.

Clarity and Competition

- 62 percent of contractors described current Buy America policy in their state(s) as somewhat or very confusing.
- 26 percent said they were less likely to bid federal-aid work because of concerns or frustration with the new Buy America requirements.

Collaboration of National Associations

Because of ongoing unease with BABAA implementation as outline above, ARTBA has joined with the American Public Transportation Association (APTA), Associated General Contractors of America (AGC) and National Association of Home Builders (NAHB) in petitioning OMB for a new rulemaking to clarify a number of these issues. Over the past months, our associations have submitted dozens of detailed comments and participated in numerous meetings with federal officials, yielding few tangible results.

We also strongly believe OMB should play a “big picture” role in implementing BABAA, such as creating the aforementioned compendium of compliant products that could be used across the federal government. In contrast, individual federal agencies, such as the modal administrations at U.S. DOT, bring decades of experience in implementing domestic preference requirements, and should be enabled to fully deploy their detailed knowledge of the projects, recipients, markets and industry specific to their respective programs.

Our coalition’s petition also seeks to improve the waiver process under the principles of the Paperwork Reduction Act.

We hope this petition results in meaningful improvements to BABAA implementation and a more collaborative approach among all parties to federal-aid policies and projects, including OMB itself.

Conclusion

As you continue your oversight role of IJIA implementation, we respectfully ask that you consider the insights of ARTBA members working to deliver projects funded by the IJIA, while maximizing the law’s benefits in safety, mobility, job-creation and other forms of economic growth. Thank you for your consideration.

Sincerely,

Richard A. Juliano, CAE
General Counsel

Addenda:

- Results of May 2023 contractor survey
- Exploding diagram of John Deere generator used in highway rest area project (example of a manufactured product)

Executive Summary

Survey of Transportation Construction Contractors on Buy America Compliance

The American Road & Transportation Builders Association (ARTBA) and Associated General Contractors (AGC) of America jointly surveyed their members on May 10-18, 2023, regarding current Buy America issues. 300 firms responded nationwide.

For more than 40 years, the Buy America law has required a domestic manufacturing process for iron, steel and certain manufactured products permanently incorporated into federal-aid highway and transit projects. In 2021, through the Infrastructure Investment and Jobs Act's "Build America, Buy America Act," Congress expanded domestic preference requirements to five categories of construction materials (non-ferrous metals, plastic and polymer-based products, glass, lumber, and drywall).

Both associations have reaffirmed their support for Buy America's overarching objective of strengthening domestic manufacturing in the long term. However, as federal and state agencies work to implement the current Buy America requirements, the survey sought to quantify the industry's short-term challenge of complying while minimizing project cost increases and delays.

The following are highlights of the survey...

Construction Materials

About two-thirds of contractors expect cost increases and/or delays on their projects because of new domestic preference requirements for plastics and non-ferrous metals.

Respondents were asked about procuring various categories of domestically-produced construction materials and characterize how that process would affect their projects now and in the near future. Options for responses included:

- MAJOR EFFECT – It will be difficult or impossible to find U.S.-made products, resulting in larger cost increases and/or project delays;
- MINOR EFFECT – This requirement may cause some smaller cost increases and/or project delays; or
- LITTLE OR NO EFFECT – We can find the U.S.-made we need with minimal difficulty.

Here are the findings for the construction materials newly subject to Buy America³:

³ Besides the responses listed, others include "Not Clear at This Time" and "Does Not Apply."

- **Plastic and Polymer-based Products**
 - Major Effect – 40 percent
 - Minor Effect – 26 percent
 - Little or No Effect – 11 percent

- **Non-ferrous Metals (such as copper, aluminum, lead, zinc, silver, gold and titanium)**
 - Major Effect – 31 percent
 - Minor Effect – 30 percent
 - Little or No Effect – 11 percent

- **Glass**
 - Major Effect – 22 percent
 - Minor Effect – 17 percent
 - Little or No Effect – 14 percent

- **Lumber**
 - Major Effect – 22 percent
 - Minor Effect – 30 percent
 - Little or No Effect – 16 percent

- **Drywall**
 - Major Effect – 22 percent
 - Minor Effect – 17 percent
 - Little or No Effect – 14 percent

In addition, more than half of the respondents expected the new requirements to “significantly” worsen costs and availability for these products, given supply chain and inflationary pressures of the past several months.

Manufactured Products

Nearly two-thirds of contractors expect significantly negative effects on their projects if the Federal Highway Administration (FHWA) changes its policy on manufactured products.

Since 1978, FHWA has exempted many manufactured products (such as signal heads, pumps, generators, pavement marking and many more) from Buy America requirements. The agency determined that it would be prohibitively expensive or impossible to determine and certify the origins of many components within these products.

FHWA is now reviewing its manufactured products waiver and considering various options. The survey asked how a roll-back or repeal of the waiver would affect upcoming projects:

- **65 percent said a change would have a “major effect,” requiring significant additional time and cost to document and certify the components within manufactured products.**
- 16 percent said it would have a “minor effect,” requiring some additional time and cost.
- Just 4 percent said it would have “little or no effect,” requiring minimal additional time and cost.

Waivers

Federal policymakers have emphasized that project sponsors can request Buy America waivers if covered products or materials are unavailable or greatly more expensive in domestic form.

- About half (48 percent) of respondents reported having no experience with Buy America waivers on their projects over the past two years.
- 16 percent said the waiver process had caused major project delays or uncertainty.
- 16 percent said it caused no or only minor delays or uncertainty.

Clarity and Competition

Authoritative federal guidance will help ensure the new Buy America requirements are implemented consistently by state transportation agencies. With guidance from the White House Made in America Office still pending, ARTBA and AGC have monitored initial state-level implementation of the new requirements, making note of any inconsistencies. The survey asked respondents to characterize the clarity of this policy in their respective state(s).

- **62 percent of contractors described current Buy America policy in their state(s) as somewhat or very confusing.**
- 29 percent described it as somewhat or very clear.

When viewed as unclear or unachievable, federal regulations can disincentivize contractors from bidding on federal-aid work and dampen competition, particularly given the variety of opportunities in other construction sectors. The survey asked if the new Buy America requirements would affect their decision to bid federal-aid highway and transit work in the next year.

- **26 percent said they were less likely to bid federal-aid work.**
- 50 percent said it made no difference.
- 2 percent said they were more likely to bid.

Conclusion

The survey results underscore the need for federal officials, state agencies and industry to work collaboratively in preventing short-term disruptions on projects that could result from revisions to Buy America policy. To help maximize the benefits from unprecedented federal transportation investments, while seeking to strengthen domestic manufacturing, contractors need a clear, achievable regulatory framework, backed by market data and appropriate use of Buy America waivers, to do their part.

