



November 18, 2022

Polly Trottenberg  
Deputy Secretary  
U.S. Department of Transportation  
1200 New Jersey Avenue SE  
Washington, DC 20590

**RE: Proposed Waiver of Buy America Requirements for De Minimis Costs, Small Grants, and Minor Components**

Dear Deputy Secretary Trottenberg:

Thank you for soliciting comments on the proposed waiver of Buy America requirements for de minimis costs, small grants and minor components. Associated Builders and Contractors submits the following comments on the proposed waiver.

**About Associated Builders and Contractors**

ABC is a national construction industry trade association representing more than 22,000 member companies. ABC and its 68 chapters help members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which ABC and its members work.

ABC's membership represents all specialties within the U.S. construction industry and is comprised primarily of general contractors and subcontractors that perform work in the industrial and commercial sectors for government and private sector customers, which includes roads, bridges, airports, railways and other critical transportation infrastructure funded by the U.S. Department of Transportation.

The vast majority of ABC's contractor members are small businesses. This is consistent with the U.S. Census Bureau and U.S. Small Business Administration Office of Advocacy's findings that the construction industry has one of the highest concentrations of small businesses (82% of all construction firms have fewer than 10 employees)<sup>1</sup> and industry workforce employment (more than 82% of the construction industry is employed by small businesses).<sup>2</sup> In fact, construction companies that employ fewer than 100 construction professionals compose 99% of construction firms in the United

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<sup>1</sup> U.S. Census Bureau 2019 County Business Patterns: [data.census.gov/cedsci/table?q=CBP2019.CB1900CBP&n=23&tid=CBP2019.CB1900CBP&hidePreview=true](https://data.census.gov/cedsci/table?q=CBP2019.CB1900CBP&n=23&tid=CBP2019.CB1900CBP&hidePreview=true) and [www.census.gov/programs-surveys/cbp/data/tables.2019.html](https://www.census.gov/programs-surveys/cbp/data/tables.2019.html).

<sup>2</sup> 2020 Small Business Profile, U.S. Small Business Administration Office of Advocacy, at pg. 3, [cdn.advocacy.sba.gov/wp-content/uploads/2020/06/04144224/2020-Small-Business-Economic-Profile-US.pdf](https://cdn.advocacy.sba.gov/wp-content/uploads/2020/06/04144224/2020-Small-Business-Economic-Profile-US.pdf).

States; they build 63% of U.S. construction, by value, and account for 68% of all construction industry employment.<sup>3</sup>

In addition to small business member contractors who build private and public works projects, ABC's membership is also comprised of large member general contractors and subcontractors who perform construction services for private sector customers and federal, state and local governments. For example, ABC members won 57% of the \$128.73 billion in direct prime construction contracts exceeding \$25 million awarded by federal agencies during fiscal years 2009-2021. These federal contractors provide subcontracting opportunities to large and small contractors in the specialty trades and deliver taxpayer-funded construction projects on time and on budget for their federal government customers.

ABC's diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry. This philosophy is based on the principles of nondiscrimination due to labor affiliation and the awarding of construction contracts through open, competitive bidding based on safety, quality and value.

### **Response to the Proposed Waivers**

ABC supports the de minimis, small grants and minor components waiver proposed by the DOT. The waivers will be particularly helpful to smaller local governments and public utilities with limited resources, ensuring they are able to maximize the value of taxpayer dollars. The waiver will also ensure that projects utilizing an insignificant percentage of noncompliant materials do not face disproportionate barriers to completion. ABC also supports the DOT's proposed waiver for projects and solicitations prior to Nov. 10, 2022.<sup>4</sup>

Together, these waivers will help to ensure that Buy America requirements are implemented in a reasonable fashion and avoid unnecessary cost increases and project delays while still achieving the goals of the Build America, Buy America Act. Below, we have outlined supply chain challenges that support the need for these waivers and provide recommendations for additional actions the DOT can take to ensure effective implementation of updated Buy America requirements.

### **I. The Construction Industry Already Faces Significant Supply Chain Challenges**

The U.S. construction industry currently faces significant headwinds in the form of supply chain disruptions, unprecedented materials cost inflation and declining investment. Our concern is that immediate implementation of Buy America requirements

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<sup>3</sup> U.S. Census County Business Patterns by Legal Form of Organization and Employment Size Class for the U.S., States and Selected Geographies: 2019, Available at [TheTruthAboutPLAs.com/wp-content/uploads/2021/07/Construction-firm-size-by-employment-2019-County-Business-Patterns-Updated-071321.xlsx](https://www.thetruthaboutplas.com/wp-content/uploads/2021/07/Construction-firm-size-by-employment-2019-County-Business-Patterns-Updated-071321.xlsx).

<sup>4</sup> See [Notice That the Build America, Buy America Requirement for Construction Materials Applies Effective Nov. 10, 2022, and Notice of Proposed Waiver of That Requirement for a Narrow Category of Contracts and Solicitations.](#)

could exacerbate these disruptions, further increase costs for contractors and taxpayers and slow the construction, repair and modernization of our nation's aging transportation infrastructure.

Despite access to vaccines and decreasing case numbers, the ongoing COVID-19 pandemic continues to cause significant supply chain disruptions. Countries around the world continue to impose COVID-19 shutdowns, affecting the global supply chain. These ongoing issues have led to ongoing and severe shortages of construction materials. Contractors face particular difficulty obtaining specialized materials that are essential to a wide range of construction activities.<sup>5</sup>

These supply chain disruptions, among other factors, have contributed to massive increases in material prices. In October 2022, construction input prices were up 14.6% from October 2021 prices, and up 40.9% since the onset of the COVID-19 pandemic in February 2020. The increase was felt across nearly all materials, with input prices up on an annual basis in eight of 11 subcategories. Currently, economists predict that inflation is not expected to decline significantly in the near term given the impacts of the Russia-Ukraine War, the COVID-19 pandemic, increased transportation costs and growing demand for construction materials as a result of forthcoming U.S. government investments in infrastructure.<sup>6</sup>

Finally, the challenges that the industry is facing have led to a decline in overall investment in the construction industry, despite government investments in infrastructure. In the third quarter of 2022, investment in nonresidential structures declined at an annual rate of 15.3%, following contractions in 10 of the past 12 quarters.<sup>7</sup> Much of this decline can be attributed to prices increases, an uncertain economy and supply chain disruptions that have forced projects to be delayed or canceled as a result of additional uncertainty and risk.

## **II. Buy America Implementation Should Be Delayed**

The DOT should consider the supply chain challenges facing the construction industry, as outlined above, in its implementation of these requirements. Given the unprecedented nature of these issues, the DOT should delay implementation of domestic preference requirements for construction materials on federally assisted projects. Instead, the DOT should conduct extensive studies and seek additional public comment to ensure effective implementation of Buy America requirements.

### **1. The DOT should consider extending its adjustment period waiver.**

The actions of multiple federal agencies tasked with federal assistance of infrastructure clearly demonstrates the need for deliberate implementation of updated Buy America

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<sup>5</sup> ["For the Want of an Insulation Screw,"](#) The New York Times, November 2022.

<sup>6</sup> ["Monthly Construction Input Prices Inch Higher in October, Says ABC,"](#) ABC, November 2022.

<sup>7</sup> ["Investment in Structures Falls Again in Third Quarter Even as US Economy Expands, Says ABC,"](#) ABC, October 2022.

requirements. On April 28, the DOT announced its six-month waiver of Buy America requirements,<sup>8</sup> the U.S. Department of Housing and Urban Development issued a similar waiver on May 3<sup>9</sup> and the U.S. Environmental Protection Agency also issued a waiver.<sup>10</sup> All agencies cited the lack of available information to immediately implement these requirements, with the EPA stating:

Getting to full, long-term adoption of BABA provisions will require extensive consultation with stakeholders (including both potential funding recipients and industry) and a carefully calibrated adjustment period, leveraging the authority granted by Congress to issue public interest waivers, creating an appropriate on-ramp to requirements. In particular, several of EPA's smaller financial assistance programs do not have the same history of domestic sourcing requirements as do the SRF and WIFIA programs. The Agency, potential awardees, and the supply chains that serve them will need time to gather data and build the capacity and processes necessary to successfully comply with all of BABA's provisions.<sup>11</sup>

Both the HUD and EPA Buy America waivers expired shortly after the DOT's on Nov. 14.

Given the supply chain challenges outlined above and the DOT's own acknowledgement of difficulties associated with implementation, the DOT should extend its current six-month adjustment period waiver by an additional six months until Buy America standards can be fully studied and developed prior to implementation.

## **2. The DOT should extend the solicitation date for projects that qualify under the new proposed waiver.**

While ABC supports both proposed transitional waivers, the DOT should extend the date for its waiver for solicitations that have already been published. This waiver currently applies to solicitations published before May 14, 2022, but ABC would recommend that this be extended until Dec. 31, 2022. This would avoid regulatory confusion for agencies and contractors that have already expended significant resources on bidding for these solicitations.

## **3. The DOT should consider agency staffing needs for an expected high volume of waiver requests.**

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<sup>8</sup> See "Notice of Proposed Temporary Waiver of Buy America Requirements for Construction Materials," published on regulations.gov on April 28, 2022: [www.regulations.gov/document/DOT-OST-2022-0047-0001](https://www.regulations.gov/document/DOT-OST-2022-0047-0001).

<sup>9</sup> See 87 Federal Register 26219: [www.federalregister.gov/documents/2022/05/03/2022-09513/general-applicability-waiver-of-build-america-buy-america-provisions-as-applied-to-recipients-of-hud](https://www.federalregister.gov/documents/2022/05/03/2022-09513/general-applicability-waiver-of-build-america-buy-america-provisions-as-applied-to-recipients-of-hud).

<sup>10</sup> See "Request for Comments on Temporary Public Interest Waiver of Section 70914 of P.L. 117-58, Build America, Buy America Act, 2021 for Selected EPA Funding Programs:" [www.epa.gov/system/files/documents/2022-07/DRAFT%20BABA%20OW%20Programs%20Waiver%20Public%20Comment.pdf](https://www.epa.gov/system/files/documents/2022-07/DRAFT%20BABA%20OW%20Programs%20Waiver%20Public%20Comment.pdf).

<sup>11</sup> Ibid.

As noted in the Office of Management and Budget’s initial guidance on implementing the new Buy America requirements, the IIJA allows for several categories of waivers that recipients can apply for when the requirements may be unfeasible.<sup>12</sup>

Given the supply chain challenges outlined above, it is highly likely that the DOT will face an extremely high volume of waiver applications, especially considering OMB’s guidance that “to the greatest extent practicable, waivers should be targeted to specific products and projects.”<sup>13</sup> Many products and projects may qualify for the nonavailability or unreasonable cost waivers given the difficulty contractors already face in obtaining affordable construction materials.

The DOT should consider the impact a flood of waiver applications will have on the agency which, along with other federal agencies, is already working to hire enough employees to effectively distribute IIJA funding and procure additional direct federal construction contracts above baseline spending.<sup>14</sup> The DOT may not have sufficient staff to process these applications in a timely manner, which would lead to additional delays and increased costs and make DOT contracting opportunities less attractive to construction industry stakeholders.

Small businesses in particular may struggle with an inefficient waiver process. Increased regulatory burdens on small businesses without sufficient resources to navigate the application process may discourage small business contractors. At the federal level, there has already been a 60% decline in the number of construction industry small businesses awarded contracts from 2010 to 2020.<sup>15</sup> Difficulty obtaining Buy America waivers may accelerate this trend for both federal and federally assisted state/local government contracts. The DOT should consider how future waivers may be granted more broadly to alleviate this concern.

## **Conclusion**

While ABC supports strategies to expand domestic jobs and manufacturing to avoid global supply chain disruptions and capture economic benefits within America, Buy America policies need to be balanced with safeguards against increased costs and/or delays of infrastructure projects funded by the federal government and ultimately taxpayers. ABC supports the proposed waivers and urges the DOT to carefully consider

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<sup>12</sup> See OMB Memo M-22-11, pg. 6: [www.whitehouse.gov/wp-content/uploads/2022/04/M-22-11.pdf](https://www.whitehouse.gov/wp-content/uploads/2022/04/M-22-11.pdf).

<sup>13</sup> Ibid.

<sup>14</sup> See “OPM’s Ahuja says agencies need to balance speed with ‘doing it right’ for Bipartisan Infrastructure Law hiring,” Federal News Network, May 3, 2022: [federalnewsnetwork.com/hiring-retention/2022/05/opms-ahuja-says-agencies-need-to-balance-speed-with-doing-it-right-for-bipartisan-infrastructure-law-hiring/](https://federalnewsnetwork.com/hiring-retention/2022/05/opms-ahuja-says-agencies-need-to-balance-speed-with-doing-it-right-for-bipartisan-infrastructure-law-hiring/).

<sup>15</sup> Chart available at: <https://TheTruthAboutPlas.com/wp-content/uploads/2022/09/60-percent-decline-of-small-businesses-awarded-federal-construction-contracts-2010-to-2020.png>. The data was prepared by an SBA economist who said, “The charts represent data on vendors who have received obligations. The definition of ‘small’ comes from the contracting officer’s determination when the contract was awarded. The COs follow the NAICS size standards.” Data is from FPDS that can be publicly accessed through SAM.gov: <https://sam.gov/reports/awards/standard>.

our recommendations to ensure Buy America requirements can be implemented with minimal disruptions to these critical infrastructure projects.

Thank you for the opportunity to submit comments on this matter.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ben Brubeck". The signature is fluid and cursive, with the first name "Ben" and last name "Brubeck" clearly distinguishable.

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