



August 15, 2022

Dan Coogan
Acting Director
Office of Resources and Business Operations
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20004

RE: Small Projects and De Minimis General Applicability Waivers for Build America, Buy America

Dear Mr. Coogan:

Thank you for soliciting comments on the Small Projects General Applicability Waiver and De Minimis General Applicability Waiver for Build America, Buy America requirements. Associated Builders and Contractors submits the following comments on the proposed waivers.

About Associated Builders and Contractors

ABC is a national construction industry trade association representing more than 21,000 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 drinking water systems, wastewater treatment works, dams and other critical water infrastructure funded by the EPA.

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)¹ and industry workforce employment (more than 82% of the construction industry is employed by small businesses).² In fact, construction companies that employ fewer

¹ U.S. Census Bureau 2019 County Business Patterns: 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.

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

than 100 construction professionals compose 99% of construction firms in the United States; they build 63% of U.S. construction, by value, and account for 68% of all construction industry employment.³

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 both the Small Projects and De Minimis general applicability waivers proposed by EPA. The Small Projects waiver 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 De Minimis waiver will ensure that projects utilizing an insignificant percentage of noncompliant materials do not face disproportionate barriers to completion.

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 EPA 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 could exacerbate these disruptions, further increase costs for contractors and taxpayers

³ 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.

and slow the construction, repair and modernization of our nation's aging water and wastewater 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, impacting the global supply chain. In addition to manufacturing issues, a number of transportation issues, including delays at West Coast ports, rail bottlenecks and a lack of trucks to transport materials have contributed to the disruptions.⁴

These supply chain disruptions, among other factors, have contributed to massive increases in material prices. In July 2022, nonresidential construction input prices were up 17.3% from July 2021 prices, and up 43.1% since the onset of the COVID-19 pandemic in February 2020. It is unlikely that inflation will decline significantly in the near term given the impacts of the Russia-Ukraine War, the COVID-19 pandemic, increased transportation costs and increasing demand for construction materials.⁵

Finally, the challenges that the industry is facing have led to a decline in overall investment in the construction industry. In the first quarter of 2022, investment in nonresidential structures declined at a rate of 0.9%, following contractions in nine of the past 10 quarters.⁶

II. Buy America Implementation Should Be Delayed

The EPA 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 EPA should delay implementation of domestic preference requirements for construction materials on federally assisted projects. Instead, the EPA should conduct extensive studies and seek additional public comment to ensure effective implementation of Buy America requirements.

1. The EPA 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 requirements. On April 28, the U.S Department of Transportation announced a six-month waiver of Buy America requirements,⁷ the Department of Housing and Urban

⁴ Sam Barnes, "[Missing Links](#)," Construction Executive, April 2022.

⁵ "[Monthly Construction Input Prices Decreased 2% in July, Up 17% From a Year Ago, Says ABC](#)," ABC, August 2022.

⁶ "[U.S. Economy Contracts in Second Quarter, Investment in Structures Falls Again, Says ABC](#)," ABC, July 2022.

⁷ 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.

Development issued a similar waiver on May 3⁸ and the EPA issued its own waiver.⁹ 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.¹⁰

Given the supply chain challenges outlined above and the EPA's own acknowledgement of difficulties associated with implementation, the EPA should extend its current six-month adjustment period waiver¹¹ until Buy America standards can be fully studied and developed prior to implementation.

2. The EPA should consider agency staffing needs for an expected high volume of waiver requests.

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.¹²

Given the supply chain challenges outlined above, it is highly likely that the EPA 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."¹³ 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 EPA 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

⁸ 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.

⁹ 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.

¹⁰ Ibid.

¹² See OMB Memo M-22-11, pg. 6: www.whitehouse.gov/wp-content/uploads/2022/04/M-22-11.pdf.

¹³ Ibid.

construction contracts above baseline spending.¹⁴ The EPA may not have sufficient staff to process these applications in a timely manner, which would lead to additional delays and increased costs and make EPA contracting opportunities less attractive to construction industry stakeholders. The EPA 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 water infrastructure projects funded by the federal government and ultimately taxpayers. ABC supports the proposed waivers and urges the EPA to carefully consider 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,



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¹⁴ 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/.