



April 17, 2023

Shailen P. Bhatt
Administrator
Federal Highway Administration
U.S. Department of Transportation
1200 New Jersey Ave. SE
Washington, DC 20590

RE: Docket No. FHWA-2022-0027, Review of General Applicability Waiver of Buy America Requirements for Manufactured Products

Dear Administrator Bhatt:

Associated Builders and Contractors hereby submits the following comments in response to the Federal Highway Administration's notice and request for comments on the general applicability waiver for Buy America requirements on manufactured products, published in the Federal Register on March 17, at 88 Federal Register 16517.

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.¹

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)² and industry workforce employment (more than 82% of the construction industry is employed by small businesses).³ In fact, construction companies that employ fewer

¹ For example, see ABC's 32nd Excellence in Construction Awards program from 2022: <https://www.abc.org/Portals/1/2022%20Files/32ND%20EIC%20program--Final.pdf?ver=2022-03-25-115404-167>.

² U.S. Census Bureau 2019 County Business Patterns: <https://data.census.gov/cedsci/table?q=CBP2019.CB1900CBP&n=23&tid=CBP2019.CB1900CBP&hidePreview=true> and <https://www.census.gov/programs-surveys/cbp/data/tables.2019.html>.

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

than 100 construction professionals comprise 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.⁴

In addition to small business member contractors that build private and public works projects, ABC also has large member general contractors and subcontractors that perform construction services for private sector customers and federal, state and local governments procuring construction contracts subject to respective government acquisition policies and regulations.

ABC's diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry. The 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 Notice and Request for Comments

ABC supports strategies to expand domestic jobs and manufacturing to avoid global supply chain disruptions and capture economic benefits within America. However, Build America, Buy America policies need to be balanced with safeguards against increased materials and construction costs and/or needless delays of infrastructure projects funded by the federal government and, ultimately, taxpayers.

ABC supports FHWA continuing its general applicability waiver of BABA requirements for manufactured products to ensure these requirements can eventually be implemented with minimal disruptions to rebuilding America's infrastructure.

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, continuing inflation and a labor shortage of more than half a million people.⁵ Our concern is that rapid implementation of BABA requirements could exacerbate these disruptions and further increase costs for contractors and taxpayers.

Despite the easing of the COVID-19 pandemic and moderate improvements to the unprecedented supply chain disruptions in some areas, the construction industry continues to face significant delays in obtaining key materials. ABC members and other construction firms report delays of eight or more months in obtaining critical construction materials and components, indicating that supply chain difficulties remain a persistent issue.⁶

⁴ 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 <https://thetruthaboutplas.com/wp-content/uploads/2021/07/Construction-firm-size-by-employment-2019-County-Business-Patterns-Updated-071321.xlsx>.

⁵ "Construction Workforce Shortage Tops Half a Million in 2023, Says ABC," Feb. 9, 2023.

⁶ <https://www.cnbc.com/2023/02/13/a-new-inflation-warning-for-consumers-coming-from-the-supply-chain-.html>.

These supply chain disruptions, among other factors, have contributed to significant increases in materials prices. In March 2023, construction input prices were up 39.0% since the onset of the COVID-19 pandemic in February 2020.⁷

II. Buy America Implementation Should Be Delayed

Given the unprecedented nature of the issues facing the industry that are outlined above, the FHWA should maintain its general applicability waiver of domestic content requirements for manufactured products.

1. Numerous federal agencies were forced to provide six-month Buy America waivers, and some agencies continue to provide additional broad waivers.

The IJA-imposed BABA requirements were initially addressed in the April 2022 OMB Guidance, OMB M-22-11, Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure.⁸ The OMB guidance provided instructions to agencies on the application of BABA requirements on federally financed infrastructure projects. ABC has submitted numerous comments to individual federal agencies with respect to their implementation of BABA.⁹

The actions of multiple federal agencies tasked with federal assistance of infrastructure clearly demonstrates the need for deliberate implementation of updated BABA requirements. On April 28, 2022, the U.S. Department of Transportation announced a six-month waiver of BABA requirements¹⁰ and the U.S. Department of Housing and Urban Development followed suit with a similar waiver on May 3, 2022.¹¹ Both agencies cited the lack of available information to immediately implement these requirements, with the DOT stating:

⁷ “[ABC: March Construction Input Prices Down Year-Over-Year for First Time Since August 2020, Still 39% Higher Than February 2020](#),” ABC, April 2023.

⁸ “[New ‘Buy America’ Mandates for Infrastructure Projects Could Trigger Cost Increases, Delays](#),” ABC, April 2022.

⁹ See ABC comments to the U.S. Environmental Protection Agency (<https://www.abc.org/LinkClick.aspx?fileticket=0-1uZ1S1FDU%3d&portalid=1&language=en-US>), the U.S. Department of Housing and Urban Development (<https://www.abc.org/LinkClick.aspx?fileticket=SNxsql2m8QU%3d&portalid=1&language=en-US×tamp=1663008670180>) and the U.S. Department of Transportation (https://www.abc.org/LinkClick.aspx?fileticket=6IPPS8_-KN8%3d&portalid=1&language=en-US×tamp=1663008674901).

¹⁰ See “Notice of Proposed Temporary Waiver of Buy America Requirements for Construction Materials,” published on regulations.gov on April 28, 2022: <https://www.regulations.gov/document/DOT-OST-2022-0047-0001>.

¹¹ See 87 Federal Register 26219: <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>.

Because construction materials have not previously been subject to Made in America rules as have iron and steel, there is a need to gather data on domestic sourcing capacity to inform stronger standards. For example, while the exact impact on highway project construction is unknown, the Department believes that it could be significant. ... The Department recognizes both the importance of ensuring Buy America compliant construction materials and the need to implement the requirement in a way that is not overly burdensome.¹²

Despite the expiration of these waivers, similar issues continue to affect the implementation of BABA requirements on federal assistance programs across additional federal agencies with responsibility for infrastructure funding.

Most recently, the FHWA established a new public interest waiver on BABA requirements for electric vehicle chargers receiving funding under the new National Electric Vehicle Infrastructure Formula Program, which aims to install 500,000 EV chargers by 2030. The waiver delays BABA requirements for chargers assembled in the United States until July 1, 2024.¹³

Clearly, the FHWA's own analysis has revealed the potential increased costs and delays to critical infrastructure development of immediate implementation of expanded BABA requirements. ABC urges the FHWA to maintain the general applicability waiver for manufactured products until domestic supply chains are better able to meet the needs of federally assisted transportation projects.

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

As noted in the OMB's initial guidance on implementing the new Buy America requirements, the IJA allows for several categories of waivers that recipients can apply for when the requirements may be unfeasible.¹⁴

Given the supply chain challenges outlined above, it is highly likely that the FHWA will face an extremely high volume of waiver applications, especially considering the OMB's guidance that "to the greatest extent practicable, waivers should be targeted to specific products and projects."¹⁵ Many products and projects will qualify for the nonavailability or unreasonable cost waivers given the difficulty contractors already face in obtaining affordable construction materials.

The FHWA should consider the impact that a flood of waiver applications will have on the agency's functioning. A lack of sufficient staff to process BABA waiver applications

¹²See 87 Federal Register 31931: <https://www.federalregister.gov/d/2022-11195/p-23>.

¹³See 88 Federal Register 10619: <https://www.federalregister.gov/documents/2023/02/21/2023-03498/waiver-of-buy-america-requirements-for-electric-vehicle-chargers>.

¹⁴ See OMB Memo M-22-11, pg. 6: <https://www.whitehouse.gov/wp-content/uploads/2022/04/M-22-11.pdf>.

¹⁵ Ibid.

in a timely manner may lead to additional delays and increased costs on infrastructure projects. Maintaining the general applicability waiver for manufactured products will reduce the quantity of waiver applications and alleviate these concerns.

In addition, ABC suggests future BABA implementation efforts incorporate a governmentwide database of products and materials that are actively seeking a waiver, as well as those that have been granted a waiver. This will eliminate inconsistencies between active and previous agency decisions and alleviate multiple requests to multiple agencies by construction industry stakeholders. In a win-win for the government workforce and its contractors, this will reduce time needed to evaluate materials, which will eliminate risk, cut costs and help get more projects built with domestic materials in the long run.

III. Responses to Specific Questions in the Notice

1. *Does the justification that was used by FHWA in granting the General Waiver in 1983 still apply? Specifically, is FHWA's approach to the application of Buy America requirements to manufactured products still appropriate, considering the enactment of the BABA, and standards established therein?*

The prior justification for the general applicability waiver, that critical manufactured products for federally assisted highway construction are not domestically available in sufficient quantities,¹⁶ still applies. As mentioned above, construction firms continue to report significant wait times as supply chain disruptions persist. Maintaining the waiver remains in the public interest to avoid worsening these ongoing issues.

6. *Should FHWA consider defining the term “produced in the United States” for manufactured products via rulemaking? If so, should it consider adopting the definition for the same term that is used in Section 70912(6)(B) of BABA, as described above? Or should it consider adopting some other definition? Should the definition vary by product or product type? Should FHWA adopt the approach for determining “cost of components” of a manufactured product described by the Office of Federal Financial Management in the Office of Management and Budget in the notification of proposed guidance published on February 9, 2023 ([88 FR 8374](#) (Feb. 8, 2023)), which is the same as is used in the FAR ([48 CFR 25.003](#))?*

ABC strongly supports additional rulemaking to provide clarity on the definition of “produced in the United States.” ABC would further urge the FHWA to undergo individual study and rulemaking processes for each manufactured category. There are a wide range of differences across all of the materials, including domestic capacity and manufacturing processes. Applying a uniform standard for all categories may be considered arbitrary and capricious, as it fails to take into account these important differences.

¹⁶ See notice: <https://www.federalregister.gov/d/2023-05498/p-26>.

Instead, by moving forward with a formal rulemaking process for each material, the FHWA and other federal agencies will be able to thoroughly research standards needed for each material, as well as receive a higher number of public comments than is feasible during this request for comments on proposed guidance. This would ultimately lead to more informed and effective BABA requirements that balance economic and supply chain realities with overall infrastructure improvement goals.

In addition, Section 70917 of IIJA intentionally excluded aggregates; cement; cementitious materials; and related additives and binders from BABA sourcing requirements. The FHWA should not undercut this clear congressional intent by attempting to construe such materials as “manufactured products.” Such a loose regulatory interpretation would be contrary to Section 70917. Congress specifically evaluated whether to consider cement and cementitious materials, aggregates—such as sand, stone or gravel—and aggregate binders and additives to be “construction materials” and determined they were not creating a domestic content requirement. In practice, subjecting these materials to BABA requirements would impose significant cost and supply chain burdens on infrastructure projects across the country. Construction industry experts must be able to use the appropriate construction materials to ensure a project’s quality, safety and resiliency without consideration of additional regulatory burden.

Conclusion

While ABC supports strategies to expand domestic jobs and manufacturing to avoid global supply chain disruptions and capture economic benefits within America, reshoring domestic manufacturing for the construction industry supply chain that has eroded over decades is not feasible in the time frame prescribed by lawmakers and regulators.

Federal agencies and their state and local government partners are already reeling from the confusion resulting from this abrupt policy change. ABC urges the FHWA to continue its general applicability waiver for at least 18 months so government and industry stakeholders can adapt to the eventual BABA final regulation and implementation so that taxpayer-funded infrastructure projects will not be needlessly delayed, subjected to increased costs or cancelled as a result of well-intentioned but ham-fisted public policy.

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

Respectfully submitted,



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