



March 13, 2023

The Honorable Shalanda Young
Director
Office of Management and Budget
725 17th Street NW
Washington, DC 20503

RE: Docket No. OMB-2023-0004 - Proposed Rule: Guidance for Grants and Agreements

Dear Director Young:

The American Road & Transportation Builders Association (ARTBA) respectfully submits these comments on implementation of the “Build America, Buy America Act” (BABA), a provision within the Infrastructure Investment and Jobs Act (IIJA), which President Biden signed into law on November 15, 2021.

The Office of Management and Budget (OMB) and its Made in America Office (MIAO) published proposed guidance for the implementation of BABA on February 9. The current draft, when finalized, will succeed OMB’s Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure (M–22–11), released on April 18, 2022.

ARTBA’s members remain focused on and committed to maximizing the benefits of the IIJA’s historic investments by building federal-aid transportation infrastructure projects as safely, efficiently and cost-effectively as possible. ARTBA also supports BABA’s principal policy rationale, strengthening the domestic manufacturing sector. While these objectives do not inherently conflict, ARTBA has identified aspects of the draft guidance which, if enacted, will likely lead to project costs increases and delays in the short term. We also recommend additional actions that OMB and federal agencies should undertake with urgency.

These areas of concern include:

- Lack of clarity and illogical timing in BABA implementation.
- Insufficient utilization of federal transportation agencies’ expertise in administering BABA requirements.
- Extending Buy America coverage to materials beyond – or in conflict with – Congress’ intentions.

We address these issues herein and appreciate OMB’s attention to them.

Background

Buy America has long applied to federal-aid highway and transit projects on which ARTBA members work (23 U.S.C. §313 and 49 U.S.C. § 5323(j), respectively). On the highway side, Buy America has required a domestic manufacturing process for any steel or iron products permanently incorporated into federal-aid projects. Also, through a long-standing waiver, the Federal Highway Administration (FHWA) has exempted manufactured products from Buy America requirements on the projects for which it provides financial assistance. The agency has done so because of difficulties and significant administrative costs in attempting to determine the origins of such a product's components, many of which are small, relatively inexpensive and hard to differentiate.

The IIJA added five categories of "construction materials" to Buy America coverage: 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.

Putting the IIJA's Historic Investment to Work

The IIJA features historic, generational investment in highway, bridge and transit infrastructure, among other sectors. In "Year One" (FY2022), the federal-aid highway program increased 38 percent, while the transit program rose 73 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 Dashboard¹, 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.

At the same time, the transportation construction industry has 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.² 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.

To reiterate, ARTBA supports Buy America's objectives. Nothing in this submission should be interpreted as seeking to undermine or evade its legal requirements. However, in these comments and otherwise, we will call attention to – and if necessary oppose – proposed

¹ <https://www.artba.org/economics/highway-dashboard-iija/>

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

policies that could constrict availability for products already subject to rising costs or limited availability in domestic form.

OMB Should Better Utilize Expert Federal Agencies in Implementing BABA

The IIJA was enacted about 16 months ago. Since then, ARTBA, its members, affiliates and partners have provided extensive feedback on BABA's implementation. In fact, this is the sixth set of written comments that ARTBA has submitted to OMB or U.S. DOT in less than a year. In particular, U.S. DOT and its agencies have facilitated numerous opportunities for comments and discussions.

Nonetheless, under OMB's leadership, many unanswered implementation questions remain. Consider this timeline:

- April 18, 2022 – OMB initial “non-binding” guidance published.
- May 19, 2022 - U.S. Department of Transportation (U.S. DOT) issues a general waiver that delays the effective date of BABA's domestic preference requirements for construction materials for 180 days. (ARTBA supported.)
- November 10, 2022 – The construction materials requirement takes effect while U.S. DOT also considers two additional waivers, 1.) “grandfathering” certain projects from that requirement if in latter stages of procurement, and 2.) exempting products on smaller projects or below a threshold of federal-aid funding from all Buy America requirements (a “de minimis” waiver).
- January 30, 2023 – “Grandfathering” waiver takes effect.
- Pending – New OMB guidance (published February 9, 2023; comments closed March 13, 2023) replacing the initial guidance and addressing coverage of materials, compliance, waiver process and other key issues.
- Still Pending – “De minimis” waiver (four-plus months).

Thus, under OMB's direction, the new construction materials requirement has actually taken effect before the office has fully defined which “manufacturing processes” are necessary to ensure compliance with BABA, and how to distinguish construction materials from manufactured products for this purpose. Also, one important waiver took effect several weeks later, and another is still pending after more than four months.

This timeline is particularly vexing because contractors and recipients planning, procuring and building transportation projects need maximum clarity and lead time on all federal-aid requirements as they work together to deliver them. This is not an academic exercise,

especially given the IJIA's large growth in federal investment. There are demonstrable ramifications. Contractors may be willing to take on risk in the form of nebulous regulations or an unpredictable waiver process, but they will "price" that risk accordingly, leading to higher project costs.³

To this point, state and local transportation agencies have fashioned their own specifications for BABA implementation without the clearest direction from the federal level. This has led to inconsistencies, which presents a particular challenge for contracting firms operating in multiple jurisdictions. Some federal agencies have tried to help. For example, on February 1, FHWA posted an informative series of questions and answers on the topic⁴. However, just over a week later, OMB published its draft guidance, revisiting several of the same issues and asserting that much of the federal BABA policy was still inchoate.⁵

Fortunately, some recipients have approached this task in a collaborative manner, compiling details on which of their agency's approved products are BABA-compliant. Unfortunately, others have simply pushed out the risk of BABA compliance to the contractor without this type of centralized information. Again, this approach will ultimately increase project costs.

To reestablish clarity in this process, OMB should build on the expertise of federal agencies that have already administered domestic preference requirements. Congress contemplated this dynamic within BABA itself, stating that its provisions "shall apply to a Federal financial assistance program for infrastructure only to the extent that a domestic content procurement preference... does not already apply to iron, steel, manufactured products, and construction materials."⁶ In other words, do not needlessly tear down or complicate substantial domestic preference programs already in place.

In a report compiled at OMB's behest⁷, U.S. DOT noted there were "relatively small" inconsistencies between BABA and the department's existing Buy America requirements, and those distinctions were understandably limited to BABA's new construction materials requirement.

It is therefore troubling to see commentary that OMB is really seeking to make domestic preference requirements more uniform across the federal government. While the policy

³ Risks include the potential that evolving federal Buy America regulations could eventually require contractors to remove non-compliant material from a project at their own expense, despite having incorporated it in good faith and with the recipient's approval. As discussed above, there is also heightened risk of cost increases or limited availability for certain product exacerbated by inartful implementation of BABA.

⁴ https://www.fhwa.dot.gov/construction/contracts/buyam_qa_baba.cfm

⁵ Another point of confusion emanates from OMB's recent correction to the proposed guidance, published ten (10) days prior to conclusion of the current comment period, and raising the issue of whether this current action constitutes a rulemaking. <https://public-inspection.federalregister.gov/2023-04746.pdf>

⁶ IJIA, Sec. 70917(a).

⁷ DOT's Identification of Federal Financial Assistance Infrastructure Programs Subject to the Build America, Buy America Provisions of the Infrastructure Investment and Jobs Act, January 2022.

objective of strengthening American manufacturing should be consistent, the realities of funding, design, procurement and construction vary greatly from program to program.

Ultimately, OMB should ensure U.S. DOT and other departments play the lead role in working with their recipients and stakeholders to implement BABA expeditiously. This means enabling them to deploy appropriate waivers and craft policies that make the most sense for their respective infrastructure sectors and programs.

OMB Should Reiterate that BABA Applies to Permanent Components

Section VI of OMB's initial guidance stated:

The Buy America preference only applies to articles, materials, and supplies that are consumed in, incorporated into, or affixed to an infrastructure project. As such, it does not apply to tools, equipment, and supplies, such as temporary scaffolding, brought to the construction site and removed at or before the completion of the infrastructure project.

The new OMB guidance does not yet include an equivalent provision. There is no indication in the IIJA that Congress intended to change longstanding policy and extend Buy America coverage to temporary products, equipment and other such items used in constructing projects, but not permanently incorporated in them. Therefore, we ask that OMB restate this clarification in the final guidance.

OMB Should Only Cover Construction Materials Enumerated by Congress

As noted above, Congress enumerated five categories of construction materials for Buy America coverage. Regrettably, OMB appears to have undertaken a crowd-sourcing exercise to exceed Congress' intentions, entertaining suggestions from groups with narrow, proprietary interests.

The proposed guidance would extend coverage to fiber optic cable and optical fiber (whereas Congress only references non-ferrous metals and polymers used in those items). Given the pointed competition for procuring these types of products across multiple U.S. industries, and the resulting elongated delivery schedules, this provision would virtually guarantee delays for affected projects in the short term.

The draft guidance also references coatings (which is arguably a manufactured product) and brick as potential additions to the list, while inviting still others. These are beyond Congress' intent and should not be added.

Covering Aggregates and Related Materials Is Clearly Contrary to Congress' Instructions

While Congress enumerated categories of construction materials to be covered, it even more explicitly listed some not to be included. Section 70917(c)(1) of the IJA exempts “cement and cementitious materials, aggregates such as stone, sand, or gravel, or aggregate binding agents or additives” from the “construction materials” covered under BABA. This limitation makes clear no domestic content procurement preference under BABA applies to aggregates and these related paving materials.

Section 70915(b)(1) requires OMB to “issue standards that define the term ‘all manufacturing processes’ in the case of construction materials” to which BABA applies a domestic content procurement preference. These standards help determine whether particular products comply with BABA requirements. In Section 70917(c)(2), Congress reiterated the exemption for the above-listed materials in this additional context. The subsection states that OMB’s standards for “all manufacturing processes” “shall not include cement and cementitious materials, aggregates such as stone, sand, or gravel, or aggregate binding agents or additives as inputs of the construction material.”

Nevertheless, the draft OMB guidance inquires as to whether one or more these exempt materials, combined together or with other items, could somehow form an end product subject to full Buy America coverage. In a curious deployment of semantics, the proposed guidance reasons that just because Congress excluded certain products from “construction materials” (as a term of art for BABA purposes), OMB still may choose to cover those same products in certain combinations. However, it is illogical that a combination of more than one exempt product would result in a manufactured product rendering those component products as not exempt.

No one disputes that aggregates and these related items are construction materials in the generic sense. However, as cited above, Congress enacted the language in these portions of the IJA to explicitly exclude them from the “construction materials” for which BABAA establishes a domestic content procurement preference.

Congress did this because subjecting aggregates and related materials to BABA requirements would severely disrupt established supply chains while pursuing questionable economic benefits for domestic manufacturing. The domestic supply of many such products is limited by environmental and land use regulations (many of them localized in scope). It is not realistic to anticipate this supply to fulfill the heightened demand resulting from IJA investment or otherwise.

For all these reasons, we respectfully urge OMB to comply with Congress’ intentions and reiterate that these products are fully exempt, regardless of their use alone or in combination with other items.

Distinguishing Construction Materials from Manufactured Products

OMB has asked repeatedly for feedback in distinguishing construction materials from manufactured products, given that a specific item may only fall under one classification or the other. This distinction is particularly important to federal-aid highway and bridge projects because of FHWA's long-standing waiver on manufactured products.⁸

Again, we suggest utilizing the expertise of U.S. DOT and its agencies. A 1997 FHWA memo⁹ states in part:

The [agency] considers a "manufactured product" to be any item that must undergo one or more manufacturing processes before the item can be used in a highway project. A manufactured product may be usable as a stand-alone product, or as a component within a more complex assembly which would also be considered a manufactured product. Some typical stand-alone products used in highway projects are steel in the form of rebar and structural steel; asphaltic cement; portland cement; and aggregates. Typical composite products include bridge bearings, signal heads, both asphaltic and portland cement concrete; and precast concrete items.

While FHWA does not apply Buy America requirements to "manufactured products," we do apply the requirements to specific components within those products. Case in point, if a bridge bearing was considered only as a manufactured product, it would be exempt from the Buy America requirements. However, FHWA policy has been that the steel components of a predominately steel product must be of domestic manufacture unless the value of the components is less than the minimal use threshold for the project."

We recommend maintaining this description for federal-aid highway and bridge projects. It would be misguided to revise it simply for the sake of uniformity across diverse federal agencies and programs.

Additional Recommendations

Finally, ARTBA recommends the following additional BABA implementation actions:

- Upon completion of this guidance, U.S. DOT should specify which common items are to be classified as construction materials and which as manufactured products. This will ameliorate the most frequent uncertainty expressed by ARTBA members.

⁸ ARTBA is aware that the IIJA requires periodic reviews of this type of waiver, and stands ready to advocate for its continued use when appropriate.

⁹<https://www.fhwa.dot.gov/programadmin/contracts/122297.cfm#:~:text=The%20FHWA%20considers%20a%20%22manufactured,used%20in%20a%20highway%20project.>

- U.S. DOT should work with recipients to develop a state-by-state listing of Buy America-compliant products. While some states have completed this task proactively, it has not been undertaken universally.

This process will also help U.S. DOT and recipients identify gaps in availability, for which they can deploy the waiver process. As an example, polymer-based resins for use on bridge decks are not currently manufactured domestically, nor has that segment of the industry shown an interest in doing so. A collaborative process will help specify targets for longer-term incentives and other efforts needed to change these market dynamics.

- U.S. DOT should work with recipients to ensure design standards incorporate Buy America requirements and utilize alternatives to components and materials with limited or no availability in domestic form.
- Through its guidance and other directives, OMB and U.S. DOT should clarify – at last – that inexpensive commercially-available off-the-shelf (COTS) products (such as nuts, bolts and tie wires) are exempt from Buy America coverage. Based on our dialogues since the IIJA’s enactment, there appears to be consensus among federal officials and industry that extending Buy America to items worth pennies, and impossible to certify as domestically-made, diverges from the statute’s intentions. Any reasonable person would agree the administrative costs far outstrip the economic benefits to domestic manufacturing or any other sector.

The proposed “de minimis” waiver appears intended to improve this circumstance, and ARTBA supports – at a minimum – the thresholds included in the proposed version published in November. However, for certain types of projects it will still be inadequate. For example, as ARTBA has previously included in our comments, a typical rest area project in Florida includes 124 categories of items, most of the COTS variety. This can easily result in a Buy America quagmire for the project.

- OMB should commit to expeditious, transparent timelines applying to MIAO’s participation in the waiver process, through which – pursuant to Executive Order 14005 – it is to review submissions from every federal agency and opine on their compliance with law and policy. Otherwise, there is potential for significant project delays or an outsized role of certain interest groups seeking to influence MIAO’s actions without regard to outcome of projects and the IIJA’s record federal investment.

Conclusion

With spring nearly upon us, the 2023 construction season – the first with BABA’s construction materials requirement in place – is about to begin in earnest. Regrettably, it also represents a season of frustration within the transportation construction industry because of the illogical timeline for implementing that requirement. Rhetoric and name-calling from those seeking a

puritanical approach to BABA implementation¹⁰, solely to benefit certain interest groups, have exacerbated ill-will among those who actually build the nation's transportation infrastructure.

It is noted that U.S. DOT – with MIAO's review and approval – issued a Buy America waiver for electric vehicle (EV) charging facilities, while numerous BABA implementation questions remain unanswered for the federal-aid highway and transit programs, which are larger by many multiples. Moreover, U.S. DOT recognized market limitations and incorporated a phased-in approach for the EV requirements. MIAO should collaborate with U.S. DOT to utilize this same degree of urgency and pragmatism for these other programs, maximizing the benefits from their historic federal investment.

In the draft guidance, OMB inquires about reducing burdens for BABA Implementation among recipients. We respectfully offer the recommendations herein to reduce burdens among all parties to federal-aid transportation projects, who work every day to fulfill the IIJA's commitments.

Thank you for considering these views. Our continued dialogue with OMB and other federal officials on this matter remains a top priority for ARTBA and our members.

Sincerely,

A handwritten signature in dark ink, appearing to read "R. Juliano", is centered on the page. The signature is fluid and cursive, with a large initial "R" and a stylized "Juliano".

Richard A. Juliano, CAE
General Counsel

¹⁰ See <https://www.washingtonpost.com/us-policy/2023/02/18/biden-buy-america-roads-bridges/>