



August 18, 2022

The Honorable Polly E. Trottenberg
Deputy Secretary
U.S. Department of Transportation
1200 New Jersey Ave SE
Washington, DC 20590-0001

Re: Docket No. DOT–OST–2022–0047 – Construction Materials Used in Federal Financial Assistance Projects for Transportation Infrastructure in the United States Under the Build America, Buy America Act; Request for Information

Dear Deputy Secretary Trottenberg:

The American Road & Transportation Builders Association (ARTBA) respectfully offers this response to the request for information (RFI) relating to implementation of the Build America, Buy America Act. We have appreciated the ongoing dialogue on this topic, an important group of provisions within the Infrastructure Investment & Jobs Act (IIJA), to which ARTBA's membership remains committed to success.

ARTBA's Buy America Policy

- ARTBA supports Buy America protection for a core list of covered materials that are permanently incorporated into transportation projects and which have been regularly enumerated by the Federal Highway Administration (FHWA) and Federal Transit Administration (FTA).
- ARTBA supports a common-sense interpretation of the Buy America rule so that the burden of compliance on transportation construction contractors does not lead to the likelihood of project cost increases and delays.
- ARTBA supports efforts by FHWA, FTA and other federal transportation agencies to develop nationwide waivers that would exempt commercially available off-the-shelf (COTS) products due to the burden of traceability of component materials in these products and their de minimis financial impact to total project value.
- Ideally, compliance with Buy America begins with a project design that has effectively vetted the specified materials to confirm that the covered materials and manufactured products are produced and available in the United States.
- ARTBA supports FHWA and FTA policy modifications that would require designers and specifiers of transportation projects to assess the availability of materials to be incorporated into the project and make all reasonable efforts to use available Buy America-qualified materials as the basis of design.

Expanding Buy America Coverage

Implementation of the IIJA's expanded Buy America provisions represents a particular challenge, in part because 1.) the bill features record federal investment in highway, bridge and transit projects, which is expected to increase demand for a number of commodities; and 2.) transportation construction contractors already face sustained and unprecedented materials cost spikes and limits in their availability.¹

Under the IIJA, Buy America will continue requiring a domestic manufacturing process for iron, steel and manufactured products permanently incorporated in federal-aid highway and transit projects (although FHWA has long applied a nationwide waiver to certain manufactured products). In addition, Buy America will now apply to certain construction materials. In its [initial guidance](#), the White House Office of Management and Budget's Made in America Office (MIAO) specified this term as "an article, material, or supply—other than an item of primarily iron or steel; a manufactured product; cement and cementitious materials; aggregates such as stone, sand, or gravel; or aggregate binding agents or additives—that is or consists primarily of:

- 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; or
- drywall."

While coverage of construction materials was to commence on May 14, the U.S. Department of Transportation (U.S. DOT) imposed a [temporary waiver](#) (with strong support from ARTBA and numerous other groups) to defer that requirement 180 days to November 10.

The 16 specific questions included in the current RFI present a very difficult task given the limited time for response. Therefore, in lieu of that approach, we offer the following notable takeaways from recent internal discussions among ARTBA members, as well as our dialogues with federal officials, including those at MIAO, U.S. DOT, Federal Highway Administration and Federal Transit Administration. We will also continue providing feedback such as that sought through the RFI's questions and subject areas.

Need for a Collaborative Approach

All parties – including federal officials, state and local agencies, and industry – should take a collaborative approach to implementing Buy America coverage of construction materials.

¹ ARTBA's National Commodity and Material Prices for Transportation Construction, derived from Bureau of Labor Statistics data, currently shows a 15.4 percent increase in highway and street construction inputs compared with one year ago. See <https://www.artba.org/economics/materials-dashboard/>.

We are troubled by reports that as the November 10th expiration of the current waiver nears, some state recipients simply plan to put the full onus on contractors for finding a way to comply. Besides the obvious impracticality of this approach, it represents another example of risk imposed on the prime contractor, a common industry concern in a number of areas. This will likely lead to higher project costs, as contractors incorporate risk associated with their newfound unilateral responsibilities for Buy America compliance into the pricing of their bids.

In contrast, to cite one example, the Florida Department of Transportation (FDOT) closely consulted with industry and has undertaken a survey of suppliers appearing on its [Approved Products List](#). FDOT has asked each respondent to confirm whether or not their products comply with the new Buy America requirements, providing them the relevant language from the IIJA to review. The results of this survey will present a much clearer picture – at least through the lens of this populous state – as to which materials are not adequately manufactured domestically, and for which additional, narrower waivers should be considered in the short term.

ARTBA members have also expressed concern that, besides responsibility being “pushed out” to the contractor, it will also be “pushed down” to agency personnel on the project level, whose interpretations of new Buy America requirements may be inconsistent or extreme. The leadership of U.S. DOT and state/local agencies could lessen this possibility by compiling a directory of firms offering Buy America-compliant items. This type of resource would also help avoid a dilemma described by one of ARTBA’s contractor-leaders, which could become much more prevalent as Buy America coverage expands. He cites a project for which it was impossible to certify a number of items (mostly of the COTS variety) as compliant with Buy America. Yet the public owner insisted on full Buy America compliance, would not consider applying for a waiver, and could not provide the contractor with even a single source for domestically-certified versions of the products in question.

The RFI’s Question 10 references a potential “good faith certification process” as a bridge to full Buy America compliance for construction materials. As seen in other federal rules such as that for the Disadvantaged Business Enterprise program, “good faith effort” is a subjective term, which in that case has been debated for decades. To the extent this approach could be used for Buy America certifications, it should represent a true collaboration among owners, contractors and suppliers, and not a nebulous standard for industry personnel to meet.

Need for Flexibility in Implementation

ARTBA and its members are committed to the IIJA’s success and support the further objective of strengthening American manufacturing. To avoid conflicts between these purposes during the short term, the White House, MIAO and U.S. DOT should consider all appropriate options for Buy America implementation, especially in its expansion to construction materials. These options should include:

- Extension of the full temporary waiver past November 10.

- Imposition of narrower waivers for products shown to have limited or no domestically-manufactured versions, as shown by surveys such as that being conducted by FDOT.
- Grandfathering of a project (either in whole or in part) which includes unique non-domestic elements designed before expiration of the construction materials waiver.
- Exclusion of Buy America requirements from utility projects ancillary to federal-aid highway and transit projects. These relocations remain a major cause of project delays, and full application of increased Buy America requirements will only exacerbate that circumstance, whether the transportation contractor or utility itself has that responsibility.

Finally, as a follow up to this RFI, U.S. DOT should host regional roundtable conversations to review the 16 questions and related issues in detail. A regional format would also enable consideration of geographic market variations which apply to many of these products around the country. ARTBA would be pleased to help organize these sessions utilizing our membership from across the transportation construction industry.

Construction Materials vs. Manufactured Products

In recent months, federal officials have asked ARTBA to help draw distinctions between construction materials and manufactured products. As noted, Buy America coverage will now extend to many construction materials, while manufactured products have been covered but subject to waivers.

The public owner procures and uses a construction material in its purest form on a project. The MIAO initial guidance cites examples that could be utilized this way, including lumber and glass. In contrast, [FHWA states](#) that a manufactured product is "any item that must undergo one or more manufacturing processes before the item can be used in a highway project." Moreover,

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.

A manufactured product can also be viewed as a unit of purchase or pay item used in the owner's procurement. Among numerous examples used in transportation construction are reflective pavement markings, drop inlets and noise walls. (ARTBA also considers an assembled product, such as a signal box, to be a type of manufactured product.)

The distinction is important because, as discussed above, Buy America will apply to the five enumerated types of materials, but coverage of manufactured products will presumably depend on whether they are "predominantly" comprised of iron, steel or the materials in

question. Moreover, ARTBA believes construction materials coverage should be limited to those five types, which originally appeared in the text of the IIJA itself.

Relating to construction materials and manufactured products, ARTBA also supports:

- Reaffirmation that Buy America coverage only applies to relevant components permanently incorporated in projects.
- Clear exemption from Buy America coverage for aggregates and other pavement-related materials – as well as manufactured products using them – as specified in the IIJA and initial guidance from MIAO.
- Continued waiver of coverage for manufactured products not predominantly comprised of iron, steel or relevant construction materials, as well as a “common sense” exemption for commercially available off-the-shelf (COTS) products like nuts, bolts, washers, nails, tie wires and others.

Conclusion

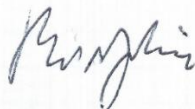
ARTBA’s members work to maximize safety, efficiency and timeliness in building the nation’s transportation infrastructure assets. We also believe that transportation investment can generate heightened and unparalleled economic activity. The IIJA’s historic investment levels should result in equally unprecedented economic benefits over several years, provided that regulatory barriers and conflicting federal policies are minimized.

Nothing in these comments should be interpreted as seeking to undermine core Buy America principles or Congress’ intent in including “Build America, Buy America” within the IIJA. ARTBA strongly believes the new law’s resulting infrastructure and economic outcomes can encompass increased American manufacturing capabilities, among other sectors. Our purpose in providing this feedback is to help you avoid policy conflicts, account for current market challenges, and best achieve the intended purposes of both Buy America and the IIJA’s surface transportation title as a whole.

We have appreciated continued opportunities to provide the transportation construction industry’s viewpoint as you determine the best ways to implement this legislation. ARTBA is available for and looks forward to additional dialogue, including our members when possible. I am available as needed at rjuliano@artba.org and (202) 683-1004.

Thank you for your consideration.

Sincerely,



Richard A. Juliano, CAE
General Counsel