



April 14, 2022

The Honorable Celeste Drake
Made in America Director
Office of Management and Budget
Washington, DC 20500

Dear Director Drake:

Thank you for the recent opportunity to meet with you and your team to discuss implementation of the “Build America, Buy America” provisions (Title IX) within the Infrastructure Investment & Jobs Act (IIJA). We appreciate your willingness to consider transportation construction industry feedback as the Made in America Office (part of the Office of Management & Budget (OMB)) finalizes its initial guidance in this area. This letter reiterates the comments I provided verbally on behalf of the American Road & Transportation Builders Association (ARTBA).

Our association’s 8,000 members, drawn from both the public and private sectors, are putting the IIJA’s historic levels of federal transportation investment into action. They plan, design, build, supply and maintain transportation projects in all modes across the country. They work to do so while maximizing safety, efficiency and timeliness, benefiting industry workers and the travelling public alike.

We are gratified that you have expressed support for keeping projects on time and on budget while enhancing domestic manufacturing capacity through Buy America compliance. ARTBA bases these comments on similar principles. We also trust this will be part of a continuous dialogue as the transportation construction industry works with public sector partners to maximize return on this historic federal investment.

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.

Expansion of Buy America to “Construction Materials”

Buy America coverage has long applied to iron, steel and certain manufactured products permanently incorporated in federal-aid highway and transit projects. The IJA expands that coverage to “construction materials,” which now must be “produced in the United States.” It specifies that all manufacturing processes for iron and steel products “from the initial melting stage through the application of coatings” must occur in the U.S.; all manufactured products must be manufactured in the U.S., and more than 55 percent of the cost of its components must be domestic, subject to some exceptions; and the manufacturing processes for all construction materials must occur in the U.S.

The law explicitly states “construction materials” do not include “cement and cementitious materials, aggregates such as stone, sand, or gravel, or aggregate binding agents or additives.” Therefore, OMB’s guidance should make clear that these are not considered construction materials for purposes of Buy America.

The guidance should also reiterate FHWA’s longstanding principle (as it has stated in the context of federal-aid highway projects) that Buy America applies to applicable components and materials permanently incorporated into the project. There is no statutory direction to extend those requirements to material or equipment used temporarily to build transportation infrastructure assets.

“Common Sense” Approach to Project-level Implementation

The OMB guidance should allow for application of Buy America using a “common sense” approach on the project level, which will minimize potential cost increases and delays. The more unnecessarily expensive the project, the more limited will be the economic benefits (including employment opportunities) emanating from federal investment.

Nowhere is this approach more critical than with commercially-available, off-the-shelf (COTS) products. The resources and time required to trace and document these products can far outweigh their de minimis financial impact to the project’s total value. Given the low cost of these items, such an “extreme” interpretation of Buy America does little to achieve the law’s purpose of strengthening domestic manufacturing.

During the Obama administration, FHWA agreed with this viewpoint, issuing a [memorandum](#) seeking to clarify Buy America coverage in this regard. In that 2012 document, the agency concluded that including those types of products in Buy America coverage would not be cost-effective to administer. FHWA listed examples of COTS that typically turn up in highway, bridge and ancillary projects, including nuts, bolts, washers, faucets, door hardware, light bulbs, and other miscellaneous steel or iron parts used in common off-the-shelf products such as toilets and the filaments in light bulbs.

While subsequent legal action revoked the FHWA memorandum (based on process, not substance), it shows that reconciling the policy objectives of Buy America with the realities of COTS has long presented a persistent and perplexing challenge. The IJA's historic investment levels will only exacerbate this challenge, as more funding will mean more projects and more component parts needed to build them.

We also implore you to consider the myriad of items needed for many federal-aid projects. As an example, attached is a list of 124 component categories for a highway rest area. The owner-agency ordered the contractor to certify the origin of all these products to ensure Buy America compliance. While some of them (like light poles) clearly fall under the law, dozens of others are relatively small and inexpensive, and require significant administrative costs to certify as Buy America-compliant, assuming it is even possible to trace their origin.

All of these circumstances argue for a certain degree of project-level flexibility in requiring contractors to ensure Buy America compliance and certify the origin of COTS components on projects. Similarly, OMB should allow FHWA to revisit its previous efforts to develop a nationwide waiver that would exempt and clarify COTS components entirely. These actions will help maximize the IJA's economic benefits with minimal impact on domestic manufacturing.

Timeliness of Waivers

The IJA and President Biden's Executive Order 14005¹ institute new requirements for Buy America waivers. The U.S. Department of Transportation (U.S. DOT) may approve a waiver if it believes compliance would be "inconsistent with the public interest" or would increase the project's cost by at least 25 percent. There are posting and public comment requirements for proposed waivers.

Moreover, in adhering to the Executive Order as it applies to Buy America waivers, U.S. DOT must provide you, as Made in America Director, "a description of its proposed waiver and a detailed justification for the use of goods, products, or materials that have not been mined, produced, or manufactured in the United States." You are to review each such waiver and make a written determination as to whether or not it is consistent with applicable law and policy. As you made clear in our recent meeting, the contracting agency still approves or disapproves the waiver itself.

¹ "Ensuring the Future Is Made in All of America by All of America's Workers" (Jan. 25, 2021)

We appreciate your comments that waivers should be viewed as a tool for implementing Buy America and achieving its underlying purposes, rather than seen as an alternative to doing so. You also noted your commitment to a timely, practical and efficient waiver review process.

While, as described above, ARTBA prefers an approach where Buy America considerations are incorporated into the design process, some waiver requests will be inevitable. The waiver application process should be timely and should not become a barrier to efficient project delivery or related decision-making by the owner and contractor. It is quite possible that a project would need to stop completely if waiting for approval of a waiver application at a critical point. In this period of supply chain shortages and uncertainties (addressed below), a contractor could find itself in unexpected need of a waiver to keep a project moving forward.

We also urge your use of U.S. DOT's expertise and related resources, as well as those of the transportation construction industry and related academia, in making these important determinations.

The adage that "time is money" fully applies to transportation construction projects. Delays resulting from the Buy America waiver process – or the requirement that contractors utilize and document even the smallest Buy America-compliant components, as described in the previous section – can lead to demonstrable and significant costs to the taxpayers. According to a 2016 report by the Texas A&M Transportation Institute based on example projects, delays were estimated to cost \$87,000 per month for a small project (e.g., reconstruction of a rural road), \$420,000 per month for a medium-sized project (e.g., widening of a semirural highway), and \$1.3 million per month for a large project (e.g., reconstruction of a highway in a large metro area).²

Given these realities, your commitment to a timely waiver process is well-placed. ARTBA and our members are equally committed to helping you achieve it.

Considering Unprecedented Materials Cost Increases

According to ARTBA's analysis of national data from the Bureau of Labor Statistics,³ the cost of highway and street construction inputs has increased 21 percent over the past year. Many states and regions are seeing unprecedented increases in costs for certain commodities, as well as limited or delayed availability. Among many other effects, a number of specialty contractors and suppliers – many of which are small businesses or participants in the Disadvantaged Business Enterprise (DBE) program – are confronting insolvency.

² CURTIS BEATY ET AL., ASSESSING THE COSTS ATTRIBUTED TO PROJECT DELAY DURING PROJECT PRE-CONSTRUCTION STAGES 2, 13 (Tex. A&M Transp. Inst. ed., 2016),

<https://static.tti.tamu.edu/tti.tamu.edu/documents/0-6806-FY15-WR3.pdf>.

³ <https://www.artba.org/economics/materials-dashboard/>

Short-term implementation of the new Buy America provisions has the potential of exacerbating these already-difficult market conditions. Immediately limiting the contractor's options for materials could further increase costs and scarcity for many of them.

Therefore, we encourage you to adopt a phased-in approach for these new Buy America requirements, taking into consideration the market conditions described above, as well as the imperative of putting the IIJA's record federal transportation investment to work as soon as possible. Even under more typical conditions, the significant tasks of expanding Buy America's statutory reach and revamping the waiver process would necessitate a measured, yet determined, approach.

We also cite a [recent letter](#) from the American Association of Highway & Transportation Officials (AASHTO) to Secretary Pete Buttigieg, which addresses Buy America among several other IIJA implementation issues:

In general, the sections in the "Buy America Sourcing Requirements" could slow down [IIJA] implementation dramatically if not implemented in a reasonable fashion. If Buy America is truly applied to all "...iron, steel, manufactured products, or construction materials," it will take years before everything is domestically available. A phased implementation approach will help to encourage industry development while minimizing disruptions to project delivery early on. FHWA should perform a market study on common items used in highway projects—especially in the new, broad category of "construction materials"—to determine where the most flexibility will be needed. Agencies will also need time to transition/expand processes to require some sort of certification to ensure they are in compliance. In addition, if the existing nationwide waiver is discontinued, FHWA needs to pursue an updated waiver rather than requiring individual waivers for specific manufactured products.

ARTBA agrees that the forthcoming OMB guidance and other Buy America implementation efforts should address these concerns of the state transportation departments, who serve as project partners to our association's member-contractors.

Conclusion

As noted at the outset, 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.

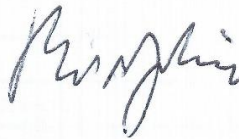
Nothing in these comments should be interpreted as seeking to undermine core Buy America principles or Congress' intent in including "Build America, Buy America" within the IIJA. ARTBA strongly believes the new law's resulting infrastructure and economic outcomes can encompass increased American manufacturing 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 these opportunities to provide the transportation construction industry's viewpoint as you finalize the initial guidance on this important legislative provision. ARTBA is available for and looks forward to a further dialogue on this matter moving forward, including facilitating direct input from our members where possible. I am available as needed at rjuliano@artba.org and (202) 683-1004.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "R. Juliano", is centered below the word "Sincerely,".

Richard A. Juliano, CAE
General Counsel

att.

cc: The Honorable Pete Buttigieg, Secretary of Transportation
The Honorable Nuria Fernandez, Federal Transit Administrator
The Honorable Stephanie Pollack, Deputy Federal Highway Administrator

Sample Listing of Products Needed for Rest Area in Federal-Aid Highway Project

1. Switch Boxes and Covers
2. Conduit Fasteners
3. Conduit & Fittings
4. Fire Alarm Devices - Panel Box, Guts are made with Metal parts, i.e. screws, contacts, termination bars
5. Lightning Protection
6. Panel Boards, Transformer, Breakers / Disconnects
7. Wire / Cable
8. Lighting Package #1
9. Lighting Package #2
10. Electrical Devices (Receptacle & Switches)
11. Generator #1
12. Generator #2
13. Fire Alarm Devices resubmittal on Compatibility
14. Fire Alarm Devices - Panel Box, Guts are made with Metal parts, i.e. screws, contacts, termination bars
15. Type C Fixture Resubmittal #1
16. Lighting Package Resubmittal
17. Type C Fixture Resubmittal #2
18. PLUMBING PACKAGE (ZURN FLUSH VALVE)
19. PLUMBING PACKAGE (ZURN URINAL FLUSH VALVE)
20. PLUMBING PACKAGE (ZURN URINAL FLUSH VALVE CACCUM BREAKER)
21. PLUMBING PACKAGE (ZURN SINGLE BASIN SINK FAUCET)
22. PLUMBING PACKAGE (MCGUIRE OPEN GRID P.O. PLUG)
23. PLUMBING PACKAGE (MCGUIRE CHROME PLATE P TRAP)
24. PLUMBING PACKAGE (SURE GRIP FLANGE)
25. PLUMBING PACKAGE (MECHANICAL MIXING VALVE)
26. PLUMBING PACKAGE (CHICAGO MOP SINK HD FAUCET)
27. PLUMBING PACKAGE (CHICAGO WALL MOUNTED MECAHNICAL ROOM FAUCET)
28. PLUMBING PACKAGE (MOP HANGER)
29. PLUMBING PACKAGE (ELKAY WATER FOUNTAINS)
30. PLUMBING PACKAGE (RHEEM WATER HEATER)
31. PLUMBING PACKAGE (AO SMITH WATER HEATER)
32. PLUMBING PACKAGE (DRAIN PAN 20")
33. PLUMBING PACKAGE (THERMAL EXPANSION TANK)
34. PLUMBING PACKAGE (ZURN FLOOD DRAIN -1)
35. SCOTTOS PLUMBING PACKAGE (ZURN FLOOD DRAIN -1)
36. PLUMBING PACKAGE (ZURN FLOOD DRAIN -2)
37. PLUMBING PACKAGE (ANTI SIOHON WALL FUACETS)
38. WINDOW PACKAGE YKK (YHS50TU Aluminum Frames), Authorized Installer Certification
Screws are zinc plated steel
39. Hager - Hinges AB8000
40. Hager - Concealed Leaf Hing 780-112HD
41. Hager - inges AB8000
42. Hager - Concealed Leaf Hing 780-112HD
43. Hager - Non Beveled Push Plates 40R

44. Hager - Non Beveled Pull Plate A44
45. Hager - Door Protection Plate 190S
46. Hager - Concave Wall Stop 236W
47. Hager - 5" Panic Threshold 520S
48. Hager - Smoke Seal System 726
49. Falcon (Allegion) M.A. Series Storeroom - MA 581-F07
50. Falcon (Allegion) M.A. Series Class Room - MA 561-F-05
51. Falcon (Allegion) M.A. Series Dormitory / Exit Lock MA 571-F13
52. Falcon (Allegion) M.A. Series Class Room Dead Lock - MA911 F29
53. Falcon (Allegion) M.A. Series Interchangeable Cores MA 911 56221C
54. Falcon (Allegion) M.A. Series Cylinder & Competitor Key Way C607 (7 pin)
55. Falcon (Allegion) M.A. Series Lever / Knob "Dane Gala (DG)
56. MATCON MASONRY SUBMITTAL (Horizontal Joint Reinforcement)
57. MATCON MASONRY SUBMITTAL (GROUT)
58. MATCON MASONRY SUBMITTAL (2) - REMAINING SUBMITTALS (TOPPING SLAB MIX, Revised CMU, Masonry Sand, Joint Reinforcement, Mix Designs for Concrete Masonry & Grout, Rebar Positioner, Ties, Joint Tie, Mesh Chairs)
59. MATCON MASONRY REBAR SUBMITTAL
60. BRITTON AIR HVAC PACKAGE SUBMITTAL (VENTS)
61. BRITTON AIR HVAC PACKAGE SUBMITTAL (ENERGY RECOVER UNITS)
62. BRITTON AIR HVAC PACKAGE SUBMITTAL (DUCTWORK)
63. BRITTON AIR HVAC PACKAGE SUBMITTAL (HVAC SYSTEM)
64. UNITED STEEL TRUSS/ EMBED SHOP DRAWINGS (EMBEDS USED TO CONNECT CMU TO TRUSSES)
65. MATCON MASONRY MISC. ITEMS (TEES, CHAIRS, JOINT POSITIONER, WIRE)
66. UNITED STEEL ADDED TRUSS/ EMBED SHOP DRAWINGS (ADDED DETAIL 8 & 9 - NEEDED ADDITIONAL EMBED)
67. MATCON STAINELSS STEEL FLASHING, TERMINATION BAR, DRIP EDGE, SEALANT
68. TOILET ACCESSORIES (STAINLESS STEEL MIRROR)
69. TOILET ACCESSORIES (STAINLESS STEEL MIRROR)
70. TOILET ACCESSORIES (TOILET PAPER DISPENSER)
71. TOILET ACCESSORIES (TOILET PARTITIONS)
72. TOILET ACCESSORIES (HAND DRYERS)
73. TOILET ACCESSORIES (DOUBLE ROBE / COAT HOOKS)
74. TOILET ACCESSORIES (ADA GRAB BARS)
75. TOILET ACCESSORIES (WALL MOUNTED WASTE RECEPTACLE)
76. TOILET ACCESSORIES (NAPKIN DISPOSAL)
77. TOILET ACCESSORIES (WALL MOUNTED SOAP DISPENSER)
78. TOILET ACCESSORIES (ADULT CHANGING TABLE)
79. TOILET ACCESSORIES (MOP HOLDER)
80. Roof Truss Sections, Details & Calculations (INCLUDED ALL COMMENTS/ CORRECTIONS FROM FDOT & EOR)
81. DRYWALL / INSULATION PACKAGE (DRYWALL, MUD, BATT INSULATION)
82. SITE LIGHTING PACKAGE 52.01, 52.02,52.03,52.04
83. Pull Boxes
84. Light Poles Aluminum
85. Light Poles Bases & Bolts
86. Light Poles & Luminar

87. Cable Distribution Submittal "Cooper"
88. Load Center Meter Socket
89. Load Center Safety Switch
90. Load Center Fuse
91. Load Center Transformer
92. Load Center Enclosure
93. Load Center Neutral Kit
94. Load Center Main Breakers
95. Load Center Contactor
96. Load Center Panelboard
97. Load Center CPT
98. Load Center H-O-A
99. Load Center Photo Cell
100. Load Center SPD
101. Load Center Component Enclosure
102. MADER ELECTRIC MOTORS (LIFT STATION MOTORS, HATCH, TRASH BASKET, ACCESSORIES)
103. ROOFING SUBMITTAL Roof Panels, Underlayment, Fasteners, Tape, & Insulation
104. SITE FURNISHINGS (SMOKERS OUTPOST, TRASH CAN, BIKE RACK, JOB BOARD)
105. SITE FURNISHINGS - ADA PICNIC TABLE & Non-ADA PICNIC TABLE - RESUBMITTAL
106. BRITTON AIR HVAC LOUVER SUBMITTAL
107. Metal Deck Shop Drawing (resubmittal)
108. Metal Decking Accessories (Screws)
109. Plumbing Misc. Items (Hangers, Couplings, Copper Piping)
110. Plumbing Misc. Items - Water Heater Resubmittal
111. BRITTON AIR LG DUCTLESS SPLIT SYSTEM #1
112. BRITTON AIR LG DUCTLESS SPLIT SYSTEM #2
113. SEAWALL FDOT 5500IV NEW CONCRETE MIX
114. RUSTEOLEUM TNEMIC LIFT STATION COATING
115. GULF TILE - TILE SELECTION SUBMITTAL
116. ROOFING NOA ENGINEERING
117. ROOFING NOA ENGINEERING RESUBMITTAL INCLUDING SOFFIT
118. ROOFING NOA ENGINEERING WITH SOFFIT
119. CORBELS
120. FDOT INDEX 530 SMALL PAVILION
121. SURE SEAL TRAP PRIMER
122. RESTROOM BUILDING SIGNAGE
123. TILE ANTIFRACTURE MEMBRANE
124. CONDUIT AND LIGHT POLE BASES