

May 13, 2024

The Honorable Shailen P. Bhatt
Administrator
Federal Highways Administration
1200 New Jersey Ave SE
Washington, DC 20590

RE: Docket No. FHWA-2023-0037-0001 - Buy America Requirements for Manufactured Products

Dear Administrator Bhatt,

On behalf of the Associated General Contractors of America (AGC), I thank the Federal Highway Administration (FHWA) for soliciting input from the construction community regarding the proposed removal of the general waiver of Buy America requirements for manufactured products (Manufactured Products Waiver) as part of FHWA regulations and the implementation process for the Build America, Buy America Act (BABAA). AGC strongly opposes FHWA's discontinuation of the Manufactured Products Waiver for domestic procurement requirements under BABAA and previous Buy America laws.

AGC is the leading association for the construction industry. AGC represents more than 27,000 firms, including over 6,500 of America's leading general contractors, and over 9,000 specialty-contracting firms. More than 10,500 service providers and suppliers are also associated with AGC, all through a nationwide network of chapters. These firms, both union and open-shop, engage in the construction of buildings, shopping centers, factories, industrial facilities, warehouses, highways, bridges, tunnels, airports, water works facilities, waste treatment facilities, dams, water conservation projects, defense facilities, multi-family housing projects, municipal utilities and other improvements to real property.

AGC supports efforts to grow American manufacturing but believes there needs to be an incremental approach to implementing BABAA. The Manufactured Products Waiver has been in place since 1983. The abrupt withdrawal of this waiver could delay critical infrastructure projects that would benefit the American public. Our members are eager to deliver on rebuilding the nation's infrastructure. Managing inflation has been one of the biggest challenges facing construction companies and it has also diminished the investment provided by the Infrastructure Investment and Jobs Act (IIJA). AGC is concerned that a rushed withdrawal of the waiver could have unintended consequences jeopardizing safety and the overall success of the IIJA. We appreciate the opportunity to provide feedback on the following sections:

Withdrawal of the Waiver Should Include a Long Transition Period

AGC supports the continuation of the Manufactured Products Waiver. Any decision to remove or alter the waiver should be followed by a transition period of 18 months or more after the final rule issuance. This interval would enable adequate preparation among contractors to communicate with suppliers, assess compliance, and facilitate necessary adjustments to their supply chains and operational capabilities.

Contractors rely on manufacturers and suppliers to do their due diligence in determining whether their products are compliant with Buy America requirements and, if not, to adjust them accordingly. This creates a frustrating situation for contractors who are ultimately responsible and liable for Buy America compliance on federal-aid projects but get caught in between recipients and manufacturers in attempting to meet these requirements.

Contractors bidding on a federal-aid project reach out to suppliers to get estimates for the various materials as part of the estimation process. They ask suppliers for a “Buy America Certification Letter” that guarantees to the contractor that these materials are Buy America compliant. Since the passage of the IIJA, they have reported that a lot of bids from suppliers come with an asterisk, denoting that the supplier cannot certify that these materials are Buy America compliant. Some companies report they then choose not to move forward with a bid, while others will add in extra cost to account for this unknown risk.

The suggested extension would afford contractors and other stakeholders sufficient time to ensure they are complying with the new regulations, maintaining required documentation, and training their workforce in accordance with the new rules. This period is also crucial for prime contractors to consult with their subcontractors, ensuring that contracts are updated to reflect the new requirements and that the associated risks are clearly understood and appropriately allocated.

State Department of Transportation (DOT) have repeatedly had to update their guidance on the BABAA requirements since the Office of Management and Budget has issued multiple rounds of implementation guidance. Should the Manufactured Products Waiver be rescinded, it is plausible to expect that state DOTs will need to revise their guidelines, material specifications, compliance forms, and other relevant documents once more. Only upon the finalization of these documents can contractors effectively begin to conform to the new standards.

Additionally, the implementation of previously mentioned changes must take into account various delivery methods. As highlighted in the Notice of Proposed Rulemaking (NPRM) by the FHWA, delivery methods such as Design-Build differ significantly in their procurement processes from those of Design-Bid-Build. Consequently, states and their local partners will be required to refine their processes not only to comply with the new Buy America stipulations but also to address the specifics of how they apply to different delivery methods.

Buy America Confusion Increases Costs and Reduces the Number of Bids

Contractors operating across various states encounter discrepancies in how construction products and materials are categorized as either “construction materials” or “manufactured products,” according to the specific guidance and interpretation of BABAA by state DOTs. This divergence complicates the establishment of a uniform compliance system, as products may require different certifications in different states.

Should the FHWA decide to rescind the Manufactured Products Waiver and introduce targeted, timed waivers for specific products, we anticipate more inconsistencies in interpretation similar to the inconsistent categorization mentioned above.

To mitigate potential confusion and ensure consistency in interpretation, AGC recommends that the FHWA develop and provide a comprehensive list of manufactured products that must comply with Buy America requirements. This directory should detail compliance timelines, outline the specifics of

any targeted waivers, and provide clear visibility of these waivers' application periods. Such measures would not only address short-term implementation challenges related to requirements but also enable state DOTs to adapt this list according to their local guidelines and any region-specific waivers.

The creation of a well-defined list with comprehensive information would effectively communicate to contractors which products need to meet the new standards and the specific timelines for compliance. This resource would serve as a valuable market tool for manufacturers who are considering initiating or expanding their production capabilities to include specific items. Ideally, this catalog would encompass various categories of information useful to all stakeholders, including identifying products that are applicable under BABAA, those that are domestically produced but require increased capacity, and those not manufactured in the U.S.

Additionally, FHWA should utilize public interest waivers to address disruptions in the supply chain that significantly impact the availability of specific products or regions. This would ensure the agency could respond swiftly to scenarios such as weather emergencies that impair manufacturing capabilities, as was the case with the freeze in Texas that shut down plants that supply a significant amount of construction plastics. Public interest waivers in response to supply chain disruptions would prevent multiple lengthy waiver requests from different projects. We urge the FHWA to implement the necessary measures to manage unforeseen situations efficiently and prevent any adverse effects on project timelines and costs.

AGC Supports Keeping the Manufactured Products Waiver

AGC believes that rescission of the Manufactured Products Waiver is not currently appropriate and that it would only be appropriate when FHWA has a complete understanding of American manufacturing capabilities and capacity to meet Buy America requirements for all products currently covered under the Manufactured Products Waiver. While AGC appreciates FHWA's efforts in attempting to gather information on this front through actions such as **Request for Information on the Use of Manufactured Products in Highway Projects (Docket ID FHWA-2023-0040)**, the breadth of materials covered under the Manufactured Products Waiver is greater than what was requested in that RFI. For example, the recently approved waiver for the **Mount Vernon Library Commons Project (Docket ID FHWA-2024-05533)** covered many additional materials not found in the RFI. While this type of project was atypical for what FHWA usually provides financial assistance for, the emergence of such cases suggests that rescission of the waiver should be deferred until there is a comprehensive understanding of the availability and status of all manufactured products used in construction projects, not solely those traditionally funded by FHWA.

Available data on materials continues to support the existence of the Manufactured Products Waiver. For example, according to the United States Geological Survey's 2023 Mineral Commodity Survey, the United States imports more than 75% of its bauxite and 59% of its alumina.¹ These two materials are the necessary components to creating aluminum, which is used in various manufactured products such as electrical cables and wiring. As these required materials cannot be easily sourced domestically, it is necessary to import them to be able to manufacture aluminum. Yet even if aluminum were to be manufactured domestically, it would fail the cost of components test as the main components of aluminum are imported. If the Manufactured Products Waiver were to be removed, it would cause a huge demand on the alternate source of aluminum manufacturing,

¹ <https://pubs.usgs.gov/periodicals/mcs2023/mcs2023-bauxite-alumina.pdf>

recycled scraps. While material recycling is a positive and should be encouraged, the available supply is not enough to keep up with demand. As a result, 54% of American consumption of aluminum was imported in 2022.²

To further exemplify the need for a continued and unaltered waiver, certain products and components are completely unavailable domestically and lack the conditions to be able to meet the manufacturing demands in the near future. The Department of Energy stated in its LED Manufacturing Supply Chain Report that “Virtually no LED lamp manufacturing is taking place in the United States today.”³ The lack of any available domestic raw materials, such as gallium,⁴ and the lack of currently available manufacturing make it all but impossible to be compliant with Buy America laws.

Any changes to the Manufactured Products Waiver, which could restrict the source products used on roads and bridges, could dramatically alter the safety of American roads and delay completion of projects. AGC urges FHWA to research manufacturing capacity for all permanent products used in FHWA’s projects before deciding to alter the current Manufactured Products Waiver to avoid any unintended consequences.

AGC believes that the original grounds for issuing the Manufactured Products Waiver remains valid. We further believe that FHWA’s 2013 review of the waiver stands, which said that it was necessary to continue the use of the waiver to avoid significant project delays and cost increases for products that made up a minor portion of the total material cost of FHWA-assisted projects.

An 18-Month Transition is Necessary for All Delivery Methods

AGC maintains that an 18-month period from the issuance of the final rule to its effective date constitutes a reasonable and considered interval that would afford contractors sufficient time to make necessary adjustments. This timeline is deemed adequate to allow for adaptations in projects that employ various alternate delivery methods, accommodating new procurement requirements, cost variations, and the availability of products.

Should this 18-month timeframe be established as the effective date, AGC foresees no need for additional special provisions or buffer periods. Conversely, should this timeframe not be adopted, the introduction of a buffer period or specific provisions may become essential. The necessity of such measures would depend on the actions taken by the FHWA concerning the potential removal of the Manufactured Products Waiver.

Tracking Origin and Cost of Components

AGC agrees with FHWA that not prescribing any specific method of compliance will ease the administrative burden of any new Buy America requirements for stakeholders. Allowing recipients to determine their own methods of certifying compliance will enable them to adopt procedures that best fit their administrative capabilities. This flexibility allows recipients to coordinate with local stakeholders, including contractors and suppliers, to devise the most practical approaches to fulfilling these requirements. Currently, the certification of compliance for “construction materials” under BABAA is regulated by state DOTs rather than the FHWA. Extending this practice to

² <https://pubs.usgs.gov/periodicals/mcs2023/mcs2023-aluminum.pdf>

³ <https://www.energy.gov/sites/default/files/2021-07/ssl-2020-led-mfg-supply-chain-mar21jul21.pdf>

⁴ <https://pubs.usgs.gov/periodicals/mcs2023/mcs2023-gallium.pdf>

“manufactured products” would similarly permit recipients to tailor their compliance strategies to accommodate their specific situations and needs.

Considerations for Disadvantaged and Remote Communities

Removal of the Manufactured Products Waiver would disproportionately affect disadvantaged and remote communities which have the highest need of infrastructure improvements. For example, the Department of Housing and Urban Development (HUD) found that “many Tribes are more disconnected from American supply chains than the average HUD grantee due to their remoteness.”⁵ As FHWA considers rescinding the Manufactured Products Waiver, it is important to consider the unintended consequences that this could have on tribal or disadvantaged communities that are less connected and have fewer transportation opportunities.

As one example to take into consideration, there are numerous communities in Alaska which are not connected to a road system and do not have access to waterway transportation for a majority of the year. These communities have limited opportunities to transport products for much needed infrastructure improvements. Adding further limitations to what these remote communities can utilize risks delaying projects for an even longer period of time than expected due to the short duration of construction seasons at these locations.

Clarification of Contract Language

As BABAA requirements are already included in contracts, FHWA should provide clear guidance that the change in requirements does not apply to contracts that have already been agreed upon. Certain contract language for projects provides only the general requirements of BABAA and the release of additional requirements without this step could be interpreted to apply retroactively and jeopardize a project.

Conflicts with Environmental Goals

The Biden Administration has set forth ambitious goals in combatting climate change and rebuilding the nation’s infrastructure. However, if the Administration wants a greener future, we have to be able to build it. The removal of the Manufactured Products Waiver could jeopardize our ability to do so, as many sustainable manufactured products are not sourced domestically.

As rapid technological development around the world increases the sustainability and reduce the emissions of products, it could hamper America’s environmental goals if an important technological innovation is first achieved abroad. FHWA is aware of this, as the agency has undergone a painstakingly detailed review of electric vehicle charging stations, which were previously classified as manufactured products, and provided that one specific product a detailed waiver and enabled a process of Buy America implementation. Such a detailed review would be necessary of all current and future manufactured products used in federal-aid projects.

Conclusion

AGC appreciates FHWA’s past and current efforts to expand domestic manufacturing while attempting to avoid placing unnecessary hardships on public and private stakeholders working to rebuild the nation’s infrastructure. Our industry wants to ensure that the Infrastructure Investment and Jobs Act is successful and that the American people see the benefits of the historic law.

⁵ <https://www.federalregister.gov/documents/2023/04/12/2023-07675/extension-of-public-interest-general-applicability-waiver-of-build-america-buy-america-provisions-as>

AGC worries that if FHWA decides to revoke or modify the longstanding Manufactured Products Waiver without an adequate transition, it will limit our ability to rebuild American infrastructure and connect communities. Thank you for the opportunity to comment on this important issue.

Sincerely,

A handwritten signature in black ink, appearing to read "Alex Etchen".

Alex Etchen
Vice President, Government Relations