

DEPARTMENT OF TRANSPORTATION

Office of the Secretary

Waiver of Buy America Requirements for Construction Materials for Certain Contracts and Solicitations

ACTION: Notice.

SUMMARY: The Department of Transportation (DOT) seeks to maximize the use of American-made products and materials in all federally funded projects as part of the Biden-Harris Administration's implementation of the Build America, Buy America Act (BABA), which was included in the historic Bipartisan Infrastructure Law (BIL). In this notice, DOT is taking two actions to help transition to the new construction materials standard. First, for DOT awards obligated on or after the effective date of the final waiver, DOT is waiving the BABA construction materials requirements for any contracts entered into before November 10, 2022. Second, DOT is waiving the BABA construction materials requirements for any contracts entered into before March 10, 2023, that result from solicitations published before May 14, 2022. For contracts executed after May 14, 2022, the waiver does not apply to any construction materials that a contractor or subcontractor takes delivery of on or after October 1, 2024.

DATES: The waiver is applicable to awards that are obligated on or after January 30, 2023. For awards that are obligated on or after November 10, 2022, but prior to January 30, 2023, this waiver is applicable to expenditures for construction materials incurred on or after January 30, 2023.

FOR FURTHER INFORMATION CONTACT: For questions about this notice, please contact Darren Timothy, DOT Office of the Assistant Secretary for Transportation Policy, at darren.timothy@dot.gov or at 202-366-4051. For legal questions, please contact Michael A.

Smith, DOT Office of the General Counsel, 202-366-2917, or via e-mail at michael.a.smith@dot.gov.

SUPPLEMENTARY INFORMATION:

BACKGROUND

In January 2021, President Biden issued Executive Order 14005, titled “Ensuring the Future is Made in All of America by All of America’s Workers,” launching a whole-of-government initiative to strengthen Made in America standards. The Executive Order states that the United States Government “should, consistent with applicable law, use terms and conditions of Federal financial assistance awards and Federal procurements to maximize the use of goods, products, and materials produced in, and services offered in, the United States.” DOT is committed to ensuring strong and effective Buy America implementation consistent with Executive Order 14005 and has a long track record of successfully applying Made in America standards to support American workers and businesses through its more than \$70 billion in grant programs and \$700 million in direct purchases in FY 2020.

On November 15, 2021, President Biden signed the Infrastructure Investment and Jobs Act (IIJA or the Bipartisan Infrastructure Law), Pub. L. No. 117-58, which includes the Build America, Buy America Act (BABA). IIJA div. G §§ 70901-27. The Bipartisan Infrastructure Law not only makes an historic investment in American transportation—from roads and bridges to rail to transit—but also greatly strengthens Made in America standards. Specifically, BABA expands the coverage and application of Buy America preferences in Federal financial assistance programs for infrastructure. BABA requires that no later than May 14, 2022—180 days after the date of enactment—the head of each covered Federal agency shall ensure that “none of the funds made available for a Federal financial assistance program for infrastructure ... may be obligated

for a project unless all of the iron, steel, manufactured products, and construction materials used in the project are produced in the United States.” IIJA § 70914(a).

BABA provides that the preferences under Section 70914 apply only to the extent that a domestic content procurement preference as described in Section 70914 does not already apply to iron, steel, manufactured products, and construction materials. IIJA § 70917(a)–(b). This provision allows Federal agencies to preserve existing Buy America policies and provisions that meet or exceed the standards required by BABA.

One of the new Buy America preferences included under BABA is for construction materials. By May 14, 2022, each covered Federal agency must ensure that all manufacturing processes for construction materials used in federally assisted infrastructure projects occur in the United States. None of the specific statutes that apply particular Buy America requirements to the Federal financial assistance programs administered by DOT’s Operating Administrations specifically covers construction materials, other than to the extent that such materials would already be considered iron, steel, or manufactured products. IIJA § 70914.

In addition to establishing Buy America preferences, BABA also provides certain statutory authorities for the Made in America Office (MIAO) in the Office of Management and Budget (OMB). IIJA §§ 70915(b), 70923. MIAO was first established by Section 4 of Executive Order 14005. MIAO’s authorities under the Bipartisan Infrastructure Law include issuing guidance to assist in applying BABA’s requirements and issuing standards that define the term “all manufacturing processes” in the case of construction materials. IIJA § 70915.

On April 18, 2022, OMB issued memorandum M-22-11, “[Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs](#)”

[for Infrastructure](#)” (Implementation Guidance). Under Section VIII of the Implementation Guidance, “construction materials” includes:

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.

Implementation Guidance at 13-14.

The Implementation Guidance states that “an article, material, or supply should only be classified into one of the following categories: (1) iron or steel; (2) a manufactured product; or (3) a construction material. For ease of administration, an article, material, or supply should not be considered to fall into multiple categories.” *Id.* at 6. The Implementation Guidance also explains that “items that consist of two or more of the listed materials that have been combined together through a manufacturing process, and items that include at least one of the listed materials combined with a material that is not listed through a manufacturing process, should be treated as manufactured products, rather than as construction materials.” *Id.* at 14. OMB characterizes its guidance on which materials are construction materials as “preliminary and non-binding guidance ... so that agencies can begin applying Buy America requirements to those materials.” *Id.* at 13.

Section 70915(b) of BABA requires OMB to issue standards that define “all manufacturing processes” for construction materials. Section VIII of the Implementation Guidance provides that, “[p]ending MIAO’s issuance of final standards on construction materials, and absent any existing applicable standard in law or regulation that meets or exceeds these preliminary standards, agencies should consider ‘all manufacturing processes’ for construction materials to mean the final manufacturing process and the immediately preceding manufacturing stage for the construction material.” Implementation Guidance at 14. After considering information received through stakeholder and industry outreach, MIAO will issue further guidance that identifies initial manufacturing processes for each type of construction material that should be considered as part of “all manufacturing processes.” *Id.* Agencies are also directed to “consult with MIAO, as needed, to ensure that any waiver issued for construction materials is explicitly targeted and time-limited, in order to send a clear market signal that additional standards for ‘all manufacturing processes’ in the case of construction materials will be forthcoming.” *Id.*

In April 2022, DOT opened a public docket (DOT-OST-2022-0047) to receive comments in response to DOT’s proposal to waive the construction materials requirement for 180 days, to allow for a longer transition period. On May 19, 2022, DOT issued a temporary waiver of the construction materials requirement for 180 days: from May 14 until November 10, 2022. [87 FR 31931](#). In the waiver notice, DOT stated its expectation that States, industry, and other participants establish procedures to document compliance.

During the waiver period, DOT continued its engagement to help facilitate the creation of robust enforcement and compliance mechanisms and to rapidly encourage domestic sourcing of construction materials for transportation infrastructure improvements. On July 28, 2022, DOT

issued a Request for Information (RFI) seeking input from the public, including DOT's project sponsors, their contractors and offerors, manufacturers, labor unions, transportation and trade associations, and other interested parties on implementing BABA's new construction materials requirement. [87 FR 45397](#). DOT asked the public to submit comments to the same docket DOT used to propose the 180-day waiver.

ISSUANCE OF THE PROPOSED WAIVER AND DISCUSSION OF COMMENTS RECEIVED

In accordance with Section 70914(b)(1) of the Act, on November 4, 2022, DOT published a notice on its website describing certain actions that the Department was taking. First, based on its review of comments received on the RFI and other engagement opportunities with stakeholders, and consistent with the purpose of the temporary transitional waiver, DOT announced that it would not modify or extend the temporary waiver for construction materials. As a result, DOT awards obligated on or after November 10, 2022, from financial assistance programs for infrastructure projects, are subject to the BABA requirement that construction materials used on those projects be produced in the United States.

The notice also sought comment on whether DOT should use its authority to provide a waiver of the Buy America requirement for construction materials on certain DOT-assisted infrastructure projects, on the basis that applying the domestic content preference for these materials would be inconsistent with the public interest.¹ DOT proposed that, for awards

¹ Because the application of Buy America to construction materials is required under BIL § 70914, the authority for this waiver is also based on BIL § 70914. Therefore, reference to, and reliance on, the waiver authority under specific Buy America provisions that are administered by the Department, such as 49 U.S.C. § 50101 (FAA); 23 U.S.C. § 313 (FHWA); 49 U.S.C. § 22905(a) (FRA); 49 U.S.C. § 5323(j) (FTA); and 46 U.S.C. § 54101(d)(2)(MARAD), is unnecessary.

obligated on or after the effective date of the waiver, DOT would waive BABA's domestic preference for construction materials for:

- (1) Any contract entered into before November 10, 2022; and
- (2) Any contract entered into before March 10, 2023, if the contract results from a solicitation published prior to May 14, 2022.

To maximize notice to affected stakeholders, the Department also announced the proposal on several email distribution lists related to the operating administrations' existing Buy America requirements and published the notice in the Federal Register. [87 FR 68572](#).

DOT received 41 comments in response to the publication from a wide array of stakeholders, including State transportation agencies, public transit agencies, airport operators, construction firms, manufacturers and suppliers, and labor organizations, as well as associations representing each of those groups.² The majority of commenters supported DOT's proposal to issue a waiver of the BABA requirements for construction materials for certain contracts and solicitations. However, certain commenters also expressed concerns about the Department's proposed action, which are discussed in more detail below.

DOT specifically requested comments on the applicable dates proposed in the notice. Some commenters supported extending the dates for contracts and solicitations that would be covered by the waiver, including several State Departments of Transportation, two public transit agencies, Associated General Contractors, and Airports Council International – North America. However, other commenters, including the Alliance for American Manufacturing (AAM), raised concerns about the proposal to waive BABA requirements for

² See the U.S. Government electronic docket site at <http://www.regulations.gov/>, Docket: DOT-OST-2022-0123.

construction materials for certain projects that may be obligating funds into 2023. Overall, DOT continues to believe that the cut-off dates for contracts and solicitations specified in the proposed waiver strike a reasonable balance between minimizing undue burdens for projects that already have executed construction contracts or issued solicitations, but for which DOT funds may be obligated in the future and moving forward to fully implement the BABA requirements for construction materials on DOT-assisted infrastructure projects in a timely manner. However, to address concerns about applying the waiver to construction materials that may be used on projects in the distant future, DOT has added an additional limitation on the applicability of the waiver, as described below.

Some commenters also expressed a desire for DOT to reconsider its decision not to extend the broader temporary waiver for construction materials. As the Department stated in the proposed waiver notice, based on its review of comments received on the RFI and other engagement opportunities with stakeholders, and consistent with the purpose of the temporary transitional waiver, DOT does not believe that an extension of that waiver is warranted.

Certain commenters also raised concerns or requested clarifications on the standards that should be applied when considering whether “all manufacturing processes” have occurred in the U.S., as is required for construction materials under BABA. As noted above, OMB issued preliminary standards for construction materials in its Implementation Guidance, which will remain in effect until final standards have been adopted by OMB. DOT considers these comments to be outside of the scope of this waiver action.

Two commenters asked about whether the waiver would be applied retroactively to projects obligating funds between the expiration of the temporary general waiver for construction materials on November 10 and the effective date of the new waiver for certain contracts and

solicitations. DOT did not propose that the new waiver would be effective on November 10, and is not doing so in this final action, which is to be effective on the date this notice is posted on the DOT Made in America website. Accordingly, this waiver does not apply to activities that would be reimbursed from grants obligated between November 10 and the effective date of this notice.

DOT also requested comments on the following: (1) whether the waiver should be time-limited or phased for certain long-term contracts, and (2) whether there are other scenarios where project delivery would be significantly disrupted or delayed due to certain circumstances, such as the level of design and engineering for a project that has occurred in relation to the effective date of the construction materials preference, and (3) specific information as to the construction materials which may not be available, as well as transportation projects, such as projects in various stages of FTA's Capital Investment Grants program, for which a waiver may be justified due to significant delay in project delivery. The Department did not receive any comments suggesting that the waiver should be applied to specific types of contracts beyond those in the proposal.

FINDING ON THE WAIVER

DOT recognizes the importance of ensuring the use of domestically produced construction materials on infrastructure projects receiving Federal assistance and the need to implement the requirement in a way that does not delay delivery of projects that were sufficiently advanced before applying the requirement to DOT funding. Therefore, based on all the information available to the Agency, DOT finds that it is in the public interest to issue a waiver of BABA's domestic preference for construction materials for:

- (1) Any contract entered into before November 10, 2022; and

- (2) Any contract entered into on or after November 10, 2022, and before March 10, 2023, if the contract results from a solicitation published prior to May 14, 2022.

This waiver applies only to: (i) DOT awards obligated on or after January 30, 2023; and (ii) for awards that are obligated on or after November 10, 2022, but prior January 30, 2023, expenditures for construction materials incurred on or after January 30, 2023. For contracts executed after May 14, 2022, the waiver does not apply to any construction materials that a contractor or subcontractor takes delivery of on or after October 1, 2024.

In these limited circumstances, DOT recipients incurred costs, executed contracts, and/or are conducting procurements with long lead times prior to the BABA construction materials requirement taking effect, though they will seek Federal reimbursement through grants obligated after the requirement became effective. This waiver will preserve the eligibility of costs a project sponsor already incurred or estimated before the construction materials requirement took effect. The purpose of covering contracts through March 10, 2023, for contracts resulting from solicitations published before the May 14, 2022, the BABA effective date, is to provide recipients with reasonable time to complete procurements. Project sponsors and offerors have invested significant resources in such procurements, which are based on design and engineering conducted before the BABA construction materials requirement went into effect. A project sponsor whose solicitation does not result in a contract before March 10, 2023, will have to take such measures as may be necessary to ensure that its contract will comply with the construction materials requirement.

In issuing this public interest waiver, DOT is not making a finding that any construction materials are not produced in the United States in sufficient and reasonably available quantities

or of a satisfactory quality. Such a finding would require a separate waiver action under section 70194(b)(2).

The waiver applies to infrastructure projects funded by financial assistance administered by the Office of Secretary of Transportation or any of DOT's Operating Administrations with financial assistance programs, including the Federal Aviation Administration (FAA); the Federal Highway Administration (FHWA); the Federal Motor Carrier Safety Administration; the Federal Railroad Administration (FRA); the Federal Transit Administration (FTA); the Maritime Administration (MARAD); the National Highway Traffic Administration (NHTSA); and the Pipeline and Hazardous Materials Safety Administration (PHMSA).

This waiver does not affect any domestic preference requirements under other authorities, including DOT's non-BABA domestic preference statutes: 49 U.S.C. § 50101 (FAA); 23 U.S.C. § 313 (FHWA and NHTSA); 49 U.S.C. § 22905(a) (FRA); 49 U.S.C. § 5323(j) (FTA); and 46 U.S.C. § 54101(d)(2) (MARAD).

The Implementation Guidance also provides that, before granting a waiver in the public interest, to the extent permitted by law, agencies shall assess whether a significant portion of any cost advantage of a foreign-sourced product is “the result of the use of dumped steel, iron, or manufactured products or the use of injuriously subsidized steel, iron, or manufactured products.” Implementation Guidance at p. 12. [E.O. 14005](#) at Section 5 includes a similar requirement for “steel, iron, or manufactured goods.” However, because the public interest waiver that DOT is proposing in this notice is not based on consideration of the cost advantage of any foreign-sourced steel, iron, or manufactured product content, there is not a specific cost advantage for DOT to consider.

Issued in Washington, DC on: January 30, 2023.

Polly E. Trottenberg,

Deputy Secretary.