



April 17, 2023

The Honorable Shailen Bhatt
Administrator
Federal Highway Administration
1200 New Jersey Avenue, SE
Washington, D.C. 20590

RE: Docket No. FHWA-2022-0027 – FHWA Review of its General Applicability Waiver of Buy America Requirements for Manufactured Products

Dear Administrator Bhatt:

The organizations signed below collectively submit the following comments to the Federal Highway Administration's (FHWA) "Review of its General Applicability Wavier of Buy America Requirements for Manufactured Products." We appreciate the opportunity to share our perspective of this review as it relates to our construction materials.

As the FHWA considers any changes to its General Applicability Waiver of Buy America Requirements for Manufactured Products, it is important to conform with the authorities contained in the Build America, Buy America Act (BABAA) as related to our construction materials. The BABAA extended domestic content procurement preferences to construction materials, as that term was defined in BABAA. It is important to recognize the provisions of BABAA related to our construction materials.

Authorities Contained in BABAA Related to our Construction Materials

Section 70917(c)(1) established an important limitation to the term "construction materials" as the term is used in BABAA that prohibits the term from including "cement and cementitious materials, aggregates such as stone, sand, or gravel, or aggregates binding agents or additives." This limitation makes clear no "construction materials" domestic content procurement preference for these construction materials is established under BABAA because the definition of the term "construction materials" used to establish a domestic content procurement preference under BABAA excludes these construction materials.

Section 709(c)(2) prohibits the same construction materials from being included as "inputs" in "all manufacturing processes" that produce "construction materials." OMB is required to "issue standards" that define the term "all manufacturing processes" for construction materials to which BABAA does apply a domestic content procurement preference. Because Section 70917(c)(2) prohibits the definition of "all manufacturing processes" from including the listed items as inputs, the combination of the listed items as concrete or asphalt mix are not a construction material for which BABAA establishes a domestic content procurement preference.

Neither of these sections establishes that the listed items are not construction materials, just that they are excluded from "construction materials" for which BABAA establishes a domestic content procurement preference. They are in fact, construction materials, and BABAA does not provide the authority for the

listed materials to be considered manufactured products or construction materials for which there is a BABAA domestic content procurement preference.

Congress considered cement and cementitious materials, aggregates such as stone, sand or gravel, and aggregates binders and additives to be construction materials for which they are not creating a domestic content procurement requirement because the limitation¹ was drafted to the term “construction materials” as that term is used under BABAA. If the terms in the limitation were not construction materials, there is no purpose, reason, or cognizable consequence to affirmatively removing them from that term as it is used under BABAA. Further evidence of this intent is found in the limitation extending the exclusion to “all manufacturing processes” for “construction materials.”

Congress understood that the construction materials they were excluding from the term “construction materials” are, when combined, concrete and asphalt mix construction materials. Congress included Section 70917(c)(2) to ensure that the combination of construction materials in Section 70917(c)(1) into concrete and asphalt mix construction materials did not create a domestic content procurement preference for concrete or asphalt mixes. The Congressional intent and purpose of Section 70917(c)(2) cannot be interpreted any other way because the consequence of Section 70917(c)(2) is singularly focused on their inputs that when combined, produce the construction materials concrete and asphalt mix. As inputs, their obvious use together to form concrete or asphalt mix is indisputable. On this point, it is pertinent that Congress did not add or subtract any of the items in Section 70917(c)(1) from Section 70917(c)(2). In repeating the identical list from Section 70917(c)(1) in Section 70917(c)(2) Congress’ intent to not establish a domestic content procurement preference for their combination as concrete or asphalt mix is clear. This intent and purpose of Section 70917(c)(2) is clean as it produces this singular consequence.

It is important to recognize that the Congressional intent with BABAA is to consider cement and cementitious materials, aggregates such as stone, sand and gravel, aggregate binding agents or additives, as well as their combination as concrete or asphalt mix to be construction materials for which a Buy America preference is not established. Therefore, in reviewing and updating FHWA’s general applicability waiver related to manufactured products, FHWA cannot apply a Buy America requirement to these construction materials as manufactured products; doing so would run counter to the Congressional intent of Section 70917(c)(1) and Section 70917(c)(2).

Responses to Questions Outlined in the Request for Comment

With regard to the first question, “does the jurisdiction that was used by the FHWA in granting the General Waiver in 1983 still apply? Specifically, is FHWA’s approach to the application of Buy America requirements to manufactured products still appropriate, considering the enactment of the BABAA, and standards established therein,” we would reiterate the Congressional intent of Section 70917(c)(1) and Section 70917(c)(2) to classify these materials as construction materials. Therefore, any revisions to FHWA’s General Applicability Wavier of Buy America Requirements for Manufactured Products must not capture cement and cementitious materials, aggregates such as stone, sand, and gravel, or aggregates binding agents or additives, or the combination of these construction materials as concrete or asphalt mix.

For your third question, regarding the volume of our construction materials “procured through FHWA financial assistance,” we do not have specific numbers related to the amount of our construction materials used in road and bridge projects that were paid for through FHWA financial assistance. With each of our

¹ IJJA, Section 70917(c)

construction materials, transportation projects that rely on FHWA funding for part of the project are a large part of our market share.

For your question related to “do you expect to expand your domestic manufacturing based on the increase in demand created by the Federal investments,” it is important to note that each of us seeks to maximize domestic production and invest in our workers. For example, the cement and concrete industries employ over 600,000 people across the United States. However, for our construction materials, there are limits to domestic production. For example, the approximately 100 cement plants across the country run at just about 85 to 90 percent capacity, but there is time where production must stop temporarily for routine maintenance and safety compliance. Across the country there are over 9,000 quarries. At every turn members, of the National Stone, Sand and Gravel Association seek to invest in American communities and expand aggregates operations to meet infrastructure needs. However, due to geologic reasons, some areas of the country do have the adequate supply of stone, sand, and gravel to be used as construction materials, mainly along the gulf coast. Further, due to permitting land use challenges and the capital needed to build a new facility, it can take more than a decade to permit and build new aggregates and cement operations. For these reasons, across our construction materials, there are limits to domestic production, which is exactly what led us to work with Congress to include Section 70917(c).

Conclusion

We appreciate the opportunity to share the perspective of our construction materials with you as FHWA evaluates its General Applicability Waiver of Buy America Requirements for Manufactured Products as instructed to do so by BABAA. As we have made clear any changes to this General Applicability Waiver cannot extend Buy America requirements to our construction materials as Section 70917(c)(1) and Section 70917(c)(2) of the Infrastructure Investment and Jobs Act makes clear that cement and cementitious materials, aggregates such as stone, sand, or gravel, and aggregate binding agents or additives as well as their combination as concrete or asphalt mix construction materials for which Buy America does not apply.

We look forward to continuing to work with FHWA to implement the Infrastructure Investment and Jobs Act so that states and municipalities can make overdue investments in tier transportation infrastructure to address years of underinvestment.

Sincerely,

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