



May 13, 2024

The Honorable Shailen P. Bhatt
Administrator Federal Highway Administration
Department of Transportation
1200 New Jersey Ave., SE Washington, DC 20590
Submitted electronically at: www.regulations.gov

Re: Notice of Proposed Rulemaking: “Buy America Requirements for Manufactured Products”;
FHWA-2023-0037-0001, FR 2024-05182

Dear Administrator Bhatt:

The organizations signed below collectively submit the following comments on the Federal Highway Administration’s (FHWA) Notice of Proposed Rulemaking (NPRM) filed March 12, 2024 entitled “Buy America Requirements for Manufactured Products”.

The Federal Highway Administration’s (FHWA) NPRM to rescind the 1983 Manufactured Product Waiver in order to comply with the requirements of Build America, Buy America Act (BABAA) section 70914 generally tracks the legal requirements of BABAA as well as the Office of Management and Budget (OMB) guidance and 2 Code of Federal Regulations (CFR) 184 amendment. Because Title 23¹ contained a pre-BABAA Buy America preference requirement for steel, iron and manufactured products, the existing waiver authority for manufacture products utilized by FHWA was subject to review by Section 70917(a) of BABAA to determine its consistency with the requirements of section 70914 of BABAA. This waiver has been in place since 1983, and was codified in 2005.² Importantly, the existing FHWA Buy America requirements do not include authority regarding construction materials.

This review concluded with FHWA determining the Manufactured Product Waiver did not meet or exceed BABAA’s domestic content procurement preferences and thus FHWA proposes to rescind the waiver. As a result, a repeal of the Manufactured Product Waiver and a revision to CFR 635.410 Buy America Requirements to implement a manufactured product domestic content procurement preference consistent with BABAA is included in the NPRM.

¹ See 23 U.S.C. 313.

² See Public Law 109-59.

I FHWA NPRM Treatment of Excluded Construction Materials

The FHWA NPRM contains a proposal within the 635.410 revision to align it with the 2 CFR 184.3 “Excluded Materials” provision. This alignment references only section 70917(c) materials listed in section 70917(c)(1), and does not directly reference the limitation in 70917(c)(2). The section 70917 (c)(2) limitation is the authority which requires unformed concrete and asphalt to be excluded from BABAA’s domestic content procurement preferences. Instead of a direct reference to unformed concrete and asphalt being excluded materials, FHWA proposes in the definition of Manufactured Products in the revision 635.410(c)(ii) to state:

Manufactured products means articles, materials, or supplies that have been processed into a specific form and shape, or combined with other articles, materials, or supplies to create a product with different properties than the individual articles, materials, or supplies. If an item is classified as an iron or steel product, an excluded material, or other product category as specified by law or in [2 CFR part 184 \(https://www.ecfr.gov/current/title-2/part-184\)](https://www.ecfr.gov/current/title-2/part-184), then it is not a manufactured product. However, an article, material, or supply classified as a manufactured product may include components that are iron or steel products, excluded materials, or other product categories as specified by law or in [2 CFR part 184 \(https://www.ecfr.gov/current/title-2/part-184\)](https://www.ecfr.gov/current/title-2/part-184). **Mixtures of concrete or asphalt delivered to a job site without final form for incorporation into a project are not a manufactured product.**

This reference is the only direct reference to unformed concrete or asphalt concerning their categorization under BABAA analysis. Instead of establishing what unformed concrete and asphalt are, FHWA only establishes what they are not; they are not manufactured products. And while it is true that they are also not “Listed Construction Materials” under either Section 70911(5) or 2 CFR 184, the FHWA revision to 635.410 is missing a critical and necessary opportunity to clarify what they are, instead of what they are not.

This is an unneeded contribution to uncertainty and confusion concerning excluded construction materials, particularly for unformed concrete and asphalt. The BABAA’s domestic content procurement preference does not apply to materials excluded under 70917(c)(1) and 70917(c)(2); these materials include unformed concrete and asphalt.

As currently proposed, the NPRM assumes federal financial assistance recipients will look not to revised 635.410(c)(1) but to applicable OMB guidance and standards for both listed construction materials and excluded construction materials. As drafted, the NPRM does not even note that there are two categories of “construction materials”. Additional uncertainty, confusion and delay is entirely predictable as a result, particularly because BABAA classification analysis for manufactured products requires definitions for construction materials, both listed and excluded.

Consequently, the FHWA should revise the revision to include at a minimum a complete definition for “excluded construction materials”. The FHWA should reference this definition in proposed 635.410(c)(2) and modify or remove the confusing and awkward phrase “or other

products as specified in law or in 2 CFR part 184”. A similar substitution should be made at 635.410(c)(1)(iv).

II Inconsistent Scope of Applicability

In FHWA’s NPRM, it is noted that because of the existence of 23 U.S.C. 313 in law, FHWA proposes to follow the applicability of Section 313 for Buy America content preferences for steel, iron and manufactured products, which states:

(h) Application to Highway Programs.-The requirements under this section shall apply to all contracts eligible for assistance under this chapter for a project carried out within the scope of the applicable finding, determination, or decision under the National Environmental Policy (NEPA) Act of 1969 (42 U.S.C. 4321 et seq.), regardless of the funding source of such contracts, if at least 1 contract for the project is funded with amounts made available to carry out this title.

Section 313(h) applies Buy America requirements using NEPA as an applicability metric where “at least 1 contract for the project is funded with amounts made available to carry out this title”. This applicability metric differs from BABAA’s 70912(2) applicability metric that applies a domestic content preference to procurements involving federal financial assistance. Section 70912(4) of BABAA defines “Federal Financial assistance” by referencing 2 CFR 200.1:

Federal financial assistance means (1) Assistance that non-Federal entities receive or administer in the form of:

- (i) Grants;
- (ii) Cooperative agreements;
- (iii) Non-cash contributions or donations of property (including donated surplus property);
- (iv) Direct appropriations;
- (v) Food commodities; and
- (vi) Other financial assistance (except assistance listed in paragraph (2) of this definition).

The 2 CFR reference above is used in BABAA to establish the scope of BABAA’s domestic content procurement preference with the term “federal financial assistance, and then defining federal financial assistance precisely. The established definition applies to procurement and does not include reference to NEPA, as does 23 U.S.C. 313(h). Consequently, as currently drafted, the proposed FHWA scope of applicability differs from the scope of applicability in BABAA to which items it applies, the funding trigger and the resultant scope of applicability.

III Buy America Requirements – 23 U.S.C. & 2 CFR 184 Differences

The FHWA notes in its NPRM that the BABAA requirements for iron, steel and manufactured products do not apply to FHWA because FHWA had an existing Buy America domestic content preference for iron, steel and manufactured products in 23 U.S.C. 313 – the repeal of the waiver in that section for manufactured products is of course the subject of the NPRM.

The FHWA's existing Buy America authority in Section 313 does not include construction materials, and consequently, "FHWA, does, however, apply BABA's domestic preference requirement for construction materials".³ The pre-existing Buy America authority in Section 313, including 313(h), apply to steel, iron and manufactured products only. Nowhere in the FHWA revision to 635.410 does FHWA directly address that the applicability requirements of Section 313(h) apply to construction materials; and yet, FHWA allows by implication that they do apply, or might, at best it is unclear.

As discussed above, Section 313(h)'s applicability differs from that of BABAA by applying an applicability metric different than "federal financial assistance" for "procurement" to:

"all contracts eligible for assistance under this chapter for a project carried out *within the scope of the applicable finding, determination, or decision under the National Environmental Policy Act of 1969* (42 U.S.C. 4321 et seq.), regardless of the funding source of such contracts, if at least 1 contract for the project is funded with amounts made available to carry out this title." (Emphasis added)

As drafted, the current FHWA NPRM glosses over and ignores the limits of Section 313(h)'s applicability to construction materials and attempts by inference to apply Section 313(h) to construction materials.

By no fault in drafting, but because FHWA simply lacks the legal authority to apply Section 313(h) to construction materials, it must apply BABAA's applicability requirements instead. The FHWA, perhaps inadvertently, confirms as much in the preamble, narrative and footnotes⁴ of the NPRM. The BABAA construction material domestic content procurement requirements apply to procurement for projects using "federal financial assistance". The FHWA reinforces the requirement, stating:

"Since section 70915(b) of BABAA directs OMB to issue the applicable standards with respect to determining when a construction material is produced in the United States for the purposes of BABAA, FHWA and its recipients will follow the applicable OMB standards and guidance for construction materials."⁵

An additional source of confusion and concern is that Section 313 authority applies to "amounts made available to carry out this title". Is it FHWA's intention to apply Buy America preferences exclusively where a project uses those specified funds? Are there not funds made available under authorities other than those to carry out Title 23 that are nevertheless within FHWA jurisdiction?

Has FHWA contemplated the effect of an "applicable finding, determination, or decision under" NEPA as the additional applicability metric under Section 313 to the aperture on BABAA

³ See 88 FR 17793

⁴ See footnote 14, FHWA NPRM, 88 FR 17804

⁵ See 88 FR 17800

content preferences? Will not some alternative contracting methods pose challenges for applying Section 313(h) to manufactured products?

As drafted, the NPRM's 635.410 revision establishes two different applicability metrics, one for iron, steel and manufactured products contained in Section 313, and one for "construction materials" in 2 CFR 184. Two different funding "triggers" are established, one for steel, iron, and manufactured products in Section 313, and one for "construction materials" in 2 CFR 184. In addition to these multiple permutations, the issue of the Buy America requirements applicable to steel, iron, and manufactured products used in a project not funded with funds made available to carry out Title 23 lingers.

IV Transition Period

The discontinuance of the FHWA Manufactured Products General Waiver will require a transition period for State DOTs. The FHWA notes in the NPRM that time may be needed:

"to allow contracting agencies, contractors, and manufacturers time to create appropriate systems and processes, as well as train staff on compliance with the proposed standards."⁶

A transition period is unquestionably needed, a minimum of at least 18 months is required. If FHWA seeks to avoid unnecessary confusion and delay in Infrastructure Investment and Jobs Act (IIJA) implementation, 38 months is required. The comments above, noting multiple sources of confusion not addressed in the NPRM as drafted as well as new sources of confusion and delay likely to be produced by the NPRM as drafted, FHWA must delay implementation of the revision to 635.410.

We expect that the FHWA will be compelled to produce additional guidance and additional revisions to 635.410 over the coming 18 months at minimum to address uncertainty, lack of clarity, and the associated delays. The complexity of BABAA's requirements when applied across 50 states, the level of current non-uniformity across 50 states in applying BABAA, and BABAA's inconsistency with certain existing statutes make the need for ongoing, likely more granular guidance, inevitable.

Time is required for State Departments of Transportation (DOT) to abandon the improvised BABAA compliance strategies currently in use, all of which rely on systems and processes that pre-date BABAA's requirements. Industry as well requires time to develop compliant processes, sourcing knowledge, and perhaps most importantly time to adjust to much needed clarity from FHWA on domestic content preference applicability, product classification analysis, and adapt to the listed construction materials and excluded construction materials rules.

The need for software systems and procurement processes alone is critical and will take many months. Updates to state DOT materials classification regimes, manuals and software must occur, including training on the updates. Where utilities are moved as part of a project, their

⁶ See 88 FR 17798

procurements must be updated and made consistent with their state DOT and FHWA BABAA guidance.

State DOTs must also establish clear metrics and what level of details are required from their contractors and suppliers to document and subsequently calculate BABAA compliance with manufactured product components, and what type of certification documents must be executed.

Changes are likely to be required in the provisions and technical specifications for design-bid-build, design-bid, and other alternative contracting methods. Cost estimate and budgeting methodologies will also require updates in all contracting categories, and in some cases anticipate shortages and price changes for certain manufactured products.

Currently, many states are “layering” BABAA compliance analysis into their “approved products lists” (APL) or “qualified products lists” (QPL). The pre-BABAA use of APLs and QPLs was largely to ensure procurement preferences for specification compliance. Many items on these lists are not procured individually, but as an input into a procured item, often a manufactured product. The improvised use of APLs and QPLs to these individual items listed to determine BABAA compliance can and does distort BABAA’s intended manufactured product analysis for domestic content.

An input or component of a manufactured product can fail the domestic content threshold of 55% and nevertheless be included in a manufactured product that is compliant with the 55% threshold for domestic content. Yet, state DOTs are in some cases determining some manufactured products non-compliant with BABAA because one of the components or inputs is listed as not BABAA compliant in their APL or QPL.

V Conclusion

Our members support Congress’ intent to increase domestic content in infrastructure projects. We also support the limitations Congress included in the effort to increase domestic content in infrastructure projects. The reasoning and wisdom of these limitations ensures the infrastructure our nation requires can be built now while increasing domestic content over time.

The complexity of applying BABAA’s domestic content procurement requirements across the nation requires patience and thoughtfulness in the development of BABAA implementation rules, and ongoing collaboration between federal, state, and local government and their industry partners. The biggest threat to achieving the goals of the IIJA is hasty, rushed implementation of unclear, insufficiently specific BABAA regulations.