



**AMERICAN  
PUBLIC  
TRANSPORTATION  
ASSOCIATION**

August 18, 2022

---

**EXECUTIVE COMMITTEE**

CHAIR

Jeffrey A. Nelson

VICE CHAIR

Kevin J. Holzendorf

SECRETARY-TREASURER

Matthew O. Tucker

IMMEDIATE PAST CHAIR

David M. Stackrow, Sr.

Dorval R. Carter, Jr.

Jim Derwinski

Dawn Distler

Jannet Walker-Ford

Karen H. King

Michele Wong Krause

Jeanne Krieg

Richard A. Kwasneski

Thomas C. Lambert

Richard J. Leary

Henry Li

MJ Maynard

Raymond J. Melleady

Allan Pollock

Naomi Renek

Leslie S. Richards

Rita A. Scott

Doug Tisdale

Thomas R. Waldron

Jeffrey Wharton

Evalynn "Eve" Williams

Docket Operations  
U.S. Department of Transportation  
1200 New Jersey Avenue, SE  
West Building, Ground Floor  
Room W12-140  
Washington, DC 20590-0001

Re: DOT-OST-2022-0047

Dear Docket Clerk:

The American Public Transportation Association (APTA) represents an \$80 billion industry that directly employs 450,000 people and supports millions of private-sector jobs. We are pleased to offer comments regarding the Department of Transportation's (DOT) Construction Materials Used in Federal Financial Assistance Projects for Transportation Infrastructure in the United States under the Build America, Buy America Act; Request for Information (RFI) published in the *Federal Register* at 87 FR 45396 on July 28, 2022.

DOT posed several questions to the public regarding the Bipartisan Infrastructure Law (BIL), which includes the Build America, Buy America Act (BABA) that requires "any infrastructure projects funded with Federal financial assistance use only construction materials produced in the United States". APTA surveyed its members and submits the following comments below.

While our members support the intent of BABA, and understand the purpose of the construction material requirement, there is concern that construction materials, which can be just about anything, will require more determinations to be made, which could slow projects down and runs counter to expending BIL funds quickly.

Furthermore, our members understand this Administration's intent to "use terms and conditions of Federal financial assistance awards to maximize the use of goods, products, and materials produced in, and services offered in, the United States," the speed with which this is being required raises several concerns that are outlined in our answers below.

---

**PRESIDENT AND CEO**

Paul P. Skoutelas

1300 I Street NW  
Suite 1200 East  
Washington, DC 20005  
p: (202) 496-4800  
f: (202) 496-4324

---

**APTA.COM**

Bottom line, however, it took well over 25 years to get to where we are today and changing the course of the industry's approach to Buy America and procuring domestically produced construction materials will take time. To that end, APTA asks DOT to consider applying the Buy America requirement to construction materials that DOT has found to have sufficient domestic supply (presumably starting with the list of materials listed in The Office of Management and Budget's Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure (OMB guidance) and require it only after OMB has issued its final guidance). Requiring any other construction materials found to have sufficient domestic supply should happen after giving the industry 120 days' notice. Such an approach to the implementation of the new BABA requirements is highly recommended to encourage industry investment in domestic production.

Alternatively, it is worth noting that BIL and BABA apply to all federally funded infrastructure projects. Thus, it would be incredibly helpful for the federal government to take the lead in creating a list or database of domestically produced construction materials and certify that those listed are Buy America/BABA compliant. OMB's Made in America Office should be tasked to perform this function. Consistency, flexibility, and predictability are highly valued by the public transit industry. The work of moving to all U.S. sourced construction materials should not be borne by the industry alone. We make suggestions below on how the Federal government might accomplish this.

Question 1: OMB guidance contained an interim list of construction materials subject to Buy America. The list, we assume, is based on research conducted by the federal government that determined those materials are available in sufficient quality and quantity to meet industry needs. Thus, the materials, products, and categories of materials or products included as "construction materials" should be limited to the list set forth in the OMB guidance. Those materials are sufficient and implement the intent of BABA. Furthermore, we also suggest that if additional materials are considered, an effort to further define materials that would fall under Buy America requires a more in-depth approach with face-to-face interaction with grantees, contractors, and suppliers over a significant period of time. Trying to develop definitions and a process through a DOT *Federal Register* request unfortunately prevents a substantive discussion of nuances that could better advance the goals of BABA.

Question 2: DOT must develop a clear, consistent standard for assigning materials to one of the categories. Unfortunately, that task could be quite difficult given that almost any material that arrives on the construction site could be considered "construction materials". Any items or materials that are currently categorized by DOT agencies as steel and iron, or manufactured products, should remain categorized as such. The determination of whether an item or material is categorized as a manufactured product or construction material should be derived from the language in Section VIII of OMB's guidance, which states:

[I]tems that consist of two or more of the listed materials that have been combined together through a manufacturing process, and items that consist of 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.

Question 3: See answer above. In addition, OMB's guidance does not discuss a waiver of cost-of-components test for commercially available off-the-shelf (COTS) items. Why should Buy America requirements for manufactured products be different from Buy American Act clauses applicable to construction projects issued by federal agencies? Developing an expanded COTS list for Buy America would be helpful by adding flexibility. Otherwise, defining a manufactured product that has many components would add a level of complexity, which would make it hard for contractors to demonstrate compliance with Buy America under BABA.

Question 4: DOT and OMB should clarify that the construction of a structure is the final manufacturing process and each of the components that are integrated into the building must be substantially manufactured in the United States. It is this component manufacturing process that should constitute the "immediately preceding manufacturing stage." This would be consistent with current practices, albeit with more stringent requirements. For instance, it would comport with federal Buy American practice while requiring 100 percent of component materials be produced in the U.S. It would also maintain a consistency with the highly developed Buy America program implemented by the FTA. To insist on treating each component individually would be counterproductive and substantially increase the cost of doing federally assisted work. This could easily result in some businesses, particularly small and disadvantaged businesses, leaving the marketplace in favor of purely private work. For those that remain, the excessive costs of determining compliance will be passed along to the transit agency and other state and local government entities utilizing federal funds. We are not aware of any DOT/OMB study establishing that construction materials meeting this standard would be available in the marketplace, which further complicates the process and could increase prices and drive down competition. Our members suggest the following guidance:

- i. Non-ferrous metals  
Require the manufacturing of non-ferrous building materials to occur in the U.S. but allow the raw material (copper, tin, etc.) to be imported.
- ii. Plastic and Polymer based Products  
Require the cutting, milling and any required dapping to occur in the U.S. but allow blocks of polymer and other raw materials to be imported.
- iii. Glass  
Require manufacturing of the glass construction material (including optic glass) to occur in the U.S. but allow any raw materials to be imported.
- iv. Lumber  
Require the sawing, milling, and final manufacturing of the lumber to occur in the U.S. but allow the logs to be imported.
- v. Drywall  
Require manufacturing of drywall to occur in the U.S. but allow the gypsum raw material to be imported.

Question 5: Regarding all manufacturing processes, there should be recognition that the manufacturing process for iron ore is more complicated than the manufacturing process for lumber or glass. To address this issue, DOT should develop a mandatory, centralized form for manufacturers to fill out the necessary information to document the material has been milled and manufactured in the U.S. Currently, this information is provided on an ad hoc basis, but making it standardized and mandatory would go a long way to ensuring material is manufactured in the U.S. Steel and aluminum industries already report a great deal of information, sufficient to determine their materials are of U.S. origin. DOT should simply rely on standard industry certifications. Furthermore, our members ask DOT to consider how such a definition of manufacturing process would impact its rule for rolling stock, since FTA distinguishes between manufacturing and final assembly and has not required “manufacturing” of rolling stock in the United States. We believe that the goals of BIL and BABA are best served by keeping the existing rolling stock rule.

Question 6: The comparison between FTA’s and FHWA’s definitions of manufacturing processes is problematic because FTA’s definition is quite broad while FHWA’s definition is limited to iron and steel. That being said, our members believe materials are not often thought of as “manufactured”. DOT appears to believe materials can be manufactured. The question becomes how much effort should contractors expend to track down each element to determine its source? For example, a stop sign has metal, paint, and glue. These are materials that go into making a stop sign. A contractor will buy the sign fully assembled, but DOT seems to suggest the contractor would have to track down the origins of the metal, paint, and glue. As noted above, if the sign is assembled or manufactured in the U.S. using domestic labor that should be enough.

Question 7: Our members note that materials can arrive on the construction site as either a manufactured product or a construction material to be used by itself.

Question 8: What would be more helpful is to have DOT develop a list of domestically available materials for project sponsors can choose from. That approach would move the certification from the suppliers to DOT, which would certify the materials on the list are domestically produced and Buy America compliant. The list could be materials or names of suppliers who are certified as providing domestically produced materials. One way to accomplish this is to have DOT partner with the Hollings Manufacturing Extension Partnership based in the National Institute of Standards and Technology. There is a center located in every U.S. state and Puerto Rico. This center partners with manufacturers to identify resources, expand and diversify markets, adopt new technology, and enhance value within supply chains. Developing a DOT-wide approach to identifying projects, construction materials needed, gaps/shortfalls, and research available domestic and foreign sources to meet the need, would allow for better project planning, keep costs from unnecessarily spiking, and reduce the industry’s burden while ensuring the goals of BABA are met.

Alternatively, DOT could expand the waiver for construction materials under the COTS waiver mentioned earlier. This would align to the two programs and provide project sponsors with clear direction regarding materials they can utilize for their project.

Question 9: As noted earlier, members do not believe FHWA and FTA should have different processes. There should be a OneDOT approach.

Question 10: While a good faith certification may make sense, what constitutes “good faith” is subject to interpretation and requires justifications and back and forth. It is a subjective measure and not an objective one. Also, why should the bidder or offeror be the certifier? (See answer to Question 8.)

Another way to approach this issue is to follow the process in 49 CFR 661.11 Appendix A, which allows 10 percent of foreign sourced materials. DOT could apply a similar threshold for construction materials.

Question 11: No, see our answer above.

Question 12: Mill test certifications are an example of records/documentation of origin of manufacturing processes. On the other hand, as the question alludes to, if something is made from materials from multiple suppliers, it would be difficult for contractors to track down the origins for each material.

Question 13: Electronic components are typically foreign-sourced. This is supported by the 100-day capstone report from the White House on semiconductor shortage and manufacturing in America. [Capstone-Report-Biden.pdf \(whitehouse.gov\)](#).

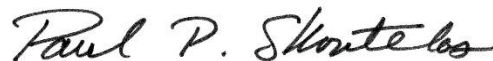
Question 14: While sand, stone, and cement produced in certain regions of the U.S. are available in sufficient quantities and quality, that is not the case in all regions of the country. Where such materials may not be readily available, the question for USDOT and OMB will be: What will domestic sourcing do to project cost and schedule? Given the current supply chain constraints, moving to all U.S. sourced construction materials will inevitably lead to project sponsors paying a premium to meet the Act’s requirements, or worse, being unable to meet project schedules. This may also be exacerbated by the fact that multiple BIL funded projects will be underway at the same time, which can increase competition and therefore further drive-up costs. The question then becomes whether the market/industry can absorb a doubling, tripling, or even a quadrupling of costs for construction materials. Cost determines winners and losers in the bid process. If a manufacturer has a global platform, are there enough incentives in the U.S. supply chain to justify setting up shop in the U.S. to meet BABA requirements? DOT may want to consider exceptions that allow a U.S. supplier to partner with a foreign supplier to provide construction materials, which would be especially helpful for high-tech products.

Question 15: Lumber, reinforced steel for concrete, and labor shortages. But, as noted above there are ebbs and flows in the industry. It all depends on the demands made on the marketplace. Agencies are rushing to spend their federal funding during this fiscal year. With the influx of funding, we believe this will become an issue and APTA pledges to conduct a survey of its members to identify materials that are or could become constrained in the future.

Question 16: American steel is an example of an industry experiencing a comeback, but the ability to strengthen domestic markets in any area will take time. Further, our members notice that Buy America compliance often results in a reduction in competition and non-compliant offers. This observation by our members is supported by a 2019 report by the Congressional Research Service: *Effects of Buy America on Transportation Infrastructure and U.S. Manufacturing* (R44266, July 2, 2019). DOT may choose to address this issue by lowering some of the obstacles American businesses face and creating incentives for businesses to enter the market.

APTA appreciates the opportunity to comment on this RFI and if there are any questions regarding this letter, please contact APTA's General Counsel, Linda Ford at [lford@apta.com](mailto:lford@apta.com).

Sincerely yours,

A handwritten signature in black ink that reads "Paul P. Skoutelas". The signature is written in a cursive style with a large initial "P" and "S".

Paul P. Skoutelas  
President and CEO