

**AMERICAN PUBLIC TRANSPORTATION ASSOCIATION
EXECUTIVE SUMMARY
INFRASTRUCTURE INVESTMENT AND JOBS ACT
BUILD AMERICA, BUY AMERICA IMPLEMENTATION
March 8, 2023**

On November 15, 2021, President Joseph Biden signed the Infrastructure Investment and Jobs Act (IIJA) into law, which includes a title addressing Buy America requirements for infrastructure projects.¹ Under the Build America, Buy America Act (BABA), each federal agency is required to “ensure that none of the funds made available for a Federal financial assistance program for infrastructure, including each deficient program, may be obligated for a project unless all of the iron, steel, and manufactured products and construction materials used in the project are produced in the United States.”

In this Act, “produced in the United States” means:

- For iron or steel products, that all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the U.S.;
- For manufactured products, that the product was manufactured in the U.S. and the cost of the product components mined, produced, or manufactured in the U.S. is greater than 55 percent of the total cost of all components of the manufactured product, unless another standard for determining the minimum amount of domestic content applies; and
- For construction materials, that all manufacturing processes occurred in the U.S.²

A federal agency may waive the application of the domestic content procurement preference where:

- applying the preference would be inconsistent with the public interest;
- the types of iron, steel, manufactured goods, or construction materials are not produced in sufficient and reasonably available quantities or satisfactory quality; or
- the inclusion of the materials produced in the United States will increase the cost of the project by more than 25 percent.

¹ P.L. 117-58, Division G, Title IX. This Title builds on [Executive Order 14005, Ensuring the Future is Made in All of America by All of America's Workers](#) (Order); signed by President Joseph Biden on January 25, 2021; *see also* APTA Fact Sheet, *Executive Order on Ensuring the Future is Made in All of America by All of America's Workers* (Jan. 25, 2021).

² Please note that BABA excludes from the definition of construction materials: cement and cementitious materials; aggregates such as stone, sand, or gravel; or aggregate binding agents or additives. In addition, the Act limits the standards under § 70915 (OMB Guidance) from including cement and cementitious materials; aggregates such as stone, sand, or gravel, or aggregate binding agents or additives as inputs of the construction materials.

Office of Management and Budget Guidance for Grants and Agreements

On February 9, 2023, the Office of Management and Budget (OMB) issued a proposed rule to revise OMB Guidance for Grants and Agreements.³ On March 8, OMB issued a correction to the notice indicating that OMB is issuing proposed guidance, not a proposed rule.⁴ OMB is proposing a new part 184 in 2 CFR chapter I to: support implementation of BABA provisions of the IIJA; clarify existing requirements to domestic preferences for procurements;⁵ and improve federal financial assistance management and transparency. This proposed guidance generally aligns with the OMB Initial Implementation Guidance.⁶

Comments are due Monday, March 13. On February 16, APTA, together with Coalition partners, sent a [letter](#) to OMB requesting that it provide for an additional 30 days (total of 60 days) for public comment on the proposed guidance until April 12, 2023. APTA is currently drafting comments to the proposed guidance.

DOT Proposed Waiver of Buy America Requirements for De Minimis Costs, Small Grants, and Minor Components

On May 19, 2022, the U.S. Department of Transportation (DOT) issued a temporary waiver of the BABA construction materials requirement. The waiver expired on November 10. On November 15, concurrent with a notice not to extend the temporary BABA waiver for construction materials and a proposed waiver for [contracts and solicitation](#), DOT published a notice seeking comment on whether it should use its authority, in accordance with § 70914(b)(1) of BABA, to grant a waiver in the public interest for the Buy America requirement for De Minimis Costs, Small Grants, and Minor Components.⁷

DOT proposed to waive BABA Buy America requirements for iron, steel, manufactured products, and construction materials under a single DOT financial assistance award for which:

- The total value of the non-compliant products is no more than the lesser of \$1 million or five percent of total allowable costs under the Federal financial assistance award;
- The size of the federal financial assistance award is below \$500,000; or
- The non-domestically produced miscellaneous minor components comprise no more than five percent of the total material cost of an otherwise domestically produced iron or steel product.

To date, DOT has not issued a final rule regarding this proposed waiver for De Minimis costs.

³ OMB, [Notice of Proposed Rule: Notification of Proposed Guidance](#), 88 Fed. Reg. 8374 (February 9, 2023).

⁴ OMB, [Guidance for Grants and Agreements Correction](#) (March 8, 2023).

⁵ [2 CFR 200.322](#)

⁶ OMB, Memorandum-22-11, [Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure](#) (April 18, 2022).

⁷ DOT, [Notice of Proposed Waiver of Buy America Requirements for De Minimis Costs, Small Grants, and Minor Components](#), 87 Fed. Reg. 68576 (November 15, 2022)

DOT Limited Waiver of Buy America Requirement for Construction Materials for Certain Contracts and Solicitations

On January 30, 2023, DOT issued a limited Waiver of Buy America Requirements for Construction Materials for Certain Contracts and Solicitation.⁸ The new waiver exempts construction materials used in federally funded infrastructure projects based on the date of grant obligation, the date of contract execution for materials, and other factors. Specifically, this waiver exempts BABA domestic preference requirements for construction materials for:

- Any contract entered into before November 10, 2022; and
- 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:

- DOT awards obligated on or after January 30, 2023; and
- For awards that are obligated on or after November 10, 2022, but prior to 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.

DOT Notice of Waiver of Buy America Requirements for Electric Vehicle Chargers

On February 21, 2023, the Federal Highway Administration (FHWA) published a notice establishing a temporary public interest waiver to waive BABA requirements for steel, iron, manufactured products, and construction materials in electric vehicle (EV) chargers.⁹ The temporary waiver is effective beginning March 23, 2023.

This short-term, temporary waiver enables EV charger acquisition and installation to immediately proceed while also ensuring the application of Buy America to EV chargers by the phasing out of the waiver in two phases. As of the effective date of this waiver, FHWA is also removing EV chargers from its existing general applicability waiver for manufactured products.

⁸ DOT, [Notice of Waiver of Buy America Requirements for Construction Materials for Certain Contracts and Solicitations](#) (January 30, 2023).

⁹ FHWA, [Notice of Temporary Waiver of Buy America Requirements for Electric Vehicle Chargers](#), 88 Fed. Reg. 10619 (February 21, 2023).