



**American
Public Transportation
Association**

November 19, 2022

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Paul P. Skoutelas

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-2022-0123

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) Notice That the Build America, Buy America Requirement for Construction Materials Applies Effective November 10, 2022, and Notice of Proposed Waiver of That Requirement for a Narrow Category of Contracts and Solicitations published in the *Federal Register* at 87 FR 68572 on November 15, 2022.

APTA applauds the Administration's initiative to ensure the use of American materials when building American infrastructure because it is critical to job creation, timely project delivery, quality, and building domestic capacity. APTA's members share this goal and are supportive of the two waivers but would like the Administration to take into account several important points.

First, APTA reminds DOT that the Bipartisan Infrastructure Law (BIL) and the Build America, Buy America Act (BABA) apply to all federally funded infrastructure projects. Thus, APTA members encourage the Administration to take the lead in creating a list or database of domestically produced construction materials and certify that those materials listed are BABA compliant. The Federal Government taking the lead is the best way to move toward building domestic capacity quickly and efficiently and achieving compliance with the Administration's goals under BABA.

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Furthermore, given the Department's recent effort to reform the Disadvantaged Business Enterprise (DBE) program, APTA members are concerned that the Department's insistence on agencies, contractors, and subcontractors certifying compliance could negatively impact a DBE's ability to participate in public transportation projects, which runs counter to DOT's efforts to revise DBE regulations.

Second, DOT requests comment on whether there are specific circumstances that may justify a project-specific waiver, such as the unavailability of specific construction materials manufactured in the United States in sufficient quantity or quality for a particular DOT-funded transportation project or category of projects. And, whether there are transportation projects, such as projects in various stages of the Federal Transit Administration's (FTA) Capital Investment Grants program, for which a waiver may be justified due to significant delay in project delivery. If completed design and engineering must be revised to comply with the construction materials preference after November 10, 2022, DOT seeks comments on the length and type of waiver which may be necessary to mitigate a significant delay.

While some federal departments and agencies may have little experience with Buy America requirements, FTA has an extensive, well-established Buy America program. We believe this program generally complies with both the letter and spirit of BABA and that both DOT and the Office of Management and Budget (OMB) should acknowledge the adequacy of that program and perhaps use it as model government-wide. It is worth noting that while OMB's April 18, 2022, guidance strives for 55 percent of components be manufactured in the United States, 49 CFR 661 requires every component to be domestically manufactured and the FTA program requires the final manufacturing process for each of these end products take place in the United States—typically at the building site. Moreover, each component of that end product must be manufactured in the United States. 49 CFR 661.5(d).

While the proposed waivers will provide some flexibility for the delivery of critical infrastructure projects, the Administration must consider another transitional waiver and provide time to spell out clear guidelines for compliance with BABA. For example, OMB's guidance could be interpreted to require that not only the cutting and fitting of construction materials, such as drywall, on site, and manufacturing of that drywall occur in the United States, but also that the materials comprising the drywall itself (e.g., gypsum, paper, glue) be manufactured in the United States. Such an interpretation would hobble construction projects across the country, whether funded by FTA or some other federal entity. Contractors would be unreasonably required to trace the upstream sources of minimal value sub-subcomponents to certify those sources. There is no current method for doing that sort of in-depth analysis. More importantly, to put that responsibility on local agencies and contractors would be patently unreasonable. The costs of federally assisted construction would be untenable and could bring construction projects to an abrupt halt, which would frustrate the core purpose of the BIL.

Third, our members also believe there may be specific circumstances that would justify a project waiver. In fact, there may be numerous reasons to request a project waiver and our members are concerned that neither DOT nor OMB are prepared to handle voluminous waiver requests and process them expeditiously to ensure minimal project delay. Given DOT's past history of not handling waiver requests on a priority basis, we hope that both the Department and OMB will make the necessary investment in knowledgeable staff to handle waiver requests. It will be essential to ensuring our shared goal of expeditious investment of BIL funds.

Fourth, APTA members spent a significant amount of time working on comments to the original Requests for Information, and DOT has not responded to a single comment or concern outlined in those submissions. Our members are concerned that DOT is moving forward with the BABA requirement and this waiver even though OMB has not provided final guidance, as required by the law. How can our members be assured that the final OMB guidance will be consistent with this waiver?

Finally, as noted above, APTA again requests that DOT delay the effective date of the BABA construction materials requirement until OMB issues its statutorily required final guidance and provide the industry sufficient time (at least one year) to adjust to the new requirements. If DOT does not delay the effective date to one year from the issuance of OMB's final guidance, APTA requests, at the very least, that DOT adjust the waiver so it does not apply to any contract solicited prior to issuance of final guidance. Contracts solicited prior to the date OMB issues final guidance would not contain provisions regarding the new BABA construction materials requirements because there is no binding guidance. This approach also will make compliance by APTA's members and contractors easier as they will be able to plan to manage grant funding to minimize the number of contracts using a mix of pre- and post-waiver funds.

If there are any questions regarding this letter, please contact APTA's General Counsel, Linda Ford at lford@apta.com.

Sincerely yours,



Paul P. Skoutelas
President and CEO