

Federal Highway Administration Proposes to End Its Buy America Waiver for Manufactured Products

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The Federal Highway Administration (“**FHWA**”) recently completed a review of its longstanding Buy America waiver for manufactured products and concluded that the waiver should be discontinued.

The agency’s proposal to end the waiver will have significant ramifications for sourcing on federally-funded highway, bridge, and tunnel projects. Recipients, contractors, and suppliers involved with such projects will be subject to new domestic preference compliance obligations as well.

The Build America, Buy America Act (“**BABA**”), enacted in 2021 as part of the Bipartisan Infrastructure Law, established general applicability Buy America preferences for all iron, steel, manufactured products, and construction materials incorporated in infrastructure projects funded by federal grants and assistance. BABA required that agencies already subject to domestic sourcing requirements under other Buy America laws assess their pre-existing obligations in comparison with the BABA requirements and determine whether the previous requirements were “deficient.” As part of that exercise, Section 70914(d) of BABA required federal agencies to review any pre-existing general applicability Buy America waivers.

Projects funded by grants and assistance through the FHWA have long been subject to a Buy America statute, which was among the statutes specifically identified in BABA for review. Since 1983, FHWA has had in place a general waiver exempting manufactured products from its domestic sourcing requirements. In accordance with BABA, FHWA commenced the review of the waiver as required approximately a year ago. 88 Fed. Reg. 16,517 (Mar. 17, 2023).

On March 12, 2024, FHWA announced its proposal to discontinue the waiver for manufactured products. 89 Fed. Reg. 17,789 (Mar. 12, 2024). Giving due consideration to the BABA policy preference against general applicability waivers, FHWA concluded that its manufactured products waiver was “overly broad, no longer in line with the purpose of domestic content procurement preferences and waivers, and therefore no longer serves the public interest.”

Due to the longstanding waiver, FHWA regulations concerning domestic preferences do not address manufactured products. The agency thus proposes to generally adopt the BABA standards and definitions relating to manufactured products and incorporate them into the current FHWA Buy America regulations. Under BABA, for a manufactured product to be “produced in the United States” it must be manufactured in the United States and have the cost of components of the product that are mined, produced, or manufactured in the United States be greater than 55 percent of the total cost of all components of the manufactured product. FHWA proposes incorporating this standard, along with associated definitions, and to apply the same methodology for calculating the cost of components. FHWA explained that this would help keep its requirements consistent with those for agencies directly subject to BABA, providing a benefit by reducing the burden of compliance on agencies, contractors, and manufacturers. FHWA announced it does not plan to modify its Buy America requirements for iron and steel, however, but would incorporate various BABA definitions to clarify the different categories and standards. Further, FHWA’s

proposed regulation would not affect construction materials used in FHWA funded projects, which are and would remain subject to the BABA requirements for construction materials.

Although for the most part FHWA hews closely to the BABA guidance, FHWA proposes some unique features for its own Buy America regulations. For example, where BABA generally only applies one Buy America test to each article, material or supply, FHWA's proposed regulations would apply its existing iron and steel test in addition to the new test for manufactured products in two specific scenarios: (1) iron and steel components of precast concrete products; and (2) iron or steel enclosures of intelligent transportation systems and other electronic hardware systems. The domestic iron and steel used in those products would count towards the 55 percent domestic components for purposes of determining whether the overall product is domestic. The new rule also proposes to "explicitly state that concrete and asphalt mixtures delivered to a job site without final form for incorporation into a project are not manufactured products."

FHWA proposes that the Buy America requirements for manufactured products would "only apply to Federal awards obligated or authorized after the effective date of a final rule." The agency also seeks comment on whether a temporary transition or adjustment waiver is 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." The agency noted the 60-day period provided before OMB's final guidance went into effect, and DOT's 180-day temporary public interest waiver for the BABA construction materials requirements, issued to allow time for stakeholders to adjust to the new requirements. FHWA may be willing to build a similar transition period into the new manufactured products domestic sourcing requirements.

FHWA estimates "the increased material costs for manufactured products permanently incorporated into FHWA-funded projects to range from a high of roughly \$737 million per year to a low of \$45 million per year."

In parallel with the proposal to rescind its manufactured products waiver, FHWA issued a request for information regarding use and domestic availability of manufactured products in highway projects. 89 Fed. Reg. 17,892 (Mar. 12, 2024). The RFI identifies items identified through an earlier request for comments as being "broadly unavailable from Buy America-compliant sources": Retroreflective sheeting; LED lamps/lighting systems; utility products; intelligence transportation systems (ITS) hardware; traffic signals and controllers; traffic cameras; changeable message signs; and vehicle detection equipment. The agency says it will consider time-limited and targeted waivers for products that are not and cannot be produced in the U.S. in the near future based on responses to the RFI.

The comment period for both the notice of proposed rulemaking and the RFI is open until May 13, 2024. While the final details of the regulation may change, and more targeted waivers and a transition period are possible, it is unlikely that FHWA will reverse its decision to end the general waiver. Federal financial assistance recipients, contractors, and manufacturers involved with FHWA-funded projects should assess their supply chains and get ready for a future in which FHWA-funded projects require U.S. produced manufactured products.