

Expansion of the Buy America Requirements for Highway Bridge Projects

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As covered in articles in the Fall 2020 and Fall 2022 issues of *ASPIRE*[®], a long-standing “Buy America” statute codified at 23 U.S.C. §313 nominally requires almost all steel, iron, and manufactured products used on projects funded (or assisted) by the Federal Highway Administration (FHWA) to be produced in the United States. However, ever since Congress first enacted the provision, FHWA has waived the domestic content requirement for *all* manufactured products other than steel and iron. FHWA permanently adopted its manufactured products waiver in 1983, and at the same time provided a much more limited *de minimis* (that is, almost insignificant) waiver for steel and iron, allowing foreign steel and iron to be used on a federally assisted project only where the cost does not exceed 0.1% of the contract price or \$2500, whichever is greater. Accordingly, although almost all predominantly steel and iron products on FHWA-funded projects must be manufactured entirely within the United States, in practice, there have historically been no such requirements for any other materials.

That changed with the enactment of the Infrastructure Investment and Jobs Act (IIJA) in November 2021. Under the new “Build America, Buy America” (BABA) provision of the IIJA, Congress provided that almost all steel, iron, manufactured products, and construction materials used on federally assisted infrastructure projects must be produced in the United States. In April 2022, the White House

Office of Management and Budget determined that “construction materials” referenced in the BABA include products consisting primarily of nonferrous metals, plastic and polymer-based products, glass, lumber, and drywall. Therefore, by differentiating between construction materials and manufactured products, the BABA effectively provides that the FHWA’s long-standing manufactured products waiver does not apply to products made primarily of wood, glass, plastic, or metals other than steel or iron. To strictly comply with the BABA, products made of such materials must be produced in the United States to be incorporated into federally assisted projects.

In May 2022, the U.S. Department of Transportation issued a temporary general waiver for application of the new BABA construction materials requirement. However, that waiver expired in November 2022. The new BABA requirement for construction materials now applies to all federally assisted transportation infrastructure contracts executed on or after March 10, 2023.

In August 2023, FHWA provided some relief by issuing a new *de minimis* waiver for construction materials. Under this waiver, construction materials produced outside of the United States may be incorporated into federally assisted highway projects, provided that the cost of such products does not exceed 5% of the total cost of all

materials and products incorporated into the project, with an upper bound of \$1 million for the cost of foreign-sourced construction materials on any project.

This new *de minimis* waiver for construction materials offers a great deal of flexibility to project owners and contractors, permitting a significant volume of construction materials of foreign or unknown origin to be incorporated into federally assisted highway projects. Certainly, the new BABA *de minimis* budget of 5% (or \$1 million) for foreign construction materials compares favorably to the historic *de minimis* budget of 0.1% (or \$2500) for foreign steel and iron. However, to take advantage of this new waiver, project participants must undertake the administrative burden of separately tracking the cost of all project materials and of all construction materials incorporated into the project that were not produced in the United States.

As originally proposed in November 2022, the new *de minimis* waiver would have also applied to steel and iron, not just the new category of construction materials. However, in the face of opposition, primarily from steel manufacturers and organized labor, FHWA elected *not* to extend the new waiver to steel and iron, deciding instead to maintain its much more stringent 1983 *de minimis* waiver for steel and iron.

Also as originally proposed by FHWA in November 2022, the new waiver would have exempted some quantity of “miscellaneous minor components” of steel or iron products. As I wrote in the Fall 2022 issue of *ASPIRE*, FHWA has long struggled with how to address “miscellaneous” steel and iron products such as screws, nuts, bolts, and washers. FHWA has seemed unable to resolve the discrepancy between its stringent application of Buy America requirements for steel and iron on the one hand and its waiver of Buy America requirements for manufactured products that often contain a significant amount of steel and iron components on the other hand.

In August 2023, in response to public opposition, including from steel manufacturers and organized labor, FHWA elected once again to not issue the proposed waiver specifically for miscellaneous steel and iron components. Instead, FHWA indicated that miscellaneous steel and iron components are likely covered by existing waivers (such as the new *de minimis* waiver for construction materials, the long-standing *de minimis* waiver for steel and iron, and the long-standing manufactured products waiver).

This suggests that, notwithstanding the requirement that almost all steel and iron incorporated into federally assisted highway projects be manufactured in the United States, a significant amount of foreign steel and iron is undoubtedly being incorporated into such projects in the form of components of products subject to the manufactured products waiver. Following an adverse ruling by the U.S. District Court for the District

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of Columbia in December 2015, FHWA has declined to issue formal guidance regarding the extent to which miscellaneous steel and iron components such as nuts, bolts, washers, and screws must have domestic content. Consequently, it has been left to each FHWA Division to determine at the project level whether a given product is predominantly steel or iron, or else covered by the manufactured products waiver.

For concrete bridge projects, FHWA's failure to issue definitive guidance creates uncertainty regarding how the domestic content requirements apply to steel reinforcement. BABA confirms the long-standing FHWA practice that Buy America requirements do not apply to cement, sand, and stone aggregate. However, as I wrote in the Fall 2020 issue of *ASPIRE*, the treatment of steel reinforcement has long been the subject of controversy and confusion. There is long-standing authority requiring steel reinforcement installed at the jobsite to be domestic (subject to the stringent steel and iron requirement). However, a project-level FHWA Division determination that precast concrete products are “manufactured products,” not predominantly steel or iron, would conceivably allow foreign steel reinforcement in the precast concrete to be incorporated into the project.

In an April 2023 letter to FHWA,¹ PCI and the National Precast Concrete Association asserted that precast concrete is a “manufactured product” for purposes of Buy America requirements. Although the letter conspicuously omitted any mention of steel reinforcement within precast concrete, it implies that precast concrete is subject to the manufactured products waiver, which would conceivably allow the use of foreign component materials (including steel reinforcement), as long as the precast concrete products are deemed by the local FHWA Division not to be “predominantly” steel or iron.

However, FHWA's manufactured products waiver may be short-lived. In March 2023, concurrent with its adoption of the new *de minimis* waiver for construction materials, FHWA

formally solicited public comments on whether the manufactured products waiver should be discontinued or modified. BABA expressly discouraged the use of broad, general applicability waivers, such as the manufactured product waiver. As of this writing, FHWA has received more than 7500 comments in response to the solicitation, with many in favor of retaining the manufactured products waiver and many opposed. Although no action has been taken to date, it seems unlikely that the manufactured products waiver will continue in its current form. Given FHWA's issuance of the new *de minimis* waiver for construction materials, a new *de minimis* waiver for manufactured products could likewise be forthcoming, allowing some foreign manufactured products to be incorporated into federally assisted highway projects, on the condition that project participants actively track and limit the use of such products.

In summary, the Buy America requirements for highway and bridge projects continue to slowly but surely evolve in favor of expanded application to a broader range of materials. Relief in the form of *de minimis* waivers by FHWA enable projects to be constructed with some foreign content but impose administrative burdens on FHWA project owners and contractors to track and limit foreign content. With the new BABA requirements, FHWA project participants are now faced with domestic content requirements not just for steel and iron but also for construction materials that include other metals, wood, glass, plastic, or polymers. FHWA project participants should expect the Buy America requirements (and associated administrative burden) to continue to expand to most other manufactured products sooner rather than later.

Reference

1. Precast/Prestressed Concrete Institute and National Precast Concrete Association. 2023. “Comment regarding Docket No. FHWA-2022-0027, Review of General Applicability Waiver of Buy America Requirements for Manufactured Products.” Posted April 16, 2023. <https://www.regulations.gov/comment/FHWA-2022-0027-7222>. 