

August 17, 2022

The Honorable Polly E. Trottenberg  
Deputy Secretary  
U.S. Department of Transportation  
1200 New Jersey Avenue SE  
Washington, D.C. 20590

Subject: FHWA Docket Number DOT-OST-2022-0047  
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

The Montana Department of Transportation (MDT) respectfully submits the following comments in response to the Department of Transportation (USDOT) request for information on the requirements for construction materials used in Federal financial assistance projects for transportation infrastructure in the United States Under the Build America, Buy America Act (BABA).

As a key partner to USDOT in the federally supported, state-administered federal transportation program, MDT appreciates the opportunity to provide comments in response to the request for information. Also please note, MDT fully endorses the comments filed jointly by the state transportation departments of Idaho, Montana, North Dakota, South Dakota, and Wyoming.

MDT appreciates that USDOT provided a temporary, 180-day waiver for the new category of construction materials. However, MDT continues to have significant concerns regarding the readiness of industry for this transition and the tremendous potential near-term negative impact on the delivery of needed transportation projects. A strategic process, supported by market research into the availability of American-made goods, needs to be undertaken at the federal level to ensure a less disruptive transition to American-made products and to ensure that current supply issues are not intensified.

MDT strongly supports the expansion of America's manufacturing capacity, promoting domestic jobs, and encouraging economic growth; however the implementation processes will take longer than the 180-day time period provided in the current waiver for both state implementation and industry transition to domestically produced construction materials.

State DOTs need the flexibility and tools to deliver new IIJA programs and projects such as EV charging infrastructure and emerging technologies that support connected vehicles and conversion to cellular V2X roadside communications. Limited domestic product availability in the short term coupled with the desire to deploy infrastructure quickly, and the anticipated significant

increase in demand for EV charging infrastructure, an extension of the blanket waiver for manufactured products is needed to ensure success of the NEVI program.

The current waiver process for Buy America often takes an undefined and unpredictable amount of time, leading to uncertainties and delays. Timely and specific waiver procedures are needed.

States need clarification on the term “manufactured product” to ensure they are meeting the intent of the Buy America requirements and are able to provide accurate information to their contractors and material suppliers. Industry needs national consistency in the distinction between “construction materials” vs. “manufactured products”.

MDT will do its part in support of national goals for the expansion of America’s manufacturing capacity, promoting domestic jobs, and encouraging economic growth. However, MDT continues to support limited undue burden and costs on states; and preserved state flexibility in delivering its programs. MDT offers the following comments to specific questions posed in the RFI:

- (1) In addition to those construction materials identified by OMB, are there specific materials, products, or categories of materials or products that are commonly used in DOT-funded projects that should be included as “construction materials” for the purpose of BABA implementation?

To the extent that requirements surrounding the implementation of Buy America for the new category of construction materials can be made consistent among all operating administrations within USDOT, that should be a primary goal of this effort. The list covers primary construction materials. However, glass, lumber, and drywall are materials specific to “building” construction and do not routinely make up construction materials involved in road and bridge transportation construction.

- (2) Are there materials used in DOT funded projects that do not clearly fit in any one of the three categories: steel and iron; manufactured products; or construction materials? How should DOT assign them to one of these statutory categories?

The three categories seem to be all encompassing. Many products can be categorized into one of the three categories, however there are numerous materials that fall within the “gray area” between a construction material and a manufactured product, such as epoxies, plastics made from multiple materials, etc. Additional clarification is needed.

- (3) Are there items that DOT agencies currently treat as manufactured products that should instead, under the OMB Initial Implementation Guidance, be treated as construction materials?

No, products categorized as construction materials should be limited.

- (4) Based on the definition of “all manufacturing processes” in the OMB Initial Implementation guidance, what do you consider “the final manufacturing process” and the “immediately preceding manufacturing stage” for common goods used in DOT

funded projects in each category of construction material listed in the OMB Initial Implementation Guidance or any other category you identify in response to Question 1 above?

The identification of individual stages within a given manufacturing process will vary depending on the material, clarification is needed, likely material by material, for industry to determine whether their final two manufacturing stages are (or can be) accomplished in the US.

Comments specific to the materials listed in the RFI:

Non-ferrous metals – Casting, forming, machining, etc. of bronze, copper, and aluminum. Zinc, which is not available domestically, is used for galvanizing, but in and of itself is not supplied or specified as “zinc” on projects, only the requirement of ferrous metals to be galvanized, so it falls under the coatings clause for steel items.

Plastic and Polymer based Products – Extrusion (thermoplastic pipe), forming (plastic shapes), and weaving (geosynthetics).

Glass – Cutting plate glass to final size

Lumber – Milling timber into dimensional lumber, including any pressure treatment for moisture, fungal, or insect damage.

Drywall – The process which combines the gypsum interior to the paper exterior into sheets.

- (5) Are the final manufacturing process and the immediately preceding manufacturing stage different for different types of products made from similar materials (e.g., Polyvinyl Chloride (PVC) or High-Density Polyethylene (HDPE) pipe vs. PVC or HDPE lumber)?

Industry is in a better position to respond to this question.

- (6) Certain DOT OAs have long provided definitions of “manufacturing processes” in their implementing regulations for Buy America requirements. For example, FTA’s regulation at 49 CFR 661.3, which it applies to manufactured products, states: “[T]he application of processes to alter the form or function of materials or of elements of the product in a manner adding value and transforming those materials or elements so that they represent a new end product functionally different from that which would result from mere assembly of the elements or materials.” FHWA’s regulation for steel and iron materials at 23 CFR 635.410(b)(1) applies to all “manufacturing processes, including application of a coating, for these materials must occur in the United States. Coating includes all processes which protect or enhance the value of the material to which the coating is applied.” Should the same (or a similar) definition of a manufacturing process apply to the final manufacturing process and the immediately preceding manufacturing stage for construction materials commonly used in DOT funded projects? If not, why not, and is there another standard for manufacturing processes that might be more appropriate to apply to construction materials?

Some products may only have one manufacturing stage, further clarification is needed to apply this definition (or similar) to construction materials.

- (7) Are there some items in OMB’s list of construction materials that typically are used in DOT-funded projects only after they have been combined into a manufactured product?

For example, is glass regularly used by itself as a construction material, or does it usually arrive at a project already incorporated with other materials as a manufactured product?

Glass is often in the form of a window which includes sashes, sills, flashing, etc. Non-ferrous metals such as bronze and brass for example, are used in irrigation valves and gates and not usually supplied as “bronze or brass”. Aluminum is similar, projects use aluminum pipe and aluminum flag poles, however even in those cases, the aluminum is not provided to the project in sheets, coils, or ingots, so it’s always part of a “manufactured product.” (pipe, poles, valves, etc.)

- (8) FTA already has an established procedure for bidders or offerors to certify the origin of steel and iron and manufactured products in its implementing regulation at 49 CFR 661.6. Should FTA require the same procedure to assure the origin of construction materials for FTA-funded projects? If not, what should FTA do differently?

If the Federal Transit Administration process works well, it should be considered across the five DOT agencies. The process should be standardized, across all the USDOT, documentation that is acceptable to FTA or FRA should also be acceptable to FHWA.

- (9) Under FHWA-funded programs, State DOTs are responsible for Buy America compliance, per 23 CFR 635.410(d). Bidders are required to comply with the project specifications, including Federal-aid projects with Buy America requirements. Most State DOTs require certifications/Step-certifications from bidders/contractors/suppliers to ensure compliance. Should FHWA continue to follow this process for certifying construction materials? If not, what should FHWA do differently?

Details on compliance requirements, material by material, are needed. The step process is based on tracing heat numbers. Heat numbers are generated by steel mills specifically for traceability. There is no such analog for Buy America construction materials. FHWA should accept final product certifications from suppliers or blanket certifications from contractors. By doing so, the onus is placed on the contractor and supplier to comply with the law and not the DOT to do the investigation into whatever is required to verify domestic origin. Rules and more importantly, consequences, should be implemented holding the contractor and supplier responsible for fraud. It should be the responsibility of the OIG to investigate potential cases of fraud, not the DOT. State DOTs should be able to accept the certification.

- (10) A commenter on DOT’s proposed temporary Buy America waiver for construction materials stated that “the ability to certify materials will grow over time, so there should be a good faith certification process that can be refined over time.” What would such a “good faith certification process” that can be implemented in the near term (i.e., prior to the expiration of the temporary waiver on November 10, 2022) look like? What steps would be required to refine those processes over time?

It is unclear how this process can be refined without specific goals provided by USDOT for traceability (i.e., lot numbers or some analog to the heat number that can be traced throughout a materials lifespan.)

- (11) Is the standard in the OMB Initial Implementation Guidance sufficiently clear to enable a bidder or offeror for a DOT-funded project to certify the construction materials to be used in the project are produced in the United States? If not, what further clarification is needed?

Clarification is needed to make compliance determinations on a number of different materials as discussed above. Definition of construction materials and guidance for certification of those materials is needed.

- (12) Are there construction materials commonly used in DOT-funded projects for which suppliers or manufacturers cannot readily determine or trace the country of origin of the final manufacturing process and the immediately preceding manufacturing stage? Are there records or documentation already in use that could serve as evidence of the origin of these to manufacturing processes (e.g., country of origin documentation, mill markings, quality control tracking)?

AASHTO's Technical Service Program NTPEP (National Transportation Product Evaluation Program) is performing audits on many of these manufacturers (plastic pipe, geotextiles, etc.) that provides an independent evaluation/audit of facilities, including their location. These audit compliance reports should be used as verification of location of origin.

- (13) Are there any construction materials commonly used in DOT funded projects that are known not to be produced in the United States based on OMB's final manufacturing process and the immediately preceding manufacturing stage standard, or are known not to be produced in sufficient quantity or of satisfactory quality? What is the basis for that knowledge?

Availability and quality is dependent on where you are located. If you use asphalt binder in New England, you get it from Canada. Binder is made elsewhere in the US, but shipping to New England is cost prohibitive when you compare shipping from Texas to shipping from Canada.

- (14) Which construction materials commonly used in DOT-funded projects currently are produced in the United States in sufficient and reasonably available amount and of satisfactory quality? Please feel free to provide any additional information on how production of these construction materials in the United States supports the regional or local economy or workforce.

MDT has historically been able to source all major construction materials within state borders. Unlike other states, Montana has multiple refineries, cement kilns, precast and prestressing plants, aggregate pits, steel pipe and beam fabricators, etc. all located within the State. It is not economical to ship these products from Montana to everywhere else. However, certain additive

material is not available within the state. Geotextiles and pavement markings come from sources outside the state but within the United States of sufficient quantity and quality. MDT doesn't currently require origin documentation for asphalt additives and are unsure if a sufficient and reasonable supply can be provided.

- (15) Are there construction materials commonly used in DOT-funded projects that are produced in the United States but subject to supply constraints? Please be specific regarding lead times or delays that will be experienced on funded projects as a result of a specific construction material supply constraint. Is the constraint on domestic supply a recent phenomenon (i.e., beginning in 2020 or later), or is it a longstanding market condition?

Due to winter storms in parts of the country, lead times for certain items such as products that rely on resin, from epoxy to geotextiles, have experienced some delays. Contractors continue to voice concerns with material availability resulting in higher prices. States have been hearing that cable rail can't be provided but NTPEP auditors indicate there is supply available, you just have to look for it and pay a premium for the material.

- (16) Are there construction materials commonly used in DOT-funded projects that previously were not produced in the United States but are currently produced in the United States or are in the process of "onshoring" as a result of recent statutory, regulatory, or market changes?

Industry is in a better position to respond to this question.

MDT greatly appreciates the opportunity to provide input on the potential impact of the new Buy America requirements on transportation project delivery. We encourage USDOT to carefully consider the input provided.



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