

Comments of the Transportation Departments of
Idaho, Montana, North Dakota, South Dakota, and Wyoming
to the
Federal Highway Administration (FHWA)
Regarding
Notice of Proposed Waiver of Buy America Requirements for Electric Vehicle Chargers
Docket No. FHWA-2022-0023
September 27, 2022

The transportation departments of Idaho, Montana, North Dakota, South Dakota and Wyoming (“we” or “our”) appreciate the opportunity to present concerns with and recommendations for modifying FHWA’s proposal to phase-in a limited waiver of Buy America requirements for electric vehicle (EV) chargers. 87 Federal Register 53539 (August 31, 2022).

Overview and Need for a Longer Phase-in Period

At the outset we want to affirm that we support the goal of buying American made items. Further, over the last year or more there has been disappointing performance of long distance and increasingly international supply chains. Those supply chain challenges underscore the positive aspects of utilizing products made in the U.S. by American workers. Compared to foreign-made products, U.S.-made products are generally made far closer to where they are needed by State DOTs and others delivering Federal transportation infrastructure programs.

Yet, it is important that implementation of Buy America statutes take a realistic approach and recognize, at a minimum, the need for appropriate waivers and for a prudent transitional period -- a phase-in -- while sources of U.S.-made products are identified and developed to replace or complement non-U.S. sources being used today.

So, we support phasing in application of Buy America requirements to EV chargers, the approach proposed by USDOT in this docket, compared to an option of immediately applying Buy America requirements to acquisition of EV chargers with Federal assistance.

We disagree, however, with FHWA’s proposed schedule for phasing in the applicability of Buy America requirements to acquisition of EV chargers with Federal assistance. We would delay all the elements of the phase-in schedule by more than one year, preferably 2 years. Further, on a related matter, we disagree with the proposal’s use of the date an EV charger is “installed” to measure the length of the phase-in. We discuss below the need for a longer phase-in and alternate effective date concepts.

In reaching this approach we note the experience of some of our states in implementing programs derived from the financial settlement with Volkswagen regarding diesel emissions mitigation projects, including the installation of EV chargers. Orders placed for EV chargers remain unfilled after considerable time -- in one case nearly a year and counting with no delivery, reportedly due to “supply chain” issues. In another case, roughly six months after an

EV charger order was placed, the supplier advised that the order could not be filled. Those attempted acquisitions are not subject to Buy America rules or the very specific equipment requirements proposed by FHWA for Federally assisted acquisition of EV chargers. See Docket No. FHWA-2022-0008. Those specific requirements would undoubtedly increase wait time. So, without them, there should be opportunity in the market for faster delivery. Yet the wait continues.

So, these incomplete procurements reinforce our view that the proposed phase-in of Buy America requirements is too fast and must be delayed. It also underscores the uncertainty of using the “install” date to determine what Buy America rules apply. The rule must allow a State to be confident what Buy America rules apply when it or a contractor makes a procurement and not discover that delivery and installation behind schedule has invalidated the eligibility of the procurement for Federal funds.

The proposed schedule is also in our view too fast because it does not appear to reflect proper consideration of all of the steps and challenges involved in delivering a new program. States are just now, in September 2022, receiving FHWA approval of their proposed NEVI program plans, for use of formula funds for deployment of EV charging equipment. Even with approval, states must then proceed to ready aspects of their plans to be put out to bid, including specifications -- and the specifications are at this time a moving target. The Buy America requirements are not finalized; nor are the equipment rules proposed in Docket No. FHWA-2022-0008.

Further, as has been noted in other recent Buy America dockets by various parties, and by FHWA in this docket (see 87 [Federal Register](#) 53543) it takes time to develop a system of manufacturer certifications to bidders as to whether products are U.S.-made, or U.S.-made to some percentage set by FHWA. Initial bid lettings for EV charging equipment and related work and equipment may have to allow more time than usual for bidders to prepare bids, including Buy America certifications.

Only after such steps and other routine aspects of the bidding process could a bidder be awarded a contract. As noted above, from that point of award, even if the successful bidder is ready to promptly place an order, we can easily see a wait of up to two years for the equipment from then. At that point, the effective date for the LAST phase of the phase-in as proposed by FHWA in this notice may well have already passed. Meaning that the proposed concept of a phase-in would have been illusory, with the final requirements – likely the ones most difficult to meet -- already in effect.

Further, as NEVI program implementation begins, with a rapid increase of orders, an increased backlog of orders at EV charger manufacturers is foreseeable, reinforcing the need for a longer phase-in period before the final Buy America requirements take effect.

Importantly, premature imposition of Buy America requirements to acquisition of EV chargers with Federal assistance will risk delayed deployment of EV chargers, as it is foreseeable that a number of the acquisitions could not be effectuated as promptly as planned or desired. This would delay and thereby reduce economic, employment and environmental benefit from the implementation of EV charging programs and eligibilities under the new infrastructure law and

title 23, United States Code. If equipment meeting Buy America requirements is scarce, the price likely will tend to go up (especially unwelcome at a time of already noteworthy inflation). We are concerned over the real potential for delay of projects when American made products are unavailable, very hard to obtain, or hard to obtain on time or at reasonable cost. These considerations are recognized as bases for waivers, including public interest waivers. See OMB Memo M-22-11 (April 18, 2022) regarding implementation of Buy America laws. We consider these types of cost and delay impacts to be foreseeable and having a downward impact on implementation of EV charger programs, including on jobs and environmental benefit.

Having to implement the program without a longer phase-in period for Buy America requirements could subject investments to undue cost increases and even reduced work and a hiatus of more than a few projects when American made products are not available, very hard to obtain, or hard to obtain on reasonable terms of cost and timing.

FHWA should extend the phase-in period for Buy America requirements to avoid these readily foreseeable costs and problems – while maintaining a clear commitment and path to Buy America requirements. We recommend adding two years the dates recommended in the notice and, in any event, more than a year should be added to the phase-in schedule proposed by FHWA in the notice in this docket.

Select a Practical Approach to the Effective Date of Buy America Requirements for Projects

As noted above, we disagree with the FHWA proposal that the applicable Buy America requirements be measured against the date an EV charger is “installed.” See 87 Federal Register 53546. This approach means that, at the time of near-term procurement, the entity placing the order (likely a contractor) does not know for sure what Buy America rules will be in effect on the date of installation of an EV charger. That type of uncertainty is inappropriate; it risks stranding assets and other financial inefficiencies or loss.

We suggest that the needed certainty would be achieved if the applicable Buy America requirements were the requirements in effect on the deadline day for submission of bids for the project. Those are the rules that a bidder would be taking into account in formulating a bid and it provides practical certainty.

Another approach would be to match the requirements with the funding. We suggest that fiscal year 2022 and 2023 funds be subject to a full waiver Phased in requirements could apply to FY 2024 funds and the final requirements under FHWA’s proposal could apply beginning with FY 2025 funds. Frankly, on October 1, 2022 Fiscal Year 2023 begins and, per FHWA’s discussion in the NPRM, the current waiver for manufactured products is in effect. So, this proposal, while different than FHWA’s, very reasonably applies the current state of law/regulation to funding that is available October 1 – and with certainty.

We note that this still leaves in place a strong incentive for a state to have its contractors seek U.S.-made equipment. If it can be found, depending on estimated (yes, estimated) delivery dates, the state could be in a position to de-obligate 2022 or 2023 funds and obligate later year

funds to the Buy America qualified equipment, saving the 2022 and 2023 funds for cases where Buy America qualified chargers might not be available or not available in a timely or cost-effective way.¹

We also note that, assuming some delay or long lead time in procurement of EV chargers, per our limited experience to date, using the install date as the determinant of which phase of the Buy America phase-in approach applies basically means that there is no phase-in, and that all or nearly all EV chargers will be subject to the January 1, 2024 requirement, with a high percentage of U.S.-made components plus U.S. assembly.

We support a real and practical phase-in; the proposed waiver as currently constituted, with a time period of roughly one year and use of the “install” date as the basis for determining what phase of the proposed waiver would apply, appears to us to be, in fact, largely a direct leap to the final phase, while also adding near term regulatory uncertainty for those few cases where there would be a chance that an interim phase would be applicable (potential install during calendar 2023).

The Ability to Request Project Specific Waivers Is Not a Sufficient Safety Valve Position; Regional or State Waivers Should be Expressly Permitted as an Option; Special Circumstances Facing Rural, Cold Weather States Would Warrant Statewide or Regional Waivers

The notice in this docket does provide that a state can apply for a Buy America waiver (from whatever general rules of Buy America application are adopted in this docket) on a “project” basis. 87 Federal Register 53547.

We suggest that may well prove to be administratively burdensome. FHWA should make clear that it will consider statewide or regional requests as well, rather than commit itself to project-by-project review when the issue is not really a project specific issue.

More specifically, we are rural, low population density states that may be considered “small market” by vendors of various materials and products, including EV chargers. We are particularly concerned that the burden of an absence of an effective and realistic waiver under this docket could fall very heavily on us, as scarce Buy America qualified products tend to be sent to more populous areas. One of our states only very recently received paint needed for highway striping during the now largely finished summer construction season -- and it is not unusual for us to have cause to wonder how shipments to us are prioritized (or not) by vendors. The blow to program delivery, local jobs, and transportation benefits that would follow from inability to receive equipment without long waits would be magnified by the short construction season in our northern, high elevation states. In Idaho, for example, some EV charger destination locations report a mid-April to mid-November construction season. So, even short delays and project disruptions can push project completion into the “next construction season.”

¹ To the extent that such ability to de-obligate might not be permitted today, FHWA should allow it.

These are concerns that could well manifest themselves as to a group of projects, not just a single project, and FHWA should expressly state in a final notice in this docket that it will consider statewide and regional requests for waivers.

Further, FHWA should commit in that notice that it will act promptly in deciding waiver applications.

Application of Proposal to Equipment in Addition to the EV Charger Itself

Before closing, we note that, under the FHWA's notice, the waiver and phase in schedule would apply to certain equipment in addition to the EV charger itself. See 87 Federal Register 53547.

Specifically, FHWA proposes that the term "EV charger" includes EV chargers and – associated payment systems, distribution systems, telecommunications and networking equipment, energy storage systems, and other supporting equipment and systems: (i) in the immediate vicinity of a charger or group of chargers; and (ii) essential to the function or operation of a charger or group of chargers.

We note that we interpret this language, as set forth in the Federal Register notice, as establishing that the requirements that something be "(i) in the immediate vicinity of a charger or group of chargers; and (ii) essential to the function or operation of a charger or group of chargers" applies to the full list of equipment. For example, if an EV charger funded under the NEVI program were to be located at a fueling station also offering other fuels, the covered distribution systems and telecommunications equipment should be limited to those in the immediate vicinity of the EV charger and essential to the EV charger's operation.

FHWA further specifies that the EV charger definition excludes "parking areas adjacent to the EV chargers and lanes for vehicle ingress and egress."

We do not read that the proposal requires that all these elements have to be acquired in a single procurement, nor should it. If a contractor can find a good supply opportunity for the EV charger, the contractor should be able to go ahead with that procurement, if the contractor so chooses, while continuing to look for purchase opportunities for other closely related equipment.

Also, in case there is some ambiguity as to the meaning of "energy storage systems" or "distribution systems," the relationship of those terms to electric utility work should be clarified. In that vein, we support AASHTO's position that utility relocation work not be subject to Buy America requirements.

Conclusion

The transportation departments of Idaho, Montana, North Dakota, South Dakota, and Wyoming thank FHWA for the opportunity to comment. We respectfully request that further action on the subject matter of this docket be in accord with our comments.
