

119th Congress—Federal Priorities: Build America, Buy America Challenges



TxDOT Government Affairs Division

SUMMARY

The Texas Department of Transportation (TxDOT) appreciates the opportunity to provide input on transportation policies for consideration by the 119th United States Congress. As a recognized leader among state departments of transportation, TxDOT looks forward to addressing the shared goal of, among others, repairing the uncertainty and extreme length of time it takes the US Department of Transportation (USDOT) and the Office of Management and Budget (OMB) to issue decisions on Buy America waivers, resulting in challenges to the transportation sector and to TxDOT's mission: *Connecting you with Texas*. Below are key items and policy priorities related to Build America, Buy America (BABA) regulations for consideration as Congress develops a surface transportation reauthorization bill and other transportation-related legislation.

Key Build America, Buy America (BABA) Challenges / Issues

- Provide guidance and flexibility for applications of BABA.
- Establish a more efficient BABA waiver process.
- Update and maintain FHWA's BABA Q&A page.
- Extend indefinitely FHWA's waiver of BABA for manufactured products.

Provide guidance and flexibility for applications of BABA

Now that the BABA waiver period for "construction materials" has ended, TxDOT urges Congress to direct USDOT to provide final guidance and flexibility for BABA implementation. The IIJA includes reaffirmation of current laws and practices for materials like iron and steel, as well as expansions of obligations for materials like manufactured products and construction materials. BABA requirements for construction materials became effective on November 10, 2022, with USDOT providing targeted waivers including a narrow category of contracts and solicitations, as well as for "de minimis" costs, small grants, and minor components.

On January 30, 2023, USDOT issued two new limited waivers for BABA construction material requirements for any contracts entered into prior to specific dates. On February 9, 2023, OMB issued proposed guidance to set domestic manufacturing standards for construction materials, including plastic and polymer-based products, glass, lumber, and drywall. On March 12, 2024, FHWA released a [Notice of Proposed Rulemaking: Buy America Requirements for Manufactured Products](#) and a [Request for Information on the Use of Manufactured Products in Highway Projects](#). Nevertheless, final guidance or rules have not been issued resulting in continued uncertainty in correctly complying with BABA standards.

Establish a more efficient BABA waiver process

As specified in 2 CFR 184.7(d)(3), "unless the Director of OMB provides otherwise," OMB's Made in America Office provides final review of BABA waivers pursuant to Executive Order 14005 and Section 70923(b) of BABA. The indeterminant timeframe for resolving waiver requests has resulted in uncertainty and project delays. TxDOT requests a set timeframe by which the Made in America Office will review waivers or provide full delegation of approval to FHWA.

Update and Maintain FHWA's BABA Q&A Webpage

FHWA issued BABA guidance that conflicts with its 1997 policy memo. The response to question number 12 found on [FHWA's BABA Q and A for Federal-aid Program](#) has led to interpretation that BABA applies to components of a manufactured product. Manufactured products are not predominantly iron or steel, as defined by 2 CFR 184.3; the 1997 policy memo states BABA for iron and steel only apply to predominately iron and steel items. The guidance has caused an unnecessary administrative burden to track minor components of all manufactured products, such as nuts, bolts, and washers. TxDOT requests Congress require FHWA to remove or modify their BABA guidance provided in the form of questions and answers that conflict with their 1997 policy memo.

Extend indefinitely FHWA's Waiver of BABA for Manufactured Products

In March 2024, FHWA issued a notice of proposed rulemaking that discontinues the long-standing waiver of BABA requirements for manufactured products. The waiver has been in place since 1984, and there are numerous commonly used products that require it to remain. Discontinuing the waiver will create material shortages or prevent projects from commencing due to material unavailability. The Associated General Contractors state that at minimum, there are currently 24 commonly used products not available domestically. TxDOT estimates that manufactured products account for 12% of project costs. With \$13.6 billion of work awarded in Fiscal Year 2024, manufactured products are estimated at \$1.6 billion. This information was previously submitted in response to the notice of proposed rulemaking.

If the waiver is discontinued, TxDOT requests a step-change approach for nationwide implementation, including:

- 1) Identifying nationwide product/material classifications (as currently there is no uniformity),
- 2) Providing additional clarification on Buy America manufactured product requirements,
- 3) Identifying material shortages and lead times for industry to return to the United States (if possible),
- 4) Maintaining waivers for items not available domestically until a set timeframe is established based on industry feedback, and
- 5) Housing certifications or a database of BABA-compliant nationwide manufacturers/vendors.

If the above process cannot be followed, TxDOT recommends keeping the manufactured product waiver in place.