

Federal Highway Administration

[Docket No. FHWA-2023-0040]

Request for Information on the Use of Manufactured Products in Highway Projects

AGENCY: Federal Highway Administration (FHWA), U.S. Department of Transportation (DOT).

ACTION: Notice; request for information (RFI).

SUMMARY: On March 17, 2023, FHWA published a request for comments on its existing general applicability waiver for manufactured products under its Buy America waiver authorities. Following the review and consideration of comments, FHWA is proposing to discontinue the waiver. The FHWA is also proposing standards for applying Buy America requirements to manufactured products should the waiver be discontinued. To ensure the continued effective implementation of FHWA programs that would be subject to new requirements for manufactured products, FHWA is seeking additional information on the domestic availability of specific manufactured products commonly used in FHWA-funded projects. To ensure the Agency has the most comprehensive and current information available on the domestic market for manufactured products used in FHWA infrastructure projects, FHWA is especially interested in comments detailing domestic materials sourcing, market readiness, timeliness of product supply, and other considerations.

DATES: Comments must be received on or before [INSERT 60 DAYS FROM PUBLICATION IN THE FEDERAL REGISTER]. Late-filed comments will be considered to the extent practicable.

ADDRESSES: To ensure that you do not duplicate your docket submissions, please submit comments by only one of the following means:

- *Federal eRulemaking Portal:* Go to www.regulations.gov and follow the online instructions for submitting comments.
- *Mail:* Docket Management Facility, U.S. Department of Transportation, 1200 New Jersey Avenue SE., West Building Ground Floor, Room W12-140, Washington, DC 20590;
- *Hand Delivery:* West Building Ground Floor, Room W12-140, 1200 New Jersey Avenue SE., Washington, DC 20590, between 9 a.m. and 5 p.m. E.T., Monday through Friday, except Federal holidays. The telephone number is (202) 366-9329;
- *Instructions:* You must include the agency name and docket number at the beginning of your comments. Except as described below under the heading “Confidential Business Information,” all submissions received, including any personal information provided, will be posted without change or alteration to www.regulations.gov. For more information, you may review the U.S. Department of Transportation’s complete Privacy Act Statement published in the Federal Register on April 11, 2000 (65 FR 19477).

FOR FURTHER INFORMATION CONTACT: For questions about this notice, please contact Mr. Brian Hogge, FHWA Office of Infrastructure, (202) 366-1562, or via email at Brian.Hogge@dot.gov. For legal questions, please contact Mr. David Serody, FHWA Office of the Chief Counsel, (202) 366-4241, or via email at

David.Serody@dot.gov. Office hours for FHWA are from 8:00 a.m. to 4:30 p.m., E.T., Monday through Friday, except Federal holidays.

SUPPLEMENTARY INFORMATION:

Electronic Access and Filing

A copy of this notice, all comments received on this notice, and all background material may be viewed online at www.regulations.gov using the docket number listed above. Electronic retrieval assistance and guidelines are also available at www.regulations.gov. An electronic copy of this document also may be downloaded from the Office of the Federal Register's Website at: www.FederalRegister.gov and the U.S. Government Publishing Office's Website at: www.GovInfo.gov.

Confidential Business Information

Confidential Business Information (CBI) is commercial or financial information that is both customarily and actually treated as private by its owner. Under the Freedom of Information Act (FOIA) (5 U.S.C. 552), CBI is exempt from public disclosure. If your comments responsive to this notice contain commercial or financial information that is customarily treated as private, that you actually treat as private, and that is relevant or responsive to this notice, it is important that you clearly designate the submitted comments as CBI.

You may ask FHWA to give confidential treatment to information you give to the Agency by taking the following steps: (1) Mark each page of the original document submission containing CBI as "Confidential"; (2) send FHWA, along with the original document, a second copy of the original document with the CBI deleted; and (3) explain why the information you are submitting is CBI. The FHWA will protect confidential

information complying with these requirements to the extent required under applicable law. If DOT receives a FOIA request for the information that the applicant has marked in accordance with this notice, DOT will follow the procedures described in its FOIA regulations at 49 CFR 7.29. Only information that is marked in accordance with this notice and ultimately determined to be exempt from disclosure under FOIA and 49 CFR 7.29 will not be released to a requester or placed in the public docket of this notice. Submissions containing CBI should be sent to: Mr. Brian Hogge, FHWA, 1200 New Jersey Avenue SE., HICP-20, Washington, DC 20590 via mail or brian.hogge@dot.gov via email. Any comment submissions that FHWA receives that are not specifically designated as CBI will be placed in the public docket for this matter.

Background

Section 313(a) of Title 23, U.S.C. requires that all steel, iron, and manufactured products used in FHWA-funded projects be produced in the United States. In 1983, FHWA issued a public interest waiver of general applicability of FHWA's Buy America requirement for manufactured products, known as the Manufactured Products General Waiver. *See* 48 FR 1946 (Jan. 17, 1983); 48 FR 53099 (Nov. 25, 1983). Based on the Manufactured Products General Waiver, FHWA does not currently apply its Buy America requirements to manufactured products except for predominantly iron or steel manufactured products and predominantly iron or steel components of manufactured products, which must comply with FHWA's existing Buy America requirements for iron or steel. For all predominantly iron or steel materials, products, or components delivered to a project site for permanent incorporation into a highway project using Title 23, U.S.C. funds, all manufacturing processes, including applications of a coating, must occur in the

United States. *See* 23 CFR 635.410. In addition, FHWA’s Buy America requirement applies to all contracts, regardless of the funding source, of any contract within the scope of a determination under the National Environmental Policy Act involves an obligation of Title 23, U.S.C. funds. *See* 23 U.S.C. 313(h).

On November 15, 2021, the President signed the Bipartisan Infrastructure Law (BIL), enacted as the Infrastructure Investment and Jobs Act (Pub. L. 117-58) into law. The BIL includes the Build America, Buy America (BABA) Act. BIL, div. G §§ 70901-53. Section 70914(d) of BABA requires Federal Agencies to review existing general applicability waivers of Buy America requirements by publishing in the Federal Register a notice that: (i) describes the justification for the general applicability waiver; and (ii) requests public comments for a period of not less than 30 days on the continued need for the general applicability waiver.

On March 17, 2023, pursuant to § 70914(d) of BABA, FHWA published a Request for Comment (RFC) on the Manufactured Products General Waiver in the Federal Register (“Manufactured Products RFC”). *See* 88 FR 16517. The FHWA received 9,496 comments in response to the 12 questions that were posed. Based on the contents of that review, and after considering the President’s policy, as embodied in Executive Order 14005, “Ensuring the Future Is Made in All of America by All of America’s Workers,” to maximize the use of goods, products, and materials produced in the United States; the intent of Congress, as expressed in BABA’s preference against general applicability waivers; the purpose and goals of domestic content procurement preferences and waivers; and FHWA’s original rationale for issuing the Manufactured Products General Waiver compared to the current domestic manufacturing situation,

FHWA is proposing to discontinue the Manufactured Products General Waiver; at the same time, FHWA is issuing a notice of proposed rulemaking (NPRM) to propose the standards for when a manufactured product will be considered to be “produced in the United States” and therefore be Buy America-compliant (“Manufactured Products NPRM”).¹ Interested parties should refer to the NPRM for the reasons and discussion concerning the proposed discontinuance of the waiver and proposed regulations.

As further explained in the NPRM, the proposed Buy America requirements for manufactured products mirror the requirements for manufactured products to be produced under § 70912(6)(B) of BABA and are substantially aligned with the applicable definitions and requirements for manufactured products in the Office of Management and Budget’s guidance implementing BABA at 2 CFR part 184. To be “produced in the United States,” a product would need to be manufactured in the United States and have the cost of components of the manufactured 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.²

As stated in the Manufactured Products NPRM, FHWA recognizes that certain types of manufactured products incorporated into FHWA-funded projects may not be currently available from domestic sources. To identify the manufactured products to

¹ Buy America Requirements for Manufactured Products, RIN 2125-AG13, Docket No. FHWA-2023-0037.

²Under FHWA’s proposed requirements, manufactured products would not be subject to any other Buy America requirement or domestic content procurement preference, with two exceptions. First, all iron or steel components of precast concrete products that are classified as manufactured products would need to meet FHWA’s existing Buy America requirements for iron or steel. Second, for iron or steel cabinets or other enclosures of intelligence transportation systems (ITS) and other electronic hardware systems that are installed in the highway right-of-way or other real property and classified as manufactured products, such iron or steel cabinets and other enclosures would also need to meet FHWA’s existing Buy America requirements for iron or steel.

which applying a Buy America requirement for manufactured products could cause those products to be rendered unavailable for FHWA-funded projects, FHWA is seeking additional information and documentation on products that are commonly procured or are expected to be procured using FHWA financial assistance that may not be currently manufactured domestically or do not otherwise meet the 55 percent domestic content standard being proposed in the NPRM. To ensure FHWA has the most comprehensive and current information available on the domestic market for manufactured products used in FHWA projects, FHWA is specifically seeking detailed comments on domestic materials sourcing, market readiness, pricing, other product supply considerations, and whether specific manufactured products or their components are manufactured in the United States for manufactured products used in projects that receive FHWA financial assistance.

The Manufactured Products RFC posed the following questions to manufactured product suppliers:

4. With respect to domestic manufacturers of products previously procured or expected to be procured using FHWA financial assistance, do you expect to expand your domestic manufacturing based on the increase in demand created by recent Federal investments? If so, by how much and over what time period? If applicable, what is the timeline to bring online additional capacity compliant with BABA?

In response to question 4, manufacturers who responded appeared evenly split between expecting to expand domestic manufacturing and not to expand domestic manufacturing. Of those who were not planning to expand, the reasons for not expanding

included having existing unused capacity, a lack of sufficient domestic demand, and the high relative costs of expanding. Several manufacturers were still evaluating expanding domestic manufacturing while two others reported either already expanding capacity or that they are currently producing products meeting the standard for manufactured products under BABA. For those who expected that they would need to expand their domestic manufacturing, the timeline to increase domestic capacity was either stated to be multiple years or an unknown amount of time.

Commenters were also asked in the Manufactured Products RFC:

Are there specific types of manufactured products that are widely used on Federal-aid highway projects for which a large portion of the components are known to not be produced in the United States or not produced in sufficient quantities? If so, what are those components, what manufacturer produces them, and where are they primarily produced? What are the obstacles to having those components produced in the United States? Please provide data to support your comment.

In response, more than two-thirds of commenters indicated there are frequently used manufactured products and components of manufactured products that are currently not widely available from domestic producers. Some of the most frequently mentioned products and components included the following: assembled electronics; electronic components; lighting systems and LEDs; ITS, and reflective materials. Commenters noted obstacles to having those components produced in the United States, which included that components and raw materials are not readily available in the United States, needing time for U.S. production to scale up, low demand and thus low incentives for

domestic production, potential unforeseen shortages, subsidized production in other countries, the likelihood of more expensive production in the United States., and intellectual property constraints.

The FHWA is interested in promptly obtaining more information on the availability of manufactured products that can meet the standard proposed in the Manufactured Products NPRM in order to assess if sufficient quantities of products are currently available to comply with the proposed requirements or whether sufficient products would be available in the future, and if so, when. The FHWA is also interested in obtaining more information on the cost of manufactured products that can meet the standard proposed in the Manufactured Products NPRM, relative to manufactured products available from foreign or non-compliant domestic sources.

On August 16, 2023, DOT issued a “Waiver of Buy America Requirements for De Minimis Costs and Small Grants” (De Minimis and Small Grants Waiver). 88 FR 55817. The De Minimis and Small Grants Waiver covers the application of Buy America requirements to products under a single financial assistance award for which (1) the total value of non-compliant products is no more than the lesser of \$1,000,000 or 5 percent of total applicable costs for the project; or (2) the amount of Federal financial assistance applied to the project, through awards or subawards, is below \$500,000. The FHWA’s statutory Buy America requirements for manufactured products are covered under the scope of the De Minimis and Small Grants waiver, so it would apply to manufactured products covered by that waiver even if the Manufactured Products General Waiver were to be rescinded.

Request for Comments and Information

The FHWA requests information from the public on the following products or categories of products identified in responses to the Manufactured Products RFC as being broadly unavailable from Buy America-compliant sources:³

- Retroreflective sheeting
- LED lamps/lighting systems
- Utility products
- ITS hardware
- Traffic signals and controllers
- Traffic cameras
- Changeable message signs
- Vehicle detection equipment.

The FHWA is also interested in receiving information on other manufactured products commonly used on FHWA-assisted projects that are not listed above, but which the commenter believes may not be available from domestic sources or may be available only at higher prices than from foreign sources or from non-compliant domestic sources. In identifying such products, note that some manufactured items may be classified as iron or steel products or as construction materials, consistent with the definitions of those items found in the Manufactured Products NPRM and in 2 CFR Part 184.

For each of these products, and based on your understanding of the Manufactured Product NPRM's proposed requirements, FHWA is requesting information under five general topic areas: (1) domestic materials sourcing and manufacturing; (2) market readiness; (3) delivery lead times; (4) pricing; and (5) other considerations.

³Commenters on the Manufactured Products RFC also cited certain other products that FHWA believes would likely be considered construction materials under the standards of 2 CFR Part 184 and would thus not be subject to the requirements for manufactured products that are being proposed in the NPRM.

When providing this information, FHWA requests that all respondents clearly specify the products for which you are providing responses. When providing information on other manufactured products commonly used on FHWA-assisted products that are not specifically listed above, please provide a detailed description of the product.

1. Domestic Materials Sourcing and Manufacturing

- a. For each of the products or categories of products you identified above, please specify whether the product meets the Manufactured Product NPRM's proposed standards for being considered "produced in the United States," as described above. (Yes or No).
- b. If you answered "Yes" to Topic 1(a), to the best of your knowledge:
 - i. Please identify all manufacturers that can either meet the Manufactured Products NPRM's proposed requirements or can currently manufacture products or categories of products you specified in the United States. For products that meet the condition of being manufactured in the United States, please identify the manufacturing location and percentage of components manufactured in the United States, as calculated by cost of components (if known).
 - ii. What is the current production capacity of the products that can meet the Manufactured Products NPRM's proposed requirements?
 - iii. What is the anticipated growth in capacity to produce products that are compliant with the Manufactured Products NPRM's proposed requirements over the next 5 years? Please explain.

- iv. For products able to meet the Manufactured Products NPRM's proposed requirements, what is the estimated lead time from purchase order to delivery to the project site? Has this lead time increased or decreased in recent years?
- c. If you answered "No" to Topic 1(a):
 - i. What actions are manufacturers taking or could take to increase the manufacturing of products that will meet the Manufactured Products NPRM's proposed requirements?
 - ii. What additional support or incentives (e.g., financial, rulemaking certainty) are needed to ensure that a sufficient supply of products that meet the Manufactured Products NPRM's proposed requirements will be available to meet the demand for compliant products on Federal financial assistance projects?
 - iii. How long might it take to implement the steps needed to increase or begin production of manufactured products that are compliant with the Manufactured Products NPRM's proposed requirements?
 - iv. If a plan is in place to manufacture products compliant with the Manufactured Products NPRM's proposed requirements, what is the volume of specific products that will be in compliance with these requirements and in what time frame?
 - v. Will the volume of manufactured products that are compliant with the Manufactured Products NPRM's proposed requirements be ramped up over time, and, if so, at what annual growth rate?

vi. What are the limiting factors for the product's ability to meet criteria for compliance under the Manufactured Products NPRM?

For example, are there particular components of these products that cannot be mined, produced, or manufactured in the United States, and which make up a significant portion of the cost of the manufactured product? If so, please describe each component separately, and indicate approximately what percent of the total cost of all components of the manufactured products it represents.

2. Market Readiness

- a. For each product you identified above, please provide your observations on the current and near-term domestic demand expected for these products or categories of products. Does this estimate of future demand take into account increases in Federal funding amounts for infrastructure under the BIL, enacted as the Infrastructure Investment and Jobs Act (Pub. L. 117-58) and the Inflation Reduction Act (Pub. L. 117-169)? Please explain.
- b. Please provide information regarding whether the current and/or near-term domestic manufacturing capacity would be adequate to meet the expected market demand. Please specify any factors helping or preventing domestic manufacturing industry from meeting the expected demand today and in the near-term and provide information on the current and expected availability or unavailability of key components or sub-components of the product or category of products you specified.

- c. Are there external factors affecting the supply of product that makes it difficult to credibly communicate the existence of increased demand, or to credibly commit that such demand will be forthcoming? If so, please describe those challenges as specifically as possible.

3. Timing

- a. Where known, for each product or category of products for which you are providing information, please specify the current range of expected product delivery timeframes. Are any existing supply chain delays applicable or anticipated for the product or critical components of the product(s)?
- b. Please provide information, if available, on expected delivery timeframe outlooks through the near-term future. Include information, if known, on whether current timing delivery concerns are related to any temporary disruption.
- c. Provide information on the current and expected near-term average customer delivery time.
- d. Provide information regarding global supply chain constraints, local permitting, safety requirements, and needs that may affect delivery timeframes or extend installation time.

4. Pricing

- a. For each product identified above as being may be available only at higher prices than from foreign sources or from non-compliant domestic sources

list the price differential in percentage terms between foreign and domestic sources of the product.

5. Other Considerations

- a. If you answered “No” to Topic 1(a), are the quantities of the project typically used on FHWA-assisted projects small enough that they might fall below the thresholds specified in the De Minimis and Small Grants Waiver and thus be subject to that waiver?
- b. Are there any other considerations that FHWA should take into account regarding production, products, product quality, or components of manufactured products used in FHWA-funded projects that are not covered by questions 1 through 3?

Issued on:

Shailen P. Bhatt
Administrator
Federal Highway Administration