

DOT Finalizes Buy America Waiver For 'De Minimis' Costs

By **Daniel Wilson**

Law360 (August 15, 2023, 5:42 PM EDT) -- The U.S. Department of Transportation on Tuesday finalized a "Buy America" waiver for when foreign-sourced materials only make up a small part of a federally funded transportation project, narrowing its scope after criticism across multiple comments.

The waiver for Build America, Buy America Act, or BABA, domestic sourcing requirements for federally funded projects will apply to "de minimis" costs and small grants, the DOT said in a **notice**. It will go into effect once the notice is formally published in the Federal Register on Wednesday.

"The waiver will allow DOT and its assistance recipients to focus their domestic sourcing efforts on products that provide the greatest manufacturing opportunities for American workers and firms and reduce delays in the delivery of important transportation infrastructure projects that provide jobs and promote economic growth," the agency said.

The final waiver comes just a day after the Biden administration **finalized guidance** for applying BABA, which expanded domestic sourcing preferences for federally funded infrastructure projects and was introduced as part of the \$1 trillion Bipartisan Infrastructure Law in 2021.

Specifically, the waiver will apply when the value of the foreign-sourced products are below \$1 million or 5% of the total cost of materials under a particular federal award, whichever amount is lower. It will also apply where the total federal funding for a project is below \$500,000, according to the notice.

The waiver is subject to review and potential renewal with a fresh public comment period every five years, the DOT said.

The department received 92 comments on its **proposed version** of the waiver issued in November 2022, from state departments of transportation, public transit agencies, trade unions and construction and vehicle industry groups, among others.

Those state agencies and industry groups were largely in favor of the waiver, with the American Association of State Highway and Transportation Officials, or AASHTO, for example saying it would "help ensure that transportation projects continue to move forward" by avoiding unnecessary paperwork and the need to account for materials that "would likely have no substantive impact on the growth of jobs for American workers."

But those departments and industry groups also asked for various tweaks to the proposal, such as having the waiver apply retroactively to projects already in motion. They also asked for clarifications regarding specific terms used in the waiver and products covered by the waiver, as well as its broader scope, such as how the waiver was intended to interact with existing Buy America waivers.

Unions broadly opposed the proposal, with the United Steelworkers Union, for example, arguing that the \$500,000 award threshold meant that, by the department's own estimates, nearly half of all DOT-funded projects would not be subject to Buy America requirements.

The union also argued that the \$1 million threshold for foreign-sourced products, meaning the waiver could apply to projects worth up to \$20 million, would also "effectively wipe out any Buy America application for existing iron and steel requirements for many projects."

"It cannot reasonably be argued that this is what Congress intended when it enacted the most far-reaching Buy America law, ever, when it included BABA in the [Bipartisan Infrastructure Law]," the union said.

The DOT on Tuesday rejected calls to rescind the waiver, and said a temporary waiver issued in January for certain contracts should cover the concerns regarding retroactivity. But the agency did make clarifications and changes that it said meant the waiver was "narrower than what DOT had first proposed."

For example, the final waiver will no longer apply for foreign "miscellaneous minor components" that make up less than 5% of the total value of an otherwise domestically made iron or steel product. Commenters had argued that the term was unclear, that iron and steel products often do not have "components" and that many such products are already likely covered by the general waiver.

"Based on these comments, there does not appear to be strong support for this portion of the proposed waiver at this time," the DOT said.

The waiver will also not apply in circumstances where similar Federal Highway Administration or Federal Railroad Administration waivers for low-value projects already apply, or where there is a "more targeted" similar waiver in place, such as the FHWA's Buy America waiver for electric vehicle chargers, the DOT said.

And the \$500,000 award threshold will count the cumulative total of all federal awards on a project if there are multiple awards, not just the amount of any single award, according to the DOT.

Also, the final waiver only applies to "total applicable project costs," or the cost of materials used in a project, not the overall project costs, which the department said would require tracking those material costs separately and acknowledged "may create a new administrative requirement" for some contractors and grant recipients.

"DOT believes that, on balance, the benefits of the waiver significantly outweigh that administrative burden and ... recipients that conclude the administrative burden of the waiver outweighs its benefit may forgo use of the waiver and comply with the relevant Buy America requirements," the agency said.

AASHTO Director of Engineering Jim McDonnell said in a statement to Law360 on Wednesday that the group appreciated the DOT granting the waiver, saying it "feels that this waiver helps to meet the intent of the expanded Buy America requirements while providing reasonable and practical exemptions to reduce the burden on transportation agencies."

But it was still concerned about the otherwise rapid implementation of Buy America requirements "for an increasing range of materials," McDonnell said.

"In the short term, delays and costs will likely increase as contractors are compelled to transition material purchases to domestic suppliers," he said. "These suppliers, in turn, might face challenges related to limited quantities and high demand, affecting their availability."

Representatives for several other industry groups, state departments of transportation and unions did not immediately respond to requests for comment Tuesday.

--Editing by Andrew Cohen.

Update: This story has been updated to include comment from AASHTO.