

U.S. DEPARTMENT OF TRANSPORTATION

DOCKET NO. 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

COMMENTS OF
THE AMERICAN SHORT LINE AND REGIONAL RAILROAD ASSOCIATION

The American Short Line and Regional Railroad Association (“ASLRRA”), on behalf of itself and its member railroads, submits the following comments in response to the U.S. Department of Transportation (“DOT”)’s Request for Information on how to apply the Build America, Buy America Act (“BABA”) requirement that construction materials used in infrastructure projects funded by federal assistance to be produced in the United States.¹

INTRODUCTION

ASLRRA is a non-profit trade association representing the interests of approximately 500 short line and regional railroad (“short line”) members and 500 railroad supply, contractor, and service company members in legislative and regulatory matters. Short lines operate 50,000

¹ 87 Fed. Reg. 45396 (July 28, 2022).

miles of track, or approximately 30% of the national freight network, employing approximately 18,000 people, and connect manufacturers, businesses and farmers in rural communities and small towns to larger markets, urban centers, and ports. ASLRRRA’s railroad members, all of whom are considered small businesses, actively work with DOT through a variety of competitive and dedicated grant programs designed to develop safety improvements as well as to expand and upgrade freight rail infrastructure and services.² As such, they have a vested interest in the application of language in BABA pertaining to construction material production.

BABA AND THE SHORT LINE FREIGHT RAIL INDUSTRY

BABA, which was included in the Infrastructure Investment and Jobs Act (“IIJA”), requires a recipient of federal financial assistance to guarantee that construction materials, manufactured products, and articles, materials, and supplies that are consumed in, incorporated into, or affixed to an infrastructure project are produced in the United States.³ For purposes of BABA, a “project” involves the construction, alteration, maintenance, or repair of infrastructure in the United States.⁴ Most importantly for short line railroads, this definition encompasses many projects funded under the Consolidated Rail Infrastructure Safety Improvements (“CRISI”)⁵ Program, the most frequently-utilized federal grant program for short line railroads.

² See 13 C.F.R. § 121.201 and North American Industry Classification System code 482112, “Short Line Railroad.”

³ See IIJA, Public Law 117-58, div. G §§ 70901-52, at § 70914(a).

⁴ *Id.* at § 70912(7).

⁵ Sec. 11301 of the Fixing America’s Surface Transportation (“FAST”) Act, Pub. L. 114-94 (2015); 49 USC § 22907.

ASLRRA commends DOT for waiving the BABA implementation date of May 14, 2022, set forth under IIJA. In June, ASLRRA co- signed a stakeholder coalition letter to USDOT expressing support for the Department’s decision to extend the 180-day waiver until November 10, 2022, allowing time to properly stand up a process to provide public and private entities with the opportunity to adjust to and learn final rules, among other reasons.

ASLRRA’S RECOMMENDATIONS

ASLRRA supports the instruction set forth in recent Office of Management and Budget (“OMB”)’s guidance for agencies to consider the public interest threshold and waive the BABA’s Buy America requirements for grant-based spending that is below the current \$250,000 simplified acquisition threshold.⁶ In addition, ASLRRA supports the intent behind OMB’s Made In America Office (“MIAO”) to centralize, standardize and modernize the waiver process, taking into account new technological advancements, among other factors. Further, ASLRRA suggests that both MIAO and DOT should coordinate with the Small Business Administration to include a small business exception in accordance with the Small Business Regulatory Enforcement Act.⁷ Additionally, ASLRRA urges MIAO and DOT to not increase the Buy America threshold to more than

⁶ OMB Memorandum M-22-11, “Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure.” (April 18, 2022).

⁷ Pub. L. 104-121, Title II, 110 Stat. 857 (1996) (codified in various sections of 5 U.S.C. §601 et seq.).

its current 55%. Legislative intent indicated in the IIJA again emphasizes the 55% standard but does not call for any escalations.⁸

While the new office is expected to reduce a need for waivers, ASLRRRA nevertheless urges MIAO to maintain an appropriately targeted waiver exception posture in accordance with the statutory criteria set forth under the FAST Act and restated under the IIJA.⁹ Section 70914(b) of the IIJA. Likewise, ASLLRA urges DOT to judiciously grant waivers, including general applicability waivers where appropriate, to railroads relying on federal funding for purchasing under programs such as CRISI.

ASLRRRA has identified a range of possible items that are common to regular rail operations, which potentially could incur BABA concerns unless opportunities for waivers, including waivers of general applicability, continue to exist. These items include:

1. Electronic components associated with locomotives, rail switches, electronic air brakes, technology required for positive train control, and similar operational and safety features, including some that have been mandated under law or required under regulation;
2. Simulators used in operational and safety training for engineers and emergency response;

⁸ See IIJA, at § 70912(6)(b)(ii).

⁹ See 49 § USC 22905(a)(2), and IIJA at § 70914(b).

3. New technologies, including customer off-the-shelf applications, for installation to reduce locomotive emissions;¹⁰
4. Software used in a broad range of applications including dispatching, telemetry devices, and signal systems;
5. Carbon capture equipment and processes involving biochar for railroad ties;
6. Lithium-ion locomotive batteries; and
7. Construction materials involved with switches or bungalows.

Given both the supply chain significance of the national rail network and the interrelated nature of electronic components used in commonplace rail equipment ASLRRA encourages DOT to utilize its targeted waiver of general applicability authority where necessary in accordance with the OMB Guidance whether for non-availability, unreasonable cost, or public interest.¹¹ In addition, as a function of the public interest, doing so would not be overly broad where the items may fall below the \$250,000 simplified acquisition threshold, or in general where the costs associated with processing an individualized waiver(s) would risk exceeding the value of the items waived.

Further, some of the necessary general applicability waivers may need to be product-specific, such as for a simulator, while others may well have to be non-product-

¹⁰ Grant funding for purchase of equipment to achieve significant reduction in locomotive emissions is a newly eligible activity for CRISI grant funding under Section 22103 of the IJJA.

¹¹ OMB Memorandum, *supra* note 5, at 9.

specific such as for off-the-shelf software used in activities such as dispatch.¹² MIAO, and subsequently DOT, should also take U.S.-based assembly into consideration in instances where each individual component in an assembled product may not meet or exceed the 55% standard.

In addition to the CRISI Program, short line railroads may be indirect beneficiaries of other DOT-based grants such as Infrastructure for Rebuilding America Program or the Better Utilizing Investments to Leverage Development Program’s nationally and regionally significant projects. Under such circumstances, the possible *de minimis* set-aside of up to 5% with a maximum of \$1 million contemplated under the Guidance would help expedite major projects to the extent possible.¹³

ASLRRRA recommends that MIAO define “manufacturing processes,” involving construction materials to contemplate “all manufacturing processes,” in accordance with the Guidance where individual components falling under the construction materials standard, including lumber, drywall or roofing used in the construction of a railroad bungalow may or may not meet the 55% expectation individually but can do so when in combination with other covered materials.¹⁴ DOT should likewise adopt such a definition.

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¹² *Id.* at.11.

¹³ *Id.* at 12.

¹⁴ *Id.* at 14.

ASLRRRA appreciates the opportunity to present the perspective of the short line railroad industry on this matter.

Respectfully submitted,

A handwritten signature in black ink that reads "Sarah Yurasko". The signature is written in a cursive style with a large initial "S" and a long, sweeping underline.

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