



U.S. Department of Transportation
Federal Highway Administration
Office of Infrastructure

FHWA: BUY AMERICA OVERVIEW

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Unless otherwise noted, FHWA is the source for all images in this presentation.

Disclaimer

Except for any statutes or regulations cited, the contents of this presentation do not have the force and effect of law and are not meant to bind the public in any way. This presentation is intended only to provide information to the public regarding existing requirements under the law or agency policies.

What You Will Hear Today

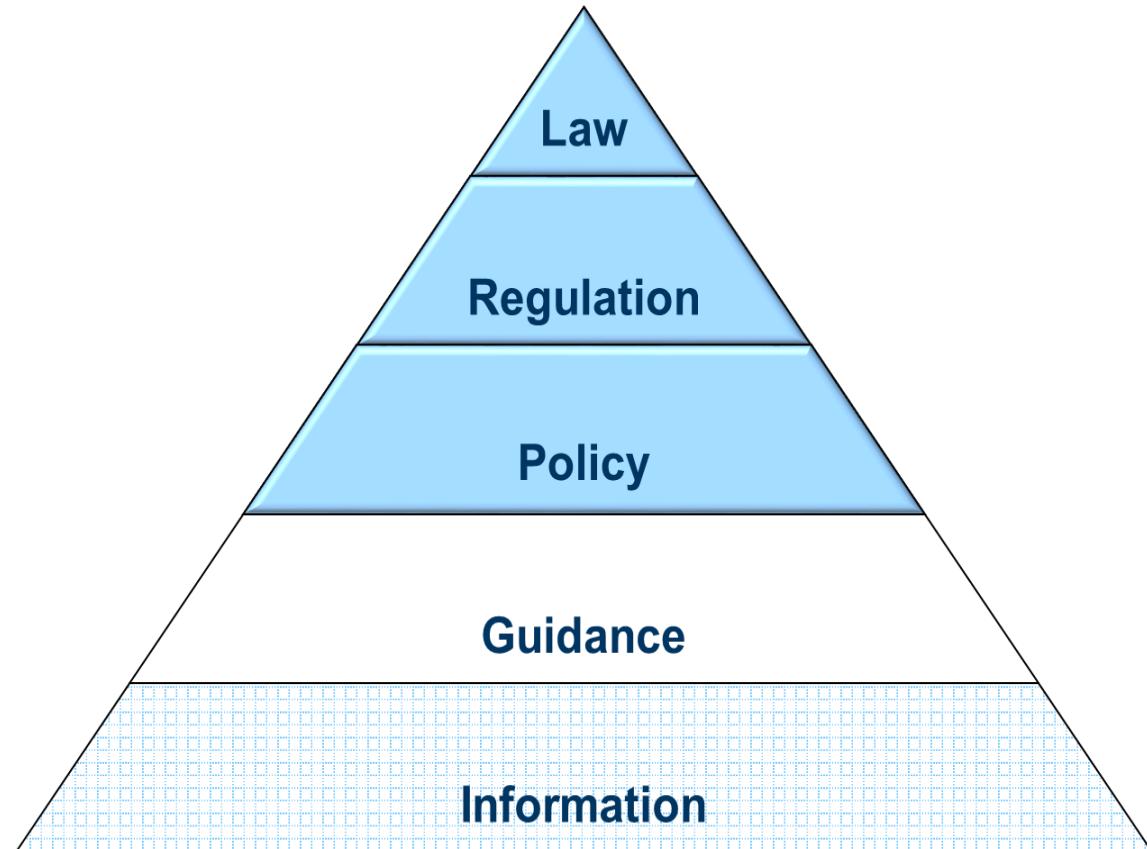
- General overview of Federal Aid Highway Program
- Brief intro to stewardship and oversight
- Project stewardship and oversight expectations
- Specifics on Build America Buy America

Federal Aid Highway Program (FAHP)

- What is it?
 - Financial assistance for development, construction, maintenance and operations of highways
 - i.e., 'Cradle to Grave, or 'Concept to Closeout'
- Administration and Implementation
 - FHWA
 - State, Local, and Other Agencies
- All must act to ensure general FAHP requirements are met

FAHP Hierarchy

- Law: 23 USC / IIJA / BIL
- Regulation: 23 CFR
- Policy: **Buy America**
- Guidance: Stewardship and Oversight
- Information: Project Records



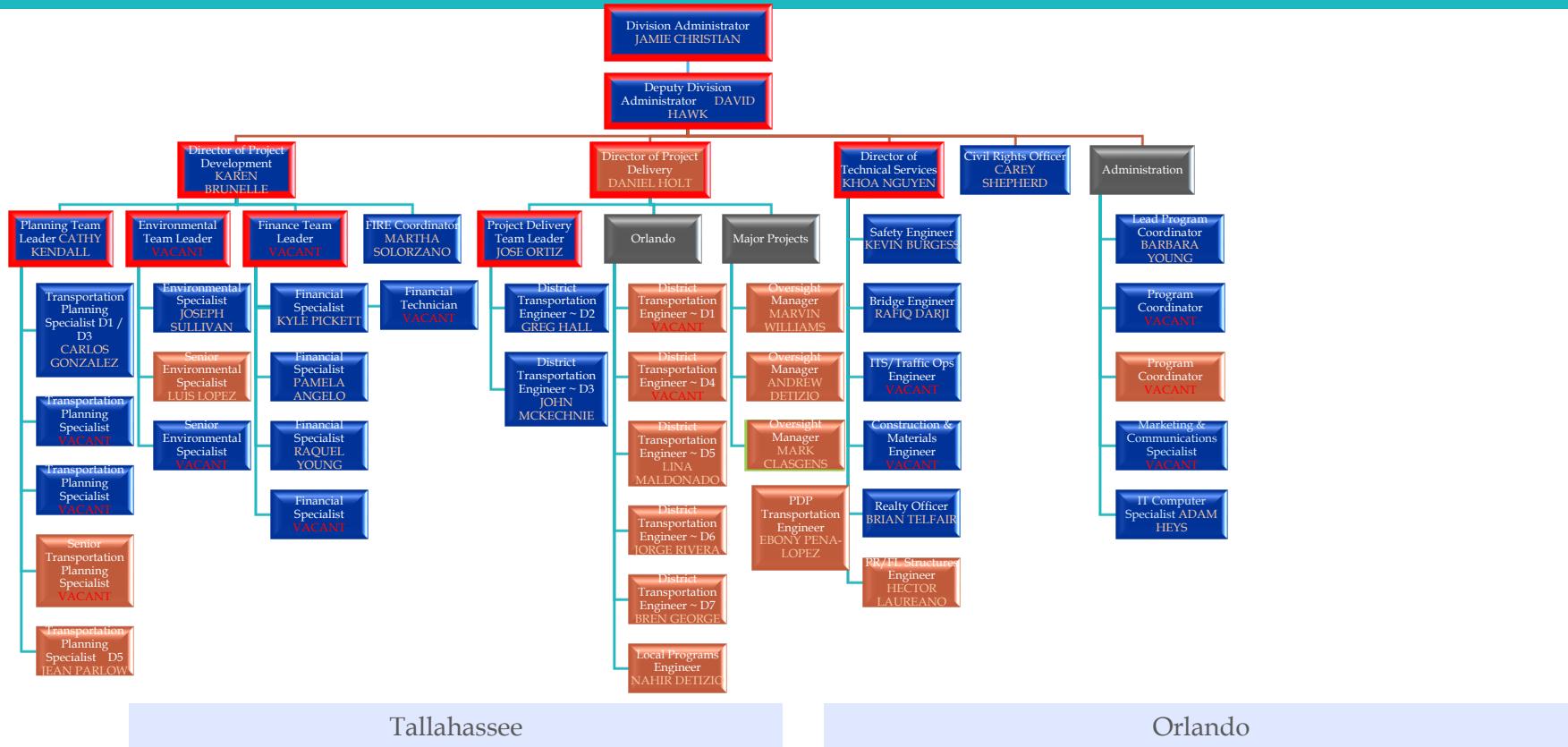
FAHP FOCUS - Stewardship / Oversight

- Stewardship: Sound judgement / decision-making
- Oversight: Consistency with laws, regulations and policies
- At the start: Congress looks to FHWA to perform
- Over Time: Congress allows FHWA to increase state's role
- Via Formal Stewardship and Oversight Agreement (S&O)
- Result – roles and responsibilities to states are:
 - Delegated, or
 - Not Delegated

Focus on Project Delivery

- Meet federal requirements (oversight)
 - Davis-Bacon, materials quality assurance, etc...
- Oversight projects 'not delegated' FHWA role
- 'Delegated' oversight projects – Role of States, Local, and Others
- Oversight delegation based on:
 - Law (e.g., FHWA Major Projects, Discretionary Grants)
 - **RISK**
- FHWA expectations of Agencies:
 - Act on behalf of FHWA (S & O and 'Hierarchy')
 - Identify / maintain responsible charges
 - Identify, categorize, and address project risks

FHWA Florida Division - Who We Are



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FHWA's Buy America Regulatory Requirements

23 CFR 635.410

- Apply to iron and steel materials and products only
 - all manufacturing processes must take place domestically, including the application of a coating on these materials
- Minimal use provision (greater of 0.1% of contract value or \$2,500)
- Optional alternate bid provision (25% differential)
- Waivers may be requested if:
 - Applying requirements would be inconsistent with the public interest; or
 - Domestically produced steel and iron are not produced in sufficient and reasonably available quantities which are of a satisfactory quality

Application of Buy America Preference

- SEC. 70914 of the Bipartisan Infrastructure Law (BIL)
 - (a) *IN GENERAL.* – Not later than 180 days after the date of enactment of this Act, the head of each Federal agency shall ensure that none of the funds made available for a Federal financial assistance program for infrastructure, including each deficient program, may be obligated for a project unless all of the iron, steel, manufactured products, and construction materials used in the project are produced in the United States. (emphasis added)

Bipartisan Infrastructure Law – Build America, Buy America Act (BABA)

- BABA Section 70914 includes a Buy America preference that all Federal agencies must apply to any Federal financial assistance program for infrastructure that is not already subject to existing Buy America requirements for the relevant categories.
- BABA Section 70917(a) provides that the Buy America requirements under Section 70914 apply only to the extent that Federal agencies do not already apply a Buy America preference to steel, iron, manufactured products, and construction materials.
 - This provision allows FHWA to preserve existing Buy America policies and provisions that meet or exceed the standards required by the Build America, Buy America Act, such as its requirements for iron and steel under 23 U.S.C. 313 and only extend coverage of Buy America to “construction materials.” (emphasis added on all bullets)

FHWA General Waiver for Manufactured Products

- FHWA's general waiver for manufactured products remains in effect. Because FHWA has an existing statutory requirement applicable to manufactured products, the BABA standard for manufactured products under Section 70912(6)(B) does not apply on Federal-aid highway projects.
- BABA Section 70914(d) provides a process for reviewing existing waivers of general applicability, such as FHWA's general waiver for manufactured products.

FHWA General Waiver for Manufactured Products (cont'd)

- Pursuant to BABA Section 70914(d), the FHWA must publish a notice in the Federal Register describing the justification for this general applicability waiver and requesting public comment on the continued need for this waiver.
- FHWA must publish in the Federal Register, a determination on whether to continue or discontinue the general applicability waiver, considering the comments received in response to the notice.

FHWA's Existing General Applicability Waivers

- Per BIL Section 70914(d), all existing general applicability waivers shall be reviewed in the Federal Register every 5 years after the date on which the waiver is issued.
- FHWA has four general applicability waivers:
 - Manufactured products
 - Pig Iron and Processed, Pelletized, and Reduced Iron Ore
 - Ferryboat parts
 - Concrete poles for Guam

What is a Construction Material?

According to the preliminary and non-binding guidance in OMB Memorandum, M-22-11, “Construction materials” includes an article, material, or supply – other than an item of primarily iron or steel; a manufactured product; cement and cementitious materials; aggregates such as stone, sand, or gravel; or aggregate binding agents or additives – that is or consists primarily of:

- non-ferrous metals;
- plastic and polymer-based products (including polyvinylchloride, composite building materials, and polymers used in fiber optic cables);
- glass (including optic glass);
- lumber; or
- drywall.

Construction Materials (cont'd.)

- Pending issuance of final standards from OMB, agencies should consider “all manufacturing processes” for construction materials to include at least the final manufacturing process and the immediately preceding manufacturing stage for the construction material. See OMB Memorandum M-22-11 of April 18, 2022.

Construction Materials (cont'd.)

Items excluded from construction materials under OMB Memo M-22-11:

- An item of primarily iron or steel
- A manufactured product
- Cement and cementitious materials
- Aggregates such as stone, sand, or gravel
- Aggregate binding agents or additives

Asphalt concrete pavement mixes are typically composed of asphalt cement (a binding agent) and aggregates such as stone, sand, and gravel. Accordingly, asphalt is also excluded from this definition of the term construction materials.

Temporary Waiver for Construction Materials

- On April 28, 2022, the USDOT posted a proposed transitional waiver concerning the application of Buy America to “construction materials” for a period of 180 days starting on May 14, 2022 (the date the Buy America construction materials requirement went into effect).
- The waiver was open for public comment through May 13, 2022
- The waiver was published in FR (87 FR 31932) on May 25, 2022
- Effective retroactively to May 14, 2022
- Expired on November 10, 2022
- During this time period, USDOT expected States, industry, and other partners to begin developing procedures to document compliance with Made in America standards for construction materials.

OMB Memo M-22-11

- Issued on April 18, 2022
- This Memo provides preliminary and non-binding guidance on the implementation of BABA, including preliminary guidance to define the term “all manufacturing processes” for construction materials.
- OMB requested additional stakeholder input before issuing further guidance identifying initial manufacturing processes for construction materials that should be considered as part of “all manufacturing processes.”
- OMB issued an RFI on this topic on April 21, 2022. 87 FR 23888 (Apr. 21, 2022).

OMB Memo M-22-11 (cont'd.)

Clarifies that an article, material, or supply should only be classified into one of the following categories:

- iron or steel;
- a manufactured product; or
- a construction material.

- Should any of the listed construction materials be combined with a second listed material or with a non-listed item, then the product should be considered a manufactured product (or steel/iron item, as appropriate).

Manufactured Products

- FHWA currently has a general applicability waiver for manufactured products, so the 55% standard for manufactured products in BABA does not apply on projects funded under Title 23, U.S.C.

New Proposed EV Charger Waiver

- Published in the Federal Register on August 31, 2022 (87 FR 53539) and closed on September 30, 2022.
- FHWA seeks to establish a waiver with phase-out periods that will ensure a sufficient and reliable supply of EV chargers are available for FHWA-funded programs, including the National Electric Vehicle Infrastructure (NEVI) program, to allow timely and strategic deployment of EV charging infrastructure across the United States.
- The proposed waiver and request for comments included:
 - Initial Blanket Waiver and Removal of EV Chargers from Manufactured Products General Waiver
 - Partial Phase-Out of Waiver
 - Proposed Meaning of EV Charger Under Waiver
 - Consideration of Use of Either Installation Date or Other Date for Waiver Effective Date and Phase-Out Dates
 - Consideration of Exclusion of Predominantly Steel and Iron Components from Coverage Under Waiver

USDOT Issues Two Proposed Waivers for Public Comment

On November 4, 2022, the Department took three concurrent actions:

- (1) USDOT is not extending its temporary waiver for construction materials, making that requirement applicable effective November 10, 2022;
- (2) in one notice, DOT is proposing a narrow waiver for de minimis costs, small grants, and minor components; and
- (3) in a second notice, DOT is proposing to take two actions to help transition to the new construction materials standard.

The comment period for the two proposed waivers ended on November 20, 2022.

New Proposed Waiver for De Minimis Costs, Small Grants, and Minor Components (87 FR 68576)

DOT is proposing to use its authority under Section 70914(b)(1) and waiver provisions in DOT Operating Administration-specific statutes, such as 23 U.S.C. 313, to waive the Act's Buy America preferences for iron and steel, manufactured products, and construction materials used in infrastructure projects funded under DOT-administered financial assistance programs for iron, steel, manufactured products, and construction materials under a single financial assistance award for which:

- The total value of the non-compliant products is no more than the lesser of \$1,000,000 or 5% of total allowable costs under the Federal financial assistance award;
- The size of the Federal financial assistance award is below \$500,000; or
- The non-domestically produced miscellaneous minor components comprise no more than 5% of the total material cost of an otherwise domestically produced iron or steel product.

New Proposed Waiver for Certain Contracts and Solicitations (87 FR 68572)

For DOT awards obligated on or after the effective date of the waiver, DOT proposes to issue a general public interest waiver of BABA's domestic preference for construction materials for:

- (1) Any contract entered into before November 10, 2022; and
- (2) Any contract entered into before March 10, 2023, if the contract results from a solicitation published prior to May 14, 2022.

References

- FHWA Buy America Construction Program Guide page:
<https://www.fhwa.dot.gov/construction/cqit/buyam.cfm>
- OMB memo M-22-11; <https://www.whitehouse.gov/wp-content/uploads/2022/04/M-22-11.pdf>
- Proposed EV Charger Waiver:
<https://www.federalregister.gov/documents/2022/08/31/2022-18831/notice-of-proposed-waiver-of-buy-america-requirements-for-electric-vehicle-chargers>
- Notice of Expiration of the DOT Construction Materials Waiver and Two New Proposed Waivers: <https://www.transportation.gov/office-policy/transportation-policy/made-in-america>

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Questions?

Thank you!