

## Buy America & BABA Waivers: Patches or Solutions?

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As you are no doubt aware, there are a number of major challenges facing public transit capital projects. There's the ongoing crisis in small transit vehicle production (you can read about this in the joint CTAA-APTA-AASHTO letter that we sent to DOT Secretary Buttigieg last month; [https://ctaa.org/wp-content/uploads/2022/10/CTAA\\_ButtigiegBus.pdf](https://ctaa.org/wp-content/uploads/2022/10/CTAA_ButtigiegBus.pdf)). Between labor shortages, supply chain disruptions and other issues, manufacturing and construction of just about anything takes more time than could ever have been imagined. And the entire US economy is experiencing inflation unlike anything we've seen since the 1970s.

While the US Department of Transportation can't single-handedly force the reopening of shuttered transit vehicle assembly lines, nor untangle the travails of component shortages or supply chain disruptions, they have taken a few steps they hope will help, at least around our industry's margins. Here is CTAA's analysis of three recent FTA/DOT waiver actions you may find interesting.

### FTA Buy America Waiver for Vans and Minivans

On October 25, 2022, the Federal Transit Administration (FTA) issued a partial, temporary waiver from some Buy America requirements pertaining to FTA grant recipients' purchases of mass production vans and minivans for use in public transportation. This waiver applies only to vans and minivans (and, as FTA hypothetically notes, large sport-utility vehicles) designed to seat at least six persons, including the driver; the waiver does NOT apply to vehicles that are modified to incorporate accessibility features nor any other sort of aftermarket conversion.

This is not a blanket waiver for all van or minivan purchases by FTA grant recipients. Vans and minivans purchased under this waiver must have US-manufactured engines or motors, and must have their final assembly in the US.

This waiver is temporary, and will expire on October 24, 2024. It's important to note, though, that FTA may rescind the waiver before that date if it determines that Buy America-compliant mass production vans and minivans are available for purchase by its grant recipients.

FTA has issued this waiver in response to requests by some of its grantees that they be able to acquire vehicles for use in vanpool services, and FTA expects that most, perhaps all,

vehicles acquired under this waiver will be used for FTA-supported vanpools. However, it's worth noting that the actual language of the waiver is more expansive:

*“For mass-produced, unmodified non-ADA accessible vans and minivans with seating capacity for at least six adults not including the driver, in lieu of applying the Buy America standards for rolling stock, FTA will require:*

*(1) Final assembly must be in the United States, as reported to NHTSA under the AALA;*

*(2) The country of origin of the engine or (in the case of electric vehicles), motor must be the United States, as reported to NHTSA under the AALA;*

*(3) The waiver is available to all FTA grant recipients;*

*(4) The waiver expires two years from the date this notice is published in the **Federal Register**, or upon FTA's publication of a **Federal Register** notice rescinding the waiver after determining that a fully Buy America-compliant vehicle has become available, whichever occurs first.*

*For the duration of this partial general nonavailability waiver, FTA recipients do not need to submit individual applications for nonavailability waivers for these vehicles.”*

To read the full language of this waiver notice, and related FTA documentation, visit the FTA “Buy America” page on their website, at <https://www.transit.dot.gov/buyamerica>.

Our first question (and probably yours') was: What about ADA-compliant, wheelchair-accessible vans or minivans? When waiving Buy America requirements, FTA generally has to respond to the specific requests that have been made by the would-be purchaser(s) of a product, and FTA's October 25 notice states they have not recently received any Buy America waiver requests concerning the acquisition of accessible vans or minivans.

### **FTA Waiver of 4-Year Useful Life Extension for Small Transit Vehicle Rebuilds**

Normally, FTA's policy is that its dollars can be used for rebuilding existing transit vehicles only if the rebuild will significantly extend the useful life of that vehicle. But as many transit managers and state DOTs are all too painfully aware, there is a critical shortfall in the ability of transit vehicle manufacturers to supply cutaway-style vehicles built on van chassis.

In response to that vehicle supply crisis, FTA issued a “Dear Colleague” letter on November 2, 2022, in which they announced a temporary waiver of the requirement that FTA-funded rebuilt cutaways or other medium-size, light-duty transit buses have their useful life extended by at least four years. Under this waiver, which will remain in effect until November 1, 2024, FTA-funded rebuilds of these smaller transit vehicles need only extend the vehicle's useful life by two years.

To read the entirety of that Dear Colleague letter, visit the FTA website at <https://www.transit.dot.gov/sites/fta.dot.gov/files/2022-11/Dear-Colleague-Letter-Cutaway-Rebuild-Useful-Life-Waiver.pdf>.

A key thing to keep in mind with this temporary change of policy is that it only guides how an FTA recipient can use funds they already have when determining whether to rebuild a vehicle they already have. This is not a notice of any newly available funds or grant opportunities.

### **DOT Proposes Two BABA Waivers, Ends One Waiver**

Last year's Infrastructure Investment and Jobs Act (also known in DOT circles as the "Bipartisan Infrastructure Law") codified a new government-wide requirement called "Build America, Buy America." Under this requirement, often termed BABA, all of the iron, steel, manufactured products and construction materials used in federally funded infrastructure projects must be produced in the US. Every cabinet-level department in the federal government is responsible for their department's own BABA implementation.

In the FTA-funded arena, BABA applies to all capital projects that are not subject to FTA's unique Buy America requirements. Generally speaking, this means that BABA compliance is a new, key requirement of construction projects, but BABA compliance can be part of other FTA capital purchases that are not of vehicles or other rolling stock.

Immediately upon the infrastructure law's enactment in November, 2021, DOT had issued a temporary waiver of BABA's applicability to non-ferrous construction materials used in transportation projects, which include concrete and similar materials, glass, lumber, drywall, and other materials used in construction that are not steel or iron. That waiver expired on November 10, 2022, and is not being renewed.

However, DOT has proposed two new BABA waivers. They have not yet taken effect. If they, or some version of them, take effect, the waivers would be permanent, not temporary. Public comments on these proposals are being accepted through November 20, 2022. Although the proposals are DOT-wide, the best place to find the details on these proposed waivers is at the FTA "Buy America" website, <https://www.transit.dot.gov/buyamerica>, in one of the bullet points under the "What's New" heading on that page.

One of the proposed BABA waivers would maintain the previous waiver from BABA's construction materials requirement, but only for contracts that DOT funding recipients (including FTA grantees) had entered into before November 10, 2022, or for contracts arising from solicitations published by DOT funding recipients before May 14, 2022, even if the contracts themselves weren't entered into until after the November 10, 2022, expiration date of the previous BABA waiver. As you can see from those various dates, this proposed waiver is a transitional provision aimed at not inserting a new BABA requirement into previous contracts or solicitations.

The second of these DOT proposals would waive all BABA requirements for qualifying small-dollar projects. Under this proposal, BABA would be waived for projects in which either:

- The total value of non-compliant products is the smaller of \$1 million, or less than 5 percent of allowable costs under the federal funding award for that project;
- The total amount of federal financial assistance to that project is less than \$500,000; or
- Non-domestically produced minor components make up no more than 5 percent of the cost of what's otherwise a domestically produced iron or steel product.

It's likely, but not guaranteed, that these waivers will be issued, more or less as proposed, later in November, or perhaps early December. As a reminder, the public comment period on these two proposed waivers is very brief, with comments due to the respective DOT dockets no later than November 20, 2022.