



May 7, 2024

Federal Highways Administration
Via Portal @ <http://www.regulations.gov>,
Docket: DOT-OST-2023-0037 & DOT-OST- 2023-0040

RE: Notice of Proposed Waiver of Buy America Requirements for De Minimis
Costs, Small Grants, and Minor Components
Docket # DOT-OST- 2023-0037 & DOT-OST-2023-0040

Dear Sirs:

Please accept these comments as a further supplement to the comments submitted by the Organizations regarding the original proposal, the 2023 expanded request for information on waivers and the relationship of the waivers to the Recreational Trails Program. (“RTP”). For the purposes of these comments, we are referring to the current request for information as “the 2024 Proposal” in order to clarify which step of the multiple year effort we are addressing. The Organizations have not resubmitted the highly detailed information provided in our previous concerns simply to avoid repetition of information. While this information is not resubmitted, those issues and factors remain a concern for our interests should there were revisions that could impact the de minimis waiver process outlined in the

2023 determination that was previously recognized. It is the Organizations understanding that the 2024 request for information is addressing the general waiver for manufactured products that was issued in 1983 by FHWA and its relationship to the most recent revisions to the BABA provisions for all agencies from the Infrastructure Act. We hope this proposal brings clarity to the entire process as since the 2023 determination, it has been our experience that there is a lot of confusion and conflict around the administration of the RTP program as a result of the multiple revisions of regulations that has recently occurred.

We are providing this input in the hope of resolving conflicts and building an administrative process that is efficient and effective in achieving goals of specific programs across FHWA and large-scale compliance with BABA requirements and other requirements, such as minimum acquisition thresholds. We have also had the opportunity to meet with FHWA representatives on this issue and welcomed the candor of these discussions. We hope these meetings fostered understanding of our concerns and issues as our concerns are far from the normal concern that FHWA encounters in the administration of their programs and efforts. It is our understanding that the current request for information is specifically seeking input around the withdrawal of the general waiver that was issued by FHWA in 1983 in response to previous BABA requirements for manufactured projects. We do not believe that the de minimis waivers previously provided for in the BABA compliance process are at issue and may be entirely outside the scope of the current request for input.

1. De minimis waivers process must remain for all materials and grant programs.

During our preliminary review of the Current Request, concerns around possible impacts to small projects waiver that were previously authorized was a major concern. We were thrilled that both documents clearly stated that the de minimis waivers would be carried through permanently. We mention this preliminary review as many of the administrators we have reached out to are in varying degrees of alignment with the conclusions in the most recent versions of the Proposals. Some states have taken a very narrow approach to defining the temporary nature of the 2023 waivers, while other states have applied a very broad definition of the temporary nature of the waivers. This has created conflicts and confusion in the administration of programs we are involved with, and we hope these conflicts are resolved with the 2024 Proposal. While we are aware our programs are a tiny portion of programs FHWA

administers we hope this information provides clarity and information to FHWA administrators that can supplement input from other parties and allow for the creation of the effective complaint programs.

As we have previously discussed in greater detail, the expansion of the BABA provisions without a process to avoid overly burdensome regulations on the small projects would simply force the programs we operate under to cease to function. Expansion of BAB provisions without de minimis waivers would be exceptionally bad for these hugely successful small projects our Organizations consistently undertake for public benefit. Our initial concerns were removed when the portions of the 2024 Proposal addressing small projects was reviewed. The Organizations vigorously support the outline of the relationship between de minimis waivers and removal of generally applicable waivers for manufactured products outlined on pg. 17797 of the Proposal. This portion of the Current Request was helpful in creating an understanding of what is and what is not within the scope of the current effort. The Organizations support the rational and concerns outlined in this summary as without the de minimis waiver, the impacts to small projects could be overwhelming. Basically, these projects would cease to exist. While these waivers may be a small concern in terms of the rulemaking, this waiver process is critical to the success of many programs that fund small projects. While we are most directly concerned with RTP, we are also aware that there are many other FHWA that would significantly benefit from these waivers as well. The Organizations support for the de minimis waivers extends to those other programs as well, even if our input focuses on the RTP program most consistently.

2. Highly detailed process that simply does not align well with small projects and more particularly RTP program.

With regard to the 2024 Proposal, the Organizations are impressed by the detailed history of the many intricacies and complexities and general evolution of these discussions on BABA type provisions that have spanned decades. A significant portion of the 2024 Proposal appears to be addressing the generalized waiver for manufactured goods issued by FHWA in 1983. While this information is impressive, the fact that the process of proving BABA compliance is HIGHLY complex and often driven by analysis of individual pieces of equipment or materials is concerning. It is for this reason we are voicing our support for the continued application of the minimum acquisition thresholds in the administration of the grant process by FHWA. The de minimis process is simple and will streamline the implementation of any program as applicants and administrators will be able to understand the program and the project specific waiver

easily. This is a significant difference from the highly complex and almost transactionally driven process that has been applied previously. This efficiency should not be overlooked as again we are seeing confusion among administrators in how to apply the 2023 waivers for small projects. Administration should be consistent across state boundaries to allow for the effective administration of the basic tenants of the programs.

3. Barriers to BABA and tracking materials have diminished but still exist.

As the Current Request outlines in great detail the 1983 BABA waiver was issued based on the inability of manufacturers of equipment to effectively track the origin of materials that they are using in order to prove BABA compliance.¹ The Organizations would agree that this process has improved since 1983 but it has been our experience that this process remains a major barrier for smaller projects and smaller manufacturers of the highly specialized equipment and resources that are funded with RTP grants. These simply are not huge multinational companies building these pieces of equipment but rather small companies who have developed equipment to address challenges they have faced in trail maintenance. Often production of these highly specialized pieces of equipment may only be 5-10 units per year. Materials are often simply sourced from general retailers in small amounts and those general retailers are unable to provide any sourcing documentation even if the materials were produced a few miles down the road.

The inability to document the source of products as BABA complaint is significant even when manufacturers are not involved. As we previously identified in greater detail, many of our projects are not buying materials but rather using naturally available materials for the project and are frequently using trees and materials on site to complete trail projects. Bringing in outside resources simply is not possible or cost effective due to the remote nature of the work being performed. We simply are not able to envision a process where BABA certification could be achieved within these project parameters. This is again a major difference from the traditional FHWA project that warrants discussion and continued application of the de minimis waivers.

¹ See, Current Request at pg. 17796.

Even when our projects include the acquisition of more commonly available equipment, manufacturers are unable to certify that a single unit is built with BABA compliant materials. As an example, Kawasaki has built their OHVs in Nebraska since the early 1970's and Polaris has traditionally been built in Minnesota. Even with clearly identified BABA manufacturers we are unable to obtain BABA certification for these units, as we simply do not buy large numbers of these units. This is a barrier to the goals of any project being achieved in isolation. This impacts of this issue have been greatly compounded over the last several years, as there have been significant issues with the supply chain to dealers generally. These supply chain issues have caused us to try to obtain equipment or materials that were simply available. The incentive for dealers to provide any additional documentation was weakened greatly as there was one unit that could be sold literally dozens of times without any additional paperwork. Our volunteers struggled to find any unit to fill their needs, and this was made more difficult given the additional complexities of funding that have been encountered. While this issue appears to have been resolved generally, there is no guarantee this issue will not return at some point in the future. Again, this warrants the continued use of the De Minimis waiver in the manner previously allowed.

4. De Minimis waivers are not generally applicable waivers.

The Organizations do feel compelled to address one concern that was raised in the current request for information, mainly the preference against general applicability waivers that has been specified in the most recent round of BABA requirements.² This is generally based on the provisions provided in §70914(d) of the Infrastructure Act. The Organizations would vigorously assert that the de minimis waivers are not a general waiver but rather a highly specialized waiver process that is based on specific factors and addressing specific issues that result from the management of small projects. The de minimis waiver is also statutorily mandated under the NDAA and repeatedly reaffirmed and updated by Congress. There are extensive regulations regarding the applicability of the factors generally found in 2 CFR part 200. The applicability of this de minimis waiver has been the topic of almost constant updates from the Office of Management and Budget. The updated policy manual from OMB for agency staff is 16 pages in length. This level of analysis and guidance is simply not required for a generally applicable waiver. The Organizations would again reaffirm the need for a simple and streamlined process for the administration of these small grants, as minimization of the administrative burden for these small projects can be a critical

² See, Current Request at pg. 17790.

component of these projects' success. If there is too much burden our volunteers simply will not pursue the grants. That would be a significant loss for the public interest these small programs have been highly successful in addressing.

5. Conclusion.

It is the Organizations understanding that the 2024 request for information is addressing the general waiver for manufactured products that was issued in 1983 by FHWA and its relationship to the most recent revisions to the BABA provisions for all agencies from the Infrastructure Act. We hope this proposal brings clarity to the entire process as since the 2023 determination, it has been our experience that there is a lot of confusion and conflict around the administration of the RTP program as a result of the multiple revisions of regulations that has recently occurred.

We are providing this input in the hope of resolving conflicts and building an administrative process that is efficient and effective in achieving goals of specific programs across FHWA and large-scale compliance with BABA requirements and other requirements, such as minimum acquisition thresholds. We have also had the opportunity to meet with FHWA representatives on this issue and welcomed the candor of these discussions. We hope these meetings fostered understanding of our concerns and issues as our concerns are far from the normal concern that FHWA encounters in the administration of their programs and efforts. It is our understanding that the current request for information is specifically seeking input around the withdrawal of the general waiver that was issued by FHWA in 1983 in response to previous BABA requirements for manufactured projects. We do not believe that the de minimis waivers previously provided for in the BABA compliance process are at issue and may be entirely outside the scope of the current request for input. The Organizations are also open to discussion on possible contingencies or guardrails to narrow the scope of any waiver, but we believe a waiver is necessary to streamline our acquisitions and efforts. If you have questions, please feel free to contact Scott Jones, Esq. (518-281-5810 / scott.jones46@yahoo.com) or Fred Wiley (661-805-1393/ fwiley@orba.biz).

Respectfully Submitted,



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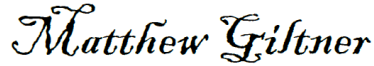


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