

Federal Regulations and Policies: What the Industry Should Know

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Regulatory Watchlist



- Government Affairs
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REGULATORY WATCHLIST

Last Updated: Nov. 2

Please contact ARTBA's *Prianka Sharma* to share your insights on these regulations.

IN THE NEWS:

Engineering News Record covered our analysis of the upcoming Supreme Court Term [here](#).

FEDERAL REGULATIONS TO WATCH:

Issues to Discuss – ARTBA and APC Advocacy

- Buy America
- Materials Costs and Availability
- DBE Program
- Davis-Bacon
- Project Labor Agreements
- OSHA Issues
- WOTUS
- NEPA
- U.S. DOT Project Delivery Center of Excellence

Buy America – IIJA

- IIJA retains coverage of **iron, steel and manufactured products**.
 - Many manufactured products exempted by FHWA nationwide waiver.
 - Commercially-available off-the-shelf (COTS) products still an issue.
- IIJA expands Buy America to **construction materials**, which must be “produced in the United States.”
 - **Includes** 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; and drywall.
 - **Exemption for** “cement and cementitious materials, aggregates such as stone, sand, or gravel, or aggregate binding agents or additives” from the definition of construction materials. (ARTBA supported)

Buy America – White House

- White House “Made in America Office” (MIAO) – created by President Biden
- Reviews waivers for all federal agencies
- Issues guidance for domestic preference programs across the federal government
- ARTBA has met with officials and submitted comments multiple times

Buy America – White House

- Most recent guidance – Effective Oct. 23
- “High-level coordinating guidance”
 - Specifies domestic manufacturing processes for all 8 categories of construction materials
 - A particular covered item falls into one category: iron, steel, construction material or manufactured product
 - Recaps waiver process
 - “unreasonable costs”
 - “nonavailability”
 - “public interest”

Buy America – U.S. DOT

- Coverage of construction materials took effect Nov. 10, 2022
- Waiver for projects in advanced stage of procurement (transit)
 - Construction materials requirement waived – in effect Jan. 30
- “De minimis” waiver took effect Aug. 16
 - All Buy America requirements waived
 - Projects with less than \$500,000 in federal funding, or
 - 5 percent of total applicable costs up to \$1 million
 - (not including iron and steel)
- COTS help?

Buy America – FHWA

- Manufactured products waiver in effect 40+ years
- Under IIJA, these waivers must now be reviewed and posted for comment every five years
- Comments were due Monday, May 22
- Potential options
 - Keep, roll back (55%?) or repeal
- Organized campaign and political pressure to support repeal

Buy America - ARTBA Contractor Survey with AGC

- How will new coverage affect projects?
 - “Major effect” – Difficult or impossible to find U.S.-made products
 - Plastics and Polymer-based – 40 percent
 - Non-ferrous metals – 31 percent
 - Glass – 22 percent
- 65 percent expected “major effect” if manufactured products waiver rolled back or repealed
- 62 percent said Buy America policy now confusing in their state(s)
- 26 percent said less likely to bid federal-aid work in next year

Buy America –Looking Ahead

- Seeking a clear, consistent and collaborative process
- Risk for certification/compliance should not be on contractors
 - State approved products lists
 - See new AASHTO-AGC-ARTBA Joint Committee paper
- Continued meetings and comments with Admin. and Capitol Hill
- Coalition activities with other national associations
- Webinars and Q&A with FHWA
- Your feedback needed continuously...

Materials Costs and Availability

- From ARTBA Contractors Division meeting with FHWA, May 2021...
 - “FHWA cannot participate in retroactive price adjustments if the original contract did not contain a commodity price escalation clause. [See 4/8/2004 FHWA memo]. State DOTs may add a retroactive commodity price escalation clause to a contract, but it would have to be state-funded.”
 - “Materials shortages are not generally grounds for time extensions unless there is a fairly widespread shortage.”

Materials Costs and Availability

- FHWA has reaffirmed this interpretation of their policy several times
- FTA has stated, “Federal resources may be available to FTA recipients to pay for the increased cost attendant to contract modifications.”
- ARTBA continues to raise this issue with Executive Branch and Congress
- Sharing developments among chapters
- AASHTO Committee on Construction presentation – Sept. 20

ARTBA National Materials Dashboard

artba.org/economics/materials-dashboard/

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National Commodity and Material Prices for Transportation Construction

Since late 2020, the transportation construction industry has confronted unprecedented pandemic-related cost increases and often-limited availability for key commodities and materials. As a result, ARTBA's Construction Forum launched a work group to raise awareness of these market forces, share strategies for addressing the problem and advocate for equitable solutions. To help ensure all project partners – whether public or private – better understand the extent of these dynamics, ARTBA's economics team has centralized national cost data for key inputs and commodities used by the transportation construction industry.

The national data in the dashboard below includes a series of indices from the U.S. Bureau of Labor Statistics to measure relative price changes in the economy:

- The **Consumer Price Index (CPI)** is a measure of the average changes in consumer prices over time and is widely cited as a measure of general inflation.
- The **Producer Price Index (PPI)** series measures specific goods, services, and commodities. They are a family of indices quantifying the average change over time in the prices received by producers for domestically-produced goods, services, and construction.
- The **PPI for Highway & Street Construction** includes weighted prices for the different components used to deliver highway and bridge projects. It does not include labor, capital investment, or imports. The main index is also broken out into energy, service, and goods, highlighted below. The PPI index for different inputs for transportation construction are included separately in the "Major Commodities" and "Select Your Input" options below.

The data are presented in index form and measure relative changes. As an example, if the index is 100 in the base year and increases to 110, prices for that commodity have risen 10 percent over that time period. Dashboard users can view overall trends or filter for specific inputs using data since 2011.

Finally, it is important to emphasize the dashboard incorporates **national** cost data. Many states and regions are experiencing even more exaggerated cost spikes for certain commodities. Also, this data does not measure any shortages or delivery times for materials, another troublesome recent trend. Nevertheless, ARTBA believes this information portrays the extraordinary nature of the current market and hopes it will help facilitate cooperative solutions to preserve the economic benefits from transportation infrastructure investment.

For questions, please contact ARTBA's Chief Economist Dr. Alison Black (alblack@artba.org) or Senior Economist Dr. Josh Huynh (jhuynh@artba.org)

Consumer Price Index	General Construction Inputs	Highway & Street Construction Inputs
303.4	149.6	147.6

DBE Program

- Current U.S. DOT DBE rulemaking
 - Comments submitted Oct. 31, 2022
- Issues include...
 - Regular-Dealer designation revisions
 - 50 percent cap on fulfilling project goal with DBE suppliers' products
 - Enhance state DBE directories; centralized database of bidders lists
 - DBE performance plan for design-build projects
 - Personal net worth increase from \$1.32 million to \$1.6 million
 - Others

DBE Program

- What is the future of the DBE program given...
 - *Harvard* college admissions case (SCOTUS)
 - *Ultima* SBA 8(a) program case (E.D. of Tennessee)?
- What would we like to envision?

Davis-Bacon

- Revised rule effective Oct. 23
- ARTBA has met with U.S. DOL Wage & Hour Division and submitted comments over several months
- Revisions include:
 - Site of work and materials – “de minimis” trucking
 - Primes who are materials suppliers
 - Wage determinations when survey data insufficient
 - 50 percent prevailing wage determination revised to 30 percent
 - Primes responsible for compliance of subs
- FHWA revised Form 1273 as of Oct. 23
- ARTBA held “office hours” for members with U.S. DOL on Nov. 3

Project Labor Agreements (PLAs)

- Biden Executive Order mandates PLAs on **direct federal construction projects** of \$35 million and up
- Includes FHWA Federal Lands
- Does **not** include federal-aid projects (through state DOTs)
- Rulemaking underway; comments submitted Oct. 18, 2022
- Now being reviewed at Office of Management and Budget

OSHA Issues

- Heat Emphasis Program
 - Rule coming
 - ARTBA/NAPA resources available
- Walkaround Rule
 - Comments submitted Nov. 13

Waters of the United States (WOTUS)

- Clean Water Act
- Key Issue: Roadside Ditches
- Major SCOTUS Victory in *Sackett* case – May 2023
- Responses from agencies
- Litigation continues

NEPA

- 2020 NEPA Reform
- Litigation to support – ARTBA et al
- Current administration has rolled back
- Fiscal Responsibility Act
- NEPA “Phase Two”

U.S. DOT Project Delivery Center of Excellence

- Announced Fall 2022
- Housed at U.S. DOT Volpe Center
- Cites ARTBA Document – “Risk Factors in Design-Build: Recommendations for Consideration”
- ARTBA has held series of meetings with Volpe, U.S. DOT and Volpe officials
- Upcoming initiative on “root causes of change orders”

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**Thank you
for APC's support of ARTBA!**

Please give us your feedback!

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