



**June 16, 2022**

**To:** Legislative and Communications Committee

**From:** Darrell E. Johnson, Chief Executive Officer

**Subject:** Federal Legislative Status Report

### **Overview**

The Orange County Transportation Authority regularly updates the Legislative and Communications Committee on policy and regulatory issues directly impacting the agency's programs, projects, and operations. This report includes an overview of community project funding requests submitted by Orange County delegation members for the Orange County Transportation Authority. An update is provided on rulemaking associated with new Buy America requirements under the Infrastructure Investment and Jobs Act.

### **Recommendation**

Receive and file as an information item.

### **Discussion**

#### **Community Project Funding Requests**

Similar to what occurred during the federal fiscal year (FY) 2022 appropriations process, Members of Congress have again solicited community project funding (CPF) requests for FY 2023. A CPF is defined as any congressionally directed spending, tax benefit or tariff benefit that would benefit an entity or a specific state, locality, or congressional district. CPFs are similar to the earmark process, but with added transparency and accountability rules to ensure the funding is being used for its intended purposes, supported by the community and can be used on a project or program in a timely manner. This year, the Orange County Transportation Authority (OCTA) has been actively engaged with the Orange County delegation members to submit CPF requests for a variety of multimodal projects. The following projects have been submitted for consideration in the FY 2023 appropriations package by members:

- \$1.5 million for the Orange County (OC) Loop submitted by Representative Young Kim (R-Placentia)  
The OC Loop includes 66 miles of seamless connections that provide the community opportunities to bike, walk, and connect to some of California's most scenic beaches and inland reaches. This funding would be used to close gaps on the trail that cut off continuous use and enhance existing segments; specifically Segment A in the City of La Habra and Segment B in the City of Brea.
- \$3 million for the State Route 91 Improvement Project from SR-55 to Lakeview Avenue submitted by Representative Young Kim (R-Placentia)  
This project will create a safer and more efficient transportation system by constructing improvements to better separate and eliminate weaving of traffic flow, replacing an ageing bridge and adding a bicycle and pedestrian facility along Lakeview Avenue. In the FY 2022 appropriations process, Representative Young Kim also secured a \$3 million CPF for the State Route 91 Improvement Project for OCTA.
- \$3 million for the Santa Ana-Garden Grove Rails to Trails submitted by Representative Lou Correa (D-Santa Ana)  
This project will increase the use of active transportation travel modes, improving facilities along the Pacific Electric corridor. This trail project will link two downtown cities and connect to the Santa Ana River Trail, part of 66-mile Class I OC Loop bikeway.
- \$4 million for the State Route 74 Improvement Project Gap Closure and Multimodal Project submitted by Representative Mike Levin (D-Dana Point)  
This project closes a 1.1-mile gap in general purpose lanes and enhances bicycle and pedestrian connectivity.

This list does not include other projects that were submitted within Orange County, which were requested by individual cities, the County, or other transportation agencies like Metrolink. Furthermore, members of the Senate have yet to make their CPF lists public. Although a project may be submitted by a member for funding, this does not guarantee that the project will receive funding in the final FY 2023 appropriations bill. Staff will continue to work with the delegation members throughout the appropriations process and will provide updates to the OCTA Board of Directors as necessary.

### Buy America Regulatory Updates

As part of the Infrastructure Investment and Jobs Act (IIJA), several reforms were made to Buy America requirements by the Build America, Buy America Act (BABA). Under BABA, 180 days after the enactment of the IIJA – May 14, 2022, federal agencies were required to ensure that no funding used via the IIJA 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. The Made in America Office (MIAO) within the Office of Management and Budget (OMB) is charged with maximizing and enforcing compliance.

The BABA requires each federal agency to ensure the following:

- All iron and steel used in the project are produced in the United States – this includes all manufacturing processes, from the initial melting stage through the application of coatings.
- All manufactured products used in the project are produced in the United States, including that the cost of the components of the manufactured product that are mined, produced, or manufactured in the United States is greater than 55 percent of the total cost of all components of the manufactured product, unless another standard for determining the minimum amount of domestic content has been established under an applicable law or regulation.
- All construction materials are manufactured in the United States. Excluded from this definition are cement and cementitious materials; aggregates such as stone, sand, or gravel; or aggregate binding agents or additives.

There are three situations where these requirements can be waived:

- Public interest waivers: when applying the preference would be inconsistent with the public interest.
- Nonavailability waivers: when the materials are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality.
- Unreasonable cost waivers: when the inclusion of materials produced in the United States will increase the cost of the overall project by more than 25 percent.

Each of these waivers are subject to a 15-day public comment process. In addition, a federal agency may also issue a general applicability waiver applied to a specific product or category of product. These waivers must be reviewed every five years and are subject to a 30-day public comment process. Prior to proposing a general applicability waiver, the federal agency must consult with

the MIAO. For all waivers, the MIAO will review to ensure it is consistent with applicable law and policy.

In order to inform implementation, 60 days after the enactment of the IIJA, each federal agency was to submit to the OMB a report that identified the federal assistance programs for infrastructure projects administered by the agency, all existing domestic content procurement requirements, and any waivers. In the Department of Transportation's (DOT) response, while it was found that in most cases its programs meet or exceed the requirements of the BABA, it detailed that none of their programs were fully consistent with BABA requirements, specifically due to the addition of construction materials.

On April 18, 2022, OMB released a memorandum detailing initial guidance related to implementation, including a more robust definition of what would be considered under the definition of "construction materials." Based on this definition, "construction materials" would include an article, material, or supply, other than those exempted under the BABA, that primarily consists of non-ferrous metals, plastic and polymer-based products, glass, lumber, or drywall. This guidance noted that since this was to be based on "all manufacturing processes" associated with such materials, the MIAO was to release further guidance, based on stakeholder feedback, on what should be included in that definition.

Since construction materials were never previously included in any Buy America requirements, this presents a significant new requirement for recipients of federal funding. Based on the need for further guidance and analysis, and in anticipation that immediate enforcement would potentially delay projects receiving assistance from the IIJA, the DOT issued a proposed, temporary 180-day public interest waiver from the enforcement of BABA requirements related to construction materials. During the public comment period, several stakeholders sent comments in support of the temporary waiver, including the American Public Transportation Association (APTA) (Attachment A) and the California Transit Association (CTA) (Attachment B). After the public comment period, DOT officially approved the waiver which will extend until November 10, 2022.

During this time, the OMB continues to seek public comment on future guidance related to the definition and applicability of "construction materials." In addition, in its temporary waiver, DOT notes that they are also seeking feedback in how best to implement this requirement, noting that there may be a need to later explore a longer waiver. In APTA's comment letter supporting the temporary waiver, the letter also notes some recommendations for future consideration including the issuance of general interest waivers for minor components, small contracts, and the inclusion of an adjustment period of four years.

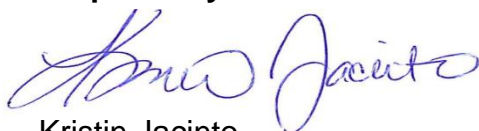
OCTA staff will continue to participate in conversations via APTA and CTA to inform the discussions associated with BABA implementation, seeking to minimize any disruption to existing and planned projects, while also ensuring compliance with the intent of BABA requirements. Because these requirements would also apply to local agency projects using federal funds, communication will also take place with those agencies via OCTA's Technical Advisory Committee. Staff will provide further updates as guidance is released and any additional waivers are considered.

**Summary**

Information is provided on community project funding requests and Buy America requirements.

**Attachments**

- A. Letter from Paul P. Skoutelas, President and Chief Executive Officer, American Public Transportation Association, to Docket Management Facility, United States Department of Transportation, dated May 13, 2022
- B. Letter from Michael Pimentel, Executive Director, California Transit Association, to Polly Trottenberg, Deputy Secretary, Office of the Secretary of Transportation, dated May 13, 2022
- C. Potomac Partners DC, Monthly Legislative Report – April 2022
- D. Potomac Partners DC, Monthly Legislative Report – May 2022

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