May 23, 2022
Celeste Drake
Director of Made in America
Office of Management and Budget
725 17th Street NW
Washington, D.C. 20503

RE: Notice of Listening Sessions & RFI; Docket Number: OMB-2022-0005

Dear Director Drake,

On behalf of The Associated General Contractors of America (AGC), I thank the Made in America Office (MIAO) within the Office of Management and Budget (OMB) and for soliciting input from the construction community regarding the clarity of definitions and usage of the terms included in the Build America, Buy America Act (BABAA).

AGC is the nation's leading construction trade association. It dates to 1918, and it today represents more than 27,000 member firms representing construction contractor firms, suppliers and service providers across the nation, and has members involved in all aspects of nonresidential construction. Through a nationwide network of chapters in all 50 states, D.C., and Puerto Rico, AGC contractors are engaged in the construction of the nation's public and private buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, water works facilities and multi-family housing units, and they prepare sites and install the utilities necessary for housing developments.

As the largest trade association representing construction contractors who will work BABAA applicable construction projects, we are an interested party and wish to offer our input. We provide the following comments in response to your questions.

(1) Which materials, products, or categories of materials or products should be included as "construction materials" for the purposes of the Act?

A. OMB Should Use the Definition of "Construction Materials" as Identified in BABAA

AGC supports having the following categories of construction materials, specifically mentioned in BABAA, to be the ones that consist of the term "construction materials:"

1. Non-Ferrous Metals
2. Plastic and Polymer-Based Products
3. Glass (including optic glass)
4. Lumber
5. Drywall

We support defining the term "construction materials" to follow congressional intent and avoid uncertainty and ambiguity. Every material listed above needs to go through an extensive manufacturing process to be shaped into a usable form for projects (and so being a manufactured product of its own), thus leaving an ambiguous difference of what separates the two categories of "construction materials" and "manufactured products."

If there is a need to add more categories of materials to this list, there needs be an open and transparent process in which the public has time to comment on whether additional items merit being included in the list under the term "construction materials."

B. Within the Categories of BABAA-Identified "Construction Materials," OMB Should Specifically Identify Materials to Limit Confusion that will Unnecessarily Delay Construction Projects or Result in Projects that Do Not Receive Bids

Even within the BABAA-identified categories of "construction materials," the federal government and its agencies should provide specific examples of the materials covered under BABAA, rather than leaving these categories broadly undefined. Instead, the agency should roll out individual materials within these categories over time to allow for a sensible transition. And the selection of specific materials within those categories should be based on study and actual supply chain capabilities.

1. *Non-Ferrous Metals*

Non-ferrous metals—pure metals or alloys—are those that do not contain iron. These metals include but are not limited to aluminum, copper, lead, nickel, tin, titanium and zinc, as well as copper alloys like brass and bronze, gold, silver and platinum, cobalt, mercury, tungsten, beryllium, bismuth, cerium, cadmium, niobium, indium, gallium, germanium, lithium, selenium, tantalum, tellurium, vanadium, and zirconium.

The most commonly used non-ferrous materials in construction are aluminum, brass, bronze, copper, lead, nickel, tin and zinc. Aluminum, the second most common metal in construction after steel, has a wide variety of uses that takes advantage of its lightweight and corrosion resistant nature. Uses for it can span a variety of projects such as building roof systems (gutters and flashing), bridges (decks and rails), and antenna towers. Another popular metal, copper is widely utilized in materials such as pipes for water distribution, cladding, and cables for electricity and communication.

AGC recommends that OMB—or other agencies with manufacturing and/or construction expertise—conduct thorough studies of the domestic manufacturing capabilities for these materials. Based on those studies, OMB could then reasonably apply BABAA requirements to one material at a time over a transitional period sufficient to allow for domestic manufacturing capacity to meet the requirements' demands. OMB could prioritize for transition those materials where a sufficient domestic manufacturing capacity already exists over those that do not. This would minimize the possibility of OMB and other federal agencies being overwhelmed with waiver requests that will require significant agency resources to manage in a timely and effective manner.

2. *Plastic and Polymer-Based Products*

Plastic and polymer-based products are ubiquitously used in construction projects. Polyvinyl Chloride (more commonly known as PVC or vinyl) is a high strength thermoplastic material widely used in construction applications, such as pipes wire and cable, siding and windows, among others. Other common plastics used in construction include but are not limited to high density polyethlene, expanded polystyrene, and more, which are used for seals, doors and windows and more. Polyurethane spray, for example, is frequently used for insulation when constructing green or low energy buildings.

The challenge with plastics and polymer-based products is delineating which are "construction materials" versus "manufactured products." To the extent that plastics incorporated as a component of a clearly manufactured product, like a door or window, they should be considered a part of the manufactured product as opposed to a construction material. That stated, OMB, as noted in the above example regarding non-ferrous materials, must conduct thorough studies of the domestic manufacturing capacity before rolling out any specific plastics as applicable under BABAA.

3. *Glass (including optic glass)*

There are many types of glass used in construction, including but not limited to: sheet or flat glass, float glass, laminated glass, shatterproof glass, energy-efficient glass, wired glass, tinted glass, toughened glass chromatic glass, extra-clean / self-cleaning glass and glass blocks. When making glass, the basic manufacturing processes include melting and refining, the float bath, coating (depending on the type of glass), annealing and cutting.

In a fiber optic cable, many individual optical fibers are bound together around a central steel cable or high-strength plastic carrier for support. This core is then covered with protective layers of materials such as aluminum, Kevlar, and polyethylene (the cladding). It is unclear to AGC how optic glass could be a construction material when it must be combined with multiple construction materials (via manufacturing processes) into fiber optic cable, itself a manufactured product.

4. *Lumber*

Lumber is used extensively throughout the construction industry in numerous forms. Some examples include plywood, hardboard, laminated veneer lumber, and oriented strand board. While lumber can be used without other additives, many of the listed products go through a manufacturing process that combines them with other construction materials in order to achieve a specific desired outcome that would not have been possible otherwise.

Plywood products, for example, improve on aspects of the parent wood as they are made from thin slices of wood that are glued together to improve stability, impact resistance, and strength-to-weight ratio. The usage of glue in such products can add an element of confusion, as glue used in construction is often derived from polymers. As stated previously, having specific materials listed to fall under the "construction materials" category after thorough study of U.S. capacity would reduce confusion and increase compliance.

5. *Drywall*

Drywall is a panel made from gypsum that is typically used in building interiors. Multiple variations and specifications of drywall are made to meet the various needs of a building depending on climate, location, and preference. Drywall can be mixed with a combination of materials that can affect the mildew, flammability, and water absorption attributes of the product.

One such example of this is drywall that is made to prevent mold from forming will utilize a fiber glass mesh, which will remove a possible organic food source for mold to grow and thus be mildew resistant. To reiterate our concerns in the glass example above, it is unclear how drywall could be a construction material when it must be combined with multiple construction materials into drywall.

C. AGC Urges OMB to Implement BABAA in an Incremental Fashion as California and Colorado Have for Their State "Buy Clean" Laws

Public policy decisions involving construction materials is not limited to those establishing domestic manufacturing preferences. Similar in their focus on such materials, but differing in the end aim of their manufacture, "buy clean" construction materials initiatives are currently being implemented in both California and Colorado.

The objective of "buy clean" initiatives is to decrease greenhouse gas emissions GHG in the manufacturing of certain construction materials as a means to address climate change. In both cases, these states understand that the manufacturing of construction materials and its supply chains are highly complex and require thorough study before new standards for their inclusion in state construction projects are established. In addition, without proper due diligence, the transport of compliant construction materials in some parts of the country could result in negative impacts to the environment. AGC urges OMB to take a similar, thoughtful approach to establishing construction materials standards for BABAA like those undertaken in California and Colorado to implement their buy clean programs.

Enacted in 2017, the Buy Clean California Act (BCCA) requires contractors that bid on infrastructure projects to disclose GHG emissions data for certain materials that they plan to use. These disclosures, called Environmental Product Declarations (EPDs), allow government purchasers to take the embodied carbon of materials into account, in turn using the states' purchasing power to influence manufacturers to reduce emissions.

The Department of General Services (DGS), in consultation with the California Air Resources Board (CARB), took several years to establish and publish the maximum acceptable Global Warming Potential (GWP) limit for four eligible materials. The BCCA targets carbon emissions associated with the production of structural steel (hot-rolled sections, hollow structural sections, and plate), concrete reinforcing steel, flat glass, and mineral wool board insulation. When used in public works projects, these eligible materials must have a GWP that does not exceed the limit set by DGS. These standards take effect in July 2022 (nearly five years from enactment), as agencies and the public were able to work with DGS to thoroughly inform the standards-making process and work through potential impacts.

On July 6, 2021, Colorado passed HB21-1303: Global Warming Potential for Public Project Materials. The Office of the State Architect and the Department of Transportation are each required to set policies on public procurement by January 1, 2024 and January 1, 2025, respectively and have called on industry and manufacturing experts to assist in the development of standards to ensure sensible implementation.

While not enacted, Washington state also has conducted research into construction materials' manufacture before establishing standards. In 2018, members of the Washington State House of Representatives introduced House Bill (HB) 2412 – Creating the Buy Clean Washington Act. Modeled after the Buy Clean California Act, HB 2412 proposed that WA state agencies awarding construction contracts require EPDs for an eligible list of materials. Although the bill did not move forward, a modified version of the proposed study that was included in the capital budget.

The capital budget authorized the UW College of Built Environments to collaborate with the Central Washington University Construction Management Program and the Washington State University Architecture and Engineering School to "analyze existing embodied carbon policy and propose methods to categorize structural materials and report structural material quantities and origins." This resulted in the Buy Clean Washington Study.

Again, AGC urges OMB to take a more thorough approach to establishing standards for construction materials via research, study and ample public comment, as was done in California and Colorado.

(2) What should "all manufacturing processes" mean under Section 70912(6)(c) of the Act?

(a) Should the term "all manufacturing processes" have the same meaning across all construction materials, or should the standard be set differently for each product, material, or category of product or material?

Due to the vast difference in manufacturing processes in the listed materials, it will be challenging to apply the same exact meaning across a vast array of materials. Thus, AGC favors that each of the five construction material categories listed under "construction material" undergo separate study and rulemaking processes to appropriately consider their manufacture.

For example, there are significant differences in the manufacturing processes for lumber as compared to plastics and polymer-based products. Plastics derive from various organic materials, such as cellulose, coal, natural gas, salt and crude oil. First there must be an extraction of raw materials. Then to begin the manufacturing process, those materials (involving thousands of compounds) must be mixed and processed under particular conditions. There are refining, polymerization and compounding processes. The lumber manufacturing process, on the other hand, involves the treatment of timber—the raw material—at a lumber mill where a mill undertakes a host of manufacturing processes that may involve debarking and bucking, head rig sawing, edging, trimming, rough lumber sorting, stickering, drying, planing and grading.

To apply the same meaning for the term "all manufacturing processes" across these categories is likely to be arbitrary and capricious at best. OMB must conduct more throughout research and investigation into how to define these processes for each category of construction material before putting forth standards. That can only be done, at a minimum, via further research and a sensible and thoughtful rulemaking processes that allow for sufficient public comment on proposed standards that a RFI process like this does not provide.

(b) For example, the equivalent standard for iron and steel products is "all manufacturing processes, from the initial melting stage through the application of coatings," which does not require the iron ore to be mined in the United States, and begins the manufacturing process with "initial melting." What should be the equivalent first process for "construction materials," and should the description be different for lumber, glass, and other construction materials?

OMB and other federal agencies should differentiate between raw materials and construction materials in a similar manner as the standard for iron and steel products takes regarding iron ore (a raw material). Such an approach is sensible because no construction materials as defined under BABAA are incorporated into construction projects in their raw material form (as stone, sand and aggregates, for example are explicitly excluded from the definition, among other things). There is often some degree of transformative change in the raw material to allow it to be suitable for incorporation into a construction project. For example, timber is the raw material needed to process lumber suitable for incorporation into construction projects, but timber itself not utilized—to AGC's knowledge—on federal and federally assisted projects. Consequently, following a similar standard for "all manufacturing processes" that differentiates between raw materials and construction materials, as is done for the raw material considerations with iron and steel, would be an appropriate.

Nevertheless, AGC contends that OMB should propose such standards for public comment before making them final. In addition, as other agencies have already done, OMB should also issue a government-wide waiver delaying BABAA implementation until the standards are finalized, rather than issuing new standards haphazardly that impact ongoing solicitation and contracts.

(c) If relevant to any construction materials, should "final assembly" be considered a manufacturing process? Or should a manufacturing process be limited to processes that alter the properties of a material in some way? If limited to processes that alter the properties of a material, should any particular standard apply? Should the standard be different for lumber, glass, and other construction materials?

As noted in AGC's responses to Questions 2(a) and 2(b), the association holds that OMB must undertake thorough study and review of the manufacturing processes involved in manufacturing applicable construction materials before establishing standards. This RFI process in no way represents such study necessary to promulgate such standards. In addition, AGC contends that OMB should undertake separate rulemakings to establish such standards to ensure that proposals receive sufficient public input before being put in place.

(3) How should agencies distinguish "construction materials" from "manufactured products" to provide clarity on how to comply with the Act's requirements and ensure efficient and effective administration?

As AGC stated in response to Question 1, "construction materials" should only refer to a specific set of listed materials: those that were originally denoted in BABAA. Unless a more clear and concise differentiation can be achieved, the confusion between both terms will cause undue complexity to material procurement. Construction materials go through a manufacturing process to reach their functional state and this can create an overlap of the terms and confusion on compliance and enforcement of the regulations. Therefore, maintaining a finite universe of items that are considered construction materials will help mitigate the dilemma of whether an item is a "construction material" or "manufactured product" under BABAA, because a "construction material" could then not be considered a "manufactured product" and vice versa.

AGC also recommends that the OMB follow a definition of "manufactured product" which has precedent in previous regulations such as in 49 CFR § 661.3 where a manufactured product is "an item produced as a result of the manufacturing process" and the manufactured process is defined as "the application of processes to alter the form or function of materials or of elements of the product in a manner adding value and transforming those materials or elements so that they represent a new end product functionally different from that which would result from mere assembly of the elements or materials." Using a previously established definition for the same term is probably the most effective and efficient way to implement BABAA requirements. This would be in line with the approach noted in AGC's response to Question 2(b) where there is differentiation between the raw material and manufactured product based upon the manufacturing processes for that product or material.

(4) How should OMB take into consideration and seek to maximize the direct and indirect jobs benefited or created in the production of construction materials, as required by the Act?

When prioritizing the maximization of direct and indirect job creation through BABAA, two different aspects need to be looked at. In general, Buy America policies are beneficial to manufacturing industry jobs (with some exceptions), but they occur at the cost of jobs in other industries. According to the **Congressional Research Service**, in 2019 Buy America requirements supported an estimated 57,000 U.S. manufacturing jobs while terminating all Buy America requirements would have created an estimate of more than 300,000 job in the U.S. economy.

As the benefits to supporting most manufacturing jobs is apparent, AGC would like to highlight the impacts on other sectors of the economy that are negatively affected by a nearly 6-to-1 ratio. In general, any regulations that restrict choice cause a net job loss and expanding choices makes the economy more competitive. **According to the Congressional Budget Office** "trade encourages a more efficient allocation of resources in the economy and raises the average productivity of businesses and industries in the United States. Through that increase in productivity, trade can boost economic output and workers' average real (inflation-adjusted) wage. In addition, U.S. consumers and businesses benefit because trade lowers prices for some

goods and services and increases the variety of products available for purchase."

Expanded Buy America preferences are expected to have an upward pressure on the cost of construction materials and the results of that pressure can have negative consequences for the people and businesses that utilize those construction materials. As prices increase, downstream companies can lose more jobs. In the manufacturing industry, a fabrication business might not be able to purchase the same quantity of materials to work with and face the need to shrink output, reduce wages, or reduce the number of employees.

According to the most recent AGC **Construction Inflation Alert**, construction companies are already experiencing a negative gap between increasing material costs and bid prices for projects. Further pressure on higher material prices will only exacerbate the gap and have a negative impact on the construction industry as they are faced with shrinking profits on projects. As contractors are attempting to close the gap between material costs and bid prices, the cost of infrastructure projects will continue to rise and in cases such as the Infrastructure Investment and Jobs Act, where there is a finite amount of money to allocate, it will lead to fewer projects that can be awarded. A decreased number of projects will result in less construction labor needed as certain infrastructure project will have to be canceled or scaled back. In some cases, the risk will be too great and contractors will ultimately decide not to bid on a project.

(5) What is the current and projected capacity of United States manufacturers to supply construction materials that meet the Act's standards? How will this capacity be impacted by the standard provided for "all manufacturing processes" under the Act? Please answer this question for any of the following materials that you have responsive information on: 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. Please also answer this question for any other material, product, or category of product you identified under question (1) above.

OMB and other federal agencies should not rely solely on responses to this 32-day RFI to put forth binding guidance or regulations under BABAA. Rather, from the information generated, OMB should conduct further study of applicable manufacturing capacity to ensure that any final standards do not unnecessarily delay construction of infrastructure that benefits American communities, especially underserved and disadvantaged communities.

It is clear to AGC, that a lack of more thoughtful, rigorous review, similar to those being undertaken by the U.S. Department of Transportation and U.S. Housing and Urban Development, could, in fact, further disadvantage those communities which this Administration seeks to help most via the Infrastructure Investment and Jobs Act. Similarly, this could also impede efforts to combat climate change by making it difficult, if not impossible, to spend the money in some of these new programs.

(6) Do you anticipate that United States manufacturers will be able to supply construction materials that meet the Act's standards in sufficient and reasonably available quantities and of a satisfactory quality to all infrastructure projects covered by the Act? Will this ability be impacted by the increased demand for United States manufacturing? Do you

foresee supply shortages or other issues for any material? If so, what Federal policies exist that may help alleviate the challenges you identified? Please answer this question for all materials referenced in question (5) above.

AGC recognizes the importance of incentivizing growth to strengthen America's manufacturing capacity. However, over the past two years, countless construction projects have been faced with mounting delays and setbacks due to unprecedented shortage of material availability along with ever-increasing lead times for deliveries. With the problems that the construction industry is confronting, contractors will face even more burdens to material procurement while working on improving America's infrastructure if they need to shift supply chains to be able to meet more expanded domestic procurement during a critical time in the current economic climate.

As AGC has been documenting since March 2021, the challenges the construction industry is facing as mentioned in the **Construction Inflation Alert** document how "[f]rom the first days of the pandemic, availability and delivery times for materials have been never-ending headaches for construction firms" and that "contractors have reported being quoted exceptionally long lead times for inputs as varied as electrical transformers and switchgear, traffic signal equipment, paint, insulation, windows, and roofing fasteners."

Along with what we hear from our members, state and federal agencies have released similarly worrying statements about manufacturing capacity to meet new BABAA requirements, not only for construction materials, but also for manufactured products. For example, shortly after the Infrastructure Investment and Jobs Act was signed into law, U.S. DOT and the Department of Energy (DOE) acted quickly to open a docket on EV Charging Equipment and Buy America Requirements.[1] There, USDOT and DOE made the stark statement that they "are not aware of any EV chargers currently able to meet applicable Buy America requirement[s] for steel and iron."[2]

For the reasons stated above along with ongoing **labor shortages in the manufacturing industry**, AGC does not believe that U.S. manufacturers will be able to meet BABAA's standards in sufficient quantities and in a reasonable timeframe. If they cannot reasonably meet the current demand for these products, an increase in demand from BABAA's requirements will only worsen the situation.

AGC supports actions to grow the American manufacturing industry; nevertheless, a rushed implementation of BABAA can cause unnecessary delays to completing infrastructure projects and have an adverse effect on the people these projects are meant to serve. AGC members are eager to work on delivering high quality infrastructure, and with the ongoing problems with supply chains, labor, and material shortages it is vital that they do not face uncertain regulatory hurdles.

To alleviate the challenges in implementing BABAA, we recommend taking an approach similar to the U.S. Department of Transportation and the Department of Housing and Urban

[1] 86 Federal Register 67115 (November 24, 2021)
[2] Id. at 67117

Development and delaying implementation in order to establish certification processes for compliance, ensure all parties are prepared for timely execution of projects, gather more data on market activities to establish domestic availability, and train government staff. This will also allow time for American manufacturers to ramp up production to meet the increased demand.

(7) How can the Act's waiver transparency requirements and supplier scouting programs be leveraged to identify gaps in domestic sourcing and inform capital investment planning?

AGC urges OMB to ensure that all requests for waivers be immediately posted to a website upon receipt. This will help mitigate confusion and help identify potential domestic sourcing issues. OMB must also take under advisement that supply chains for construction materials are often regional in nature. While there may be materials available domestically, at times those materials may face shortages that often appear regionally as opposed to nationally. Shipping costs of construction materials could oftentimes make their transport from elsewhere uneconomical. In addition, to ship such materials would undoubtedly add to greenhouse gas emissions.

(8) How else might OMB spur and incentivize domestic manufacturing of construction materials that meet the Act's standards?

AGC holds that Congress, not OMB, is best positioned to incentivize domestic manufacturing, as Congress can pass legislation establishing competitive tax policy that will have the greatest impact.

(9) What additional considerations should OMB consider when developing guidance and standards for construction materials?

The statute provides some details as to what are and are not "construction materials." In both cases, OMB must make clear to agencies what falls under either category or otherwise face the very realistic possibility of numerous interpretations among not only federal construction agencies, but also state and local agencies that receive applicable federal funds for infrastructure investment. In a time of unparalleled supply constraints and material shortages, additional and unclear material requirements will lead to problematic project delays or halts and cause serious setbacks in improving American infrastructure in a timely manner.

To help avoid this scenario as best as possible, AGC recommends that:

A. OMB provide guidance for determining whether a construction material falls under the exemptions under BABAA;
B. OMB begin with a thorough review of the explicitly denoted construction materials in BABAA to determine that existing supply chains can meet the arbitrary deadline set by Congress; and
C. OMB develop a thorough, transparent and inclusive process under which additional items may be included under the definition of "construction materials"

Below, AGC elucidates why and how OMB should implement these recommendations.

A. AGC Recommends that OMB Provide Guidance for Determining Whether a Construction Material Falls under BABAA Exemptions

BABAA is clear in stating that "the term 'construction materials' shall not include cement and cementitious materials, aggregates such as sand, stone or gravel, or aggregate binding agents or additives." Despite this clarity, there remain questions in the construction industry regarding the scope of this exemption.

In order to follow this exemption, avoid confusion on construction jobsites, and circumvent submittal of needless waivers, AGC recommends that OMB firmly state that agencies should interpret these exemptions broadly. To that point, OMB should make clear that the definition of "construction materials" does not include construction materials that derive from the exempted items. To that point, asphalt and concrete—which are made from aggregates, binding agents and additives—should be exempted.

B. AGC Recommends that OMB Undertake a Thorough Review of the Explicitly Denoted Construction Materials in BABAA to Determine Whether Existing Supply Chains Can Meet the Arbitrary Deadline set by Congress

AGC appreciates that OMB has provided a 32-day comment period to help better understand the realities of the construction supply chain through this RFI. However, this should merely be the beginning of a thorough, transparent and inclusive review of the explicitly denoted "construction materials" that fall under BABAA. The Biden administration has previously undertaken such approaches.

For example, on February 24, 2021, President Biden signed Executive Order (EO) 14017 on America's Supply Chains. Under that EO, certain agencies conducted a **100-day supply chain review** relating to semiconductor manufacturing, high-capacity batteries, critical minerals, and pharmaceuticals, among other things. On February 24, 2022, the Administration released an additional **follow up report**, as required under the EO, with individual agencies providing even more detailed reviews, like the U.S. Department of Transportation's **Supply Chain Assessment of the Transportation Industrial Base: Freight and Logistics**.

Just as the Administration took a thoughtful approach to assessing and strategizing supply chain improvement, so too should OMB in regards to BABAA implementation. This sentiment is underscored by the fact that USDOT's primary supply chain report recommendation is to invest in freight infrastructure, which will oftentimes include BABAA requirements that could, in fact, significantly delay those critical projects.

To execute such a plan, AGC recommends that OMB undertake a process similar to that the Administration undertook under EO 14017. With agencies like the USDOT and the U.S. Department of Housing and Urban Development already instituting transitional waivers, OMB would be better served by bringing agencies together with their respective construction and manufacturing communities. Such communication among federal agency experts who procure and help deliver infrastructure projects with their industry partners would better identify specific issues and recommendations for addressing them. For example, this undertaking could help

better focus the design and engineering community towards maximizing American-made construction materials that avoid the need for waiver requests during construction.

C. AGC Recommends that OMB Develop a Thorough, Transparent and Inclusive Process under which Additional Items may be Included under the Definition of "Construction Materials"

As noted in its response to Question 1, AGC recommends that OMB follow the lead of California and Colorado in taking sufficient time via thorough, transparent and inclusive processes to establish standards for construction materials inclusion in construction projects under BABAA.

(10) What guidelines should be considered by OMB and the FAR Council to determine whether an end product that might be procured under the BAA by a Federal agency has been manufactured domestically?

AGC urges OMB and the FAR Council to undertake a thorough rulemaking process to develop these guidelines with sufficient time for public comment on draft guidelines.

(a) What is the best way to promote a clear and consistent understanding of the term "manufacturing" while accommodating the range of manufacturing processes involved in the wide variety of products purchased by the Federal Government?

AGC defers to its response in Question 10.

(b) Should consideration be given to the definition of "manufacturer" used in SBA's regulations, as described above?

AGC is not in the best position to answer this question.

(c) Should consideration be given to holdings cited by courts or the GAO for determining whether an end product is domestically manufactured, such as whether substantial changes in physical character occurred domestically, whether the article is completed in the form required by the Government domestically, or whether the item being procured is made suitable for its intended use, and its identity is established, in the United States?

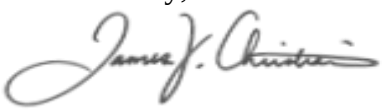
Yes. To the extent OMB can utilize existing legal precedent for determining whether an end product is domestically manufactured, AGC supports such incorporation into OMB and other agencies' guidance and regulations. Taking this approach, OMB could help mitigate new litigation that would, in many cases, merely be a rehash of what is already mostly settled law that has been incorporated into existing supply chains and business models. In addition, such an approach could help put forth some degree of certainty among construction supply chains and contractors alike.

(d) What existing sources, in addition to those described above, may offer relevant definitions or guidelines that could be suitable for understanding whether an end item has been domestically manufactured in the context of Federal procurement?

AGC is unaware of other sources that may offer relevant definitions or guidelines.

We appreciate the opportunity to share our insights with you and to help advance our common goals of fair competition and of economic and efficient performance of publicly funded construction projects. If you would like to discuss this matter with us further, please do not hesitate to contact me.

Sincerely,



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