

## Frequently Asked Questions on White House Office of Management & Budget's Final Build America, Buy America Guidance

Congress passed and President Biden signed into law the Build America, Buy America Act (BABAA) as part of the Infrastructure Investment and Jobs Act (IIJA) on November 15, 2021. BABAA requires that all iron, steel, manufactured products and construction materials used in federally assisted construction projects must be produced in the United States. BABAA effectively expands long existing Buy America requirements applicable to federal-aid transportation projects to all other types of federal-aid construction projects (BABAA does not apply to direct federal construction projects that fall under the Buy American Act).

The Made in America Office (MIAO) within the White House Office of Management and Budget is responsible for implementing BABAA across federal agencies. The MIAO issued preliminary guidance for BABAA on April 21, 2022 (called [OMB Memorandum M-22-11](#)), and issued final guidance on August 14, 2023. The FAQs below help provide some key questions construction contractors may have about this final guidance and will be updated as AGC of America staff continues to review the guidance.

- **Question: *Where can I find the final guidance?***
  - **Answer:** OMB provides a five-page summary (found [HERE](#)) and the complete final guidance (found [HERE](#)).
- **Question: *Which type of contracts are impacted by the BABAA final guidance?***
  - **Answer:** BABAA final guidance applies to all federal financial assistance for infrastructure projects— or grants, cooperative agreements, and other federal awards that federal agencies provide to recipients constructing such projects.

The final guidance does *not* apply direct federal infrastructure projects. For example, projects directly contracted with the U.S. Army Corps of Engineers, General Services Administration, Department of Veterans Affairs, etc., do not have BABAA requirements, but do have Buy America Act requirements which have been in place since the 1930s.

- **Question: *When will this guidance take effect and how will it apply to projects?***
  - **Answer:** The final guidance will take effect on October 23, 2023.

That stated, the guidance provides for a transition period from the guidance in OMB Memorandum M-22-11 to the final guidance for ongoing or previously planned projects. Except in circumstances defined in the guidance, the final guidance applies to federal-aid projects awarded on or after October 23.

Awards obligated on or after May 14, 2022, the effective date of BABAA, and before the effective date of the final guidance, are instead subject to OMB Memorandum M-22-11.

In general, this BABAA guidance should be considered the final authority. However, OMB will also continue to convene inter-agency workgroups on a recurring basis to ensure that federal agencies implement BABA in a consistent and uniform manner.

Each federal agency with federal-aid construction programs (including but not limited to the U.S. Department of Transportation (transportation), U.S. Department of Housing and Urban Development (affordable housing), U.S. Environmental Protection Agency (water and wastewater), and U.S. Department of Commerce (broadband) may undertake their own processes to put forth “clarifying” guidance.

At a minimum, contractors may expect federal agencies to put forth their own guidance to recipients of federal-aid construction funds (e.g., state departments of transportation, municipal drinking water and wastewater agencies, etc.) to ensure that this new OMB guidance is included in applicable contract awards made on or after October 23. If a contractor is currently bidding any solicitations for federal-aid construction projects, the contractor may want to consider submitting an RFI to the owner inquiring about this impending guidance and its impact on the solicitation process.

- **Question:** *What significant changes are made from the preliminary guidance to this final guidance when it comes to construction materials?*
  - **Answer:** The final guidance maintains that original construction materials—non-ferrous metals, plastic and polymer-based products, glass, lumber, and dry wall—it put forth must be “produced in the United States.” It also adds three new construction materials to the list: fiber optic cable (including drop cable), optical fiber, and engineered wood.

The final guidance also specifies the specific manufacturing processes that must take place in the United States for each construction materials to be considered compliant. It also notes that “minor additions of articles, materials, supplies, or binding agents to a construction material do not change the categorization of the construction material” to a manufactured product, for example.

It is important to note that OMB wanted to also include paint, coatings, bricks, and geotextiles as construction materials. However, in line with AGC recommendations, it did not do so.

- **Question:** *Are asphalt and concrete exempt from BABAA requirements?*
  - **Answer:** For the most part. “After careful consideration of the comments received on this topic and the statutory text of BABA, Office of Management and Budget (OMB) clarifies that section 70917(c) materials, on their own, are not manufactured products. Further, section 70917(c) materials should not be considered manufactured

products when they are used at or combined proximate to the work site — such as is the case with wet concrete or hot mix asphalt brought to the work site for incorporation.”

As a reminder, those exempted materials under section 70917(c) include: “cement and cementitious materials, aggregates such as stone, sand, or gravel, or aggregate binding agents or additives.”

- **Question: *When will exempted construction materials, as noted directly above, be considered a manufactured product, and have to be BABAA compliant when combined?***
  - **Answer:** When the exempted materials in combined form are brought to the work site in specific shape or form. “Certain section 70917(c) materials (such as stone, sand, and gravel) may be used to produce a manufactured product, such as is precast concrete. Precast concrete is made of components, is processed into a specific shape or form, and is in such state when brought to the work site.” AGC also believes that this would include other commonly used products like concrete pipe.
- **Question: *What significant changes are made to the requirements for complaint manufactured products?***
  - **Answer:** The definition of “manufactured products” was revised to provide an affirmative definition for the term instead of just explaining, in the negative. The revised definition also clarifying language on items that may be considered components of a manufactured products. The definition is now:

Manufactured products means:

- (1) Articles, materials, or supplies that have been:
  - (i) Processed into a specific form and shape; or
  - (ii) Combined with other articles, materials, or supplies to create a product with different properties than the individual articles, materials, or supplies.

[Note here that a manufactured product—to meet the “produced in the United States” requirement—is one where 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 components of the manufactured product, unless another standard applies (e.g., Federal Transit Administration federal-aid projects already have their own manufactured products and components test that will likely remain in place). That stated, this 55 percent of the cost of components test will likely be new to many manufacturers, and, in turn, could impede implementation and compliance.

- (2) If an item is classified as an iron or steel product, a construction material, or a section 70917(c) material under § 184.4(e) and the definitions set forth in this section, then it is not a manufactured product. However, an article, material, or supply classified as a manufactured product under § 184.4(e) and paragraph (1) of this definition may include components that are construction materials, iron or steel products, or section 70917(c) materials.

[Note that is an item is predominantly iron or steel or a combination of both—where the cost of the iron and steel content exceeds 50 percent of all of its components—then it is not a “manufactured product” but instead an “iron or steel product” and should meet the “produced in the United States” requirement for iron or steel products. That requirement is for all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States]

- **Question: *Does this guidance impact the Federal Highway Administration’s (FHWA) general waiver of Buy America requirements for manufactured products on federal-aid highway projects?***

- **Answer:** No. The FHWA manufactured products waiver remains in place, for now. FHWA, however, is considering removing that 40-year-old waiver. If that does happen, FHWA will likely issue new guidance on manufactured products in line with this new guidance, as explained above.

As you may recall, [FHWA solicited input](#) on possibly withdrawing the manufactured products waiver on March 17. AGC members sent over a thousand comments in support of maintaining waiver and AGC of America [filed comments](#) in support of such as well. The association also conducted a survey jointly with the American Road and Transportation Builders Association reflecting the negative impacts of the waiver’s withdrawal on the construction industry and project delivery.

- **Question: *What has AGC of America been doing on BABAA?***

- **Answer:** AGC of America lobbied in support of exemptions from BABAA requirements during the legislative process. The association successfully secured language exempting cement, stone, sand, gravel and aggregate binders from the definition of “construction materials” in the statute. Nevertheless, AGC understood that implementation of that exemption would require further effort throughout the regulatory implementation process.

To that point, AGC has spent the better part of the last two years advocating for reasonable implementation of BABAA. See below for some examples.

- AGC [expresses concerns](#) with proposals to expand Buy America requirements – June 2021
- AGC [weighs in on Buy America](#) to US Senate – July 2021
- AGC asks for Buy America [transition period](#) and improvements to waiver process – January 2022
- [AGC meets](#) with Made in America Office – March 2022
- [AGC calls on White House](#) to study impacts of Buy America on Supply Chain – May 2022
- AGC calls for [delay of implementation](#) of Buy America requirements – June 2022
- [AGC meets](#) with Made in America Office – November 2022
- AGC Member, [Ali Mills](#), testifies on Buy America – December 2022
- AGC Meets with [FHWA Administrator](#) on Buy America – January 2023

Updated: *August 24, 2023*



- AGC Member, [Jeff Firth](#), testifies on Buy America – February 2023
- [AGC weighs in](#) on Made in America Guidance – March 2023
- [AGC meets](#) with Made in America Office – May 2023