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March 12, 2023

The Honorable Shalanda Young
Director
Office of Management and Budget
725 17th St. NW
Washington, DC 20503

RE: Docket No. OMB-2023-0004 - Proposed Guidance: Guidance for Grants and Agreements

Dear Director Young,

On behalf of the Associated General Contractors of America (AGC), I thank the Office of Management and Budget (OMB) for soliciting input from the construction industry regarding the Proposed Guidance as part of OMB's implementation process for the Build America, Buy America Act (BABAA).

To provide some background, AGC is the nation's leading construction trade association. It dates to 1918, and it today represents more than 27,000 member firms including construction contractor firms, suppliers, and service providers. Through a nationwide network of 89 chapters in all 50 states, D.C., and Puerto Rico, AGC contractors are engaged in the construction of the nation's highways, bridges, broadband infrastructure, airports, transit systems, public and private buildings, water works facilities and multi-family housing units, among other things.

AGC supports efforts to grow American manufacturing; nevertheless, a rushed implementation of BABAA could unnecessarily delay projects that would benefit the American public. AGC members are eager to deliver on rebuilding the nation's infrastructure. However, with construction material shortages and supply chains constraints, it is vital that we do not exacerbate these conditions that have already made it challenging to ensure the success of the Infrastructure Investment and Jobs Act (IIJA). We appreciate the opportunity to provide feedback on the following sections:

(1) Should OMB adopt definitions based on those provided in the FAR at [48 CFR 25.003](#)?

In an effort to provide consistent and clear requirements for BABAA, OMB has proposed to adopt already existing definitions from the FAR and applying them to BABAA. The definitions in question are "cost of components," "end product," and "component" (hereby simply referred to as "definitions" for the purposes of answering **Question 1**). Although it is exceptionally important that OMB's guidance is consistent and clear, there are a variety of reasons why OMB should create its own separate definitions to wholly encompass the unique nature of BABAA's requirements.

As was noted in the **Changes Proposed by OMB and Expected Impact** section of the Proposed Guidance, the FAR's definition "is used for Federal procurement," while BABAA's applicability is much wider and more stringent. We urge caution in applying the definitions of specific FAR rules when they were written with the intent of addressing different challenges, circumstances, and requirements.

The FAR definition includes clarification on **commercially available off-the-shelf (COTS)** items as part of their definition of "end product." COTS items can include hardware and software that is sold in substantial quantities in the commercial marketplace that are incorporated into a variety of infrastructure projects. As BABAA does not mention such a category, OMB should clarify that COTS would be included in that definition. Failure to align the definition to include COTS risks additional burdens on recipients and their partners as the FAR's definition was designed to work in conjunction with such a category. Applying the proposed "cost of components" test to existing software incorporated into infrastructure projects would be problematic due to the difficulty in finding existing BABAA compliant software. In turn, the definition as proposed would force recipients to procure custom-made software to manage infrastructure assets such as streetlights, EV charging stations, traffic lights, cameras, smart poles, and various sensors used to gather data. As software development can be a process which takes years to complete, BABAA compliance for these items could jeopardize the Administration's ambitious goals for American infrastructure, including the installation of 500,000 EV charging stations. Failure to include COTS items along with the other definitions will negatively impact safety, climate change mitigation, data collection, and other goals for modern infrastructure as certain manufactured products, otherwise ready to be installed and utilized, face delayed incorporation due to being subject to requirements that were not originally intended for them.

To further illustrate the lack of interoperability of using many of the proposed FAR definitions for BABAA guidance, the definitions which OMB has proposed to use function in conjunction with definitions listed in **48 CFR 25.003**, would be contradictory to the scope of BABAA. For example, FAR's version of the term "construction materials" goes beyond congressional intent of what was included in BABAA. The FAR definition was written for a different purpose, and therefore much more expansive.

As federal procurement is subject to international trade agreements and obligations, the definitions that the FAR uses were crafted with the understanding that a wider variety of exemptions and flexibility are available. Although AGC supports additional flexibility in BABAA, no further guidance has been provided by OMB other than that BABAA "be applied in a manner consistent with U.S. trade agreement obligations related to Government procurement".¹ As no further guidance has been provided on trade agreement applicability (other than the previously mentioned statement or similar) for BABAA, it would be a misguided attempt to use FAR's definitions, wherein

¹ <https://www.federalregister.gov/documents/2022/04/21/2022-08491/notice-of-listening-sessions-and-request-for-information>

the regulations provide additional comprehensive details on how trade obligations interact with the definitions in question.

AGC believes that OMB should exercise caution in unilaterally basing definitions on already existing rules as it could lead to further confusion and stray from congressional intent. However, if OMB still decides to implement the requirements based on FAR definitions, we have the following feedback:

- OMB should remove the words “by the contractor” in the definition for “cost of components.” This language could exclude subcontractors or other stakeholders from being able to purchase compliant materials for a project. It is advisable to not replace “by the contractor” with an alternative entity to provide flexibility as to which entities are allowed to procure materials.
- On the suggested definition of “end product,” the term “public use” should be removed or replaced as not all federally assisted projects are intended for public use. One example of this conflict can be found in affordable housing programs where the final intended use is private.
- AGC agrees that, should OMB choose the suggested definition of “cost of components,” the term “construction materials” should be removed. Similarly, OMB should do the same for the definition of “components” as it also contains a reference to construction materials while the standard is intended for manufactured products.

Although the suggestions in the list would alleviate some of the possible confusion with the Proposed Guidance, AGC strongly cautions OMB on the use of FAR’s definitions as outlined in our response to Question 1.

(2) Other construction material standards. What, if any, additional construction materials should be included in the proposed guidance? OMB requests feedback on the inclusion of the following construction materials and proposed standards for manufacturing processes for those construction materials to determine if they are produced in the United States:

At a time when the industry has been experiencing supply chain constraints, material shortages, and historically high prices for construction materials, OMB should not be exploring expanding BABAA’s requirements. Economic factors coupled with a rushed implementation of BABAA could further jeopardize the success of the IIJA. For example, in the first year of the IIJA, states were not reporting an increase in projects as expected, in fact many were only able to move forward with a similar number of projects that we saw under the extension of the Fixing America’s Surface Transportation Act due to historic inflation and supply chain constraints.

Federal and state agencies, along with their partners, either developed or were still in the process of developing policies based on OMB’s Initial Guidance. Now, they are suddenly faced with a different and expanded set of requirements that will further delay effective implementation of BABAA. OMB needs to ensure that a reasonable and phased approach is taken with implementing the requirements to the initial five listed construction materials before shifting focus to an expanded list of materials. Implementation of the materials specifically outlined in BABAA should be the focus of any final guidance rather than leaving the process incomplete while switching efforts to exploring expanded requirements.

It is also difficult to properly comment on the proposal to include additional materials in the list as OMB has not shared any of their findings about the proposed materials. Has OMB conducted research and outreach to accurately judge the capacity and capability of U.S. manufacturers to meet all additional demand? If not, why are these specific materials being considered? If OMB has conducted research, why has it not been shared for the public to view and comment on? Throughout the implementation process, OMB has lacked transparency in its findings, research, and reasoning. Without knowledge of how or why OMB has come to these conclusions on additional materials, the public cannot adequately address the accuracy and reasoning of OMB's proposal to expand the category of construction materials.

(3) *Proposed definition of construction materials.* Is additional guidance needed on the proposed definition of construction materials? In this proposed guidance, OMB only intends to classify materials that consist of only one or more of the construction materials listed in § 184.3(c)(1) as construction materials. However, OMB also seeks to avoid disqualifying construction materials with only *de minimis* additions of non-construction materials. For example, if *de minimis* additions of non-construction materials do not add significant value to, or substantially transform, the otherwise qualifying construction material, they should not change the categorization of the material under this guidance.

If OMB seeks to avoid disqualifying construction materials with *de minimis* additions of non-construction materials, OMB should provide additional guidance to the proposed definition of construction materials. The guidance for the construction material category should contain a specific standard in which it is clear and understandable to determine how much of a material's allowable cost or percentage can contain *de minimis* additions.

(4) *Definition for "predominantly" iron or steel items.* To be consistent with certain existing Buy America and Buy American laws and policies, or for other reasons, should OMB adopt a definition of "predominantly" iron or steel items? Other reasons for providing such a definition may include efficiency and to help differentiate between categories of products. What, if any, definition of the term "predominantly" should be provided in this guidance in the case of iron or steel products, as reflected in the definitions of "manufactured products" and "iron and steel products" in § 184.3 of this guidance. OMB is specifically interested in feedback on whether it should adopt a definition of the term "predominantly" similar to the definition of the term "predominantly of iron or steel or a combination of both" in the FAR at [48 CFR 25.003](#) so that Federal procurement requirements through the FAR are aligned with the uniform guidance in order to reduce burden on industry. The definition of "predominantly of iron or steel or a combination of both" in the FAR at [48 CFR 25.003](#) means that the cost of the iron and steel content exceeds 50 percent of the total cost of all its components; and also addresses the meaning of "the cost of iron and steel."

No. Iron and steel have a long history of being subject to Buy America requirements as part of various laws, but for the numerous reasons outlined in our response to **Question 1**, OMB should not utilize the same definition present in the FAR as those regulations were meant to address a different set of circumstances.

If OMB seeks to be consistent with previous domestic procurement requirements, the definitions used for iron and steel products should instead be based on the Buy America Act's existing language. The Buy America Act requires that certain agencies within the United States Department of Transportation (DOT) to apply domestic preference rules to recipients and third parties involved in procurement as part of federal financial assistance, similar to BABAA, while the FAR's focus and wording was created with the intent of addressing direct federal procurements. As iron and steel already have a decades long history of complying with DOT federal financial assistance, using already existing language from the Buy America Act would provide manufacturers and contractors the easiest transition in expanding the requirements to other federally assisted programs.

(5) How to distinguish between categories of products. Is further guidance needed on how to distinguish between steel or iron products, manufactured products, and construction materials? For example, OMB Guidance explained that items that consist of two or more of the listed construction materials that have been combined together through a manufacturing process, and items that include at least one of the listed construction materials combined through a manufacturing process with a material that is not listed as a construction material, should be treated as manufactured products, rather than as construction materials. Relative to the OMB Guidance, OMB has proposed a modified approach in this guidance for distinguishing among categories of products. That approach is set forth in the proposed definitions under § 184.3 and in particular under the definition for construction materials at § 184.3(c). OMB seeks feedback on the approach proposed in this guidance relative to the approach in the earlier OMB Guidance.

AGC believes that further guidance is necessary to distinguish between manufactured products and construction materials. As the industry has been keeping a close eye on developing BABAA policies, confusion and questions still remain among stakeholders on what materials belong to which category.

This confusion exists within state departments of transportation as they attempt to provide lists of approved products to their partners. Inconsistencies in product categorization exist on a state-by-state basis and make comparisons of differing approved products lists straightforward to scrutinize.

One example to illustrate this problem is with the categorization of epoxies and adhesives. One state DOT has the previously mentioned materials under the category of manufactured products while another state DOT has classified them as construction materials. Although these differences exist in many states throughout the nation, AGC only singles out this example to demonstrate that there is confusion in differentiating the categories. This lack of consistency poses a great risk for compliance by contractors and manufacturers which operate in multiple states. This inconsistency of interpretation also poses additional difficulties for manufacturers, wherein their products would need to meet two different sets of requirements to be compliant with interstate differences.

Another set of materials which have been subject to varying levels of interpretation are the exempt materials as mentioned in BABAA (cement and cementitious materials, aggregates such as stone, sand, or gravel, or aggregate binding agents or additives). While OMB addresses the possible varying interpretations for exempt materials in **Question 9**, it is concerning that OMB is still uncertain of how the exempt materials should be categorized when congressional intent is so clear in the statute.

To further highlight the need for more guidance in distinguishing between categories, the inconsistency in applying BABAA requirements to epoxies, adhesives, and various other materials would not be resolved if the Proposed Guidance became final in its current form, leaving various interpretations and confusion unresolved while OMB is exploring whether to expand the list of existing construction materials as noted in **Question 2**. OMB needs to take a measured response in distinguishing between different categories for the existing list of construction materials before expanding the new rules.

When there is such uncertainty around the ability to procure compliant materials, bids will come in higher than owner's engineer's estimates, which will mean fewer infrastructure projects like we saw in the first year of the IIJA.

Questions (6)(7)(8) Meaning and standards for composite building materials and fiber optic cables and optical fibers.

It was the intent of Congress, in passing BABAA, to list the materials in **Questions 6, 7, and 8** as subcategories to the more encompassing construction materials they are a part of. OMB should view the materials in question as examples and clarity set forth by Congress in explaining what the list of construction materials entail.

Additionally, separating composite building materials from the category of “plastics and polymer-based products” would expand the requirements beyond what was intended by Congress. The definition for composite building materials can be any two or more materials which are combined together for improved characteristics. A broad interpretation to this definition could encompass materials which contain no plastic or polymer-based products whatsoever. For example, combining two types of wood to make plywood or combining two types of fibers to make mesh. Congress included it as a sub-category of “plastic or polymer-based products,” and clearly intended for it to be limited to plastics or polymers as a component of the composite building material.

OMB has not stated their reasoning as to why it believes these materials should be made into an expanded list and thus it is difficult to ascertain the necessity to create additional stand-alone construction materials. Due to a lack of additional information and data on why these changes are being proposed, AGC believes that it is unnecessary to separate the materials and create a larger list for the category of construction materials as it does not seem to serve any additional purpose from what little information is available.

(9) Aggregates. Section 70917(c) of the Act provides that the term construction materials shall not include the following materials: (i) cement and cementitious materials; (ii) aggregates such as stone, sand, or gravel; or (iii) aggregate binding agents or additives (the “Excluded Materials”). However, the Act does not specify whether these Excluded Materials should be entirely excluded from coverage under Buy America Preferences. How should OMB treat Excluded Materials in the context of the manufactured product Buy America Preference under this guidance? For example, how should the guidance treat Excluded Materials made of a combination of raw materials or combined with other raw materials to create a material that has different properties than the properties of the individual raw materials? In defining manufactured products in this guidance in § 184.3, should OMB supplement the proposed definition by adding the standard under [2 CFR](#)

176.140(a)(1), which defines a “manufactured good” as “a good brought to the construction site for incorporation into the building or work that has been—(i) Processed into a specific form and shape; or (ii) Combined with other raw material to create a material that has different properties than the properties of the individual raw materials.” That is, should OMB exclude raw aggregates (such as stone, sand, or gravel) unless they have been processed into a specific form or shape or combined with other raw materials, such as combining them with cement powder and water to produce precast concrete products? How should OMB treat cement and cementitious materials before they are processed into a specific form and shape?

OMB should implement the law as written and follow congressional intent. Congress established a clear exemption to the category of “construction materials” under BABAA in Section 70917(c)(1) that states “the term “construction materials” shall not include cement and cementitious materials, aggregates such as stone, sand, or gravel, or aggregate binding agents or additives” (“Excluded Materials”). This limitation makes clear that domestic procurement preferences under BABAA which apply for construction materials do not apply to the Excluded Materials.

Congress also expressly provided that the same Excluded Materials should not be included as “inputs” in “all manufacturing processes” that produce construction materials in Section 70917(c)(2). Congress understood that the listed Excluded Materials are, when combined, concrete and asphalt mix (ordinarily considered to be construction materials). The Congressional intent and purpose of that Section cannot be interpreted any other way because the consequence of 70917(c)(2) is focused solely on their use as inputs that when combined together produce the construction material concrete or asphalt. As inputs, their obvious use together to form concrete or asphalt mix is indisputable.

There is nothing in the statute to suggest that the OMB should subject a combination of Excluded Materials to the BABAA sourcing preference if the combined materials constitute a material with different properties than the separate Excluded Materials being combined. To the contrary, the wording and structure of the statute is contrary to and precludes the theory on which OMB seeks comment.

(10) Specific sections of proposed guidance. Please provide suggestions on specific sections of the proposed guidance. Please provide clarity as to the section of the guidance that each comment is referencing by beginning each comment with the section number in brackets. ***For example; if the comment is on 2 CFR 184.1 include the following before the comment: 184.1.***

Section 184.7 Federal awarding agency's issuance of a Buy America Preference waiver.

Additional clarity is needed on the use and applicability of waivers. OMB’s initial BABAA guidance (OMB M-22-11) contained detailed information on the waiver process, information required, and the various types of waivers. Much of that information is missing from the Proposed Guidance. As the Proposed Guidance will be overriding certain portions of the initial guidance, it is imperative that OMB include as much detail as possible on the waiver process so that all stakeholders have a clear understanding on how to successfully navigate the waiver system.

Exclusion of Temporary Materials

OMB and Federal agencies have been clear in their previous guidance and policies that BABAA only applies to materials which are permanently incorporated into an infrastructure project. However, the Proposed Guidance does not make a distinction between incorporating permanent and temporary materials to a project. OMB should provide clarity that BABAA requirements do not apply to any temporary materials or equipment used in a project to avoid possible confusion.

Section 184.6 Construction material standards.

Since AGC represents contractors, AGC urges OMB to work with manufacturers and suppliers to ensure that the required manufactured steps included in this section do not impede or disqualify any existing recycling processes for the materials listed.

(11) Reducing burden on recipients. Please provide suggestions for reducing burden for recipients.

The Need for Additional Clarity of Applicable Programs

Prior to releasing the initial guidance and as required by BABAA, Federal agencies compiled lists of their programs which they believe BABAA applies to. Certain agencies have published those lists for public view, but many have not. OMB has also not publicly confirmed whether those submitted lists are correct or if there is any misinterpretation of BABAA for specific programs.

To reduce confusion and questions of applicability for agencies, state and local partners, and contractors, OMB should publish a list of all applicable programs subject to BABAA requirements based on OMB's initial outreach to Federal agencies. Forgoing such a list of programs, confirmed by OMB, risks BABAA not being applied to specific projects or being applied to non-applicable projects. As a result infrastructure projects could be unnecessarily delayed negatively affecting the communities that these projects are meant to serve.

The Need for Clarity on International Trade Agreements

The proposed guidance makes no mention of existing trade agreements and how they apply to BABAA requirements. To date, OMB has provided no additional guidance on this subject other than stating that BABAA complies with all existing international trade agreements. Additional clarity is needed detailing how BABAA complies with trade agreements to ensure that no recipients are in violation of any existing agreements.

As one example, the Government Procurement Agreement (GPA) has voluntarily been signed by 37 states. Questions remain on whether the GPAs apply to BABAA applicable projects. The initial guidance released by OMB suggested that international trade obligations can be considered for public interest waivers applications, but if BABAA does not violate any international trade agreements, why would it be necessary to apply for a waiver from BABAA requirements to be able to meet those international obligations?

OMB should conduct a thorough review of these international trade agreements made by the Federal government and those signed on to by states and clearly outline which agreements are in effect and can work alongside BABAA. Requiring a public interest waiver from every state recipient to judge trade obligations is a slow and cumbersome method of complying with trade agreements. It

also forces state recipients to risk violating their GPAs and other obligations if the waivers are not approved or not approved in a timely manner. A review of the agreements and detailed guidance by OMB would save time and administrative resources by avoiding having to process multiple waivers by various states.

Comprehensive and Transparent Waiver Process

AGC urges OMB to ensure that all requests for waivers received by Federal agencies and OMB be immediately posted to a website upon receipt, rather than they are approved to post to the Federal Register for comment, so that recipients and the public can successfully track the status of any requests throughout the entire process. This will eliminate the current uncertainty and lack of transparency with Buy America where waivers sit at agencies without being sent to OMB. This will also 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.

Furthermore, the waiver request system in place should be transparent as it goes through a federal agency and before it reaches the OMB. Key questions remain on the practical inter-governmental implementation of the waiver process as well as the establishment of guardrails to ensure the waiver request approval process does not become unduly politicized. For example, what happens if the Made in America Director takes more than 15 days to make a determination? If such a determination is not made within 15 days, will the waiver requests be automatically approved or denied? AGC anticipates an increase in volume of waiver requests, particularly during the early months of the Proposed Guidance's implementation, which raises concerns about whether the Made in America Office is sufficiently funded, resourced, and trained to meet these obligations.

The Necessity for a Phased Approach to Implementation

The rushed implementation of vague BABAA requirements forced numerous Federal agencies to immediately delay implementation by issuing general applicability waivers when the law came into effect on May 14, 2022. Unfortunately, nearly one year later, OMB's insistence on full overnight implementation has created a chaotic patchwork of policies by federal, state, and local agencies and a situation in which stakeholders have not had adequate time to hire and train employees, assess current supply chains, confirm compliance of thousands of products, find alternate sources of compliant materials, and begin making those changes at a contractual and operational level.

Continuing to pursue full implementation of the law without regard to recipients' circumstances will cause a wide variety of problems in all matters related to the maintenance, repair, and building of our infrastructure. State agencies, public housing authorities, and non-profit organizations are just a few examples of the numerous recipients of Federal financial assistance which have been imploring the Federal government to take a more measured and phased approach to BABAA's requirements. OMB should model the implementation of the new BABAA requirements in a similar manner that the Federal Transit Administration implemented the increased domestic content of rolling stock over a five-year period to ensure that transit cars could still be procured domestically.

Rushing to implement and enforce the requirements could lead to delayed or scaled down projects which would have an adverse effect on the Administration's goals of environmental sustainability, connecting disadvantaged communities, and the building of new manufacturing facilities. OMB should recognize that additional time will be needed for all stakeholders to adjust to the Proposed Guidance should it be finalized in its current form. The Proposed Guidance, as it is written now, adds additional requirements and so OMB should take the following actions when implementing the final guidance to ensure that it does not unduly disrupt infrastructure projects:

- As BABAA requirements are already included in contracts, OMB should provide clear guidance that the Proposed Guidance does not apply to contracts that have already been agreed upon. Certain contract language provides only the general requirements of BABAA and the release of additional requirements without this step could be interpreted to apply retroactively and jeopardize a project.
- OMB should provide a reasonable and phased approach to introducing any new manufacturing requirements to any materials used in construction. As mentioned previously in our comments, any change of requirements will require further employee training, evaluating impacts on the supply chain, issuing compliance certificates, and adjusting contractual and operational processes to meet requirements. As the Proposed Guidance replaces and overrides various aspects of the Initial Guidance, stakeholders will have to completely redo all of their processes which they undertook to comply with BABAA and the Initial Guidance.
- OMB should evaluate the implementation processes which has taken place at various state DOTs, as well as other state and local agencies. While certain states DOTs have released information on compliance with BABAA, a sizeable portion of DOTs have yet to release any additional information because there is significant confusion. Our members have reached out to AGC, requesting information on how to comply with BABAA and inquiring on what forms they should use because the states in which they operate have not provided contractors with a Certificate of Compliance form, let alone been able to provide additional clarity on BABAA compliance.

Conflicts with Environmental Goals

The Administration has set forth ambitious goals in combatting climate change and rebuilding the nation's infrastructure. However, if the Administration wants a greener future, we have to be able to build it, and rushed implementation of BABAA could jeopardize our ability to do so.

AGC also has concerns that BABAA could worsen the carbon footprint of construction projects. This is especially true for communities that are near the border with Canada or Mexico. These communities have built long lasting relationships with their counterparts across the border, spurred by decades of free trade agreements, and depend on each other for thriving economies and meaningful career opportunities. Rushed implementation could lead to additional emissions of greenhouse gases in construction if a border community is forced to rely on a manufacturer from greater distances, increasing transportation costs and embodied carbon of materials, rather than getting the materials non-domestically. This was one of the reasons that many in Congress chose to support the exclusion of aggregates from BABAA in the IIJA.

Conclusion

AGC appreciates OMB's efforts to expand domestic manufacturing while attempting to avoid placing unnecessary hardships on public and private stakeholders working to rebuild the nation's infrastructure. Our industry wants to ensure that the Infrastructure Investment and Jobs Act is successful and that the American people see the benefits of the historic law.

AGC, however, worries that OMB has decided to not use a phased approach in implementation to allow all stakeholders a much needed adjustment period. Thank you for the opportunity to comment on this important issue. AGC looks forward to more opportunities to weigh in as OMB implements these new requirements.

Sincerely,

A handwritten signature in cursive script, reading "James V. Christianson". The signature is written in dark ink and is positioned below the word "Sincerely,".

James V. Christianson
Vice President, Government Relations