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THE CONSTRUCTION
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Understanding New Build America, Buy America Requirements

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About Your Presenter

- Jimmy Christianson leads the AGC of America's government relations efforts in Washington D.C., both on Capitol Hill and in the federal agencies.
- Prior to joining AGC, Jimmy worked as an attorney for the international law firm of K&L Gates and as a government affairs specialist for the American Road & Transportation Builders Association.
- Jimmy received his Bachelor of Arts degree with magna cum laude honors from the University of Pennsylvania and Juris Doctorate degree with cum laude honors from the University of Maine School of Law.
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About Your Presenter

- Senior Counsel with Smith Currie
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- Co-Editor of Smith Currie's COMMON SENSE CONSTRUCTION LAW (5th Edition (2015) and 6th Edition (2019), John Wiley & Sons)



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About Your Presenter

- Florida Bar Board Certified Construction Attorney and Partner in Smith Currie's Fort Lauderdale office
- Education: B.A., University of Florida; J.D., *magna cum laude* Florida State University College of Law; Legislative Editor, *Florida State University Law Review*
- Lectures frequently on construction contracts; legal considerations for green building and sustainable projects; and alternative project delivery, design-build and P3



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AGENDA

Understanding New Build America, Buy America Requirements

- 01 The IIJA and Pre-Existing Requirements for Domestic Materials
- 02 Build America, Buy America Act: Domestic Material Requirements
- 03 Buy America Preferences: Final Rule and Guidance from OMB
- 04 OMB Final Guidance and Rule: Categorization and Definitions
- 05 OMB Final Guidance and Rule for “Produced in the United States”
- 06 Exceptions and Waivers of BABAA Buy America Preferences



Part One

The IIJA and Pre-Existing Requirements for Domestic Materials

Infrastructure Investment and Jobs Act (IIJA)

- Bipartisan Infrastructure Law
- Five-year investment of over \$973 billion in broadly defined infrastructure projects
- Funding flows from federal to state, and to local government, and at times directly to private entities
- Much of IIJA's investment is in transportation infrastructure and "formula" funding
- Will allow for more discretionary projects by state and local policymakers through block grants, loan assistance or competitive grants

Impact of IIJA on Contractors

- Includes financial incentives to further socioeconomic policies, which impact:
 - Regulatory burdens and attendant risks on contractors
 - Costs of performing the work
 - Compliance obligations
 - Costs for construction materials
 - Contractor's ability to select materials, suppliers
- Affect federal, state, local, public, and private projects involving “infrastructure”
- Build America, Buy America Act within IIJA has significant impact on materials used in construction of “infrastructure”
- Must be “produced in the United States”

Preexisting Domestic Construction Material Requirements

- Domestic content requirements and domestic preferences have been in place for decades
- IIJA expands preferences, including all “infrastructure” – whether funded by IIJA or not
- Pre-existing requirements and applicability
 - Buy American Act (BAA)
 - Buy America
- IIJA has similarities to BAA and Buy America – but also provides a substantively different set of requirements

Buy American Act (BAA)

- Applies to direct Federal procurement (construction under \$7m and other designated contracts not subject to U.S. trade agreements)
- Contractors required to use domestic construction material on contracts to which the BAA applies
- BAA has been expanded over the years
 - 2009 – The American Recovery & Reinvestment Act (ARRA)
 - Applicability to projects funded by AARA – including state, local projects
 - 2020 – Required percentage of domestic components increased from 50% to 60% effective October 2022, will increase to 75% by 2029
- FAR Part 25 implements BAA requirements

Buy America

- Enacted as part of Surface Transportation Assistance Act of 1982
- Preference for domestically produced materials on federally funded transportation projects and other specific agencies (EPA, FAA, FTA)
- Requirements flow down to recipients of grants and other federal funds
- Requires that the “steel, iron, and manufactured goods used in the project are produced in the United States” – includes manufacturing processes: melting, casting, forming, finishing, coating
- Can be waived by agency if criteria met

Relevance of BAA and Buy America to BABAA

- Existing regulatory structure for BAA within FAR Part 25
- Agency interpretations and dispositions since 1933 when passed
- Buy America has been implemented since 1983
- OMB Final Guidance and Final Rule provide commentary that the guidance tries to harmonize with this precedent
- But OMB also states that “there are many substantive differences between the BAA, implemented in the FAR, and BABA” and rejects use of previously established rules and definitions in some instances



Part Two

Build America, Buy America Act: Domestic Material Requirements

Build America, Buy America Act (BABAA)

- Part of the IIJA, effective May 14, 2022
- Expands the coverage of domestic preferences to more potential recipients, projects, and covers more construction materials
- Prohibits federal funding on *infrastructure* projects unless all material used is domestically produced
 - “none of the funds made available for a Federal financial assistance program for infrastructure 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” BABA 70914(a).
- Applies to *all* federal financial assistance for *infrastructure*, not just IIJA funding, unless the project or the material is covered by a waiver

BABAA Required for All “Infrastructure”

INFRASTRUCTURE —The term “infrastructure” includes, at a minimum, the structures, facilities, and equipment for, in the United States—

- A. roads, highways, and bridges;
- B. public transportation;
- C. dams, ports, harbors, and other maritime facilities;
- D. intercity passenger and freight railroads;
- E. freight and intermodal facilities;
- F. airports;
- G. water systems, including drinking water and wastewater systems;
- H. electrical transmission facilities and systems;
- I. utilities;
- J. broadband infrastructure; and
- K. buildings and real property.

See Pub. L. No. 117-58, §70912.

BABAA – Materials Requirements

- Materials covered by the BABAA requirements include:
 - 1) Iron and steel
 - 2) Manufactured products
 - 3) Construction materials
- OMB Implementation Preliminary Guidance, April 2022 (OMB Memorandum M-22-11)
- OMB Final Guidance and Final Rule Published August 23, 2023 – Effective date October 23, 2023

BABAA – Materials Requirements

Included as Construction Materials

- Non-ferrous metals
- Plastic and polymer-based products (including PVC, composite building materials, and polymers used in fiber optic cables)
- Glass (including optic glass)
- Fiber optic cable (including drop cable)
- Optical fiber
- Lumber
- Engineered wood; and
- Drywall

Excluded from “Construction Materials”

- Manufactured products
- Iron and steel
- Cement, and cementitious materials
- Aggregates (stone, sand, gravel)
- Aggregate binding agents and additives

Build America, Buy America Act (BABAA)

- Summary definitions for produced in U.S.:
 - **Iron and steel**
 - All manufacturing processes occurred in the U.S.
 - **Manufactured products**
 - Must be manufactured in the U.S. with the costs of U.S. components more than *55% of total cost of all components*
 - **Construction materials**
 - *All manufacturing processes* for the construction material must occur in the U.S.

Build America, Buy America Act (BABAA)

Encompasses all items permanently incorporated into a project, whether consumed in, incorporated into, or affixed to the construction project

Does not apply to temporary works or items brought to and removed from the construction site prior to completion of the project, such as temporary scaffolding

Does not apply to equipment and furnishings used at or within the finished project and not permanently affixed, such as movable chairs, desks, and portable computer equipment

Differences Between BAA and BABAA

Buy American Act

- **Domestic Content Requirement:**
 - Currently 60%; increases to 75% by 2029
 - Can use Trade Agreements Act
- **Scope:**
 - Encompasses every end product, including furnishings
 - Includes a specific exclusion for COTS products

Build America, Buy America Act

- **Domestic Content Requirement:**
 - 55% with no escalations included in current law
- **Scope:**
 - Excludes temporary works, tools, equipment, and furnishings
 - No specific exclusion for COTS products



Part Three

Buy America
Preferences: Final
Rule and Guidance
from OMB

Guidance Framework

- November 2021: IIJA signed into law
- April 18, 2022: OMB Mem. M-22-11, Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure
- MIAO of OMB issued Final Guidance August 14, 2023, with effective date of October 18, 2023 – with transition period
- OMB publishes Final Guidance and Final Rule in Federal Register August 23, 2023, effective 60 days following publication

Status of Initial Guidance and Updated Guidance

Initial Guidance: OMB Memorandum M-22-11 (April 18, 2022)

Final Rule attempts to maintain portions of Initial Guidance, refers to Initial Guidance in portions

OMB will issue a “successor M-Memorandum” on or before effective date of Final Rule, to be effective on October 23, 2023

OMB anticipates the Initial Guidance will “carry over” to the updated M-Memorandum except when in conflict with Final Rule

OFFICE OF MANAGEMENT AND BUDGET**2 CFR Parts 184 and 200****Guidance for Grants and Agreements**

AGENCY: Office of Federal Financial Management, Office of Management and Budget.

ACTION: Final rule; notification of final guidance.

SUMMARY: The Office of Management and Budget is revising the OMB Guidance for Grants and Agreements. The revisions are limited in scope to support implementation of the Build America, Buy America Act provisions of the Infrastructure Investment and Jobs Act and to clarify existing provisions related to domestic preferences. These revisions provide further guidance on implementing the statutory requirements and improve Federal financial assistance management and transparency.

DATES: The effective date for the revised guidance is October 23, 2023.

FOR FURTHER INFORMATION CONTACT: Please contact Callie Conroy, Office of Management and Budget, via phone at 202-395-2747; via email at MBX.OMB.Media@OMB.eop.gov.

SUPPLEMENTARY INFORMATION:**Executive Summary**

The Office of Management and Budget (OMB) is revising its guidance in title 2 of the Code of Federal Regulations (2 CFR) to add a new part 184 and revise 2 CFR 200.322. The revisions implement the requirement for the Director of OMB to issue guidance to the head of each Federal agency to assist in the implementation of the requirements of the Build America, Buy America Act (BABA), Public Law 117-58, 135 Stat. 429, 70901-70927, Nov. 15, 2021.

As required by BABA, the new part 184 of 2 CFR provides clear and consistent guidance to Federal agencies about how to apply the domestic content procurement preference (Buy America or BABA preference) as set forth in BABA to Federal awards for infrastructure projects. See BABA 70915. For example, the new part 184 includes definitions for key terms, including iron or steel products, manufactured products, construction materials, and materials identified in section 70917(c) (section 70917(c) materials) of BABA. These definitions provide a common system for Federal agencies to distinguish between the product categories established under the statutory text in BABA. The new part also offers standards that define “all

manufacturing processes” in the case of construction materials.

The new part 184 also includes guidance for determining the cost of components of manufactured products. The part 184 text uses a modified version of the “cost of components” test found in the Federal Acquisition Regulation (FAR) at 48 CFR 25.003, which is used for Federal procurement. Using this approach for determining the cost of components of manufactured products in the context of Federal financial assistance aims to provide a consistent approach for industry, with only minor modifications which are explained in this document.

The new part 184 also includes guidance on proposing and issuing Buy America waivers. For example, based on the statutory text of BABA, it restates the circumstances under which a waiver may be justified. The new part also includes guidance on the type of process that a Federal agency should implement to allow recipients to request waivers, including the process a Federal agency should follow in issuing proposed and final waivers.

The revised provision in 2 CFR part 200 specifies that Federal agencies providing Federal financial assistance for infrastructure projects must implement the Buy America preferences set forth in 2 CFR part 184, as required under section 70914(a) BABA, as of the effective date of the guidance, unless specified otherwise.

Background

On November 15, 2021, President Biden signed into law the Infrastructure Investment and Jobs Act (IIJA), Public Law 117-58, which includes BABA, at sections 70901 through 70927. BABA establishes a domestic content procurement preference for Federal financial assistance obligated for infrastructure projects. That preference is generally referred to in this document as the Buy America preference or BABA preference. The BABA preference applies to three separate product categories: (i) iron or steel products; (ii) manufactured products; and (iii) construction materials. See BABA 70912 and 70914.

BABA required that by May 14, 2022, the head of each covered Federal agency must ensure that “none of the funds made available for a Federal financial assistance program for infrastructure 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 [(U.S.).]” BABA 70914(a). BABA is consistent with this the Administration’s policy in Executive

Order 14005, Ensuring the Future Is Made in All of America by All of America’s Workers (E.O. 14005), to “use terms and conditions of Federal financial assistance awards . . . to maximize the use of goods, products, and materials produced in, and services offered in, the [U.S.).]”

BABA requires OMB to issue guidance to the head of each Federal agency to “assist in applying new domestic content procurement preferences.” BABA 70915. BABA also allows OMB to amend 2 CFR, if necessary, to provide guidance to Federal agencies on imposing the Buy America preference through the terms and conditions of Federal awards. *Id.*

On April 18, 2022, OMB released M-22-11, entitled “Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure” (Memorandum M-22-11). Memorandum M-22-11 provided initial implementation guidance to Federal agencies on the application of the Buy America preference to Federal financial assistance programs for infrastructure, the Buy America waiver process, and other topics. Memorandum M-22-11 also provided “preliminary and non-binding” guidance on the definition of “construction materials” and associated standards for determining when all manufacturing processes of the construction material occur in the U.S. while OMB obtained stakeholder input to refine that definition and the associated standard for “all manufacturing processes” for each construction material.

On April 21, 2022, OMB issued a Notice of Listening Session(s) and Request for Information (RFI) in the **Federal Register**, which explained that OMB was beginning the process of seeking public input for its revised guidance and standards for construction materials. 87 FR 23888 (Apr. 21, 2022).

On February 9, 2023, OMB issued a Notification of Proposed Guidance in the **Federal Register**, which explained that OMB was proposing a new part 184 in 2 CFR chapter I to support implementation of BABA and clarify existing provisions in 2 CFR 200.322. 88 FR 8374 (Feb. 9, 2023).

In accordance with BABA, through this document, OMB is now amending 2 CFR, subtitle A, chapter I by adding a new part 184 to support implementation of BABA. OMB is also amending 2 CFR 200.322 to clarify existing provisions within part 200. The guidance in part 184 is intended to improve consistency in the implementation of BABA requirements across the Federal Government.

New OMB Final Rule

Proposed Rule published February 9, 2023 –
Comment period ended March 13, 2023

Final Rule and Notification of Final Guidance
published August 23, 2023

Creates new part 184 in 2 CFR Chapter I

Revises 2 CFR 200.322 Domestic preferences for
procurements

Summary of Significant Changes

- Revised definitions
 - “construction materials”
 - “manufactured products”
- Added definitions:
 - “component”
 - “Section 70917(c) materials”
 - “predominantly of iron or steel or a combination of both”
- Guidance on categorization and applying Buy America preference by item category
- Revises standards for fiber optic cable, plastic and polymer-based products, and recategorizes composite building materials

General Comments by OMB

- Final Rule and Notification of Final Guidance over 37 pages of commentary and guidance from OMB, new rules are four pages
- General themes of OMB comments:
 - Attempts to be consistent with initial guidance in M-22-11, but creates variations
 - “Aims for” either “general consistency with” or to have “reasonable degree of consistency with” various FAR provisions
 - Attempts consistency with agency implementation of Buy America requirements
 - But “[t]here are many substantive differences between the BAA, implemented in the FAR, and BABA”

General Comments by OMB

- Acknowledges undecided issues and punts to agencies to use reasonable discretion on specific issues
- Many commentators requested:
 - Greater consistency on certification procedures
 - Database of approved products
- Declines to address commentator requests to provide further clarity
- Topics “may possibly be the subject of future guidance for OMB or individual Federal agencies” – but not now

OMB Final Rule and Guidance – Applicability of BABAA

- Broad definition of “infrastructure” in IIJA is expanded
- Adds one specific item to definition of “infrastructure” from IIJA – “structures, facilities, and equipment that generate, transport, and distribute energy including electric vehicle (EV) charging.”
- Directs that Federal awarding agencies “should interpret the term ‘infrastructure’ broadly and consider [the listing of types of projects] as illustrative and not exhaustive.”
- Provides considerable discretion for agencies to apply BABAA to projects and require compliance



Part Four

OMB Final Guidance and Rule: Categorization and Definitions

Categorizing Articles, Materials and Supplies

- All articles, materials and supplies incorporated into infrastructure project are categorized into one, and only one, of the four categories:
 - Iron or steel products;
 - Manufactured products;
 - Construction materials; or
 - Section 70917(c) materials
- An article may not fall into multiple categories
- But OMB also recognizes an article, material or supply may not fall under *any* of the categories

When Does Categorization of Articles, Materials and Supplies Occur?



Classification is “based on its status at the time it is brought to the work site for incorporation into an infrastructure project”



OMB aligns with FAR 25.003 – defining construction material as being “brought to the construction site by a contractor or subcontractor for incorporation into the building or work”



Classification based on “status” at time of bringing to work site – article may change thereafter



This is “when *categorization* occurs – not when Buy America compliance is required.”



Does not mean that federal agencies will require “compliance checks for all products brought to the work site” – if articles, materials or supplies are not incorporated, no compliance with BABAA is required

Iron or Steel Products – Defined

- Iron or steel products are “articles, materials or supplies that consist wholly or predominantly of iron or steel or a combination of both.”
- Final Rule defines “Predominantly of iron or steel or a combination of both” generally consistent with existing FAR 25.003:
 - The cost of the iron and steel content is more than 50% of the total cost of all its components
 - The cost of iron and steel is the cost of the iron or steel mill products (such as bar, billet, slab, wire, plate or sheet), casting or forging utilized in the manufacture of the product, and a good faith estimate of the cost of iron and steel components
- Note: Final Rule *does not* include exception for COTS fasteners as expressly set forth in FAR 25.003 (“excluding COTS fasteners”)

Construction Materials – Defined

- Articles, materials or supplies that consist of *only one* of the following:
 - Non-ferrous metals
 - Plastic and polymer-based products (including polyvinylchloride, composite building materials, and polymers used in fiber optic cables)
 - Glass (including optic glass)
 - Fiber optic cable (including drop cable)
 - Optical fiber
 - Lumber
 - Engineered wood; and
 - Drywall

Construction Materials List – Changes in Final Rule

- If identified as a Construction material, must be entirely produced in United States and is not subject to 55% rule like Manufactured products
- OMB added three new items to “Construction materials” listing – engineered wood, fiber optic cable, and optical fiber
- Fiber optic cable also now expressly includes drop cable
- Final rule does not include paint, coatings, bricks, geotextiles due to objections from AGC and other stakeholders

Construction Materials – Additions



If one of the listed items is combined with another listed item, “it is nonetheless considered a construction material”



“Minor additions”
exception:

“Minor additions of articles, materials, supplies or binding agents to a construction material do not change the categorization of the construction material.”

“Minor additions” is not defined – agency discretion

Manufactured Products – Defined

- Final Rule provides definition for “manufactured products” in the affirmative by explaining what it is – prior guidance only defined as what it is *not*
- Articles, materials or supplies that have been:
 - Processed into a specific form and shape;
 - Combined with other articles, materials, or supplies to create a product with different properties than the individual articles, materials or supplies

Manufactured Products – Defined



If an item is an iron or steel product, a construction material, or a section 70917(c) material, it is *not a manufactured product*



However, an article, material or supply that meets the definition of a manufactured product may still be considered a manufactured product *even if* it includes “components” that are construction materials, iron or steel products, or section 70917(c) materials



“Component”: an article, material or supply (manufactured or unmanufactured) incorporated directly into a manufactured product or an iron or steel product

Section 70917(c) Materials – Defined

- Section 70917(c) of the Build America, Buy America Act creates an *exception* to the definition of “construction materials”
- Section 70917(c) Materials defined as:
 - “cement and cementitious materials”
 - “aggregates such as stone, sand or gravel” or
 - “aggregate binding agents or additives”

Section 70917(c) Materials – Defined

- Section 70917(c) materials, on their own, are not manufactured products
- Section 70917(c) materials should not be considered manufactured products when they are used at or combined proximate to the work site (e.g., wet concrete or hot asphalt mix brought to the work site)
- Section 70917(c) materials (such as stone, sand, and gravel) may be used to *produce* a manufactured product, e.g., precast concrete

Section 70917(c) Materials as Components

- Section 70917(c) materials are excluded from “construction materials” category, but *not* excluded from the “manufactured products” category
- Section 70917(c) materials may be treated as components of manufactured products to which a Buy America preference will apply
- If two individual section 70917(c) materials are combined, and non-minor, additional, other materials are included *before* being brought to the work site, the new product would be a manufactured product and section 70917(c) materials should be treated as components
- In such case, the cost of the section 70917(c) materials should be included in the 55% cost of components

Section 70917(c) Materials as Components

- Example: precast concrete
 - Should be treated as manufactured products – with components including aggregates, cement, and aggregate binding agents
 - Buy America preference will apply to cement and cementitious materials as components of precast concrete when precast *is shipped to work site*
 - However – “Circumstances where a Buy America preference does not apply include when cement and cementitious materials are brought to the work site as standalone products (to be mixed onsite) or in combination with other section 70917(c) materials, such as in the case of wet concrete mix, which has not yet settled into a specific form or shape before reaching the work site.”

Categorization Determines Requirements

- An article, material, or supply must meet the Buy America Preference only for the single category in which it is classified. § 184.4(f)
- Provision added to address concerns about which standard, if any, should be applied to *components* of items that do match the product category of the classification
 - For iron and steel products, there is “no restriction on the place of production or manufacture of components or subcomponents that do not consist of iron and steel.”
 - For construction materials, there is “no restriction on the place of production or manufacture of minor additions, or the materials used for additions . . . such as coatings for non-ferrous metals”
- Example: steel guardrail coated with aluminum
 - Steel guardrail must be U.S. produced; there would be no restrictions on other guardrail components

Status of “kits” assembled onsite

- Product purchased from a single manufacturer or supplier as a “kit” may be classified as a manufactured product even if brought to work site as separate components
- “Kits” – product acquired for incorporation into an infrastructure project:
 - from a single manufacturer and shipped to work site in constituent components
 - manufactured or assembled on the work site by a contractor
- Generally, a kit will be limited to discrete products, machines, or devices performing a unified function
- More wide-ranging system of interconnected products, machines or devices (e.g., an HVAC system for a building) should *not* be considered a kit



Part Five

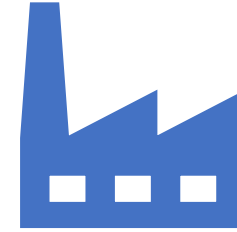
OMB Final
Guidance and Rule
for “Produced in the
United States”

Iron or Steel Products



Considered “Produced in the United States” if:

All manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States



OMB Commentary:

Buy America preference “does not apply directly to non-iron or –steel components”

“[N]o restriction on the place of production or manufacture of components or subcomponents that do not consist of iron or steel”

Requirement for iron or steel “does not restrict the origin of the raw materials used in production of the iron or steel”

§184.6 Construction material standards.

(a) The Buy America Preference applies to the following construction materials incorporated into infrastructure projects. Each construction material is followed by a standard for the material to be considered “produced in the United States.”

(1) *Non-ferrous metals.* All manufacturing processes, from initial smelting or melting through final shaping, coating, and assembly, occurred in the United States.

(2) *Plastic and polymer-based products.* All manufacturing processes, from initial combination of constituent plastic or polymer-based inputs, or, where applicable, constituent composite materials, until the item is in its final form, occurred in the United States.

(3) *Glass.* All manufacturing processes, from initial batching and melting of raw materials through annealing, cooling, and cutting, occurred in the United States.

(4) *Fiber optic cable (including drop cable).* All manufacturing processes,

from the initial ribboning (if applicable), through buffering, fiber stranding and jacketing, occurred in the United States. All manufacturing processes also include the standards for glass and optical fiber, but not for non-ferrous metals, plastic and polymer-based products, or any others.

(5) *Optical fiber.* All manufacturing processes, from the initial preform fabrication stage through the completion of the draw, occurred in the United States.

(6) *Lumber.* All manufacturing processes, from initial debarking through treatment and planing, occurred in the United States.

(7) *Drywall.* All manufacturing processes, from initial blending of mined or synthetic gypsum plaster and additives through cutting and drying of sandwiched panels, occurred in the United States.

(8) *Engineered wood.* All manufacturing processes from the initial combination of constituent materials until the wood product is in its final form, occurred in the United States.

(b) Except as specifically provided, only a single standard under paragraph (a) of this section should be applied to a single construction material.

Construction Material Standards:

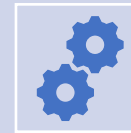
“Produced in the United States”



Provides standards for determining whether construction materials are considered “produced in the United States”



Each construction material must have had “all manufacturing processes” occur in the United States



Only a single standard should be applied to a single construction material (but see Fiber optic cable)

Construction Materials with Multiple Inputs

- Only single standard to be applied to single construction material
- OMB sought to avoid confusion over which or how many standards apply to single item with multiple construction materials as inputs
- Fiber optic cable is lone exception:
 - Could include standards for non-ferrous metals, plastic and polymer-based products, glass, optical fiber – to a single item
 - Final Rule requires fiber optic cable to comply with glass and optical fiber, but specifically excludes non-ferrous metals, plastic and polymer-based products



(1) *Non-ferrous metals*. All manufacturing processes, from initial smelting or melting through final shaping, coating, and assembly, occurred in the United States.

Construction Materials Example – Non-Ferrous Metals

- OMB views “non-ferrous metals” as metals “not containing, including, or relating to iron or steel”
- Examples: Aluminum, copper
- Multiple applications: Wires, piping, roofing, etc.
- Considered “Produced in the United States” if “all manufacturing processes” occur in the U.S.
- Intent to cover “all” from OMB’s understanding of the beginning (smelting/melting) to end (assembly) – and all points in between, including rolling

OMB Final Rule – Manufactured Products “Produced in the United States”



Final Rule defines “Produced in the United States” generally in line with prior guidance in M-22-11, with some enhancements



“Manufactured products” are produced in the United States subject to Buy America Preferences when “**the cost of the components** 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 [subject to some exceptions].”



New: Guidance for “cost of components” – generally incorporates FAR 25.003

OMB Final Rule – “cost of components”

- In determining whether the “cost of components” for manufactured products is greater than 55% of the total cost of all components (meaning “produced in the United States”), the following applies:
 - **Components purchased by manufacturer:** The acquisition cost, including transportation costs to the place of incorporation into the manufactured product (whether paid to domestic firm or not) and any applicable duty (whether duty-free entry certificate entered or not)
 - **Components manufactured by the manufacturer:** All costs associated with the manufacture of the component, including transportation costs to the place of incorporation into the manufactured product, plus allocable overhead costs, but excluding profit. Does not include costs for the manufacture of the product.



Part Six

Exceptions and Waivers of BABAA Buy America Preferences

Exceptions to Final OMB Rule

- Final Rule effective October 23, 2023, applies to awards after that date
- Awards from May 14, 2022 – October 22, 2023, will be governed by OMB initial guidance in Memorandum M-22-11
- For these ongoing projects:
 - If another award made *prior* to October 23, 2024, also governed by M-22-11
 - If another award is made *after* October 23, 2024, Final Rule will apply to award
 - UNLESS – “if significant design or planning changes are made to the infrastructure project, the Federal awarding agency may apply” Final Rule

BABAA Waivers

- Agency by agency
 - Different processes
 - Different timing requirements
 - No set duration for consideration by agency of waiver in most instances (some exceptions)
- Waivers
 - “General Applicability”
 - Project specific
 - Funding specific
- General reasons for waivers:
 - Public interest
 - Nonavailability
 - Excessive cost (25% of overall project)

Waiver Process – Agency by Agency

- Each federal agency retains control and responsibility for developing an internal system for processing waiver requests requested by recipients
- Internal processes for each agency will be different, and review of each agency information will be required to evaluate:
 - What is required for waiver request (contents, format, supporting materials)?
 - When are submissions required to be submitted (prior to application for funding, after application has been granted)?
 - What are time frames for agency review of waiver requests?

BABA Waivers – Made in America Office

- Made in America Office created by EO 14005 (“Ensuring the Future is Made in All of America by All of America’s Workers”) (Jan. 25, 2021)
- IIJA codified MIAO, with purpose to:
 - Increase reliance on domestic supply chains
 - Gather government-wide data to support decision-making to make U.S. supply chains
 - Increase transparency of waivers to provide clear demand signals to domestic producers
- MIAO waiver website: <https://www.madeinamerica.gov/waivers>

FHWA Manufactured Products Waiver

- FHWA issued a general waiver from Buy America requirements for manufactured products in 1978 – remained in effect since
- February 7: President Biden highlighted this waiver as a “loophole” in his efforts to expand Buy America
- March 17: FHWA seeks input on ending the waiver
- May 22: AGC submits comments supporting the waiver; over 1000 AGC members also comment, supporting waiver via AGC action alert
- Summer 2023: Internal USDOT debate on maintaining the waiver or not

Examples of Manufactured Products on Highway Jobs

- Compost
- Fertilizer
- Mulch
- Paint
- Surface finishes for concrete
- Joint sealants
- Traffic signals
- Vehicle and pedestrian signals
- Electronic signs and their controller assemblies
- Electrical items in general
- Raised pavement markers
- Prefabricated pavement markers
- Reflectors incorporated into pavement
- Duct cable
- Non-electric signs
- Tray cable
- Lighting fixtures
- Light bulbs
- Electrical conductors
- Landscape pavers
- Permanent concrete barrier (if precast)
- Precast structures/parts
- Waterstop
- Elastometric pads
- High load multi-rotational bearings
- Sliding elastometric bearings
- Evaporation retardants
- Waterproofing membranes for structures

Other Buy America Resources

- [AGC's FHWA Buy America One-Pager](#)
- [AGC's FTA Buy America One-Pager](#)
- [AGC's BABAA Final Guidance FAQs](#)
- [EPA BABAA PPT](#)
- [TXDOT BABAA Material Classification Sheet](#)
- [Virginia DOT BABAA Material Classification Sheet](#)
- [Washington State DOT BABAA Materials List](#)



Questions

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