

**AUGUST 23, 2023**

For more information,
contact:

Michael Taylor
+1 202 626 2385
jmtaylor@kslaw.com

Patrick Togni
+1 202 626 2958
ptogni@kslaw.com

Jamieson Greer
+1 202 626 5509
jgreer@kslaw.com

Jeffrey Telep
+1 202 626 2390
jtelep@kslaw.com

Katherine Vessels
+1 202 626 2929
kvessels@kslaw.com

Nicholas Paster
+1 202 626 5585
npaster@kslaw.com

King & Spalding

Washington, D.C.
1700 Pennsylvania
Avenue, NW
Suite 900
Washington, D.C. 20006
Tel: +1 202 737 0500

OMB Finalizes Regulatory Guidance On “Buy America Preferences For Infrastructure Projects”

Revised guidance takes effect on October 22, 2023
and will be supplemented by forthcoming
memorandum

On August 23, the Office of Management and Budget (“OMB”) published final Guidance for Grants and Agreements to “support implementation” of the Build America, Buy America Act (“BABA”) provisions of the Infrastructure Investment and Jobs Act (“IIJA”) and to “clarify existing provisions related to domestic preferences.” (“Final OMB BABA Guidance” or “Final Guidance”).

BABA was enacted on November 15, 2021 as part of the IIJA and generally requires that public infrastructure projects receiving federal financial assistance source U.S.-produced iron or steel products, manufactured products, and construction materials. BABA effectuates this policy goal by requiring agencies 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 United States” to strengthen America’s industrial base.

As of May 14, 2022, BABA applies to awards where funds are appropriated or otherwise made available for public infrastructure projects in the United States, regardless of whether infrastructure is the primary purpose of the award. The Final Guidance has now clarified that the BABA requirements do not supplant the Federal Acquisition Regulations that apply to direct Federal procurement, which implement the Buy American Act (“BAA”) (41 U.S.C. §§ 8301-8305). Furthermore, OMB has clarified that Section 184.1 of the Final Guidance does not supplant existing Buy America requirements established by other Federal agencies.

The regulations published with the Final OMB BABA Guidance take effect on October 22, 2023 (*i.e.*, 60 days after publication in the Federal



Register) and build upon guidance that OMB previously provided to the trade shortly after enactment of the IIJA (which was known as OMB Memorandum M-22-11 (Apr. 18, 2022)). Although OMB intends to issue a new memorandum that will replace and slightly modify M-22-11 before the regulations published with the Final Guidance take effect, OMB also has now explained that projects already having received federal awards while Memorandum M-22-11 was in effect (or a project “that receives a subsequent Federal award within one year” of the Guidance’s effective date, *i.e.*, October 23, 2024) will continue “to be subject to Memorandum M-22-11 instead of the revised guidance.” OMB stated that this provision “is intended to provide additional flexibility for certain projects in the implementation phase.” Thus, a participant must confirm when the particular Federal infrastructure project award took place in order to confirm which guidance may be applicable in ensuring compliance.

BACKGROUND

Following enactment of the IIJA and BABA, in February 2023, OMB published a proposed rule “to revise OMB Guidance for Grants and Agreements” and requested public comments from interested parties including manufacturers, labor organizations, and industry associations, among others. OMB received nearly 2,000 comments in response, which OMB addresses in the preamble to the Final Guidance. The new regulations implementing the Final Guidance will be published in a new part of the Code of Federal Regulations (“C.F.R.”) (2 C.F.R. Part 184).

OMB has emphasized that the new regulatory provisions are “high-level coordinating guidance for Federal agencies to use in their own direct implementation of BABA, as required by” applicable law.

HIGH-LEVEL SUMMARY OF KEY DEFINITIONS AND GUIDANCE

Construction Materials

Under BABA, “all manufacturing processes for the construction material” must occur in the United States. The Final Guidance defines construction materials as “articles, materials, or supplies that consist of only one” of the following items:

1. Non-ferrous metals
2. Plastic and polymer-based products (including polyvinylchloride, composite building materials, and polymers used in fiber optic cables)
3. Glass (including optic glass)
4. Fiber optic cable (including drop cable)
5. Optical fiber
6. Lumber
7. Engineered wood
8. Drywall.

With respect to “all manufacturing processes,” 2 C.F.R. § 184.6 contains the following specific “standards for the material to be considered ‘produced in the United States.’”

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



- **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.”
- **Glass** – “All manufacturing processes, from initial batching and melting of raw materials through annealing, cooling, and cutting, occurred in the United States.”
- **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 metal, plastic and polymer-based products, or any others.
- **Optical fiber** – “All manufacturing processes, from the initial preform fabrication stage through the completion of the draw, occurred in the United States.”
- **Lumber** – “All manufacturing processes, from initial debarking through treatment and planning, occurred in the United States.”
- **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.”
- **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.”

Importantly, despite the language that the construction materials consist of “only one” of the listed items, the guidance clarified that “**minor additions** of articles, materials, supplies, or binding agents to a construction material do not change the categorization of the construction material.” (emphasis added). OMB opted not to define “minor additions,” but instead emphasized “that Federal agencies should exercise reasonable discretion in applying” this aspect of the guidance “within their respective Federal financial assistance programs for infrastructure” because a single percentage threshold may not be workable across agencies and/or project types.

With respect to coatings, the Guidance also explains that the addition of coatings does “not change the categorization of a construction material if they are added through a manufacturing process specifically described in the” applicable standard for that construction material. For example, “adding a coating to aluminum, even if not considered a minor addition, would not convert the aluminum ‘construction material’ to a ‘manufactured product’ because coatings are specifically identified in the manufacturing process for non-ferrous metals.” Importantly, OMB continued that “the coatings themselves do not require domestic sourcing in this scenario if comprised of different materials. In other words, it is not OMB’s intent to require domestic sourcing directly for the coating itself.”

Another important modification from OMB’s initial proposal is that “composite building materials” are no longer a separate category of construction material. Rather, OMB moved composite building materials to the category of “plastic and polymer-based products.” In addition, while OMB determined to expand the definition of construction materials to include fiber optic cable (including drop cable), optical fiber, and engineered wood, other items that commenters asked OMB specifically to list (e.g., coatings, paint, bricks, and geotextiles) were not listed. Although ultimately requiring a fact-specific analysis, OMB’s commentary suggests that the agencies governing specific projects are likely to consider these as manufactured goods (at least for the time being). Importantly, OMB “may consider adding additional items to the list of construction materials in future iterations of its guidance through revisions to part 184.” This statement underscores the need for affected stakeholders thoughtfully to categorize any articles, materials, or supplies that may be procured in BABA projects to facilitate compliance with any applicable requirements.



Iron And Steel Products

For iron or steel products, the Final Guidance confirms that the rules are intended to apply to products that are “predominantly of iron or steel or a combination of both.” This threshold may be met if “the cost of the iron and steel content exceeds 50 percent of the total cost of all its components.” OMB confirmed that “labor costs are not included” when calculating “whether the product meets” this threshold. In contrast, the cost calculation should be made by reference to “the cost of the iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the product and a good faith estimate of the cost of iron or steel components.”

If the specific product contains more than 50 percent iron and steel content (by cost), then “all manufacturing processes, from the initial melting stage through the application of coatings,” must “occur[] in the United States. Interestingly, in a separate comment with respect to lumber products, OMB described the “‘melted and poured’ manufacturing standard [that is] applied to iron and steel products” by noting that this “standard recognizes the distinction between the original raw material input – such as ore or logs, which may be mined, grown or extracted elsewhere – and the beginning of a manufacturing process, which initiates the beginning of the process where constituent components are combined to produce the end product brought to the work site and used on the infrastructure project.”

OMB determined not to incorporate waivers or exemptions that are based on analogous provisions in the Federal Acquisition Regulations, “such as the language related to” commercial-off-the-shelf (“COTS”) fasteners. Thus, it is possible, therefore, that individual agencies may address fasteners in the context of other public interest waivers (*e.g.*, *de minimis* or minor component waivers) on a project-specific or general basis.

Another key clarification with respect to iron and steel products is that “an article, material, or supply incorporated into an infrastructure project must meet the Buy America preference for only the single category in which it is classified.” OMB explained that “in the case of iron or steel products, the Buy America preference does not apply directly to non-iron or -steel components.” (emphasis added). This clarification is important for companies that manufacture iron and steel products that contain some non-iron or -steel components. For example, OMB describes “a steel guardrail consisting predominantly of steel but coated with aluminum. In this case, the steel must be produced in the” United States under BABA, “but there would be no restrictions on the other components of the guardrail.”

Manufactured Products

The Final Guidance defines “manufactured products” as 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.” This definition marks an important revision from the proposed guidance which had defined the manufactured products using a negative definition (*i.e.*, items not classified as an iron or steel product or as a construction material). Thus, in summary, the Final Guidance adds a positive definition in a new subpart one of the definition while retaining a negative definition in subpart two of the definition. The new definition of Manufactured Products is:

“(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.

(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.”



Component

The Final Guidance defines “component” to mean “an article, material, or supply, whether manufactured or unmanufactured, incorporated directly into:” (i) “a manufactured product; or, where applicable,” (ii) “an iron or steel product.” OMB determined to use “a modified form of the definition used at FAR 25.003.”

Clarifying Guidance on Cement and Cementitious Materials, Aggregates (Stone, Sand, or Gravel) And Aggregate Binding Agents/Additives (Called “Section 70917(c) Materials”)

The Final OMB BABA Guidance creates a new (*i.e.*, fourth) product category in recognition of the fact that section 70917(c) of the IIJA specifically included a “Limitation With Respect to Aggregates” so that “cement and cementitious materials; aggregates such as stone, sand, or gravel; or aggregate binding agents or additives” should not be considered “construction materials.” This new category is termed “Section 70917(c) Materials,” and the Guidance explains that such materials, “on their own, are not manufactured products” when used at, “or combined proximate to” the work site (for example, wet concrete or hot asphalt mix brought to the worksite). This is a complex area of the guidance and affected companies should carefully review the new regulations, OMB’s responses to comments, and the forthcoming supplemental memorandum.

DETERMINING COST OF COMPONENTS FOR MANUFACTURED PRODUCTS

As expected, OMB adopted “a modified version of the ‘cost of components’ test found in the” FAR “at 48 C.F.R. § 25.003” to determine the cost of components of manufactured products. OMB determined to “adhere[] closely to the FAR definition” with two limited but important exceptions. First, OMB uses the term “manufacturer” instead of “contractor.” Second, OMB replaces the term “end product” with “manufactured product.” The revisions from the FAR are intended to “promote uniformity and predictability for stakeholders” in the context of performing the cost analysis for manufactured products and to “ensure that similar provisions are applied for both Federal procurement contracts under the FAR and Federal financial assistance under” BABA.

In terms of the cost calculation methodology, OMB’s final rule requires that components that “are mined, produced, or manufactured in the United States” must be “greater than 55 percent of the total cost of all components of the manufactured product, unless another standard that meets or exceeds this standard has been established under applicable law” for this purpose.

The cost of components for manufactured products should be calculated pursuant to different “instructions” depending upon whether the components are “purchased by the manufacturer” or “manufactured by the manufacturer.” For components that are purchased by the manufacturer, the cost calculation must include “the acquisition cost, including transportation costs to the place of incorporation into the manufactured product (whether or not such costs are paid to a domestic firm), and any applicable duty (whether or not a duty-free entry certificate is issued).” For components that are manufactured by the manufacturer, the cost calculation must include “all costs associated with the manufacture of the component, including transportation costs...plus allocable overhead costs, but excluding profit.” OMB also note[d] that labor costs associated with the manufacturing of the manufactured product are not included in the costs of components test, which is consistent with the approach under the FAR.”

DISTINGUISHING BETWEEN PRODUCT CATEGORIES

OMB finally clarifies that “an article, material, or supply should only be classified into one of the following categories: (1) iron or steel products; (2) manufactured products; (3) construction materials; or (4) section 70917(c) materials.” In limited instances, certain items “may not fall under any of the categories,” *e.g.*, “temporary items brought to a work site” that will not be “permanently incorporated into an infrastructure project” or “non-manufactured raw materials that do not meet the



newly added affirmative definition of ‘manufactured products[.]’” In general, however, an item may only fall within one category.

Further, the classification of an article, material, or supply as falling into one of the categories “must be made based on its status at the time it is brought to the work site for incorporation into an infrastructure project.” OMB leaves the agencies “reasonable discretion” on the term “work site,” which generally means the location of the infrastructure project at which the iron, steel, manufactured products, and construction materials will be incorporated. The Final Guidance emphasizes the importance of timing as to when the categorization occurs to ensure there is no confusion that BABA applies only to products “incorporated into an infrastructure project,” and that categorization after the product has been incorporated into the final project would be unwieldy for agencies and project participants.

OMB also recognizes that kits that sold by a manufacturer and manufactured or assembled from constituent components on the work site by a contractor generally will be considered manufactured products. The guidance clarifies, “Federal agencies should generally interpret the term kit as limited to discrete products, machines, or devices performing a unified function.” In calculating the cost of components for these kits, “the manufacturer should be considered the entity that performs the final manufacturing process that produces the kit, not the contractor that manufactures or assembles it on the work site.” Thus, the place of incorporation is the location in which the manufacturer establishes and collects the elements of the kit. Transportation costs to the work site should not be considered.

CONCLUSION

The Final OMB BABA Guidance provides important interpretive tools to companies that are in covered federal infrastructure projects. While the Final Guidance is intended to address many of the most pressing questions and compliance considerations that are associated with participating in Federal infrastructure investments under BABA, many aspects of the Final Guidance are expected to be subject to further clarification by OMB (through the forthcoming guidance memorandum that will replace OMB Memorandum M-22-11) and/or by individual Federal agency action. Companies that are BABA award recipients or part of a recipient’s supply chain must carefully consider this information and agency-specific materials (e.g., waivers) on a project- and product-specific basis.

To find out more, please visit our [Buy American and Supply Chain Policy Roundup](#).

ABOUT KING & SPALDING

Celebrating more than 130 years of service, King & Spalding is an international law firm that represents a broad array of clients, including half of the Fortune Global 100, with 1,300 lawyers in 23 offices in the United States, Europe, the Middle East and Asia. The firm has handled matters in over 160 countries on six continents and is consistently recognized for the results it obtains, uncompromising commitment to quality, and dedication to understanding the business and culture of its clients.

This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice. In some jurisdictions, this may be considered “Attorney Advertising.” View our [Privacy Notice](#).

ABU DHABI	CHARLOTTE	FRANKFURT	LOS ANGELES	PARIS	SINGAPORE
ATLANTA	CHICAGO	GENEVA	MIAMI	RIYADH	TOKYO
AUSTIN	DENVER	HOUSTON	NEW YORK	SAN FRANCISCO	WASHINGTON, D.C.
BRUSSELS	DUBAI	LONDON	NORTHERN VIRGINIA	SILICON VALLEY	
