

OMB Issues Proposed Rule and Guidance on U.S.-Made Construction Materials in Infrastructure Projects

On February 9, 2023, the Office of Management and Budget (“OMB”) issued a proposed rule and notification of proposed guidance aimed at standardizing the implementation of the Build America, Buy America (“BABA”) provisions of the Infrastructure Investment and Jobs Act (“IIJA” or “the Act”), which may impact all federally funded infrastructure projects in the United States. These requirements may apply to any federally funded project (not just IIJA) and the entire infrastructure project, even if the project is funded by both federal and non-federal funds under one or more awards. The proposed standards are more rigorous than past Buy American/Buy America programs, which largely targeted iron and steel and only covered certain projects. Comments on the newly proposed rule are due on March 13, 2023.

The proposed rule includes a number of proposed changes to the federal grant rules reflecting OMB’s initial implementation contained in April 2022 OMB Memorandum M-22-11, “Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure,” which [we previously discussed](#).

OMB is required by IIJA to issue standards that define “all manufacturing processes” regarding construction materials. While OMB’s earlier memorandum provided “preliminary and non-binding” guidance on the definition of construction materials, the proposed rule would establish a new part 184 to OMB regulations to reflect OMB’s updated interpretation of, and standards for, “all manufacturing processes” for manufacturing construction materials, which are based on industry feedback, agency consultation and market research conducted by OMB.

Changes Proposed by OMB and Expected Impacts

OMB proposes to implement a new part 184 in 2 CFR chapter I (2 CFR part 184) to support implementation of the Act and clarify existing requirements within 2 CFR 200.322, Domestic preferences for procurements. The proposed revisions are intended to improve uniformity and consistency in the implementation of BABA requirements across government agencies by adding a new part addressing the Buy America Preference for all awards with infrastructure expenditures set forth in section 70914 of IIJA. The new part will generally align with OMB’s guidance in M-22-11, mentioned above. The new part also provides definitions for the purpose of 2 CFR part 184 and a common framework for applying the BABA preferences.

The new part 184 also includes guidance for determining the cost of manufactured products and proposes to use the definition of “cost of components” in the Federal Acquisition Regulation (“FAR”) (48 CFR 25.003) that is used for federal procurement. Using this “cost of components” definition for determining the cost of manufactured products for Federal Financial Assistance aims to provide consistent and clear market requirements for industry to meet one standard for making such cost determinations.

Stakeholder Feedback

OMB seeks stakeholder feedback on several specific aspects of the proposed rule, including:

- **Cost of components.** In determining the “cost of components” for manufactured products for purposes of this proposed rule and guidance, OMB is proposing to adopt a definition based on the description provided in the FAR at 48 CFR 25.003. Under this proposed approach, “cost of components” refers to both components “purchased by the contractor”¹ and “components manufactured by the contractor.”² OMB explained using this FAR definition will provide “consistent and clear market requirements for industry to meet one standard,” but OMB still seeks feedback on whether a different standard should apply to federal infrastructure grants and financial assistance agreements.
- **Proposed definition and standards of construction materials.** In the proposed guidance, OMB only intends to classify materials that consist of only one or more of the following construction materials while also seeking to avoid disqualifying construction materials with only *de minimis* additions of non-construction materials:
 - **Non-ferrous metals:** All manufacturing processes, from initial smelting or melting through final shaping, coating and assembly, must occur in the United States.
 - **Plastic and polymer-based products:** All manufacturing processes, from initial combination of constituent, plastic or polymer-based inputs until the item is in a form in which it is delivered to the work site and incorporated into the project, must occur in the United States.
 - **Composite building materials:** All manufacturing processes, from initial combination of constituent materials until the composite material is in a form in which it is delivered to the work site and incorporated into the project, must occur in the United States.
- **Glass:** All manufacturing processes, from initial batching and melting of raw materials through annealing, cooling and cutting, must occur in the United States.
- **Fiber optic cable:** All manufacturing processes, from the initial preform fabrication stage through fiber stranding and jacketing, must occur in the United States.
- **Optical fiber:** All manufacturing processes, from the initial preform fabrication stage through fiber stranding, must occur in the United States.
- **Lumber:** All manufacturing processes, from initial debarking through treatment and planning, must occur 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, must occur in the United States.

In addition, OMB proposed standards for each of the above construction materials for when the material can be considered “produced in the United States.” OMB is also requesting input on the proposed standards for fiber optic cable and optical fiber, and whether additional standards should be issued for other categories of construction material such as “coatings,” “brick” and “engineered wood products.”

- **Definition of “predominantly” iron or steel items.** To be consistent with certain existing Buy America and Buy American laws and policies, or for other reasons, OMB is seeking input on whether it should adopt a definition of “predominantly” iron or steel items to better differentiate between the categories of products. Specifically, OMB is asking whether it should adopt the same definition of “predominantly of iron or steel” for purposes of federally funded infrastructure projects as contained in the FAR, which currently defines a product as “predominantly of iron or steel” if the cost of the iron and steel content exceeds 50%.
- **Distinguishing between “manufactured products” and “construction material.”** In its April 2022 guidance, M-22-11, OMB explained that items consisting of two or more of the listed construction materials that have been combined 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

¹ The cost of components “purchased by the contractor” would mean the acquisition cost, including transportation costs to the place of incorporation into the end product or construction material and any applicable duty (regardless of whether or not a duty-free entry certificate is issued).

² “Components manufactured by the contractor” would refer to all costs associated with the manufacture of the component, including transportation costs plus allocable overhead costs, but excluding profit. The term, however, would not include any costs associated with the manufacture of the end product.

manufactured products, rather than as construction materials. OMB now proposes defining “manufactured products” as those articles, materials or supplies incorporated into an infrastructure project that “are not categorized as a construction material” but “do not consist wholly or predominantly of iron or steel or both.” OMB is seeking feedback on the approach tendered in the proposed rule and guidance relative to the approach articulated in M-22-11.

Lingering International Complications Posed by OMB’s Proposed Changes

OMB’s proposed revisions may run afoul of U.S. obligations under various trade agreements, including the World Trade Organization Agreement on Government Procurement (WTO-GPA). The IIJA includes boilerplate text confirming that it “shall be applied in a manner consistent with the United States obligations under international agreements.” However, it remains unclear how OMB will interpret those international obligations, particularly in instances where the funding award is made at the subnational (i.e., state or local) level using federal funds and/or whether the nature and form of the funding is subject to these international agreements. Contractors using subcontractors and/or supplies from non-U.S. entities will need to closely monitor these developments.

Conclusion

Domestic preference requirements for federal procurement and federal financial assistance continue to evolve at an unprecedented pace, and the most recent OMB proposed rule and guidance are just the latest developments in this area. Comments on the proposed rule are due on March 13, 2023. Given the BABA’s requirements’ significant impact on federally funded infrastructure projects, contractors and suppliers should carefully consider whether there are reasons for maintaining a different set of standards that have traditionally applied to federal infrastructure projects and if they should, or would like, to provide input to OMB on this or other issues as the proposed guidance is being finalized.

Companies that perform work on federally funded infrastructure projects should continue to monitor the evolving domestic preference standards as additional regulations are issued and implemented, familiarize

themselves with the changing Buy America requirements, and assess and document their compliance with the various country of origin requirements, including a review of products acquired through the supply chain for various projects and customers.

FOR MORE INFORMATION

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