

Industry Takeaways From OMB's Final Buy America Guidance

By **Amy Hoang and Sarah Barney** (September 7, 2023, 5:22 PM EDT)

On Aug. 23, the Office of Management and Budget published new guidance implementing the domestic sourcing requirements of the Build America, Buy America Act, or BABA, a sweeping change to domestic sourcing requirements for federally funded infrastructure projects.[1] The agency **released** the prepublished guidance on Aug. 14.

The revised guidance includes an update to the federal grant regulations at Title 2, Chapter 1, of the Code of Federal Regulations, in a new part, Title 2 of the Code of Federal Regulations, Part 184.[2]

The revised guidance builds on OMB's nonbinding, proposed guidance from February 2023 and preliminary guidance from OMB's April 2022 memorandum OMB M-22-11.[3] This article highlights some of the key ways the revised guidance differs from, or conforms with, OMB's prior guidance.



Amy Hoang

Revised Definition of Construction Materials

BABA contains different domestic manufacturing requirements depending on whether a material qualifies as (1) a construction material, (2) a manufactured product, (3) a steel or iron product, or (4) a Section 70917(c) material — a new category added by the revised guidance to include product categories listed in BABA as excluded materials.[4]

Prior guidance provided a list of materials that should be considered construction materials, including glass, lumber, and plastic and polymer-based products.[5]



Sarah Barney

A key point of commentary and confusion surrounding the early rounds of guidance centered around OMB's position that an item should only fall under a single category subject to requirements, while simultaneously providing guidance that could result in an item being considered as falling under multiple categories.

While the February 2023 proposed guidance suggested that an item made out of a combination of multiple types of construction materials would still be categorized as a construction material,[6] the revised guidance clarifies that a combination of different construction materials — e.g., adding a plastic frame to sheet glass — results in a manufactured product, not a construction material.[7]

The revised guidance defines "construction materials" as "articles, materials, or supplies that consist of only one of the items" listed in the definition, although "[m]inor additions of articles, materials, supplies, or binding agents to a construction material do not change the categorization of the construction material." [8] Additionally, "[t]o the extent one of the items listed [in the definition] contains as inputs other items listed [in the definition], it is nonetheless a construction material." [9]

New Definition of Manufactured Products

The February 2023 proposed guidance defined a "manufactured product" as a catchall, and in the negative as any material that did not meet the definition of a construction material or steel or iron

product.[10] The revised guidance adds an affirmative definition of manufactured products, stating that they are "[a]rticles, 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." [11]

Updated Definition of All Manufacturing Processes

The revised guidance provides new standards as to what constitutes "all manufacturing processes" for construction materials, specifically walking through what constitutes "produced in the United States" for each specified category of construction materials.[12]

Contractors and suppliers should review the revised guidance to confirm what "all manufacturing processes" means for the construction materials they are selling or using in a project. As an example, "all manufacturing processes" for plastic and polymer-based products includes all processes from the "initial combination of constituent plastic or polymer-based inputs" until the item is in its final form[13]

Clarification Of How to Calculate Cost of Components

To be considered produced in the U.S. under BABA, a manufactured product must be (1) manufactured in the U.S., and (2) the cost of components that are mined, produced or manufactured in the U.S. must be greater than 55% of the total cost of all components of the manufactured product.[14]

In an attempt to create cohesion across the diverse domestic sourcing schemes contractors may face, the revised guidance adopts the "cost of components" calculation laid out in Federal Acquisition Regulation 25.003, with a few discrete differences: (1) replacing "contractor" with "manufacturer"; and (2) replacing "end product" with "manufactured product." [15]

These grammatical changes do not make dramatic substantive changes to the calculation but acknowledge the infrastructure-specific nature of the items being acquired, including the fact that a contractor may not be the individual manufacturing the items.[16]

No Additional Guidance on Aligning BABA Requirements with U.S. Trade Agreements

The revised guidance acknowledges that a number of states have opted to tie their procurement activities to the terms of one or more international trade agreements, and therefore require application of BABA's domestic sourcing requirements in a manner that is consistent with these agreements.[17]

However, OMB elected not to include a specific statement to this effect in Part 184, instead relying on the existing OMB memorandum from 2022, which states that if "a recipient is a State that has assumed procurement obligations pursuant to the Government Procurement Agreement or any other trade agreement, a waiver of a Made in America condition to ensure compliance with such obligations may be in the public interest." [18]

No Rescission of April 2022 OMB Memorandum

While the revised guidance does replace the proposed guidance published in February 2023, it does not replace or rescind the guidance published in the April 2022 OMB memorandum. Instead, OMB views the OMB memorandum as supplementing the requirements set out in Title 2 of the Code of Federal Regulations, Part 184.[19]

The revised guidance notes that OMB intends to update its April 2022 memorandum M-22-11 to revise portions that contradict the revised guidance.[20] The revised guidance is effective Oct. 23, meaning that, to the extent the revised guidance alters existing requirements from the preliminary guidance, the revised guidance will generally apply to federally funded infrastructure projects awarded after Oct. 23.[21]

Key Takeaways and Next Steps for Industry

The revised guidance is particularly useful for manufacturers wrestling with the distinction between "construction materials" and "manufactured products." While even under the revised guidance the distinction may not be perfectly clear, the definitions in the revised guidance help to clarify the terms, and highlight the bright-line approach OMB intends to take in categorizing items for the purpose of determining requirements.

More importantly, the revised guidance differs from the standards in both the proposed guidance and the OMB memorandum — though it aligns more closely with the OMB memorandum. Accordingly, contractors and suppliers should assess whether the changes to the definitions affect prior assessments of what constitutes a construction material versus a manufactured product.

The revised guidance's definition of construction materials highlights the unambiguous approach OMB intends to take with the categorization of BABA products, as well as the internal controls contractors may need to develop for tracking the production and timing of incorporating "construction materials" and any items they are integrated into.

Suppliers who do not typically sell in the federal supply chain should familiarize themselves with FAR 25.003 to ensure they understand how to calculate the cost of components for purposes of the 55% domestic component rule for manufactured products. For instance, contractors may mistakenly use the total cost, including assembly, of the end product as their denominator, which is incorrect under FAR Part 25.003.

Suppliers should be precise in any certifications requested by higher-tier contractors. The revised guidance repeatedly suggests that federal agencies awarding grants for infrastructure projects supplement the revised guidance with their own requirements or interpretations. Suppliers that certify generally to global BABA compliance may not be considering forthcoming agency-specific guidance.

It is imperative for contractors and suppliers to understand which domestic sourcing requirements apply to a contract. BABA's requirements apply only to federally funded infrastructure projects, and other domestic sourcing requirements such as the Buy American Act or Trade Agreements Act may apply to projects and materials procured directly by federal agencies.

Furthermore, even federally funded infrastructure projects may involve non-BABA requirements. As the revised guidance notes, OMB recognizes that other agencies such as the U.S. Environmental Protection Agency, Federal Highway Administration and Federal Transit Administration already have Buy America requirements that apply to federally funded infrastructure projects.

In those cases, agencies must assess whether their existing Buy America requirements are less stringent than BABA, and if so, incorporate elements of BABA where necessary to align. As a result, contractors and suppliers should be cognizant that some projects may include BABA requirements, alternative Buy America requirements or even a mix of both.

Contractors and suppliers should be aware of the sources of federal funding if performing on infrastructure projects. Not only is it important to understand whether a project is federally funded and therefore subject to BABA, but contractors and suppliers must also be cognizant of any agency-specific guidance implementing BABA. As the revised guidance notes, OMB encourages federal agencies to provide additional guidance to supplement OMB's requirements in Part 184.

While the revised guidance provides additional clarity and finality on some aspects of BABA, more developments are still to come as federal agencies implement BABA requirements. We will continue to monitor these developments and their impacts on industry.

Amy Hoang is a partner and co-chair of the government contracts practice group at Seyfarth Shaw LLP.

Sarah Barney is an associate at the firm.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of their

employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] See 88 Fed. Reg. 57,750 (Aug. 23, 2023).

[2] 88 Fed. Reg. 57,750 at 57,750.

[3] See 88 Fed. Reg. 8,374 (Feb. 9, 2023); Office of Management & Budget, Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure, OMB M-22-11 (Apr. 18, 2022). We have written previously on the statutory requirements of BABA and how OMB implemented those requirements in prior guidance.

[4] 88 Fed. Reg. 57,750 at 57,772.

[5] Proposed Guidance, 88 Fed. Reg. 8,374 at 8,378.

[6] 88 Fed. Reg. 8,374 at 8,376

[7] 88 Fed. Reg. 57,750 at 57,754S

[8] 88 Fed. Reg. 57,750 at 57,788.

[9] Id.

[10] 88 Fed. Reg. 8,374 at 8,377.

[11] 88 Fed. Reg. 57,750 at 57,788.

[12] 88 Fed. Reg. 57,750 at 57,789.

[13] Id.

[14] 88 Fed. Reg. 57,750 at 57,777.

[15] Id. at 57,777-78.

[16] Id.

[17] 88 Fed. Reg. 57,750 at 57,786.

[18] See OMB memorandum M-22-11 at 11.

[19] 88 Fed. Reg. 57,750 at 57,751.

[20] Id.

[21] 88 Fed. Reg. 57,750 at 57,750.