

PRATT'S GOVERNMENT CONTRACTING LAW REPORT

VOLUME 9

NUMBER 12

DECEMBER 2023

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Library of Congress Card Number:

ISBN: 978-1-6328-2705-0 (print)
ISSN: 2688-7290

Cite this publication as:

[author name], [article title], [vol. no.] PRATT’S GOVERNMENT CONTRACTING LAW REPORT [page number] (LexisNexis A.S. Pratt).

Michelle E. Litteken, GAO Holds NASA Exceeded Its Discretion in Protest of FSS Task Order, 1 PRATT’S GOVERNMENT CONTRACTING LAW REPORT 30 (LexisNexis A.S. Pratt)

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Editorial Office
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862
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POSTMASTER: Send address changes to *Pratt's Government Contracting Law Report*, LexisNexis Matthew Bender, 230 Park Ave. 7th Floor, New York NY 10169.

U.S. Office of Management and Budget Issues Final Guidance on Implementation of Build America, Buy America Act

*By Kevin J. Maynard, Christopher B. Weld and Cara L. Sizemore**

In this article, the authors review final guidance issued by the Office of Management and Budget on the implementation of the Build America, Buy America provisions of the Bipartisan Infrastructure Law.

The Office of Management and Budget (OMB) has issued long-awaited final guidance on the implementation of the Build America, Buy America (BABA) provisions of the Bipartisan Infrastructure Law.¹

The BABA imposes Buy America preferences on iron and steel, manufactured products, and construction materials used in federally funded infrastructure projects. This final rule is aimed at implementing those requirements.

The final rule follows a proposed rule asking for stakeholder feedback on a wide range of topics relevant to the implementation of BABA, including how to determine “cost of components,” manufacturing standards for certain construction materials, and the definition of “predominantly iron or steel.”

OMB’s final guidance, which covers more than 160 pages, similarly encompasses a wide array of issues, including the notable provisions discussed below.

UPDATED DEFINITIONS AND STANDARDS FOR “CONSTRUCTION MATERIALS”

As mentioned above, the BABA imposes Buy America preferences on certain “construction materials” used in federally funded infrastructure projects. The final guidance updates the list of construction materials subject to BABA to include “engineered wood,” and also clarifies that “fiber optic cable” includes “drop cable” (which OMB characterized as “a frequently used sub-type of fiber optic cable”). The final guidance also updates the specific manufacturing processes that must be performed in the United States in order for particular categories of construction material to be considered “produced in the United States.”

* The authors, attorneys with Wiley Rein LLP, may be contacted at kmaynard@wiley.law, cweld@wiley.law and csizemore@wiley.law, respectively.

¹ https://www.whitehouse.gov/wp-content/uploads/2023/08/REV_2-CFR-Guidance-Pre-publication-version-8.13.pdf.

UPDATED DEFINITION OF “MANUFACTURED PRODUCTS”

The proposed rule defined a manufactured product in the negative—essentially stating that a manufactured product was not construction material and was not a product that consisted wholly or predominantly of iron or steel. In response to numerous comments, the final guidance now includes an affirmative definition of the term “manufactured products,” which is defined as “articles, materials, or supplies that have been: (i) processed into a specific form or shape, or (ii) combined with other articles, materials, or supplies to create a product with different properties than the individual articles, materials, or supplies.” Consistent with earlier guidance, OMB’s final guidance states that an item should not be considered to fall into multiple categories. Thus, an item should only be classified as either an iron or steel product, a construction material, or a manufactured product.

“MINOR ADDITIONS” TO CONSTRUCTION MATERIALS

OMB’s final guidance also updates the definition of construction material to provide that “[m]inor additions of articles, materials, supplies, or binding agents to a construction material do not change the categorization of the construction.” OMB did not provide a specific definition of “minor additions,” nor did it provide a specific percentage or amount of material that would qualify as a “minor addition.” Instead, OMB provided a few examples of minor additions—such as wax, binding agents, and coatings—and otherwise instructs that Federal agencies “should exercise reasonable discretion” in determining whether the addition of a particular material to a construction material qualifies as a “minor addition.”

DEFINITION OF “COST OF COMPONENTS”

Under the BABA, at least 55% of the total cost of all components of a manufactured product must be mined, produced, or manufactured in the United States. Recognizing the benefit of consistency between the BABA requirements and the Buy American requirements in the Federal Acquisition Regulation (FAR), OMB’s final guidance includes a definition of “cost of components” that closely aligns with the FAR’s definition: (i) For components purchased by the manufacturer, OMB’s final guidance defines the “cost of components” as the manufacturer’s “acquisition cost,” including transportation costs and applicable duty; (ii) For components manufactured by the manufacturer, the “cost of components” is determined based on the costs associated with the manufacturing of the component, including transportation costs and allocable overhead costs, but not including profit or any labor costs associated with the manufacturing of the finished end product.

DEFINITION OF “PREDOMINATELY OF IRON OR STEEL”

OMB also looked to the FAR’s definition of “predominately of iron or steel or a combination of both,” which is defined in the final guidance as any product for which the cost of the iron and steel content exceeds 50% of the total cost of all components, based on “a good faith estimate.” The guidance also provides examples of “iron or steel products” to include “bar, billet, slab, wire, plate, or sheet, castings, or forgings” utilized in the manufacture of the product.

WAIVER PROCESS

Under the BABA and OMB’s initial guidance, the BABA preference may be waived if:

- (i) Iron, steel, manufactured products, or construction materials are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality;
- (ii) The inclusion of iron, steel, manufactured products, or construction materials produced in the United States will increase the cost of the overall project by more than 25%; or
- (iii) The application of the preference is “inconsistent with the public interest.”

OMB’s final guidance, which is largely unchanged, provides additional instructions for processing waivers—including the format, content, and supporting materials required for agencies to waive the application of the Buy America preference.

“EXCLUDED MATERIALS”

OMB’s final guidance also includes additional clarification regarding those materials that were excluded from coverage under Section 70917(c) of the BABA: cement and cementitious materials; aggregates such as stone, sand, or gravel; or aggregate binding agents or additives. Under OMB’s final guidance, these “Excluded Materials” (also referred to as “Section 70917(c) materials”) on their own, are not manufactured products and are not subject to BABA’s domestic preference. However, OMB’s final guidance also instructs that there may be circumstances when Section 70917(c) materials will be treated as components of manufactured products to which a Buy America preference will apply—including, for example, stone, sand, and gravel when combined with other materials to produce a manufactured product, such as precast concrete.

WAIVERS OR EXEMPTIONS FOR INTERNATIONAL TRADE OBLIGATIONS

Although the final rule itself does not include any formal provisions regarding the effect of trade agreements on the application of the BABA

preference, the preamble to the rule includes an extensive discussion of this topic in response to comments from various stakeholders. In response to these comments, OMB noted that under Section 70914(e) of BABA, the Buy America provisions “must be applied in a manner consistent with the obligations of the United States under international agreements.” OMB indicated that Federal financial assistance awards “are generally not subject to international trade agreements because these international obligations only apply to direct federal procurement activities by signatories to such agreements.” However, it also reaffirmed its earlier guidance in Memorandum M-22-11 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.” OMB also directed stakeholders to a “Fact Sheet”² issued by the Made In America Office which includes similar guidance regarding the issuance of public interest waivers “to allow State entities to comply with their international trade obligations.”

APPLICATION OF BABA PREFERENCE TO FOR-PROFIT ENTITIES

The initial guidance provided by OMB in Memorandum M-22-11 instructed that the BABA preference only applied to “non-federal entities,” which according to OMB does not include “for profit” entities based on the definitions in the federal grant rules. A number of commenters asked for clarification on this issue, pointing out the potential for confusion as well as an “unlevel playing field” between for-profit entities and other applicants for competitive grants. In response, OMB clarified that although for-profit entities are not considered “non-federal entities” for purposes of the federal grant rules, federal agencies are nevertheless permitted (but not required) to apply the BABA preference and other provisions of the federal grant rules to for-profit entities.

CONCLUSION

OMB’s final guidance should help provide some additional clarity regarding the application of the BABA preference to federally funded infrastructure projects, including the standards for determining whether particular materials qualify as “produced in the U.S.” Nevertheless, OMB’s guidance still leaves many issues unaddressed and leaves a number of issues to federal agencies to provide specific guidance in the context of their particular infrastructure programs.

² <https://www.madeinamerica.gov/media/documents/buy-american-vs-buy-america-fact-sheet.pdf>.