

ALERT

OMB Issues Proposed Guidance on Requirement for U.S.-Produced Construction Materials in Infrastructure Projects

February 9, 2023

WHAT: Following the State of the Union, in which President Biden reiterated the Administration's focus on made-in-America infrastructure, the Office of Management and Budget (OMB) issued proposed guidance aimed at standardizing the implementation of the Build America, Buy America (BABA) provision of the Bipartisan Infrastructure Law. As we've previously discussed, the BABA requires, among other things, the use of U.S.-produced iron and steel, manufactured products, and "construction materials" in federally-funded infrastructure projects. On February 9, 2023, OMB issued a proposed rule and notification of proposed guidance about the implementation of the BABA's requirements.

The proposed rule includes a number of proposed changes to the federal grant rules, which largely reflect the initial implementing guidance contained in OMB's *Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure*, which was issued in April 2022. In addition, OMB is seeking additional stakeholder feedback on a number of specific aspects of the proposed rules, including:

- **Definition of "cost of components":** OMB proposes to use the same definition of "cost of components" as currently used in the Federal Acquisition Regulation (FAR) clauses implementing the Buy American Act for federal procurement contracts. Under this proposed approach, "cost of components" would mean the acquisition cost and transportation costs for components purchased by the contractor and all costs associated with the manufacture of the component, including transportation costs,

Authors

Kevin J. Maynard
Partner
202.719.3143
kmaynard@wiley.law
Cara L. Sizemore
Partner
202.719.4192
csizemore@wiley.law

Practice Areas

Build America, Buy America
Buy American and Trade Agreements Acts
Construction
Federal Grant Compliance
Federal Infrastructure Resource Center
Government Contracts

for those manufactured by the contractor. OMB noted that use of the FAR definition will provide “consistent and clear market requirements for industry to meet one standard,” but is nevertheless seeking input on whether a different standard should apply to federal infrastructure grants.

- ***Manufacturing standards for certain construction materials:*** The proposed guidance includes standards for determining whether specific categories of construction materials should be considered “produced in the United States” for purposes of the BABA requirements. Specifically, the proposed guidance includes specific manufacturing standards for the following categories of construction material used in federally-funded infrastructure projects:

- Non-ferrous metals
- Plastic and polymer-based products
- Composite building materials
- Glass
- Fiber optic cable
- Optical fiber
- Lumber
- Drywall

In addition, OMB is specifically 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.”

- ***Guidance on distinguishing between “manufactured products” and “construction material”:*** The proposed rule also proposes to define manufactured products as those “not categorized as a construction material” and that “do not consist wholly or predominantly of iron or steel or both.” OMB is requesting feedback on whether industry wants additional guidance on how to distinguish between manufactured products and construction material.
- ***Feedback on definition of “predominantly iron or steel.”*** Finally, OMB is seeking input on whether to adopt a definition of the term “predominantly iron or steel” to help differentiate between categories of products. In particular, 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 defines a product as “predominantly iron or steel” if the cost of the iron and steel content exceeds 50%.

WHEN: The proposed rule was issued February 9, 2023. Comments on the proposed rule are due on March 13, 2023.

WHAT DOES IT MEAN FOR INDUSTRY: One notable aspect of OMB’s latest proposed guidance is the effort to align the “Buy America” standards for federal infrastructure projects with the “Buy American Act” requirements applicable to federal procurement contracts. Although that may help simplify the currently diverse definitions in domestic preference laws, contractors should carefully consider whether there are reasons for maintaining

a different set of standards that have traditionally applied to federal infrastructure projects. OMB has invited interested parties to provide input on this and other issues as it works to finalize its proposed guidance on application of the BABA requirements, which will have a significant impact on federally funded infrastructure projects for years to come.