

ALERT

OMB Issues Updated Guidance on Implementing Build America, Buy America Requirements

November 13, 2023

WHAT: The Office of Management and Budget (OMB) recently issued an update to its initial guidance on implementing the Build America, Buy America (BABA) provisions of the Bipartisan Infrastructure Law. This is the third set of guidance on the implementation of BABA issued by OMB in just over a year and a half.

As we have discussed in prior alerts, BABA requires that all iron and steel, manufactured products, and construction materials used in federally funded infrastructure projects be produced in the United States. OMB issued initial guidance on the implementation of BABA in April 2022, in the form of OMB Memorandum M-22-11. After consideration of extensive public comments, in August 2023, OMB issued more detailed, formal guidance, which was incorporated into the federal grant rules at 2 CFR Part 184, effective October 25, 2023.

The latest guidance “rescinds and replaces” OMB’s initial guidance by removing provisions that are in “direct conflict” with the formal rules contained in Part 184. Most notably, OMB’s latest guidance removes the general standard initially issued by OMB for determining the country of origin for “construction materials.” Instead, as we previously discussed, the final guidance incorporated into 2 CFR Part 184 details the specific manufacturing processes that must be performed in the United States in order for each particular category of listed construction material to be considered “produced in the U.S.”

In addition to removing conflicting provisions, OMB’s latest guidance provides additional guidance regarding the waiver process, to supplement the formal rules contained in 2 CFR Part 184. Under the

Authors

Kevin J. Maynard
Partner
202.719.3143
kmaynard@wiley.law
Christopher B. Weld
Partner
202.719.4651
cweld@wiley.law
Cara L. Sizemore
Partner
202.719.4192
csizemore@wiley.law

Practice Areas

Build America, Buy America
Buy American and Trade Agreements Acts
Government Contracts
International Trade

BABA and OMB's implementing guidance, waivers can be granted for three reasons:

- Applying the Buy America preference would be inconsistent with the public interest (a "public interest waiver");
- Types of 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 ("a nonavailability waiver"); or
- 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% (an "unreasonable cost waiver").

For the most part, this latest supplemental guidance reaffirms the processes, principles, and criteria that were set forth in OMB's initial guidance—including, for example, the form and content of proposed waivers; the requirement to publish proposed waivers for public comment; the requirement to perform thorough market research and consider alternative products before issuing non-availability waivers; as well as OMB's guidance that waivers are to be "time limited" and "targeted" to specific products or projects, "to the greatest extent possible," to maximize the use of materials produced in the United States. OMB's latest guidance also includes some additional guidance regarding the waiver process, including:

- Reiterating that all waiver requests must be reviewed by the Made in America Office (MIAO);
- Requiring that all waivers must be "cross posted" on both the agency website as well as the BuyAmerican.gov website;
- Requiring that any request for a "general applicability waiver" covering more than one project include information on the "size and scale" of the program(s) covered by the proposed waiver, including the number of projects and amount of federal funds subject to the waiver;
- Requiring that market research supporting a non-availability waiver should include relevant details, including "who conducted the market research, when it was conducted, sources that were used, and the methods used to conduct the research";
- Requiring agencies to post all public comments received in response to a proposed waiver, as well as the agency's response to those comments; and
- Instructing that where multiple agencies coordinate together on waiver requests that affect infrastructure projects across agencies, each agency must still make its own waiver determination, so that no one agency can "independently issue a waiver that applies to other agencies."

WHEN: The formal BABA rules issued by OMB in 2 CFR Part 184 took effect on October 25, 2023. For a "limited set of infrastructure" projects awarded prior to that effective date, OMB instructs that recipients and subrecipients may continue to rely on OMB's initial guidance—including OMB's initial guidance regarding categorization of materials, as well as the preliminary standards for construction materials.

WHAT DOES IT MEAN FOR INDUSTRY: OMB's latest guidance on implementation of BABA—its third significant set of guidance in just over a year and a half—illustrates how the rules in this complex area are continuing to evolve. Adding to this complexity, agencies are also continuing to provide their own guidance for applying the BABA requirements to their particular programs and funding opportunities, as permitted by OMB's guidance. Recipients and subrecipients should therefore be careful to review all of the relevant guidance, as well as the terms and conditions of their particular award, to fully understand their BABA compliance obligations. Wiley will continue to monitor this space and provide further updates as additional guidance is issued.

Vaibhavi Patria, a Law Clerk at Wiley Rein LLP, contributed to this alert.