

Build America, Buy America Final Guidance Issued

On August 14, the Office of Management and Budget (OMB) issued a “pre-publication” version of its final guidance to promote the use of American-made materials in federally funded infrastructure projects.¹ The guidance applies to the Build America, Buy America Act² (BABA), which was signed into law on November 15, 2021, as part of President Biden’s landmark Bipartisan Infrastructure Law. BABA requires companies seeking federal financial assistance to use American-made iron, steel, manufactured products, and construction materials on all federally funded infrastructure projects, thereby expanding the federal government’s American-made preferences previously established in the Buy American Act.³

Most importantly, the guidance further defines certain critical terms, explains how to calculate the cost of components of manufactured products, and includes guidance on proposing and issuing waivers. The final guidance will be incorporated into Title 2 of the Code of Federal Regulations by adding a new part 184 and revising 2 CFR 200.322, and will take effect 60 days after it is published in the *Federal Register*.⁴

Definitions

The guidance clarifies that “[a]n article, material, or supply should only be classified into one of the following categories: (1) iron or steel products; (2) manufactured products; (3) construction materials; or (4) section 70917(c) materials.”⁵ The guidance accordingly updates the definitions of these categories:

- **“Iron or steel products”** are defined as “articles, materials, or supplies that consist wholly or predominantly of iron or steel or a combination of both.”⁶
- **“Manufactured products”** are 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.”⁷
- **“Construction materials”** means articles, materials, or supplies that consist of only one of the following: (i) non-ferrous metals; (ii) plastic and polymer-based products (including polyvinylchloride, composite building materials, and polymers used in fiber optic cables); (iii) glass (including optic glass); (iv) fiber optic cable (including drop cable); (v) optical fiber; (vi) lumber; (vii) engineered wood; and (viii) drywall.⁸ The guidance adds to the definition fiber optic cable (including drop cable) and engineered wood.
- **“Section 70917(c) materials”** mean certain materials that are excluded from the term “construction materials,” pursuant to Section 70917(c) of BABA. Under the final guidance, these “Section 70917(c) materials” include “cement and cementitious materials; aggregates such as stone, sand, or gravel; or aggregate binding agents or additives.”⁹

Cost of Manufactured Products and their Components

For “manufactured products” to qualify as “produced in the United States,” the end-product must be manufactured in the United States and *more than 55%* of the total cost of all components of the manufactured product must also be of U.S. origin. The final guidance outlines that costs federal agencies and award recipients can count when determining if a “manufactured product” satisfies this 55% test.

- For components *purchased* by the manufacturer, the following costs should be included in the 55% calculation: the acquisition cost, including transportation costs to the place of incorporation into the manufactured product, regardless of whether or not such costs are paid



Lawrence M. Prosen

Member

lprosen@cozen.com
Phone: (202) 304-1449
Fax: (202) 861-1905



Adam Poliner

Associate

arpoliner@cozen.com
Phone: (202) 280-6512
Fax: (202) 861-1905

Related Practice Areas

- Construction Law
- Government Contracts
- Infrastructure

Industry Sectors

- Real Estate & Construction

to a domestic firm, and any applicable duty, regardless of whether or not a duty-free entry certificate is issued.

- For components *manufactured* by the manufacturer, the following costs should be included in the 55% calculation: all costs associated with the manufacture of the component, including transportation costs, plus allocable overhead costs. Importantly, all costs related to profit and any costs associated with the manufacture of the manufactured product must be excluded.

BABA Waivers

As many contractors know, it is often difficult to achieve Buy American (and now BABA) requirements due to limited availability or market conditions, among other causes. The guidance reaffirms and describes the circumstances when a waiver of the BABA requirements may be justified. Three bases exist to justify a waiver:

1. **Public interest.** A “public interest waiver” applies when applying the Buy America Preference would be inconsistent with the public interest.
2. **Nonavailability.** A “nonavailability waiver” applies when 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.
3. **Unreasonable cost.** An “unreasonable cost waiver” applies when the inclusion of iron, steel, manufactured products, or construction materials produced in the United States would increase the cost of the overall infrastructure project by more than 25%.¹⁰

The guidance also further explains the procedure for obtaining a waiver.

- Government contractors must request waivers in writing to the federal awarding agency. Federal awarding agencies are required to provide waiver request submission instructions and guidance on the format, contents, and supporting materials required for waiver requests from recipients.
- Before issuing a proposed waiver, the federal awarding agency must prepare a detailed written explanation for the proposed determination to issue the waiver.
- Before issuing a final waiver, the federal awarding agency must make the proposed waiver and the detailed written explanation publicly available and usually provide a 15-day period for public comment on the proposed waiver.¹¹

Conclusion

BABA, the Buy American Act, and related regulations and guidance continue to alter compliance requirements on federally funded projects. Government contractors seeking to compete for and perform federally financial assisted or federally funded infrastructure projects should review their supply chain, sourcing, and manufacturing processes to ensure domestic sourcing is compliant with BABA and the final guidance. OMB states that BABA implementation is an iterative process, meaning that further guidance or changes are likely to come in the future, so government contractors should continue to monitor developments in this area.

Please contact us with any questions or inquiries you may have.

¹ CFR Guidance — Pre-publication version ([whitehouse.gov](https://www.whitehouse.gov)).

² Pub. L. No. 117-58, §§ 70901 to 52, 135 Stat 429, 1294 to 1313 (Nov. 15, 2021).

³ See *generally* Buy American v. Buy America Fact Sheet.

⁴ CFR Guidance, at 2, 27.

⁵ *Id.* at 85.

⁶ *Id.* at 153.

⁷ *Id.* at 77.

⁸ *Id.* at 152-53.

⁹ *Id.* at 155.

¹⁰ *Id.* at 159.

¹¹ *Id.* at 159-161.

