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For more information,
contact:

Michael Taylor
+1 202 626 2385
jmtaylor@kslaw.com

Patrick Togni
+1 202 626 2958
ptogni@kslaw.com

Steve Cave
+1 703 245 1017
+1 202 626 9628
scave@kslaw.com

Katherine Vessels
+1 202 626 2929
kvessels@kslaw.com

King & Spalding

Washington, D.C.
1700 Pennsylvania
Avenue, NW
Suite 900
Washington, D.C. 20006
Tel: +1 202 737 0500

OMB Proposes New Regulatory Guidance On “Buy America Preferences For Infrastructure Projects”

Comments On The Proposal Must Be Filed By March 13, 2023

Two days after President Biden’s State of the Union address announced that there would be “new standards to require all construction materials used in Federal infrastructure projects to be made in America,” the Office of Management and Budget (“OMB”) initiated rulemaking “to revise OMB Guidance for Grants and Agreements” (“Proposed BABA Regulatory Guidance”). Once implemented, the guidance would be included in a new part of the Code of Federal Regulations (“C.F.R.”) (2 C.F.R. Part 184) intended “to support implementation of the Build America, Buy America Act provisions of the Infrastructure Investment and Jobs Act; and to clarify existing requirements.” The proposed regulations also would require all “Federal awarding agencies providing Federal financial assistance for infrastructure projects” to “comply with the Buy America Preferences” in the Proposed BABA Regulatory Guidance (by modifying 2 C.F.R. Part 200.322).

Enacted on November 15, 2021 as part of the Infrastructure Investment and Jobs Act (“IIJA”), the Build America, Buy America Act (“BABA”) requires infrastructure projects receiving Federal funding to source all iron, steel, manufactured products, and construction materials from the United States. BABA seeks to “use terms and conditions of Federal financial assistance awards to maximize the use of goods, products, and materials produced in, and services offered in, the United States” to strengthen America’s industrial base.

The Proposed BABA Regulatory Guidance would codify and clarify several aspects of prior OMB guidance contained in OMB Memorandum M-22-11 (Apr. 18, 2022), including the following key areas.



Applicability

The Buy America Preference applies to awards where funds are appropriated or otherwise made available for infrastructure projects in the United States, regardless of whether infrastructure is the primary purpose of the award.

The Proposed BABA Regulatory Guidance provides several examples of “public infrastructure projects” that are covered by the requirements, including “the structures, facilities, and equipment for, in the United States, roads, highways, and bridges; public transportation; dams, ports, harbors, and other maritime facilities; intercity passenger and freight railroads; freight and intermodal facilities; airports; water systems, including drinking water and wastewater systems; electrical transmission facilities and systems; utilities; broadband infrastructure; and buildings and real property; and structures, facilities, and equipment that generate, transport, and distribute energy including electric vehicle (EV) charging.”

Importantly, the proposed regulations would instruct Federal agencies to “interpret the term ‘infrastructure’ broadly” for purposes of deciding whether a project that is not identified in the list of examples should be covered by these procurement rules. Federal agency heads would be required to assess “whether the project will serve a public function, including whether the project is publicly owned and operated, privately operated on behalf of the public, or is a place of public accommodation, as opposed to a project that is privately owned and not open to the public.”

Key Definitions

The Proposed BABA Regulatory Guidance provides definitions for “iron or steel products,” “manufactured products,” and “construction materials.” The proposed language explains what “produced in the United States” means in the context of each of the three categories, as discussed below. OMB seeks public comments on the definitions in the proposed regulatory language that could inform how these and other terms are defined or applied in any final rule.

Determining Cost Of Components For Manufactured Products

As currently drafted, the Proposed BABA Regulatory Guidance would use the definition of “cost of components” in the Federal Acquisition Regulations (“FAR”). Specifically, OMB proposes adopting the following rules for determining the cost of components for manufactured products:

To determine “whether the cost of components for manufactured products is greater than 55 percent of the total cost of all components, use the following definitions:

- (a) For components purchased by the manufacturer, the acquisition cost, including transportation costs to the place of incorporation into the end product (whether or not such costs are paid to a domestic firm), and any applicable duty (whether or not a duty-free entry certificate is issued); or
- (b) For components manufactured by the manufacturer, all costs associated with the manufacture of the component, including transportation costs as described in paragraph (a) of this section, plus allocable overhead costs, but excluding profit. Cost of components does not include any costs associated with the manufacture of the end product.”

OMB’s notice telegraphs the high likelihood for a significant number of public comments on this proposal because the language is limited to “components purchased by the manufacturer” or “components manufactured by the manufacturer.” OMB is requesting comments on whether this provision should refer to “the ‘manufacturer’ or some other entity” that is involved in the procurement transaction (*i.e.*, the contractor). Affected companies who want to ensure that the regulatory guidance is clear and provides workable tests should consider filing comments on this important aspect of the proposal.

“Produced In The United States” Standards For Construction Material

Proposed section 184.6 discusses domestic manufacturing process standards for construction material (including: non-ferrous metals, plastic and polymer-based products, composite building materials, glass, fiber optic cable, optical fiber, lumber, and drywall) to be considered “produced in the United States.” OMB seeks comments on how to implement any final definition of the key terms such as “composite building materials” and “fiber optic cable” and whether additional



standards should be issued for other categories of construction material such as “coatings,” “brick,” and “engineered wood products.”

Regulatory Provisions On Waivers And Exemptions

Under section 70914(a) of the IIJA, Federal financial infrastructure investments obligated on or after May 14, 2022 must comply with BABA requirements, and, absent a waiver, all iron, steel, manufactured products, and construction materials permanently incorporated into an infrastructure project subject to BABA requirements must be produced in the United States. The Proposed BABA Regulatory Guidance includes new provisions that confirm waivers and exemptions may be available in certain situations (*i.e.*, waivers based upon the public interest, non-availability, or unreasonable cost of BABA-qualifying articles).

In addition, the Guidance provides for exemptions to the Buy America preference for qualifying disaster relief and emergency response expenditures.

Request For Comments (March 13, 2023 Due Date)

OMB has requested public comment on the Proposed BABA Regulatory Guidance. Comments must be filed by March 13, 2023. OMB “particularly invited” comments on questions that were organized in 11 topics:

- Cost of components.
- Other construction material standards.
- Proposed definition of construction materials.
- Definition for “predominantly” iron or steel items.
- How to distinguish between categories of products.
- Meaning of composite building materials.
- Fiber optic cables and optical fibers.
- Standards applicable to optical fiber and optic glass.
- Aggregates.
- Specific sections of proposed guidance.
- Reducing burden on recipients.

OMB also is requesting comments on whether and how to distinguish manufactured products and construction materials.

While affected companies should carefully review the OMB-provided questions, public comments are not limited to the questions and topics that were posed by OMB in the Federal Register. To the contrary, interested persons may submit comments on any aspect of the proposal.

Conclusion

The Proposed BABA Regulatory Guidance is the latest development in transformative changes to the way that the Federal government spends its dollars on infrastructure in the United States. Affected companies should carefully review the Proposed BABA Regulatory Guidance and decide whether to engage in the public comment process and other advocacy efforts so that OMB takes their positions into account when drafting and implementing any final regulations.

King & Spalding is uniquely positioned to advise participants in projects that receive funding under the Infrastructure Act at all stages. Our Government Matters team includes six U.S. Attorneys, 24 Assistant U.S. Attorneys, and former senior officials from the highest ranks in regulatory and enforcement organizations, including the Environmental Protection



Agency, the Federal Trade Commission, the Federal Energy Regulatory Commission, and the National Highway Traffic Safety Administration. We have been named “Law Firm of the Year” for Government Relations by US News & World Report, have been recognized three times as Environmental Group of the Year by Law360, and are recognized as among the leading energy regulatory practices in the United States by Legal 500. To find out more, please visit our [Buy American and Supply Chain Policy Roundup](#).

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