

---

This material from *The Government Contractor* has been reproduced with the permission of the publisher, Thomson Reuters. Further use without the permission of the publisher is prohibited. For further information or to subscribe, call 1-800-328-9352 or visit <https://legal.thomsonreuters.com>. For information on setting up a Westlaw alert to receive *The Government Contractor* in your inbox each week, call your law librarian or a Westlaw reference attorney (1-800-733-2889).

---

# THE GOVERNMENT CONTRACTOR<sup>®</sup>

Information and Analysis on Legal Aspects of Procurement

DECEMBER 20, 2023 | VOLUME 65 | ISSUE 46

## ¶ 345 FEATURE COMMENT: Good Tidings: OMB Wishes Contractors A Happy Holidays With Updated Guidance On Implementation Of Build America, Buy America Requirements

The end of the year is always a time for careful reflection, celebration, and hope for the year ahead. In that spirit, as we approach the end of 2023, we celebrate the second anniversary of the Infrastructure Investment and Jobs Act (IIJA) (signed by President Biden on Nov. 15, 2021), and the important developments in the Office of Management and Budget's implementation of the domestic sourcing requirements contained in the Build America, Buy America Act (BABA). P.L. 117-58, 135 Stat. 429, 70901-70927. In the two years since passage of the IIJA, in addition to the numerous infrastructure and energy programs created and funded by the \$1.2 trillion dollar law, agencies and recipients have grappled with the BABA requirements as they awaited authoritative OMB guidance. Over the course of the past year, OMB has issued a Final Rule (88 Fed Reg. 57,750, available at [www.govinfo.gov/content/pkg/FR-2023-08-23/pdf/2023-17724.pdf](http://www.govinfo.gov/content/pkg/FR-2023-08-23/pdf/2023-17724.pdf)) (Aug. 23, 2023), containing detailed guidance on BABA for federal agencies administering federal financial assistance programs for infrastructure (including responses to extensive public comments on the implementation of the BABA requirements). OMB also issued a memorandum (M-24-02, Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure, available at [www.whitehouse.gov/wp-content/uploads/2023/10/M-24-02-Buy-America-Implementation-Guidance-Update.pdf](http://www.whitehouse.gov/wp-content/uploads/2023/10/M-24-02-Buy-America-Implementation-Guidance-Update.pdf)) (Oct. 25, 2023) ("M-24-02") that rescinded and replaced OMB's initial implementation guidance (M-22-11, Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure, available at [www.whitehouse.gov/wp-content/uploads/2022/04/M-22-11.pdf](http://www.whitehouse.gov/wp-content/uploads/2022/04/M-22-11.pdf)) (April 18, 2022) ("M-22-11").

---

*The Government Contractor is not printed the weeks containing December 25 and January 1. The next issue will be dated January 10, 2024.*

---

Despite these significant developments, two years after the passage of the IIJA and BABA, recipients of federal financial assistance awards continue to seek guidance on how to apply the BABA domestic sourcing requirements, with many recipients (and subrecipients, including for-profit contractors) finding that their ongoing projects are

now subject to new domestic preference requirements agencies are still in the process of implementing. So where are we now? Before discussing the current state of the BABA regulations, a brief overview is in order.

**All I Want For Christmas is Clear Guidance on Domestic Preference Requirements**—If Mariah Carey were a recipient of federal financial assistance awards, she may have revised her perennial holiday favorite to specify that there is just one thing she needs—clarity on how to source materials for projects subject to the BABA requirements. For years, federal financial assistance recipients (and contractors under those awards) have been subject to several statutes and regulations applicable to infrastructure projects, the requirements of which vary widely depending on both the agency administering the funds and the statutory program from which funds were paid. In theory, the BABA requirements would apply a consistent set of domestic preference restrictions to all federal financial assistance infrastructure projects—not just those funded by the IIJA—and thus clarify requirements.

Federal Government contractors—often the “subrecipients” of awards to non-federal entity “recipients”—regularly perform projects with domestic sourcing requirements (e.g., the Buy American Act (BAA)). However, the BAA requirements and the BABA requirements are not identical. The Federal Acquisition Regulation implements portions of the BAA applicable to “Federal procurement—what the Federal government buys for its own use.” 88 Fed. Reg. 57753. BABA, on the other hand, applies to “Federal financial assistance for infrastructure projects – or grants, cooperative agreements, and other Federal awards that Federal agencies provide to recipients constructing such projects.” *Id.* OMB also noted that there are “many substantive differences between the BAA, implemented in the FAR, and BABA.” *Id.* And yet, while the requirements of BABA and the BAA differ, as explained further in this Feature Comment, OMB has “aimed for a reasonable degree of consistency on certain specific provisions” set forth in the Final Rule. *Id.*

The fundamental domestic preference requirement for infrastructure projects funded by federal financial

assistance is set forth in the IIJA in deceptively simple terms:

Not later than 180 days after the date of enactment of this Act, the head of each Federal agency shall ensure that none of the funds made available for a Federal financial assistance program for infrastructure, including each deficient program, may be obligated for a project unless all of the iron, steel, manufactured products, and construction materials used in the project are produced in the United States.

IIJA § 70914(a).

The exact scope of that requirement is illuminated by additional definitions in the law. “Federal financial assistance” is defined for BABA purposes as follows:

- (A) **IN GENERAL.**—The term “Federal financial assistance” has the meaning given the term in section 200.1 of title 2, Code of Federal Regulations (or successor regulations).
- (B) **INCLUSION.**—The term “Federal financial assistance” includes all expenditures by a Federal agency to a non-Federal entity for an infrastructure project, except that it does not include expenditures for assistance authorized under section 402, 403, 404, 406, 408, or 502 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5170a, 5170b, 5170c, 5172, 5174, or 5192) relating to a major disaster or emergency declared by the President under section 401 or 501, respectively, of such Act (42 U.S.C. 5170, 5191) or pre and post disaster or emergency response expenditures.

IIJA § 70912(4). This definition is significant in that it clearly applies the BABA requirements to almost all infrastructure projects, not just those funded by the IIJA. Thus, BABA requirements will continue to apply to federal financial assistance programs for infrastructure even after the IIJA funds are exhausted.

As federal financial assistance programs for “infrastructure” are (and will continue to be) subject to BABA, the definition of “infrastructure” is essential to understanding when and to what extent the BABA requirements apply. “Infrastructure” is defined for BABA purposes as follows:

## THE GOVERNMENT CONTRACTOR

The term “infrastructure” includes, at a minimum, the structures, facilities, and equipment for, in the United States—

- (A) roads, highways, and bridges;
- (B) public transportation;
- (C) dams, ports, harbors, and other maritime facilities;
- (D) intercity passenger and freight railroads;
- (E) freight and intermodal facilities;
- (F) airports;
- (G) water systems, including drinking water and wastewater systems;
- (H) electrical transmission facilities and systems;
- (I) utilities;
- (J) broadband infrastructure; and
- (K) buildings and real property.

IIJA § 70912(5). This is an expansive definition and, as explored further herein, OMB intends for the BABA requirements to apply to a very wide range of infrastructure projects.

BABA also sets forth an item-by-item definition to illustrate what is required for iron, steel, manufactured products, and construction materials to be considered “produced in the United States”:

PRODUCED IN THE UNITED STATES.—The term “produced in the United States” means—

- (A) in the case of iron or steel products, that all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States;
- (B) in the case of manufactured products, that—
  - (i) the manufactured product was manufactured in the United States; and
  - (ii) the cost of the components of the manufactured product that are mined, produced, or manufactured in the United States is greater than 55 percent of the total cost of all components of the manufactured product, unless another standard for determining the minimum amount of domestic content of the manufactured product has been established under applicable law or regulation; and
- (C) in the case of construction materials, that all manufacturing processes for the construction material occurred in the United States.

IIJA § 70912(6).

These definitions raised more questions than they answered. For example, what is included in the “cost of the components” when determining whether a manufactured product is “produced in the United States”? What are “all manufacturing processes” for a

particular construction material? For that matter, what items fall into the category of “construction materials”? While Congress identified certain construction materials in BABA itself (i.e., “non-ferrous metals, plastic and polymer-based products (including polyvinylchloride, composite building materials, and polymers used in fiber optic cables), glass (including optic glass), lumber, and drywall”), Congress explicitly left it to OMB to issue guidance on the application of the requirements in § 70914, to include issuing “standards that define the term all manufacturing processes in the case of construction materials.” IIJA §§ 70911(5), 70915(b)(1). At last OMB has issued such guidance, providing a framework for establishing that a covered item is produced in the U.S.

**It’s Beginning To Look A Lot Like Construction Materials (and Manufactured Products ... and Iron and Steel ...)**—Much like a child (or a child at heart) brimming with joy at the promise of a holiday morning, stakeholders have been eagerly awaiting long-promised guidance on the definition of construction materials, their domestic manufacturing processes, and how to determine whether iron, steel, and manufactured products are “produced in the United States.” OMB provided initial implementation guidance to federal agencies on the application of the BABA requirements in Memorandum M-22-11, issued by OMB on April 18, 2022 (approximately six months after the passage of IIJA on Nov. 15, 2021). M-22-11 included “preliminary and non-binding guidance” on the definition of construction materials and the standards for determining whether all manufacturing processes of the construction materials take place in the U.S. M-22-11 at 13-14. However, OMB noted that it was “seeking additional stakeholder input before issuing further guidance identifying initial manufacturing processes for construction materials that should be considered as part of “all manufacturing processes.” Id. at 14.

On Feb. 9, 2023, OMB issued its notification of proposed guidance (Proposed Rule), outlining proposed revisions to the OMB Guidance for Grants and Agreements to implement the BABA requirements. 88 Fed. Reg. 8374 (Feb. 9, 2023). Specifically, the Proposed Rule proposed the creation of a new part 184 in

2 CFR chapter I and revision to 2 CFR § 200.322, Domestic preferences for procurements, to implement the requirements in § 70914 of the BABA. This guidance generally aligned with M-22-11, but provided some additional critical guidance to agencies and posed several questions to contractors and other stakeholders, requesting input to inform OMB’s efforts to finalize its guidance on the BABA requirements.

On Aug. 23, 2023, OMB issued a Final Rule (effective Oct. 23, 2023), formally amending the Code of Federal Regulations to add 2 CFR pt. 184 and amend 2 CFR § 200.322 to clarify existing provisions within 2 CFR pt. 200. The Final Rule “provides guidance to Federal agencies on how to implement the BABA requirements and standards in a consistent and coordinated way,” provides “clarity to Federal agencies and recipients of federally funded infrastructure project awards,” and “will help send clear market signals to the industries manufacturing products about what is needed to satisfy the BABA requirements.” 88 Fed. Reg. 57751.

**So This Is The Final Rule, And What Have You Done?**—With another year over, and a new one about to begin, stakeholders reviewing the Final Rule may understandably hope this document is a good one, without any fear of inadvertent noncompliance with the BABA requirements. Those hopes may be justified, as the new 2 CFR pt. 184 provides detailed guidance on several critical concepts for implementing the BABA requirements. Significantly, the Final Rule includes:

- Definitions of critical terms included in the BABA requirements (2 CFR § 184.3);
- Direction on applying the Buy America Preference (defined in 2 CFR § 184.3 as: “the ‘domestic content procurement preference’ set forth in section 70914 of the Build America, Buy America Act, which requires the head of each Federal agency to ensure that none of the funds made available for a Federal award for an infrastructure project may be obligated unless all of the iron, steel, manufactured products, and construction materials incorporated into the project are pro-

duced in the United States”) to a Federal award (2 CFR § 184.4);

- How to determine the cost of components for manufactured products (2 CFR § 184.5);
- Construction material standards (2 CFR § 184.6); and
- Federal awarding agencies’ issuance of a Buy America Preference waiver (2 CFR § 184.7).

The Final Rule also updates 2 CFR § 200.322 to specify: “Federal agencies providing Federal financial assistance for infrastructure projects must implement the Buy America preferences set forth in 2 CFR part 184.” 88 Fed. Reg. 57790.

*Applying the Buy America Preference to a Federal Award:* The Final Rule makes clear that the Buy America Preference is to be applied as broadly as possible, specifying that it “applies to Federal 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 Federal award.**” 2 CFR § 184.4(a) (emphasis added). The Final Rule takes a similarly broad approach in its discussion of what constitutes “infrastructure” for purposes of applying the Buy America Preference, providing information about what constitutes “infrastructure in general” in 2 CFR § 184.4(c) (which generally tracks the IJA definition in § 70912(5), adding the structures, facilities, and equipment that generate, transport, and distribute energy including electric vehicle charging). OMB also notes that this description of infrastructure “in general” should not limit application of the Buy America Preference:

The Federal awarding agency should interpret the term “infrastructure” broadly and consider the description provided in paragraph (c) of this section as illustrative and not exhaustive. When determining if a particular project of a type not listed in the description in paragraph (c) constitutes “infrastructure,” the Federal awarding agency should consider 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.

## THE GOVERNMENT CONTRACTOR

2 CFR § 184.4(d). Thus, the Final Rule makes clear the already broad definition of infrastructure set forth in the IJA does not limit agencies' ability to impose the BABA requirements on recipients, and it gives agencies significant discretion to implement the Buy America Preference across a wide variety of federal financial assistance awards. Thus, even contractors that do not consider themselves "traditional" infrastructure contractors should take note of these requirements if they are or intend to become involved in the federal supply chain on a project covered by the Buy America Preference.

*Section 70917(c) Materials:* The Final Rule also provides a definition of "Section 70917(c) materials" and provides guidance regarding the treatment of those materials. As the term suggests, these are materials identified in § 70917(c) of the BABA, which specifically provides: "the term 'construction materials' shall not include cement and cementitious materials, aggregates such as stone, sand, or gravel, or aggregate binding agents or additives." IJA § 70917(c). Accordingly, the Final Rule defines these materials as "cement and cementitious materials; aggregates such as stone, sand, or gravel; or aggregate binding agents or additives." 2 CFR § 184.3.

The Final Rule provides that an article, material, or supply should only be classified into one of four categories: (1) iron or steel products; (2) manufactured products; (3) construction materials; or (4) § 70917(c) materials. 2 CFR § 184.4(e)(1). For purposes of BABA categorization, an item should be classified based on its status when brought to the work site. 2 CFR § 184.4(e)(2). While § 70917(c) is clear that such materials are not "construction materials" or inputs of "construction materials," OMB recognized that the statute did not exclude § 70917(c) materials from the "manufactured products" category. Thus, the Final Rule clarifies that "no Buy America preference is applied directly to individual section 70917(c) materials"; however, OMB recognized that there are circumstances "when section 70917(c) materials will be treated as components of manufactured products to which a Buy America preference will apply." 88 Fed. Reg. 57772. For example, OMB recognized that "certain section 70917(c) materials (such as stone, sand,

and gravel) may be used to produce a manufactured product such as the case with precast concrete. Precast concrete consists of components processed into a specific shape or form and is in such state when brought to the work site, making it a manufactured product." *Id.* Thus, in this instance, the value of the § 70917(c) materials will be included in the 55 percent cost of components requirement applicable to manufactured products.

*Iron and Steel:* The Final Rule clarifies the definition of "Iron or steel products," defining the term itself as "articles, materials, or supplies that consist wholly or predominantly of iron or steel or a combination of both" and adding a definition of "predominantly of iron or steel or a combination of both." 2 CFR § 184.3. Under the Final Rule, this is defined as follows:

Predominantly of iron or steel or a combination of both means that the cost of the iron and steel content exceeds 50 percent of the total cost of all its components. The cost of iron and steel is the cost of the iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the product and a good faith estimate of the cost of iron or steel components.

*Id.* This added definition provides important clarity, and is generally consistent with the FAR definition at FAR 25.003. However, the definition in the Final Rule does not adopt certain FAR-specific waivers or exemptions (such as an exception for commercial off the shelf fasteners). Even so, this definition should provide welcome consistency to stakeholders who navigate both the FAR BAA requirements and the federal financial assistance BABA requirements, as it ensures that "similar principles are applied in the context of both Federal procurement and Federal financial assistance." 88 Fed. Reg. 57768.

*Final Definition of "Construction Materials":* The new regulations at 2 CFR pt. 184 refine and replace key features of OMB's previous guidance, M-22-11. The initial definition of "construction materials" stated that a construction material "is or consists primarily of" one or another applicable material. M-22-11 at 16 (defining construction materials to include "non-ferrous metals; plastic and polymer-based products (including polyvinylchloride, composite building

materials, and polymers used in fiber optic cables); glass (including optic glass); lumber; or drywall.”). In the Final Rule, “of only one or more of” replaced “is or consists primarily of.” In the comments, stakeholders noted that the use of “primarily of” resulted in a confused distinction between “manufactured products” and certain “construction materials” that may include other materials that industry considers “manufactured products.” 88 Fed. Reg. 57759. The Final Rule therefore adds a provision that “minor additions of articles, materials, supplies, or binding agents to a construction material do not change the categorization of the construction material.” 2 CFR § 184.3.

“Construction Materials” are defined in the Final Rule to include (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. 2 CFR § 184.3. The Final Rule adds three categories of materials not included in the M-22-11 guidance: optical fiber, fiber optic cable, and engineered wood. *Id.* With respect to optical fiber and fiber optic cable, OMB noted that the IJA “intentionally defines infrastructure to include ‘Broadband infrastructure,’ of which one of the main construction inputs in fiber optic cables.” 88 Fed. Reg. 57763. OMB further concluded the following regarding the additions:

OMB believes that the classification of “fiber optic cable” and “optical fiber” is logically consistent with BABA .... Consequently, OMB does not view the proposed guidance as necessarily adding additional items to the list of construction materials, but rather clarifying the standards for “optic glass” and “polymers used in fiber optic cables” in the context of broadband, creating a coherent and straightforward definition and standard, rather than shoehorning everything into those two definitions.

88 Fed. Reg. 57764. With respect to engineered wood, OMB specified that it made sense to include engineered wood as a separate, standalone construction material as it is viewed as an input to an infrastructure project. 88 Fed. Reg. 57765. OMB also noted the following:

Given the complementary nature of engineered wood with traditional lumber, and the fact that engineered wood consists of lumber, OMB did not want to artificially incentivize economic activity toward engineered wood over lumber simply because the former was categorized differently under OMB’s guidance and thus subject to different domestic content preferences.

*Id.* If engineered wood were not categorized as a construction material, it would necessarily be categorized as a manufactured product (as it consists of inputs of more than one listed item), and would thus be subject to the less-stringent domestic preference requirement for manufactured products. This would create an incentive for recipients and their contractors to use engineered wood rather than lumber. Thus, OMB determined that it was appropriate to include engineered wood in the definition of construction materials to allow stakeholders to “distinguish between lumber, plastic and polymer-based products, and engineered wood when applying the standards at § 184.6.” 88 Fed. Reg. 57766.

*Clarity Regarding “Manufactured Products”*: The Proposed Rule defined manufactured products as articles, materials, or supplies incorporated into an infrastructure project that (1) do not consist wholly or predominantly of iron or steel or both; and (2) are not categorized as a construction material. 88 Fed. Reg. 8377. The Final Rule revises the definition of “manufactured products” to provide “an affirmative definition for the term instead of just explaining, in the negative, what the term does not include.” 88 Fed. Reg. 57752. Accordingly, the definition in the Final Rule provides that “manufactured products” are articles, materials, and supplies that have been (1) “processed into a specific form and shape” or (2) “combined with other articles, materials or supplies to create a product with different properties than the individual articles, materials, or supplies.” 2 CFR § 184.3. The second paragraph of the Final Rule definition retains the negative element of the Proposed Rule definition, noting that if an item is “classified as an iron or steel product, a construction material, or a section 70917(c) material ... then it is not a manufactured product.” *Id.* Lastly, the definition notes that certain manufactured products “may include components that are construction materi-

## THE GOVERNMENT CONTRACTOR

als, iron or steel products, or section 70917(c) materials.” Id.

The Final Rule also clarifies how to determine whether the cost of components for manufactured products exceeds 55 percent of the total cost of all components. Specifically, OMB provides instructions on how to determine the cost of components purchased and manufactured by a manufacturer at 2 CFR § 184.5. These instructions closely resemble the “cost of components” definition found in FAR 25.003, modified slightly to align with the terms used in the Buy America Preference (i.e., replacing the term “contractor” with “manufacturer” and the term “end product” with “manufactured product.”) 88 Fed. Reg. 57777. OMB asserts that closely following the FAR definition “will promote uniformity and predictability for stakeholders and ensure that similar provisions are applied for both Federal procurement contracts under the FAR and Federal financial assistance under part 184.” Id.

*“Manufacturing Processes” For Construction Materials:* The IJA also required OMB to define manufacturing processes for covered construction materials. IJA § 70915(b)(1). OMB’s original guidance noted that the final guidance would define manufacturing processes, and—pending that definition—required “agencies [to] consider ‘all manufacturing processes’ for construction materials to include at least the final manufacturing process and the immediately preceding manufacturing stage for the construction material.” M-22-11 at 14. The Final Rule enumerates the following list of processes for each construction material:

1. Non-ferrous metals. All manufacturing processes, from initial smelting or melting through final shaping, coating, and assembly, occurred in the United States.
2. Plastic and polymer-based products. All manufacturing processes, from initial combination of constituent plastic or polymer-based inputs, or, where applicable, constituent composite materials, until the item is in its final form, occurred in the United States.
3. Glass. All manufacturing processes, from initial

batching and melting of raw materials through annealing, cooling, and cutting, occurred in the United States.

4. Fiber optic cable (including drop cable). All manufacturing processes, from the initial ribboning (if applicable), through buffering, fiber stranding and jacketing, occurred in the United States. All manufacturing processes also include the standards for glass and optical fiber, but not for non-ferrous metals, plastic and polymer-based products, or any others.
5. Optical fiber. All manufacturing processes, from the initial preform fabrication stage through the completion of the draw, occurred in the United States.
6. Lumber. All manufacturing processes, from initial debarking through treatment and planing, occurred in the United States.
7. Drywall. All manufacturing processes, from initial blending of mined or synthetic gypsum plaster and additives through cutting and drying of sandwiched panels, occurred in the United States.
8. Engineered wood. All manufacturing processes from the initial combination of constituent materials until the wood product is in its final form, occurred in the United States.

2 CFR § 184.6.

**Here Comes OMB Claus**—The Final Rule provided that, prior the effective date of the guidance (Oct. 23, 2023), OMB would issue an updated memorandum to remove direct conflicts between M-22-11 and the Final Rule. 88 Fed. Reg. 57751. Thus, stakeholders were left waiting for OMB’s bag filled with toys (or updated guidance—equally as fun, right?) that would align the Final Rule with OMB’s Implementation Guidance. As the Final Rule complemented M-22-11, the new OMB Memorandum M-24-02 (which was issued on Oct. 25, 2023—a couple of days after the effective date of the Final Rule) is largely consistent with M-22-11, but includes a few significant updates. In particular, M-24-02 addresses the applicability of the

BABA requirements to for-profit contractors. M-24-02 includes a list of “non-Federal” entities to which BABA applies: “States, local governments, territories, Indian tribes, Institutions of Higher Education (IHE), and nonprofit organizations.” M-24-02 at 4. The guidance notes that, although for-profit entities are not covered by the definition of “non-Federal” entities, agencies may consider applying the guidance to for-profit entities consistent with their legal authorities. M-24-02 at 4. Thus, most agencies will likely require the majority of the BABA requirements to apply to for-profit subrecipients by means of flow-down provisions. In fact, OMB expressly contemplates this outcome, noting that unless the federal award specifically provides otherwise, subawards “should conform to the terms and conditions of the Federal award from which they flow.” *Id.* at 5. For example, if a state received an award from a federal agency and entered into a subaward with a for-profit entity to carry out the project as a subrecipient (as is often the case), “the Buy America preference requirements included in the Federal award would flow down to the for-profit entity.” *Id.*

Notably, M-24-02 left unchanged the guidance in M-22-11 specifying that a Buy America preference “only applies to articles, materials, and supplies that are consumed in, incorporated into, or affixed to an infrastructure project.” M-22-11 at 5; M-24-02 at 4. As such, it does *not* apply to tools, equipment, supplies, temporary scaffolding, etc. brought to a construction site and removed at or before completion of an infrastructure project. *Id.* Similarly, the Buy America Preference does not apply to equipment or furnishings that are used “at or within the finished infrastructure project, but are not an integral part of the structure or permanently affixed to the infrastructure project.” *Id.*

**Have Yourself A Merry Little Waiver**—Section 70914(b) of the BABA specifically provided for certain waivers, giving rise to hope that those waivers would mean that all recipients’ (and subrecipients’) troubles in complying with BABA requirements could, in certain cases, be miles away. Specifically, the Act provides for waivers where applying the Buy America Preference would be inconsistent with the public interest (a “public interest waiver”), for covered items not produced in the U.S. in “sufficient and reasonably

available quantities or of a satisfactory quality” (a “nonavailability waiver”), and for situations where the inclusion of iron, steel, manufactured products, or construction materials produced in the U.S. would increase the cost of the overall project by more than 25 percent (an “unreasonable cost waiver”). IJA § 70914(b). Section 70937(b)(2) of the Act also established a “urgent contracting need” exception to the requirements. The Final Rule provided very basic guidance regarding federal awarding agencies’ issuance of BABA waivers, identifying public interest, nonavailability, and unreasonable cost waivers as potential justifications for waiving the application of the Buy America Preference. 2 CFR § 184.7(a). The Final Rule specified that, where recipients reasonably believe a waiver is justified, recipients may make a written request to the federal awarding agency. 2 CFR § 184.7(b). OMB tasked agencies with providing waiver request submission instructions and “guidance on the format, contents, and supporting materials required for waiver requests from recipients.” *Id.*

*Issuing Buy America Waivers:* Although the Proposed and Final Rule provided some basic guidance on the steps agencies must take before issuing proposed and final waivers, see 2 CFR § 184.7(c)-(e), OMB provided significant and detailed guidance on the circumstances under which waivers may be justified in M-24-02 (which modified, but largely mirrors, the guidance in M-22-11 on issuing BABA waivers). Both M-24-02 and M-22-11 emphasize that waivers should be time-limited, targeted, and conditional. M-22-11 at 9; M-24-02 at 9. M-22-11 explained the steps an agency must take before issuing a waiver pursuant to the IJA’s statutory waiver authority; namely, agencies must make a detailed written explanation for the proposed waiver publicly available on the agency’s website and provide a period for public comment. M-22-11 at 11. M-24-02 does not make substantive changes to this requirement, and requires that the agency provide the same information to the OMB Made in America Office (MIAO) in support of a proposed waiver. M-24-02 at 7. Specifically, agencies must include the following:

[A] detailed justification for the use of goods, products, or materials mined, produced, or manufactured outside



## THE GOVERNMENT CONTRACTOR

the United States and a certification that there was a good faith effort to solicit bids for domestic products supported by terms included in requests for proposals, contracts, and nonproprietary communications with potential suppliers.

M-24-02 at 7. M-24-02 also establishes substantially the same framework for future agency exceptions to the BABA requirements as M-22-11, and provides a list of information that agencies must provide to the MIAO “at a minimum and to the greatest extent practicable” with each proposed waiver. The revisions to the list in the new memorandum are highlighted below:

- Waiver type (nonavailability, unreasonable cost, or public interest)
  - Recipient name and Unique Entity Identifier (UEI)
  - Federal awarding agency organizational information (e.g., Common Governmentwide Accounting Classification [CGAC] Agency Code)
  - Financial assistance listing name and number
  - Federal financial assistance program name
  - Federal Award Identification Number (FAIN) (if available)
    - **M-24-02 revises this to:** (if available or applicable)
  - Federal financial assistance funding amount
  - Total cost of infrastructure expenditures, including all Federal and non-Federal funds (to the extent known)
    - **M-24-02 replaces this with the following:** “Total estimated infrastructure expenditures, including all Federal and non-Federal funds (if applicable).”
  - Infrastructure project description and location (to the extent known)
  - **M-24-02 adds:** In the case of general applicability waivers, a description of the relevant Federal program(s)—including information on the size and scale of the program(s), an estimate of the dollar amount of Federal financial assistance that would be subject to the waiver, and an estimate of how many infrastructure projects would be subject to the waiver.
- List of iron or steel item(s), manufactured products, and construction material(s) proposed to be excepted from Buy America requirements, including name, cost, country(ies) of origin (if known), and relevant PSC and NAICS code for each
    - **M-24-02 spells out:** Product and Service Code (PSC) and North American Industry Classification System (NAICS) code.
  - A certification that the Federal official or assistance recipient made a good faith effort to solicit bids for domestic products supported by terms included in requests for proposals, contracts, and nonproprietary communications with the prime contractor.
  - **M-24-02 adds:** Market research, where applicable, 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.
  - A statement of waiver justification, including a description of efforts made (e.g., market research, industry outreach), by the Federal awarding agency and, and in the case of a project or award specific waiver, by the recipient, in an attempt to avoid the need for a waiver. Such a justification may cite, if applicable, the absence of any Buy America-compliant bids received in response to a solicitation.
  - Anticipated impact if no waiver is issued.
  - Any relevant comments received through the public comment period.
    - **M-24-02 added the following:** “For final waivers, any relevant comments received through the public comment period, and the agency’s response to those comments.”

M-22-11 at 7-8; M-24-02 at 7-8.

*Public Interest Waivers:* M-24-02 also offered only slight changes to agency guidance concerning the issuance of public interest waivers of general applicability. *Id.* at 11. These suggested general applicability public interest waivers include (with updates from M-24-02 highlighted below):

- **De minimis:** These waivers would promote efficiency for both recipients and federal agencies, especially where the cost of submitting and processing individualized waivers would “risk exceeding the value of the items waived.” OMB posited that agencies “may consider adopting an agency-wide public interest waiver that sets a de minimis threshold, for example, of 5 percent of project costs up to a maximum of \$1,000,000.”
  - **Update from M-24-02:** The new memorandum adds that “applicable project costs are defined as material costs subject to the Buy America preference.”
- **Small Grants:** Agencies may also consider whether the Buy America preference could be waived for awards below the Simplified Acquisition Threshold (currently \$250,000). OMB noted that such a waiver “may be particularly relevant in the initial years after enactment of IJJA, and may be phased out over time as agencies develop efficient waiver review capabilities.”
- **Minor Components:** Agencies may also use their public interest waiver power to allow “minor deviations for miscellaneous minor components within iron and steel products”—for example, such a waiver might allow a small percentage (e.g., 5 percent) of the total material cost of an otherwise domestic iron or steel end product to be used.
  - **Update from M-24-02:** The new OMB memorandum provides additional clarity, stating that “[t]his waiver type may not exempt an entire iron and steel product from the Buy America preference; the primary iron and steel components of the product must still be produced domestically.” M-24-02 at 12.

- **Adjustment Period:** OMB advised agencies to consider “whether brief, time limited waivers to allow recipients and agencies to transition to new rules and processes may be in the public interest.” **Update from M-24-02:** This waiver provision has been removed.
- **International Trade Obligations:** To the extent a recipient is a state that has assumed procurement obligations pursuant to a trade agreement, OMB advised that waiver from the Made in America requirements to ensure compliance with those obligations may be in the public interest.
- **Other Considerations:** OMB advised that agencies have discretion to issue waivers in the public interest, and acknowledged that waivers in the public interest may be appropriate in some circumstances, but not others. An agency should consider “the nature and amount of resources available to the recipient, the value of the items, good, or materials in question, the potential domestic job impacts, and other policy considerations, including sustainability, equity, accessibility, performance standards, and the domestic content (if any) of and conditions under which the non-qualifying good was produced.”

M-22-11 at 11; M-24-02 at 11-12.

Consistent with OMB M-22-11 (and 2 CFR § 184.7), OMB M-24-02 requires agencies to provide a comment period of not less than 15 days following a proposed waiver. M-24-02 at 6. M-24-02 also specifies that general applicability waivers are “subject to a minimum 30-day public comment period when reviewed for modification or renewal.” *Id.* As a part of this process, and consistent with the prior memorandum, agencies are required to provide a website address where they will post public comment to OMB, but in all instances must post the waiver to BuyAmerican.gov. Agencies are also required to consult with the MIAO prior to posting a broadly applicable waiver for comment, who will make a determination upon receipt of the waiver by the agency. M-24-02 at 7.

*Nonavailability Waivers:* The OMB memoranda are consistent with respect to nonavailability waivers, not-

## THE GOVERNMENT CONTRACTOR

ing that before granting such a waiver, an agency should consider “whether the recipient has provided thorough market research ... and adequately considered, where appropriate, qualifying alternate items, products, or materials.” M-22-11 at 9-10, M-24-02 at 10.

*Unreasonable Cost Waivers:* Finally, with respect to unreasonable cost waivers, M-22-11 and M-24-02 are consistent in their description of the required contents of such waivers (i.e., the waiver justification must include a comparison of the overall cost of the project with domestic products to the overall cost of the project with foreign-origin products). M-22-11 at 10; M-24-02 at 10. However, the new memorandum clarifies that agencies should determine whether cost advantages of foreign-sourced products result from dumping or injurious subsidies, not only for public interest waivers but also unreasonable cost waivers. M-24-02 at 11-12.

**DJ Play a BABA Song**—On Oct. 20, 2023—three days before the effective date of the Final Rule—the timeless icon Cher released her first Christmas album. Thanks to Cher and OMB, stakeholders have two things to dance about this holiday season: new music and long-awaited clarity on the BABA requirements. However, as much as we would like to be dancing all night long in celebration of this guidance, we expect that there will still be a few challenges to overcome as agencies implement BABA within the context of their

own unique federal financial assistance programs. The Final Rule is clear that it is “not intended as comprehensive guidance on all topics related to the implementation of BABA.” 88 Fed. Reg. 57751. Instead, part 184 “is intended to be high-level coordinating guidance for Federal agencies to use in their own direct implementation of BABA, as required under section 70914 of BABA.” Id. In light of the final regulations at 2 CFR § 184, as icing on the regulatory gingerbread house, the new OMB memorandum provides sample language federal agencies can use to effectuate the requirements of BABA and the OMB guidance. M-24-02 at 15-19. OMB also notes that agencies should send their proposed terms and conditions to OMB’s MIAO prior to incorporating them into awards. Id. at 15. That said, OMB has given us the only thing many stakeholders wanted this year: a big step forward in ensuring clear and consistent guidance regarding the implementation of the key BABA requirements. For that, we can feel warmed through the holidays, and look forward to more developments in 2024.

*This Feature Comment was written for THE GOVERNMENT CONTRACTOR by Cara Wulf and Marcos Gonzalez. Ms. Wulf is a Partner in the Washington, D.C. office of McCarter & English LLP. Mr. Gonzalez is an Associate and is also based in the Washington, D.C. office of McCarter & English. They can be reached at [cwulf@mccarter.com](mailto:cwulf@mccarter.com) and [mgonzalez@mccarter.com](mailto:mgonzalez@mccarter.com).*

