



March 10, 2023

Deidre A. Harrison
Deputy Controller, Office of Federal Financial Management
Office of Management and Budget
725 17th St NW
Washington, DC 20503

RE: Docket No. OMB-2023-0004, Guidance for Grants and Agreements

Dear Ms. Harrison:

Associated Builders and Contractors hereby submits the following comments in response to the Office of Management and Budget's proposed guidance in the above referenced proceeding—published in the Federal Register on Feb. 9, 2023, at 88 Federal Register 8374—as part of its implementation of the Build America, Buy America Act contained in the Infrastructure Investment and Jobs Act.

About Associated Builders and Contractors

ABC is a national construction industry trade association representing more than 22,000 member companies. ABC and its 68 chapters help members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which ABC and its members work.

ABC's membership represents all specialties within the U.S. construction industry and is comprised primarily of general contractors and subcontractors that perform work in the industrial and commercial sectors for government and private sector customers.¹

The vast majority of ABC's contractor members are small businesses. This is consistent with the U.S. Census Bureau and U.S. Small Business Administration Office of Advocacy's findings that the construction industry has one of the highest concentrations of small businesses (82% of all construction firms have fewer than 10 employees)² and industry workforce employment (more than 82% of the construction industry is employed by small businesses).³ In fact, construction companies that employ fewer than 100 construction professionals comprise 99% of construction firms in the United

¹ For example, see ABC's 32nd Excellence in Construction Awards program from 2022: <https://www.abc.org/Portals/1/2022%20Files/32ND%20EIC%20program--Final.pdf?ver=2022-03-25-115404-167>.

² U.S. Census Bureau 2019 County Business Patterns: <https://data.census.gov/cedsci/table?q=CBP2019.CB1900CBP&n=23&tid=CBP2019.CB1900CBP&hidePreview=true> and <https://www.census.gov/programs-surveys/cbp/data/tables.2019.html>.

³ 2020 Small Business Profile, U.S. Small Business Administration Office of Advocacy (2020), pg. 3, <https://cdn.advocacy.sba.gov/wp-content/uploads/2020/06/04144224/2020-Small-Business-Economic-Profile-US.pdf>.

States; they build 63% of U.S. construction, by value, and account for 68% of all construction industry employment.⁴

In addition to small business member contractors that build private and public works projects, ABC also has large member general contractors and subcontractors that perform construction services for private sector customers and federal, state and local governments procuring construction contracts subject to respective government acquisition policies and regulations.

ABC's diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry. The philosophy is based on the principles of nondiscrimination due to labor affiliation and the awarding of construction contracts through open, competitive bidding based on safety, quality and value.

Response to the Proposed Guidance

ABC supports strategies to expand domestic jobs and manufacturing to avoid global supply chain disruptions and capture economic benefits within America. However, BABA policies need to be balanced with safeguards against increased materials and construction costs and/or needless delays of infrastructure projects funded by the federal government and, ultimately, taxpayers. The OMB should carefully consider ABC's comments and recommendations to ensure these requirements can be implemented with minimal disruptions to rebuilding America's infrastructure.

I. The Construction Industry Already Faces Significant Supply Chain Challenges

The U.S. construction industry currently faces significant headwinds in the form of supply chain disruptions, continuing inflation, a more than half a million-person skilled labor shortage⁵ and declining private-sector investment in construction activity. Our concern is that rapid implementation of BABA requirements could exacerbate these disruptions and further increase costs for contractors and taxpayers.

Despite the easing of the COVID-19 pandemic and moderate improvements to the unprecedented supply chain disruptions in some areas, the construction industry continues to face significant delays in obtaining key materials. ABC members and other construction firms report delays of eight or more months in obtaining critical construction materials, indicating that supply chain difficulties remain a persistent issue.⁶

These supply chain disruptions, among other factors, have contributed to significant increases in material prices. In January 2023, construction input prices were up 4.9%

⁴ U.S. Census County Business Patterns by Legal Form of Organization and Employment Size Class for the U.S., States, and Selected Geographies: 2019, available at <https://thetruthaboutplas.com/wp-content/uploads/2021/07/Construction-firm-size-by-employment-2019-County-Business-Patterns-Updated-071321.xlsx>.

⁵ "Construction Workforce Shortage Tops Half a Million in 2023, Says ABC," Feb. 9, 2023.

⁶ <https://www.cnbc.com/2023/02/13/a-new-inflation-warning-for-consumers-coming-from-the-supply-chain-.html>.

from January 2022 prices, and up 37.7% since the onset of the COVID-19 pandemic in February 2020.⁷

II. Buy America Implementation Should Be Delayed

The OMB should consider the supply chain challenges currently facing the construction industry, as outlined above, in its implementation of these requirements. Given the unprecedented nature of the issues facing the industry, the OMB should delay implementation of domestic preference requirements for construction materials on federally assisted projects. Instead, the OMB should conduct additional studies and seek additional public comment to ensure effective implementation of Buy America requirements.

1. Numerous federal agencies were forced to provide six-month Buy America waivers, and some agencies continue to provide additional broad waivers.

The IIJA-imposed BABA requirements were initially addressed in the April 2022 OMB Guidance, OMB M-22-11, Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure.⁸ The OMB guidance provided instructions to agencies on the application of BABA requirements on federally financed infrastructure projects. ABC has submitted numerous comments to individual federal agencies with respect to their implementation of BABA.⁹

The actions of multiple federal agencies tasked with federal assistance of infrastructure clearly demonstrates the need for deliberate implementation of updated BABA requirements. On April 28, 2022, the U.S. Department of Transportation announced a six-month waiver of BABA requirements,¹⁰ and the U.S. Department of Housing and Urban Development followed suit with a similar waiver on May 3, 2022.¹¹ Both agencies cited the lack of available information to immediately implement these requirements, with the DOT stating:

⁷ [“ABC: Construction Materials Prices Rise 1% in January; Up 5% From a Year Ago,”](#) ABC, February 2023.

⁸ [“New ‘Buy America’ Mandates for Infrastructure Projects Could Trigger Cost Increases, Delays,”](#) ABC, April 2022.

⁹ See ABC comments to the U.S. Environmental Protection Agency (<https://www.abc.org/LinkClick.aspx?fileticket=0-1uZ1S1FDU%3d&portalid=1&language=en-US>), the U.S. Department of Housing and Urban Development (<https://www.abc.org/LinkClick.aspx?fileticket=SNxsql2m8QU%3d&portalid=1&language=en-US×tamp=1663008670180>) and the U.S. Department of Transportation (https://www.abc.org/LinkClick.aspx?fileticket=6IPPS8_-KN8%3d&portalid=1&language=en-US×tamp=1663008674901).

¹⁰ See “Notice of Proposed Temporary Waiver of Buy America Requirements for Construction Materials,” published on regulations.gov on April 28, 2022: <https://www.regulations.gov/document/DOT-OST-2022-0047-0001>.

¹¹ See 87 Federal Register 26219: <https://www.federalregister.gov/documents/2022/05/03/2022-09513/general-applicability-waiver-of-build-america-buy-america-provisions-as-applied-to-recipients-of-hud>.

Because construction materials have not previously been subject to Made in America rules as have iron and steel, there is a need to gather data on domestic sourcing capacity to inform stronger standards. For example, while the exact impact on highway project construction is unknown, the Department believes that it could be significant. ... The Department recognizes both the importance of ensuring Buy America compliant construction materials and the need to implement the requirement in a way that is not overly burdensome.¹²

Despite the expiration of these waivers, similar issues continue to impact the implementation of BABA requirements on federal assistance programs across additional federal agencies with responsibility for infrastructure funding.

Most recently, the Federal Highway Administration established a new public interest waiver on BABA requirements for electric vehicle chargers receiving funding under the new National Electric Vehicle Infrastructure Formula, which aims to install 500,000 EV chargers by 2030. The waiver delays BABA requirements for chargers assembled in the United States until July 1, 2024.¹³

Clearly, federal agencies continue to recognize the potential costs and delays of immediate implementation of expanded BABA requirements. ABC urges the OMB to delay the effective date of the proposed guidance until agencies are confident that domestic supply chains are better able to meet the needs of federally assisted infrastructure projects.

2. The OMB should consider agency staffing needs for an expected high volume of waiver requests.

As noted in the OMB's initial guidance on implementing the new Buy America requirements, the IJA allows for several categories of waivers that recipients can apply for when the requirements may be unfeasible.¹⁴

Given the supply chain challenges outlined above, it is highly likely that federal agencies will face an extremely high volume of waiver applications, especially considering the OMB's guidance that "to the greatest extent practicable, waivers should be targeted to specific products and projects."¹⁵ Many products and projects will qualify for the nonavailability or unreasonable cost waivers given the difficulty contractors already face in obtaining affordable construction materials.

¹²See 87 Federal Register 31931: <https://www.federalregister.gov/d/2022-11195/p-23>.

¹³See 88 Federal Register 10619: <https://www.federalregister.gov/documents/2023/02/21/2023-03498/waiver-of-buy-america-requirements-for-electric-vehicle-chargers>.

¹⁴ See OMB Memo M-22-11, pg. 6: <https://www.whitehouse.gov/wp-content/uploads/2022/04/M-22-11.pdf>.

¹⁵ Ibid

The OMB should consider the impact of a flood of waiver applications on federal agencies, which already do not have enough personnel to effectively distribute IIJA, Inflation Reduction Act and CHIPS funding and procure additional direct federal construction contracts above baseline spending.¹⁶ Agencies do not have sufficient staff to process these BABA waiver applications in a timely manner, which will lead to additional delays and increased costs on infrastructure projects.

The OMB should consider how waivers may be granted more broadly and efficiently in a uniform multiagency waiver process that alleviates administrative bottlenecks; multiple waiver requests to multiple federal agencies for the same material; and other red tape burdening the federal workforce and small and large businesses. At a minimum, the guidance should be delayed until a digital clearinghouse or website could facilitate this approach.

III. Responses to Specific Questions in the Proposed Guidance

1. *Other construction material standards.* What, if any, additional construction materials should be included in the proposed guidance?

ABC urges the OMB to avoid adding additional construction materials to the proposed guidance. As outlined above, the expanded requirements of the proposed guidance pose significant challenges to the construction industry and any further expansion to new materials would serve to exacerbate these issues.

Additionally, ABC again urges the OMB to undergo individual study and rulemaking processes for each construction material category. There are a wide range of differences across all of the materials, including domestic capacity and manufacturing processes. Applying a uniform standard for all categories may be considered arbitrary and capricious, as it fails to take into account these important differences.

Instead, by moving forward with a formal rulemaking process for each material, the OMB and other federal agencies will be able to thoroughly research standards needed for each material, as well as receive a higher number of public comments than is feasible during this request for comments on proposed guidance. This would ultimately lead to more informed and effective BABA requirements.

In addition, Section 70917 of IIJA intentionally excluded aggregates; cement; cementitious materials; and related additives and binders from BABA sourcing requirements. The OMB should not undercut this clear congressional intent by attempting to construe such materials as “manufactured products.” Such a loose regulatory interpretation would be contrary to Section 70917. Congress considered cement and cementitious materials, aggregates such as sand, stone or gravel, and aggregate binders and additives to be “construction materials” for which they were not

¹⁶ See “Biden Promised to Revive a ‘Hollowed Out’ Federal Workforce. Has He Delivered?,” Government Executive, March 6, 2023: <https://www.govexec.com/workforce/2023/03/biden-promised-revive-hollowed-out-federal-workforce-delivered/383506/>.

creating a domestic content requirement. The proposed guidance is well outside the scope of OMB authority and inconsistent with legislative intent. In practice, subjecting these materials to BABA requirements would impose significant cost and supply chain burdens on infrastructure projects across the country. Construction industry experts must be able to use the appropriate construction materials to ensure a project's quality, safety and resiliency without consideration of additional regulatory burden.

2. Proposed definition of construction materials. Is additional guidance needed on the proposed definition of construction materials?

The OMB should provide additional guidance on its stated intent to “avoid disqualifying construction materials with only de minimis additions of non-construction materials.”¹⁷ The OMB must provide clear metrics for determining whether a material has received significant additional value or been substantially transformed by a manufacturing process to avoid any confusion between contractors and manufacturers attempting to comply with the regulation.

BABA's requirement that the cost of components of manufactured products produced in the United States be greater than 55% of the total cost of all components of the manufactured product raises numerous questions concerning how to calculate those costs. For example, a vast majority of products used in the clean energy and water infrastructure sectors contain thousands of parts with a range of costs and complicated manufacturing steps. Determining compliance with the 55% cost requirement is extremely difficult. The OMB has not developed sufficient guidance or best practices for stakeholders to follow in order to certify compliance with BABA requirements of manufactured products produced in America. Absent a comprehensive description of such practices and consensus, uncertainties will arise and likely cause needless project delays and increased costs. The OMB should engage directly with industry to resolve this issue.

Conclusion

While ABC supports strategies to expand domestic jobs and manufacturing to avoid global supply chain disruptions and capture economic benefits within America, reshoring domestic manufacturing for the construction industry supply chain is not feasible in the time frame prescribed by lawmakers and regulators in most instances.

Federal agencies and their state and local government partners are already reeling from the confusion resulting from this abrupt policy change. ABC urges the OMB to provide a significant amount of time of at least 18 months for government and industry stakeholders to adopt to the eventual BABA final regulation and implementation so taxpayer-funded infrastructure projects are not needlessly delayed, subjected to increased costs or cancelled as a result of well-intentioned but ham-fisted public policy.

Thank you for the opportunity to submit comments on this matter.

¹⁷ See preamble: <https://www.federalregister.gov/d/2023-02617/p-31>.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Ben Brubeck". The signature is fluid and cursive, with the first name "Ben" and last name "Brubeck" clearly distinguishable.

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