



OMB Proposes Major Changes to Buy America Requirements

On February 9, the Office of Management and Budget (OMB) released a new [proposed rule](#) to provide additional guidance, expand and implement the requirements of the Build America, Buy America Act (BABAA) on federally assisted construction projects. The proposal seeks to increase the list of materials classified as “construction materials,” expand manufacturing requirements for construction materials, and broaden the definition of “manufactured products,” among other things.

The changes from the [initial preliminary guidance](#) to the new proposed rule are wide-sweeping. OMB proposes new definitions for categories of “construction materials” and “manufactured products” and altering specific manufacturing requirements. This document provides a high-level understanding of the changes presented by the proposed rule and how it could impact construction contractors.

Construction Materials

Definition of Construction Materials: The initial preliminary guidance definition of “construction materials” includes materials that consist primarily of 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.

- The proposed rule definition of construction “material”—in addition to those mentioned above—explicitly adds fiber optic cable and optical fiber as separate and distinct categories of construction materials and states that binding agents will be disregarded when one or more of the listed materials are combined together.
- The agency is also seeking feedback and exploring whether they should add bricks, coatings (such as paint and stain), and engineered wood products to the list of construction materials.

The proposed rule remains in line with the initial preliminary guidance in providing that the definition of “construction materials” does not include “an item of primarily iron or steel, or a manufactured product.

- Nevertheless, OMB is seeking information on to what degree to include cement and cementitious materials, aggregates such as stone, sand, or gravel, or aggregate binding agents or additives—materials explicitly exempted from the definition of construction materials—to be covered in some way under BABAA requirements. There could be an attempt to include BABAA requirements—in some form—on “processed” raw aggregates, the combination of these raw materials with other exempted materials, and precast concrete, for example.

Manufacturing Processes Requirements for Construction Materials: The initial preliminary guidance defines the domestic “manufacturing processes” requirement for “construction materials” as the final manufacturing process and the immediately preceding manufacturing stage for all listed materials need to occur in the United States.

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The proposed rule changes the initial preliminary guidance by listing out every single manufacturing step required to occur in the United States by specific construction material category. They are as follows:

- *Non-ferrous metals* - From initial smelting or melting through final shaping, coating, and assembly.
- *Plastic and polymer-based products* - From initial combination of constituent, plastic or polymer-based inputs until the item is in a form in which it is delivered to the work site and incorporated into the project.
- *Composite building materials* - From initial combination of constituent materials until the composite material is in a form in which it is delivered to the work site and incorporated into the project.
- *Glass* - From initial batching and melting of raw materials through annealing, cooling, and cutting.
- *Fiber optic cable* - From the initial preform fabrication stage through fiber stranding and jacketing.
- *Optical fiber* - From the initial preform fabrication stage through fiber stranding.
- *Lumber* - From initial debarking through treatment and planing.
- *Drywall* - From initial blending of mined or synthetic gypsum plaster and additives through cutting and drying of sandwiched panels.

Manufactured Products

Definition of Manufactured Products: The initial preliminary guidance defined manufactured products as items that consist of two or more of the listed construction materials (and are not primarily made of iron or steel) that have been combined together through a manufacturing process and items that include at least one of the listed construction materials combined with a material that is not listed through a manufacturing process.

- The proposed rule definition broadens the applicability of this term to mean any materials that are permanently incorporated into an infrastructure project that are not already classified in the iron/steel and construction material categories.

Cost of Components Definition for Manufactured Products: Under the initial preliminary guidance the cost of the components of manufactured products that are mined, produced, or manufactured in the United States must be 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.

- The proposed rule changes clarify how the cost of components should be calculated as required by BABAA using definitions under the Federal Acquisition Regulation. Specifically:
 - For components **purchased** by the manufacturer - The acquisition cost, including transportation costs to the place of incorporation into the end product (whether or

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- not such costs are paid to a domestic firm), and any applicable duty (whether or not a duty-free entry certificate is issued).
- For components **manufactured** by the manufacturer - All costs associated with the manufacture of the component, including transportation costs as described previously for purchased products, plus allocable overhead costs, but excluding profit. Cost of components does not include any costs associated with the manufacture of the end product.

As the definition of “manufactured products” is broadened to match the Federal Acquisition Regulation (FAR), the proposed rules highlight another contradiction of BABAA implementation. The FAR definition is intended to guide direct acquisitions by federal government agencies (e.g., Army Corps of Engineers, General Services Administration, National Parks Service, etc.) under the Buy American Act. However, federal agencies under the Buy American Act can acquire materials incorporated into their projects from a multitude of nations worldwide in order to respect the federal government’s international trade obligations and agreements. Meanwhile, state, local, and private entities—which do not have international trade agreements—are forced under BABAA to source their materials only domestically. As a result, the use of the same definition for two different domestic manufacturing sourcing laws will likely incur widely different results.

The Consequences of Writing the Rules as You Go: Mass Confusion

As federal agencies and their local partners have been using the previous initial preliminary guidance for their agency-specific implementation of BABAA, the new proposed rule’s changes risk additional confusion and inconsistency to a process already characterized as such. If no grace period is given to allow all stakeholders time to adapt to these changes, the new requirements threaten to jeopardize delivery of infrastructure projects. Sudden and abrupt changes in requirements in the middle of a project will only lead to additional delays and problems in delivering on the promises of the Infrastructure Investment and Jobs Act.

Similarly, federal agencies will need additional time to reevaluate their existing policies to adhere to the finalized rules. For example, a week prior to the release of OMB’s proposed rules, the Federal Highway Administration (FHWA) released a [Q&A document](#) to address some of the confusion that their state and local partners have been experiencing with BABAA implementation. As the proposed changes, however, are already published and accepting comments, will the FHWA Q&A document be relevant or need revisions just a week after it is already published?

AGC will provide more information and updates to this document as guidance changes.