



NATIONAL STONE, SAND
& GRAVEL ASSOCIATION

NSSGA Build America Buy America Summary for Implementation

On August 14, the White House Office of Management and Budget (OMB) published its final guidance on the implementation of the Infrastructure Investment and Jobs Act (IIJA), Build America, Buy America Act (BABA). The pre-publication version is currently available [here](#).

The final guidance will become effective 60 days after publication in the [Federal Register](#) but provides a wind-down period for ongoing or previously planned products. The final guidance was published on August 23 and applies to federal grants issued after its effective date of October 23.

The final guidance includes long sought clarity for the aggregates industry and fully excludes aggregates (cement, asphalt binder and their mixed products, concrete and asphalt, brought to the jobsite in mix form) from the domestic sourcing requirements.

While the clarity is a good start, this guidance will be utilized by dozens of federal agencies, all 50 state departments of transportation and other state and local agencies to enact individual sourcing requirements. Constant vigilance is prudent as implementation of BABA plays out in the next few months.

Background

Enacted on November 15, 2021 in the IIJA, BABA establishes a procurement requirement to use domestic materials for infrastructure projects that use federal financial assistance. BABA applies to three categories of items: (i) iron or steel products; (ii) manufactured products; and (iii) construction materials. NSSGA worked to establish the only statutory exclusion in Section 70917(c) which clearly excludes (i) cement and cementitious materials; (ii) aggregates such as stone, sand, or gravel; and (iii) aggregate binding agents or additives and their mixed products from BABA's domestic content procurement requirements.

In April 2022, the OMB published the Initial Guidance, which was accompanied by a request for information and public comments. In February 2023, the OMB published "Interim Guidance," which also underwent public comment and review. The Final Guidance was informed by nearly 2,000 public comments including NSSGA, NRMCA, PCA and NAPA's detailed comments. NSSGA worked to ensure a majority of the 2,000 comments filed carried our industry position on BABA.

Among other key elements, BABA requires that when federal grants are used for infrastructure projects, all iron and steel products and "construction materials" must be of U.S. origin, and "manufactured products" must have greater than 55% U.S. content.

Importantly, and as affirmed in the Final Guidance, BABA domestic content procurement requirements only apply to infrastructure projects that are funded (in part or in whole) with federal financial assistance. BABA does not apply to federal government direct procurement or override pre-existing Buy America rules of other



agencies where they meet or exceed BABA's requirements. The Final Guidance clarifies that BABA requirements apply to all federal financial assistance programs for infrastructure, even if they are not funded through federal financial assistance under the IIJA.

Construction Materials

BABA's requirements for construction materials are particularly important because prior domestic content laws did not apply to construction materials. The final guidance defines construction materials as 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."

Of interest this list includes three new categories not previously covered in prior OMB guidance: fiber optic cable, optical fiber and engineered wood. The Final Guidance also confirms that "all manufacturing processes" for construction materials must take place in the United States. This is an important clarification since the Initial Guidance required that only the final and immediately preceding manufacturing processes were to occur in the United States.

Excluded Materials

OMB spends considerable time in the Final Guidance responding to our industry comments and establishing new rules on how agencies should treat Section 70917(C) excluded materials (aggregates, cement, binder, asphalt and concrete). OMB establish a fourth category for excluded materials and lays out detailed parameters about their exclusion and details how each individual material should be treated:

- **Aggregates** – "Aggregates should be classified as a section 70917(c) materials. The fact that an aggregate is processed into a specific form or shape — for example, to meet certain construction specifications — would not affect its classification....Similarly, aggregates combined with minor additions of other materials that do not impact the commonsense identification of the material as an aggregate — for example, gravel combined with additives to increase traction or resilience or for some other purpose — would also not impact the classification of the aggregate as a section 70917(c) material. In addition, aggregates mixed only with other aggregates — such as sand mixed with gravel — remain aggregates and section 70917(c) materials. "
- **Cement and Concrete** – "Cement is an input of concrete....Circumstances when a Buy America preference does not apply include when cement and cementitious materials are brought to the work site as standalone products (to be mixed on site) or in combination with other section 70917(c) materials, such as in the case of wet concrete mix, which has not yet settled into a specific form or shape before reaching the work site. As with cement, in some cases, aggregate binding agents and additives will ultimately be treated as components of a manufactured product."
- **Asphalt** – "In the case of section 70917(c) materials, OMB clarifies in this preamble that, to the extent the section 70917(c) materials were only combined as an unsettled mixture without final form when



reaching the work site, such as in the case of wet concrete or hot mix asphalt, the unsettled mixture should not be considered a manufactured product to which a Buy America preference applies.”

Manufactured Products

How should excluded materials be treated if they are inputs into a manufactured product? The simple answer is there is no change from previous rules and regulations. As previously indicated, BABA provisions in IIJA mostly focused on the expansion of sourcing requirements for construction materials and their inputs. OMB clarifies a number of times that if excluded materials are inputs to manufactured products, like precast concrete, there is no change to the sourcing requirements and the manufactured product and inputs should be treated as such, for example:

- “The revised guidance clarifies that a manufactured product may include components that are section 70917(c) materials, construction materials, iron or steel products, manufactured products, raw materials, or any other articles, materials, or supplies”
- “The section 70917(c) materials should be excluded under the more stringent standard for “construction materials.” No exclusion, however, is provided under the category for “manufactured products” on which BABA is silent relative to these materials”

NSSGA sought further clarification from OMB after release of the final guidance and was informed that the rules for manufactured products and inputs were not significantly altered. It is reasonable to expect the same treatment of manufactured products going forward.

