



Classification of Cement and Cementitious Materials, Aggregates Such as Stone, Sand, or Gravel, and Aggregate Binding Agents or Additives Under the Build America, Buy America Act

On November 15, 2021, President Biden signed into law the Infrastructure Investment and Jobs Act (IIJA), Pub. L. No. 117-58, which includes the Build America, Buy America Act (BABAA), §§ 70901-52. The BABAA extended domestic content procurement preferences to certain construction materials.

Classification as a Construction Material

Section 70917(c)(1) established an important limitation to the term “construction materials” as that term is used in the BABAA. The limitation prohibits the term “construction materials” used in BABAA from including “cement and cementitious materials, aggregates such as stone, sand, or gravel, or aggregate binding agents or additives.” This limitation makes clear no “construction material” domestic content procurement preference for these construction materials is established under the BABAA because the definition of the term “construction materials” used to establish a domestic content procurement preference under BABAA excludes these construction materials.

Classification during the Manufacturing Process

Section 70917(c)(2) prohibits the same construction materials from being included as “inputs” in “all manufacturing processes” that produce “construction materials”. The Office of Management and Budget (OMB) is required to “issue standards that define the term “all manufacturing processes” for construction materials to which BABAA does apply a domestic content procurement preference. Because Section 70917(c)(2) prohibits the definition of “all manufacturing processes” from including the listed items as inputs, the combination of the listed items as concrete or asphalt mix are not a construction material for which BABAA establishes a domestic content procurement preference.

Congress considered cement and cementitious materials, aggregates such as stone sand or gravel and aggregate binders and additives to be construction materials for which they were not creating a domestic content procurement requirement because the limitation¹ was drafted to the term “construction materials” as that term is used under BABAA. The limitation to the definition excludes what would otherwise be included in the definition. If the items in the limitation were

¹ IIJA, Section 70917(c)

not construction materials, there is no purpose, reason, or cognizable consequence to affirmatively removing them from that term as it is used under BABAA. Further evidence of this intent is found in the limitation extending the exclusion to “all manufacturing processes” for “construction materials.”

Limitation Applies to Asphalt and Concrete Manufactured Products

Congress understood that the construction materials they were excluding from the term “construction materials” are, when combined, concrete and asphalt mix construction materials. Congress included Section 70917(c)(2) to ensure that the combination of construction materials in Section 70917(c)(1) into concrete and asphalt construction materials did not create a domestic content procurement preference for concrete or asphalt mixes. The Congressional intent and purpose of 70917(c)(2) cannot be interpreted any other way because the consequence of 70917(c)(2) is singularly focused on their use as inputs that when combined produce the construction material concrete or asphalt.

As inputs, their obvious use together to form concrete or asphalt mix is indisputable. On this point it is pertinent that Congress did not add or subtract any of the items in 70917(c)(1) from 70917(c)(2). In repeating the identical list from 70917(c)(1) in 70917(c)(2) Congress’ intent to not establish a domestic content procurement preference for their combination as concrete or asphalt is clear. This intent and purpose of 70917(c)(2) is clear as it produces this singular consequence.

Summary

Congress intended to exempt asphalt and concrete mix, and its inputs, from the provisions of BABA when Section 70917(c)(1-2) was added to IIJA prior to Senate consideration of the legislation. Any interpretation to the contrary is a misreading of the statute and antithetical to congressional intent.

Reference

SEC. 70917. APPLICATION.

(c) LIMITATION WITH RESPECT TO AGGREGATES.—In this part—

(1) the term “construction materials” shall not include cement and cementitious materials, aggregates such as stone, sand, or gravel, or aggregate binding agents or additives; and

(2) the standards developed under section 70915(b)(1) shall not include cement and cementitious materials, aggregates such as stone, sand, or gravel, or aggregate binding agents or additives as inputs of the construction material.

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