

March 13, 2023

DeDe Rutberg, Director  
Made in America Office  
Office of Management and Budget  
725 17<sup>th</sup> Street NW  
Washington, D.C. 20503

Re: Comment to the Office of Management and Budget on proposed amendments to 2 CFR 184 and 200 to implement the Build America, Buy America Act provisions of the Infrastructure Investment and Jobs Act.

Dear Director Rutberg:

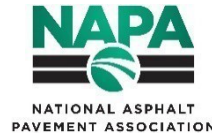
The organizations signed below collectively submit the following comments on the Office of Management and Budget's (OMB) proposed amendment to 2 CFR 184 and 200, and responses to questions outlined in the preamble of the notice of the proposed rule. We divide our comments into three sections: 1) Authorities contained in the Build America, Buy America Act (BABAA) provisions of the Infrastructure Investment and Jobs Act (IIJA) pertinent to our construction materials; 2) Responses to questions in the preamble; and 3) Additions and strikes required by BABAA to the proposed rule.

### **Part 1 - Authorities Contained in BABAA Pertinent to Our Construction Materials**

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

Section 70917(c)(1) established an important limitation to the term "construction materials" as that term is used in 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 materials" domestic content procurement preference for these construction materials is established under BABAA because the definition of the term "construction materials" used to establish a domestic content procurement preference under BABAA excludes these construction materials.

Section 70917(c)(2) prohibits the same construction materials from being included as "inputs" in "all manufacturing processes" that produce "construction materials". 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.

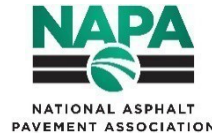
Neither of these sections establishes that the listed items are not construction materials, just that they are excluded from the “construction materials” for which BABAA establishes a domestic content procurement preference. BABAA does not provide authority for the listed materials being considered manufactured products because only the combination of construction materials not included in the limitation produces a “manufactured product” under OMB’s proposed guidance.

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 limitation<sup>1</sup> was drafted to the term “construction materials” as that term is used under BABAA. If the items in the limitation were 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”.

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 mix construction materials did not create a domestic content procurement preference for concrete or asphalt mixes. The Congressional intent and purpose of Section 70917(c)(2) cannot be interpreted any other way because the consequence of Section 70917(c)(2) is singularly focused on their use as inputs that when combined produce the construction materials concrete or asphalt mix. 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 Section 70917(c)(1) from Section 70917(c)(2). In repeating the identical list from Section 70917(c)(1) in Section 70917(c)(2) Congress’ intent to not establish a domestic content procurement preference for their combination as concrete or asphalt mix is clear. This intent and purpose of Section 70917(c)(2) is clear as it produces this singular consequence.

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<sup>1</sup> IJJA, Section 70917(c)



Thus Section 70917(c) provides dual protections against establishing a domestic content procurement preference to the listed construction materials and their combination into the construction materials concrete or asphalt mix.

## **Part 2 - Responses to Questions in the Preamble**

In ignoring the existence of Section 70917(c) in BABAA and its legal consequences, including limitations on OMB's implementation authority, OMB asserts authority it does not possess to contravene the clear intent of Congress in Section 70917(c).

### ***Lack of Legal Authority "Categories" Not Outlined in the Law***

In the preamble and throughout the proposed amendment, OMB continues its interpretation of BABAA, contained in OMB's April, 18, 2022, M-22-11 "Initial Guidance"<sup>2</sup> that each article, material and supply "should only be classified into *one* of the following categories: (1) iron or steel; (2) a manufactured product; or (3) a construction material."<sup>3</sup> The limitation of each to a single category is for "ease of administration".<sup>4</sup>

BABAA's statutory authority establishes domestic content preferences on its own terms, with clear limits to the establishment of domestic content preferences. OMB uses the term "construction materials" more broadly than BABAA authorizes. The term under BABAA must be read as "construction materials for which a domestic content preference is established". By ignoring the legal purpose, and corresponding meaning of limits of the terms' use under BABAA, OMB asserts authority it does not have.

No authority is contained in BABAA for OMB to force all "article(s), material(s) and suppl(ies)" into one of three categories. Quite the opposite because Congress recognized a "category" of construction materials for which BABAA does not apply a domestic content procurement preference in Section 70917(c). By artificially and without authority creating a requirement of placement within one of the three categories, OMB seeks to expand domestic content procurement preferences beyond the Congressionally intended limits contained in BABAA.

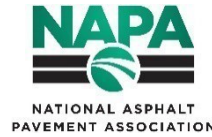
In question (3) of the preamble, OMB states "In this proposed guidance, OMB only intends to classify materials that consist of only one or more of the construction materials listed in § 184.3(c)(1) as construction materials." OMB's intention appears to be that all other "materials" belong in the manufactured products category since OMB interprets BABAA to place everything

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<sup>2</sup> OMB's Memorandum of April 18, 2022, M-22-11, "Initial implementation Guidance on the Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure".

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.



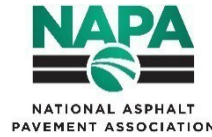
in one of three categories. Since OMB proposes to exclude the materials listed in Section 70917(c) from its interpretation and use of the term “construction materials”, OMB, without legal authority to do so, seeks to apply domestic content procurement preferences for construction materials listed in Section 70197(c) as “manufactured products”. We reiterate that this runs counter to Section 70917(c)(2) of BABAA.

In question (5) OMB states, in reference to its Initial Guidance, “OMB Guidance explained that items that consist of two or more of the listed construction materials that have been combined together through a manufacturing process, and items that include at least one of the listed construction materials combined through a manufacturing process with a material that is not listed as a construction material, should be treated as manufactured products, rather than as construction materials.”

OMB’s proposed amendment modifies the Initial Guidance quoted in question (5) in its proposed definition of “construction materials” to mean “articles, materials, or supplies incorporated into an infrastructure project that consist of only one or more of the following materials, except as provided in paragraph (2) of this definition:

- (1)(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;
  - (v) Optical fiber;
  - (vi) Lumber; or
  - (vii) Drywall.
- (2) For an item that consists only of a combination of one or more of the construction materials listed in paragraph (1) of this definition and binding agents, any binding agents shall be disregarded, and each construction material must meet the Buy America Preference standard defined in § 184.6”.

Not only does this definition of “construction materials” ignore the exclusion of construction materials listed under Section 70917(c), but it also relied upon in OMB’s proposed definition of “manufactured products” to enlarge without authority the term to mean “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 (as defined in this section)(emphasis added)”.

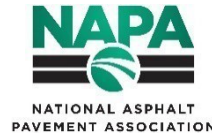


OMB's proposed amendment employs artificially established categories to which OMB asserts a domestic content procurement preference. The definitions of manufactured products and construction materials in the proposed amendment willfully ignore Section 70917(c) and its legal consequences. OMB cannot invent definitions in a guidance that are not consistent with Section 70917(c) to allow OMB to deem the listed materials, or their combination, to be manufactured products and apply a domestic content procurement preference to them. Congress specifically excluded this scenario by including both Section 70917(c)(1) and Section 70917(c)(2). OMB ignores a plain reading of the law excluding the construction materials in Section 70917(c)(1) and (2) from the artificial categories and their corresponding preferences, into which OMB asserts all items must be placed. There are in fact "categories" of items for which BABAA did not establish a domestic content procurement preference – OMB has a legal obligation to recognize this fact.

***"Excluded Materials" and "raw aggregates and raw materials."***

In question (9) of the preamble, OMB cites Section 70917(c)(1), while notably omitting Section 70917(c)(2), and states that the term "construction materials shall not include the following materials: (i) cement and cementitious materials; (ii) aggregates such as stone, sand, or gravel; or (iii) aggregate binding agents or additives." OMB then states, "However, the Act does not specify whether these Excluded Materials should be entirely excluded from coverage under Buy America Preferences." Here again, OMB relies on its artificially created "categories" and its proposed definitions of "construction materials" and "manufactured products" to further invent a scenario where the excluded materials are not excluded. In doing so, OMB misinterprets the intent of Section 70917(c).

OMB is incorrect in its assertion that "the Act does not specify whether these Excluded Materials should be entirely excluded from coverage under Buy American Preferences". It is only within the artificial, and unauthorized, artifice created by OMB that such an assertion is possible. "Excluded Materials" as OMB refers to cement and cementitious materials, aggregates such as stone, sand, or gravel, and aggregate binding agents or additives are construction materials that cannot be treated as manufactured products because they individually and when combined are construction materials for which Congress established no domestic content procurement preference – that is the intent, purpose, and consequence of Section 70917(c)(1) and (2). OMB in question (9) further departs from the plain reading of the law by introducing concepts nowhere contained in BABAA, such as "raw materials", "individual raw materials", and "raw aggregates" to ask a series of non-sequitur questions. We note here that BABAA was not a codified amendment to the U.S. Code. It is statutory authority, and its provisions must be interpreted within its four corners of provided authority. For example, OMB's introduction of the term "raw aggregates" to suggest they are something different from aggregates and that BABAA provided OMB the authority to apply a



domestic content procurement preference to “raw aggregates” when implementing BABAA is unsupported by any authority in BABAA, and we assert it is specifically prohibited.

Congress used the term aggregates and defined aggregates in the amendment as “aggregates such as sand, stone, and gravel.” To the extent OMB is suggesting it has the authority to apply a domestic content procurement preference to aggregates once they are combined to “form a shape”, such as would occur when aggregates are combined with cementitious asphalt mix or when aggregates are combined with cement and cementitious materials to form concrete OMB ignores the clear intent of Section 70917(c)(1) and (2).

Similarly, OMB’s suggested use of 2 CFR 176.140(a)(1) which defines a “manufactured good” as “a good brought to the construction site for incorporation into the building or work that has been—(i) Processed into a specific form and shape; or (ii) Combined with other raw material to create a material that has different properties than the properties of the individual raw materials” has no legal footing under BABAA’s authority. Seeking to employ this “supplemental” definition of a manufactured good to subvert Section 70917(c) and apply a domestic content procurement preference to excluded construction materials by reclassifying them as manufactured products is legally unsupported and contradicts BABAA Section 70917(c)(1) and Section 70917(c)(2).

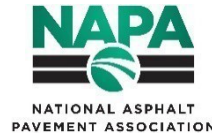
Also, in question (9), OMB asks “should OMB exclude raw aggregates (such as stone, sand, or gravel) unless they have been processed into a specific form or shape or combined with other raw materials, such as combining them with cement powder and water to produce precast concrete products?” Here again, OMB ignores Section 70917(c)(2), which prohibits any of the construction materials in Section 70917(c)(1) from being inputs of a construction material under the standards developed by OMB under Section 70915(b). Those standards define “the term ‘all manufacturing processes’ in the case of construction materials.”<sup>5</sup>

Congress did not add or subtract any of the construction materials listed in Section 70917(c)(1) from Section 70917(c)(2). In repeating the identical list from Section 70917(c)(1) in Section 70917(c)(2) Congress’ intent to not establish a domestic content procurement preference for the combination of construction materials under Section 70917(c)(1) as concrete or asphalt mix is clear. This intent and purpose of Section 70917(c)(2) is clear as it produces this singular consequence.

Finally, question (9) asks “How should OMB treat cement and cementitious materials before they are processed into a specific form and shape”. We further note in response to question (9) that cement and cementitious materials are specifically excluded under Section 70917(c)(1) and also excluded under Section 70917(c)(2) when combined with other excluded

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<sup>5</sup> IIJA, Section 70915(b)(1).



materials under Section 70917(1) from being a construction material for which a domestic content procurement preference is established.

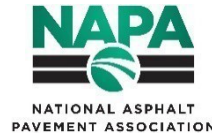
Cement and cementitious materials are not themselves alone “processed into a specific shape and form”. Cement and cementitious materials are used to bind aggregates and come in a wide variety of forms. What cement-specific materials have in common is their use of hydraulic cement binders to improve the physical, chemical, and mechanical properties of the hardened matrix that results when mixed with aggregates other binding agents or cementitious materials and installed to form the procured project purpose.

Cement and cementitious materials are used to bind aggregate to form the ubiquitous building material concrete. A useful comparison is that cement is to concrete as flour is to cake mix. Cementitious material are any materials having cementing properties (hydraulic or pozzolanic) that contribute to the formation of hydrated calcium silicate compounds that help the material cure into concrete. Both cement and cementitious materials come in a variety of forms, and are comprised of several different constituents, and can be mixed and placed using various methods. As the cement industry works to reduce its carbon footprint the increase in use of supplementary cementitious materials, that are added to contribute to concrete’s fresh and hardened properties, will be included in cements and concrete.

Asphalt cement binder is also a cementitious material that serves as an aggregate binding agent, that has proven to be readily adhesive, waterproof, and durable. An “asphalt cement” is often called “asphalt binder” because asphalt cement is a binder, as the name implies, used to bind aggregates in the production of asphalt mix, which is then installed as pavement. The process of mixing an asphalt cement binder with aggregates to produce an asphalt mixture (aka, asphalt concrete) has been in use for hundreds of years. Pavement mixtures are designed by highway engineering professionals in compliance with precise, standardized methodologies. These standardized engineering design methodologies ensure that when the pavement mixture is installed, the finished pavement will meet short- and long-term specifications for load-bearing capacity, durability, ride quality, and safety required by the transportation authorities.

Like the cement industry, the asphalt pavement industry is working to further reduce carbon emissions in the production and construction of asphalt pavement. This may result in even further use of replacements for asphalt cement binder.

Cement and cementitious materials only take on a “specific form and shape” when combined with aggregates such as stone, sand and gravel to form concrete or asphalt mix, and the mix is then installed in the project as required by the project specifications. Both concrete and asphalt mix are construction materials procured to construct the subject of a procurement. Neither concrete nor asphalt mix is procured for the purpose of possessing concrete or asphalt mix



themselves. Neither concrete nor asphalt mix is in a final form when procured, only their use as a construction material establishes their final form. Both are perishable in that their plasticity is created and temporarily maintained by heat or continuous mixing action until they are used for their construction material purpose. All concrete and asphalt mixes are necessarily mixed in close proximity to their procurement construction material purpose. Thus all asphalt and concrete mixing occurs in the United States.

When cement and cementitious materials or binding agents and additives are used to bind aggregates into concrete or asphalt mix they are inputs to a manufacturing process for a construction material under Section 70915(b) and thus excluded from the standards defining the term “manufacturing processes”.<sup>6</sup>

It is unclear if OMB means by “*processed* (emphasis added) into a specific form and shape” something other than our explanation above of what cementitious materials are and how they are used. If by the use of the word “*processed*” OMB is suggesting it has authority not addressed by the prohibition in Section 70917(c)(2) cited above we strongly disagree. The restriction in Section 70917(c)(2) precludes the listed materials from being inputs into “all manufacturing processes” standards for construction materials developed by OMB. OMB cannot make a distinction between the use of the phrase “all manufacturing process” under Section 70915(b)(1) referenced in the Section 70917(c)(2) exclusion and the word “*processed*” used in question (9) referencing 2 CFR 176.140(a)(1). Section 70917(c)(2) prohibits the listed items being included in OMB’s definition of “all manufacturing processes”, thus cannot include application of the definition in 2 CFR 176.140(a)(1) to construction materials for which BABAA does not establish a domestic procurement preference.

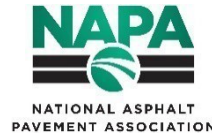
For the same reasons, neither can OMB replace the word “input”, and its meaning, as used in Section 70917(c)(2) with “raw materials” or “raw aggregates” as those terms are used under 2 CFR 176.140(a)(1). OMB cannot avoid the legal consequence of Section 70917(c) in asking “For example, how should the guidance treat Excluded Materials made of a combination of raw materials or combined with other raw materials to create a material that has different properties than the properties of the individual raw materials?”

To the extent OMB is suggesting it has the authority to apply a domestic content procurement preference to aggregates once they are combined to “form a shape”, such as would occur when aggregates are combined and bound by cement and cementitious materials to form concrete or asphalt mix, OMB ignores the clear intent of Section 70917(c)(1) and (2).

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<sup>6</sup> IJIA, Section 70917(c)(2).





To the extent OMB suggests it has authority to impose a domestic content procurement preference to the construction materials listed in Section 70917(c) before they are “cement and cementitious materials, aggregates such as stone, sand, or gravel, or aggregate binding agents or additives” by applying the “manufactured good” analysis in 2 CFR 176.140(a)(1) which employs the concept of “raw materials” we point again to Section 70917(c) as prohibiting the existence of such authority. We note that the terms Congress used in Section 70917(c) are construction materials terms that necessarily include all that constitutes the particular construction material. As defined terms, there is no authority to “deconstruct” their definition by importing and applying a manufactured product analysis that uses terms such as “raw materials” or “raw aggregates”.

The word “raw” appears nowhere in BABAA Part 1. OMB employs the word “raw” as a synonym for “input”. The term “input” is used under Section 70915(b)(2)(A), where in issuing the standards required under Section 70915(b)(1) OMB shall “ensure that the standards require that each manufacturing process required for the manufacture of the construction material and the inputs of the *construction material* (emphasis added) occurs in the United States.”<sup>7</sup> The term “construction material” used in Section 70915(b)(1) does not include cement and cementitious materials, nor any of the other construction materials excluded by Section 70917(c) from the term “construction materials” as that term is defined under BABAA to establish a domestic content procurement preference. It is indisputable that Section 70917(c)(2) prohibits any of the listed materials from being subjected to standards addressing “manufacture processes” for construction materials or standards for “inputs” into construction materials. OMB cannot substitute the word “raw” for “input” to avoid the prohibition established in Section 70917(c)(1) and (2), nor to invent authority not provided in BABAA to add more domestic sourcing requirements than what BABAA required.

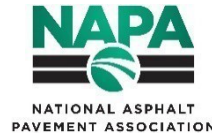
These responses and accompanying analysis to the questions posed by OMB, make clear that OMB must simply recognize Congress excluded from the term “ construction materials”, as that term is used under BABAA to establish domestic content procurement preferences, cement and cementitious materials, aggregates such as stone, sand, or gravel, or aggregate binding agents or additives or their combination as asphalt or concrete mix. We request OMB please follow the law as clearly defined in BABAA.

### **Part 3 - Additions and strikes required by BABAA to the proposed rule.**

With our comments and accompanying analysis above applied to OMB’s proposed rule 184 to Part 2 of the Code of Federal Regulations, we have made additions and strikes to the proposed rule below.

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<sup>7</sup> IJIA, Section 70915(b)(2)(A).



# PART 184—BUY AMERICA PREFERENCES FOR INFRASTRUCTURE PROJECTS

## [184.1](#)

Purpose of this part.

## [184.2](#)

Applicability.

## [184.3](#)

Definitions.

## [184.4](#)

Applying the Buy America Preference to a Federal award.

## [184.5](#)

Determining the cost of components for manufactured products.

## [184.6](#)

Construction material standards.

## [184.7](#)

Federal awarding agency's issuance of a Buy America Preference waiver.

## [184.8](#)

Exemptions to the Buy America Preference.

Authority: [Pub. L. 117-58](#), 135 Stat. 429.

### [§ 184.1](#)

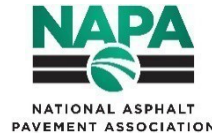
Purpose of this part.

This part provides guidance to Federal awarding agencies on the implementation of the Buy America Preference applicable to Federal financial assistance set forth in part I of subtitle A, Buy America Sourcing Preferences, of the Build America, Buy America Act included in the Infrastructure Investment and Jobs Act ([Pub. L. 117-58](#)) at division G, title IX, subtitle A, part I, sections 70912 through 70917. Section 70914 of the Build America, Buy America Act 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 used in the project are produced in the United States.

### [§ 184.2](#)

Applicability.

This part applies to a Federal award for an infrastructure project only to the extent that a Buy America Preference meeting or exceeding the requirements of section 70914 of the Build America,



Buy America Act did not apply to iron, steel, manufactured products, and construction materials in the Federal financial assistance program under which the Federal award is provided before November 15, 2021.

### [§ 184.3](#)

#### Definitions.

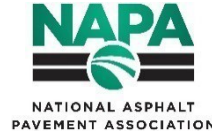
Terms not defined in this part shall have the same meaning as provided in [2 CFR part 200, subpart A](#). As used in this part:

*Build America, Buy America Act* means division G, title IX, subtitle A, part I, sections 70901 through 70927 of the Infrastructure Investment and Jobs Act ([Pub. L. 117-58](#)).

*Buy America Preference* means 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 used in the project are produced in the United States.

*Construction materials, for which there is a domestic procurement preference*, means articles, materials, or supplies incorporated into an infrastructure project that consist of only one or more of the following materials, except as provided in paragraph (2) of this definition:

- (1)(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;
  - (v) Optical fiber;
  - (vi) Lumber; or
  - (vii) Drywall.
- (2) For an item that consists only of a combination of one or more of the construction materials listed in paragraph (1) of this definition binding agents, any binding agents shall be disregarded, and each construction material must meet the Buy America Preference standard defined in § 184.6.



*(3) Construction materials excluded from a domestic content procurement preference means cement and cementitious materials, aggregates such as stone, sand, or gravel, or aggregate binding agents or additives and any combination of these construction materials such as concrete or asphalt mix.*

*Infrastructure project* is any activity related to the construction, alteration, maintenance, or repair of infrastructure in the United States regardless of whether infrastructure is the primary purpose of the project.

*Iron or steel products* means articles, materials, or supplies incorporated into an infrastructure project that consist wholly or predominantly of iron, steel, or both.

*Manufactured products* means 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 or are an excluded construction material under § 184.3 (as defined in this section).**

*Produced in the United States* means the following, for:

(1) *Iron and steel products.* All manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States.

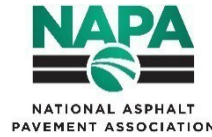
(2) *Manufactured products.* (i) The product was manufactured in the United States; and

(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. The costs of components of a manufactured product are determined according to § 184.5.

(3) *Construction materials subject to BABAA domestic content procurement preferences* All manufacturing processes for the construction material occurred in the United States. See § 184.6 for more information on the meaning of “all manufacturing processes” for specific construction materials.

#### [§ 184.4](#)

Applying the Buy America Preference to a Federal award.



(a) The Buy America Preference applies to awards where funds are appropriated or otherwise federal financial assistance made available for infrastructure projects in the United States, regardless of whether infrastructure is the primary purpose of the award-

(b) All Federal awards Federal Financial assistance with infrastructure projects must include the Buy America Preference in the terms and conditions. The Buy America Preference must be included in all subawards, contracts and purchase orders for the work performed, or products supplied under the award. The terms and conditions of a Federal award flow down to subawards to subrecipients unless a particular section of the terms and conditions of the Federal award specifically indicate otherwise.

(c) Infrastructure encompasses public infrastructure projects which includes at a minimum, the structures, facilities, and equipment for, in the United States, roads, highways, and bridges; public transportation; dams, ports, harbors, and other maritime facilities; intercity passenger and freight railroads; freight and intermodal facilities; airports; water systems, including drinking water and wastewater systems; electrical transmission facilities and systems; utilities; broadband infrastructure; and buildings and real property; and structures, facilities, and equipment that generate, transport, and distribute energy including electric vehicle (EV) charging.

(d) 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.

#### [§ 184.5](#)

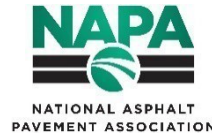
Determining the cost of components for manufactured products.

In determining whether the cost of components for manufactured products is greater than 55 percent of the total cost of all components, use the following definitions:

(a) For components purchased by the manufacturer, the acquisition cost, including transportation costs to the place of incorporation into the end product (whether or not such costs are paid to a domestic firm), and any applicable duty (whether or not a duty-free entry certificate is issued); or

(b) For components manufactured by the manufacturer, all costs associated with the manufacture of the component, including transportation costs as described in paragraph (a) of this section, plus allocable overhead costs, but excluding profit. Cost of components does not include any costs associated with the manufacture of the end product.

#### [§ 184.6](#)



Construction material standards.

The Buy America Preference applies to the following construction materials used in infrastructure projects. Each construction material is followed by a standard for the material to be considered “produced in the United States.”

1) The Buy American preferences apply to:

(a) *Non-ferrous metals.* All manufacturing processes, from initial smelting or melting through final shaping, coating, and assembly, occurred in the United States.

(b) *Plastic and polymer-based products.* All manufacturing processes, 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, occurred in the United States.

(c) *Composite building materials.* All manufacturing processes, 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, occurred in the United States.

(d) *Glass.* All manufacturing processes, from initial batching and melting of raw materials through annealing, cooling, and cutting, occurred in the United States.

(e) *Fiber optic cable.* All manufacturing processes, from the initial preform fabrication stage through fiber stranding and jacketing, occurred in the United States.

(f) *Optical fiber.* All manufacturing processes, from the initial preform fabrication stage through fiber stranding, occurred in the United States.

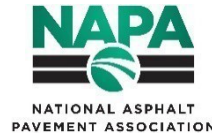
(g) *Lumber.* All manufacturing processes, from initial debarking through treatment and planning, occurred in the United States.

(h) *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.

2) The Buy America preference does not apply to: (a) cement and cementitious materials, aggregates such as stone, sand, or gravel, or aggregate binding agents or additives and any combination of these construction materials such as concrete or asphalt mix.

[§ 184.7](#)

Federal financial assistance agency's issuance of a Buy America Preference waiver.



(a) A Federal awarding agency may waive the application of the Buy America Preference in any case in which it finds that:

(1) Applying the Buy America Preference would be inconsistent with the public interest (a “public interest waiver”);

(2) Types of iron, steel, manufactured products, or construction materials are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality (a “nonavailability waiver”); or

(3) The inclusion of iron, steel, manufactured products, or construction materials produced in the United States will increase the cost of the overall project by more than 25 percent (an “unreasonable cost waiver”).

(b) A request from a non-Federal entity to waive the application of the Buy America Preference must be provided to the Federal awarding agency in writing. Federal awarding agencies shall provide waiver request submission instructions and guidance on the format, contents, and supporting materials required for waiver requests from non-Federal entities.

(c) Before issuing a waiver, the Federal awarding agency must:

(1) Prepare a detailed written explanation for the proposed determination to issue the waiver, including for those proposed waivers based on a request from a non-Federal entity;

(2) Make the proposed waiver and the detailed written explanation publicly available in an easily accessible location on a website designated by the Federal awarding agency and the Office of Management and Budget;

(3) Provide a period of not less than 15 calendar days for public comment on the proposed waiver; and

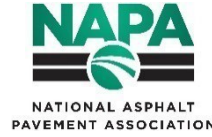
(4) Before finalizing a waiver, submit the waiver determination to the Office of Management and Budget Made in America Office for final review pursuant to [Executive Order 14005](#) and sections 70923(b)(2) and 70937 of the Infrastructure Investment and Jobs Act ([Pub. L. 117-58](#)).

(d) The review of existing waivers of general applicability are subject to a minimum 30-day public comment period.

#### [§ 184.8](#)

Exemptions to the Buy America Preference.

(a) The Buy America Preference does not apply to 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](#), [16 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.

(b) “Pre and post disaster or emergency response expenditures” consist of expenditures for financial assistance that are:

(1) Authorized by statutes other than the Stafford Act, [42 U.S.C. 5121](#) *et seq.*; and

(2) Made in anticipation of or response to an event or events that qualify as an “emergency” or “major disaster” within the meaning of the Stafford Act, [42 U.S.C. 5122\(1\)](#), (2).

(c) cement and cementitious materials, aggregates such as stone, sand, or gravel, or aggregate binding agents or additives and any combination of these construction materials such as concrete or asphalt mix.

## **PART 200—UNIFORM ADMINISTRATIVE REQUIREMENTS, COST PRINCIPLES, AND AUDIT REQUIREMENTS FOR FEDERAL AWARDS**

2. The authority citation for part 200 continues to read as follows:

Authority: [31 U.S.C. 503](#).

3. Amend § 200.322 by adding paragraph (c) to read as follows:

### [§ 200.322](#)

Domestic preferences for procurements.

\* \* \* \* \*

(c) Federal awarding agencies providing Federal financial assistance for infrastructure projects must comply with the Buy America Preferences set forth in [2 CFR part 184](#).