



AMERICAN PUBLIC WORKS ASSOCIATION

Your Comprehensive
Public Works Resource

www.apwa.net

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March 13, 2023

Submitted electronically to: <https://www.regulations.gov>

Dede Rutberg
Made in America Office
Office of Management and Budget
725 17th Street NW
Washington, D.C. 20503

Re: Comments on Proposed Amendments to 2 CFR 184 and 200 to implement the Build America, Buy America Act provisions of the Infrastructure Investment Act

Dear Ms. Rutberg:

On behalf of the more than 30,000 members of the American Public Works Association (APWA), we appreciate the opportunity to submit comments on revisions to Office of Management and Budget (OMB) Guidance for Grants and Agreements and implementation of the Build America, Buy America Act (BABAA) provisions of the Infrastructure Investment and Jobs Act (IIJA). APWA includes not only personnel from local, state, and federal agencies, but also private sector personnel responsible for designing, building, operating, and maintaining all facets of our nation's infrastructure.

APWA continues to be a proud supporter of the IIJA. We believe this historic and comprehensive law warrants thoughtful implementation in order to avoid disruptive and unintended consequences. APWA members have a long history of achieving compliance with domestic procurement requirements. After a review of past experiences, we strongly recommend proceeding cautiously with such a large undertaking, this includes providing:

- Adequate time for the supply chain to adjust to the final rules;
- Adequate time to educate enforcement staff and update existing policies;
- Adequate time for project contracts to adjust so those which already have BABAA-related language do not impose expanded requirements in the middle of construction due to newly released rules;

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CHIEF EXECUTIVE OFFICER
Scott D. Grayson, CAE



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- Consistent rules, interpretations, and enforcement across all federal agencies; and
- A functioning and fully transparent waiver process to address real-world supply chain limitations and hard deadlines for waiver consideration.

APWA wants to ensure standards are enforced appropriately and new rules allow for a thorough plan for phased implementation. It should be remembered much of the funding in IIJA was set aside for small and disadvantaged communities with long overdue infrastructure improvements to serve some of the most vulnerable populations and to address noncompliance with existing regulations. Project focus will include transportation, water supply and wastewater treatment systems, stormwater management, drainage and flood control infrastructure, waste and refuse disposal systems, public buildings and grounds, emergency planning and response, and other structures and facilities essential to the economy and quality of life nationwide. Public works professionals are doing what is best in the communities where they live and serve despite an array of challenges. APWA places a high priority on respecting and enhancing local control for infrastructure projects.

Processes should be as straightforward and equitable as possible to provide clarity and allow maximum flexibility along with ease of coordination across different programs. Inconsistent mandates make it more difficult for communities to receive funding and therefore at minimum should be streamlined as much as possible. Having different sets of Buy America requirements within the same project will create needless confusion and complications. Project managers would be tasked with figuring out which set of requirements apply to different aspects of a given project or financing package. The requirements should not be such that they serve as a disincentive to potential applicants for federal assistance. Driving communities away from programs may ironically result in more projects being funded with financial instruments that can result in an additional burden for taxpayers - but do not have the environmental, wage and domestic purchasing goals of federal programs. Already, local agencies tend to avoid federal funding due to increased risks, costs, and project implementation time (A June 2022 APWA nationwide survey of roadway contractors revealed an average 4.6% increase in costs and an average 8.4% increase in construction time for projects with federal Buy America requirements – a significant impact to costs and time from Buy America requirements). Therefore, any changes in the requirements should be carefully examined and carefully applied in order to minimize adverse economic and project delivery impacts.

As we have noted in previous comments, while some programs already have a history of compliance with AIS requirements and while that means IIJA's investments have been supporting American businesses and jobs in these industries from day one, we should not underestimate the significance of the new domestic preference

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requirements for construction materials and manufactured goods. Many projects take years and must meet strict regulations, deadlines, and technological standards. As EPA highlighted for instance in a proposed waiver last summer, “the domestic availability of other non-ferrous construction materials and manufactured products incorporated is largely unknown at this time” and absent an appropriate waiver, these requirements risk substantially increasing costs and delaying projects. The types of goods and materials covered by BABAA may be integral aspects of a project and essential to achieving environmental and public health objectives or regulatory compliance. Time is still needed to ascertain what products and materials are available domestically, comparative costs and what modifications upcoming projects may need. Time will also help more public works professionals learn the new requirements which now must be considered from the planning and design process forward.

OMB should consider rolling out specific construction materials under which BABAA requirements will apply over time. BABAA requirements could be applied to one material at a time over a transitional period sufficient to allow domestic manufacturing capacity to meet the requirement’s demands. If so, OMB should prioritize for transition those materials where a sufficient domestic manufacturing capacity already exists over those that do not (or provide sufficient notice to allow time for a ramp-up in capacity). This would mitigate the risk of an avalanche of waiver requests that would require significant agency resources to manage promptly and effectively while simultaneously averting sharp shocks to supply chains. Significant delays as a result of lengthy waiver processes will cause cost increases, leading to projects being put back on the shelf or scaled down in scope. These challenges will compound existing difficulties caused by workforce shortages, the lingering effects of trade wars, supply chain issues, and inflation.

Mandates while well-intentioned can entail complex prescriptive procedures to demonstrate compliance thereby increasing the time and cost of administration for federally financed projects. Higher costs risk erasing savings from federal investment, which can again dissuade localities from seeking federal funds. Communities who lack full-time professional capacity to manage capital improvement projects will bear a disproportionate burden as will their low-income, disadvantaged and underserved populations. Some of those communities that cannot access other financing sources rely on federal funding and end up spending a large portion of project dollars on mandated requirements rather than on infrastructure improvements. In the worst cases, these communities defer maintenance until infrastructure fails. We have seen this occur across the country and the consequences from reduced access to economic opportunities to contaminated water to collapsing structures. In the end, many communities are not upgrading and maintaining their infrastructure as needed, leading to a lower quality of life for residents, as well as lower environmental protections and higher public health risks.

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It is imperative that actions taken by the government provide clarity and relief, and not contribute to uncertainty that threaten to stall necessary improvements. In response to specific requests for comments:

- OMB should align definitions with Federal Acquisition Regulations (FAR) in the Code of Federal Regulations (CFR) where required and avoid creating multiple definitions that may create confusion and increase cost of compliance. Guidance should include FAR definitions so that the guidance becomes a complete, free-standing document and end users need not search across multiple documents, which would increase compliance costs and the probability of misunderstandings.
- OMB should ensure there are consistent and clear market requirements for industry to meet one standard for determining the “cost of components” of manufactured products.
- If OMB’s definition of “contractor” covers capital improvement projects that might be completed by Department staff, then the current language would be sufficient. Otherwise, a revision to recognize that capital improvement projects are not completed exclusively by contractors (outside parties) would be recommended.
- We are urging for the time being that OMB does not include additional construction material standards in the guidance such as coatings, brick, or create new subsets of definitions such as “optic glass”.
- Guidance needs to be clear about “de minimis” to avoid confusion along with a consistent definition of “predominantly”. Language should not be overly prescriptive, but rather clear and unambiguous for the reader, and any rule ideally would mirror existing industry practices in conjunction with rules for existing federal programs.
- It is important to not only clearly and specifically identify construction materials that fall under BABAA requirements, but also explicitly detail which materials are exempt. Excluded materials such as (i) cement and cementitious materials; (ii) aggregates such as stone, sand, or gravel; or (iii) aggregate binding agents or additives should be entirely excluded from coverage under BABAA. Raw aggregates should always be fully excluded from BABAA compliance calculations, which means excluding these raw materials in calculations of precast concrete products. If a material is excluded, there should not be partial incorporation or “scope creep” and Congressional intent should be respected on this matter.

APWA members pride themselves on being committed to public service by profession and being a trusted resource is another way we work to protect our communities. If APWA may be of further assistance, please contact Ryan McManus, APWA Government Affairs Manager, at rmcmanus@apwa.net or 202-218-6727.

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Thank you for your time and consideration of these comments.

Sincerely,

A handwritten signature in black ink that reads "Scott D. Grayson". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Scott D. Grayson, CAE
Chief Executive Officer

A handwritten signature in black ink that reads "BK Pugh". The signature is bold and blocky, with a long horizontal stroke extending to the right.

Keith Pugh, PE, PWLF
APWA President

PRESIDENT
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CHIEF EXECUTIVE OFFICER
Scott D. Grayson, CAE