



SHEET METAL AND AIR CONDITIONING CONTRACTORS' NATIONAL ASSOCIATION, INC.

March 13, 2023

**VIA ELECTRONIC SUBMISSION**

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

**RE: Public Comments on Proposed Rule, “Guidance for Grants and Agreements,” 88 Fed. Reg. 8374 (Feb. 9, 2023)**

Dear Ms. Rutberg:

The Sheet Metal and Air Conditioning Contractors’ National Association (SMACNA) is an international trade association representing 3,500 signatory contracting firms with more than 100 chapters throughout the United States, Canada, Australia, and Brazil. SMACNA provides its sheet metal and air-conditioning contractor members with assistance in areas including business management, labor relations, marketing, governmental affairs, and technical research and development – on a national, state, and local level.

SMACNA provides these comments in support of the Office of Management and Budget’s (OMB) Proposed Rule, *Guidance for Grants and Agreements*, 87 Fed. Reg. 62218 (Oct. 13, 2022) (hereafter the “Proposed Rule”), which implements the *Build America, Buy America Act* (“BABA Act”) as part of the *Infrastructure Investment and Jobs Act of 2021* (“IIJA”), Pub. L. No. 117-58, tit. X, §§ 70901-52. The BABA Act prescribes domestic preference requirements for both grants and cooperative agreements (Part 1), §§ 70911-70917, and for procurement contracts (Part 2), §§ 70918-70927.

As outlined in detail below, SMACNA fully supports the IIJA – and, in particular, the “Buy America” portions of the BABA Act – because the law ensures that federal infrastructure investments are completed with American-made “iron, steel, manufactured products, and construction materials.”<sup>1</sup> The “Buy America” requirements reinvest tax dollars in America, which creates jobs, ensures goods are produced under appropriate environmental and workplace safety standards, and protects America’s economic and national security.

SMACNA strongly supports the establishment of robust Buy America policies. These policies must, however, be responsive and rapidly administrable to recognize the current

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<sup>1</sup> IIJA, § 70914.

limitations in America's production capacity and anticipate future supply disruptions. Consistency, flexibility, and predictability across the specialty metals supply chain are essential to our industry. Without necessary waiver flexibility, completion dates could be seriously delayed on many of our complex federal projects. Thus, provided below are suggestions on how the Proposed Rule can be improved to utilize more American-made material in projects that are completed on time and on budget.

**I. THE PROPOSED RULE SHOULD BE PHASED IN AT A MEASURED PACE.**

SMANCA understands and supports the Administration's intent to "use terms and conditions of Federal financial assistance awards to maximize the use of goods, products, and materials produced in, and services offered in, the United States."<sup>2</sup> However, the Buy America changes that may result from the Proposed Rule should be rolled out at a measured pace. This is consistent with Congressional intent and will ensure that domestic supply chains, already strained by international and domestic product disruptions, have time to adjust to the Buy American requirement.

Although not addressed by the Proposed Rule, it is important to remember that the IJJA does not impact *existing* "product-specific general applicability waivers." In fact, under the IJJA, "product-specific general applicability waivers" that were issued more than 180 days before enactment of the IJJA are *exempt* from review for at least 5 years:

***Limitation on the review of existing waivers of general applicability.*** For a period of 5 years beginning on the date of enactment of this Act, paragraphs (1) and (2) [of § 70914(d)] shall ***not*** apply to any product-specific general applicability waiver that was issued more than 180 days before the date of enactment of this Act.<sup>3</sup>

All other general applicability waivers, including those issued after enactment of the IJJA, must be reviewed "every 5 years after the date on which the waiver is issued."<sup>4</sup>

The IJJA's treatment of existing "product-specific general applicability waivers" demonstrates Congress' intent to avoid abrupt disruptions in supply chains with difficult-to-domestically-source materials immediately following passage of the IJJA. OMB should keep this in mind as it implements the requirements of the IJJA.

In addition, to assist contractors with sourcing more domestic supplies, the Final Rule should instruct the OMB's Made in America Office (MIAO) to create a list or database of

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<sup>2</sup> 88 Fed. Reg. at 8374 (citing Executive Order 14005, Ensuring the Future Is Made in All of America by All of America's Workers).

<sup>3</sup> IJJA, § 70914(d)(3).

<sup>4</sup> IJJA, § 70914(d)(1).

domestically produced construction materials and certify that those listed are Buy America compliant. This will reduce transaction costs associated with each contractor individually finding local suppliers. In addition, other contractors would be able to use the MIAO's database to source American-made materials even if they are not subject to the Final Rule.

## **II. THE PROPOSED RULE SHOULD AUTHORIZE THE USE OF "PRICE ESCALATION CLAUSES" TO FURTHER INCENTIVIZE USE OF AMERICAN-MADE MATERIALS.**

High material prices were recently identified as the biggest challenge right now for the specialty contractor segment of the construction industry. According to the Department of Labor's Producer Price Index, "inputs to nonresidential construction and commercial construction remain 37.9 percent and 38.2 percent higher than February 2020."<sup>5</sup> Iron and steel remain 55.9 percent higher when compared to February 2020 and other widely used materials, such as concrete products remain 27.9 percent higher as compared to the start of the pandemic.<sup>6</sup>

While we fully support the IIJA – and, specifically, the "Buy America" portions of the BABA Act – the increased demand for domestically-sourced goods will undoubtedly create upward pressure on material costs (at least in the short term). This will, of course, be compounded by the post-pandemic price increases to material inputs specified above.

It is true that participants can obtain a "waiver" from the Buy America requirements if one of the following conditions is met:

- (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").<sup>7</sup>

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<sup>5</sup> Sebastian Obando, *Material Prices Back on the Rise*, CONSTRUCTION DIVE (Feb. 17, 2023) (citing DOL Producer Price Index, January 2023) (available at <https://www.constructiondive.com/news/construction-input-prices-increase-january/643031/>).

<sup>6</sup> *Id.*

<sup>7</sup> Proposed Rule, 2 C.F.R. § 184.7; see also IIJA § 70914(b).

However, rather than incentivizing participants to seek a waiver, the Proposed Rule should incentivize contractors to diligently search for domestic supplies. This can be achieved by authorizing federal agencies to include “price escalation clauses” in their awards and subawards.

Generally speaking, a “price escalation clause” (also called an “escalation clause”) is a contractual provision that authorizes contractors or subcontractors to recover some or all of the cost increases that occur over the course of a project if certain conditions are met. For example, a price escalation clause could be drafted to permit a contractor to recover costs if their budgeted cost for a specific material (such as American-made drywall, concrete, or copper piping) has increased by a certain percentage.

In addition to incentivizing contractors to exhaustively source domestic supplies (rather than seeking a waiver), an escalation clause provides contractors with certainty that they will not face a financially ruinous price spike in cost inputs, such as the 275% spike in lumber prices in 2020.<sup>8</sup> This protects American jobs and ensures that America’s infrastructure projects are completed on time.

Remember, too, it will take time for contractors to understand and incorporate the newly devised and implemented Buy America Preference into their bids. Authorizing the use of “price escalation clauses” in the Final Rule will ensure that contractors feel confident they will not suffer economically when bidding on federal projects. This will increase bidding on federal projects, particularly amongst smaller, highly skilled specialty contractors who could greatly enhance a project’s quality but could not weather a disastrous spike in prices. This supports small businesses and will, in turn, increase competition and decrease prices over time.

### **III. THE PROPOSED RULE SHOULD CLARIFY THE WAIVER PROCESS FOR THE SUBSTITUTION OF MATERIAL IN UNFORESEEN CIRCUMSTANCES AND EMERGENCIES.**

Deadlines and timelines, along with cost, are the most important aspects of a construction project. This is because each specific task in a complex construction project – which is often performed by many different trades – must be completed in a specific sequence. For example, the sheet metal contractor cannot install the HVAC system until the foundation is poured and the structure erected.

The nonavailability (or delay) in a single material can throw off the completion timeline for an entire project. For example, a drywall contractor cannot install the drywall until the plumbers, electricians, and sheet metal workers have finished their work. Thus, the availability of drywall at the start of a construction project is meaningless if the supply cannot be delivered at the time it is needed on the project.

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<sup>8</sup> Available at <https://www.fs.usda.gov/features/how-pandemic-drove-cost-wood-products>.

While the Proposed Rule includes a “nonavailability waiver” if the federal agency determines that “[t]ypes 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,”<sup>9</sup> OMB should make clear in the Final Rule that the “nonavailability waiver” is applicable in situations where materials are not available during the phase of construction when the specific materials are needed.

In the example above, the availability of drywall at the beginning of a multiyear construction project would not preclude a drywall contractor from obtaining a “nonavailability waiver” in the event that drywall is not available at the time the contractor needs it to be delivered, so that it can be installed before other finishing trades are scheduled to perform their work. Thus, to ensure that projects are completed on time and on budget, OMB should make clear in the Final Rule that the “nonavailability waiver” is applicable in situations where materials are not available during the phase of construction when the materials are needed.

**IV. THE PROPOSED RULE SHOULD EXEMPT SPECIALTY MATERIALS MANDATED BY THE OWNER OR GENERAL CONTRACTOR.**

In the sheet metal industry, it is not uncommon for a project owner or general contractor to mandate that highly specific, rare, as well as unique materials be used in a construction project. As noted above, the “nonavailability waiver” is available if the federal agency determines the materials “are not produced in the United States . . . of a satisfactory quality.”<sup>10</sup> The OMB should make clear in the Final Rule that this may include materials mandated by the federal agency or general contractor.

**V. THE PROPOSED RULE SHOULD REQUIRE THAT FEDERAL AGENCIES HAVE A TIMELY AND EFFECTIVE WAIVER REVIEW PROCESS.**

As noted above, deadlines and timeliness are as important to the construction industry as cost. Thus, in the event that a contractor needs to obtain a waiver, it is critical that the contractor receive a timely response from the federal agency.

As noted above, under the IIJA, each federal agency has authority to waive application of the Buy America Preference if the agency finds that: (1) application of the preference would be contrary to the public interest, (2) the materials and products subject to the preference are not produced in the United States in sufficient and reasonably available quantities or of satisfactory quality, or (3) inclusion of domestically produced materials and products would increase the cost of the overall project by more than 25 percent.<sup>11</sup>

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<sup>9</sup> Proposed Rule, 2 C.F.R. § 184.7(a)(2); see also IIJA § 70914(b)(2).

<sup>10</sup> Proposed Rule, 2 C.F.R. § 184.7(a)(2); see also IIJA § 70914(b)(2).

<sup>11</sup> IIJA § 70914(b); see also Proposed Rule, 2 C.F.R. § 184.7(a).

The Proposed Rule requires federal agencies to provide the following guidance to interested parties: “waiver request submission instructions and guidance on the format, contents, and supporting materials required for waiver requests from non-Federal entities.”<sup>12</sup> As outlined above, in the Final Rule, federal agencies should be provided more guidance by OMB regarding “the format, contents, and supporting materials required for waiver requests.”

The Proposed Rule also requires federal agencies to take the following steps before issuing any waiver:

- (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 [OMB].
- (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 [MIAO].<sup>13</sup>

There are three potential issues with the Proposed Rule’s waiver-review process that should be remedied as part of the Final Rule.

**First**, the Proposed Rule assumes that federal agencies have sufficient staff and resources to *expeditiously* process the ever-escalating number of waiver requests. This may not necessarily be the case and federal agencies will need many additional staff and training to ensure that the agency is complying with the IIJA regulations and keeping up with the expected flurry of infrastructure related waiver requests. Thus, the Final Rule should require that all federal agencies establish a functioning and adequately resourced staff to manage a highly responsive waiver review process. Federal agencies should also be allocated the necessary resources to hire and train additional review staff needed to draft, and publish waiver guidance, as well as engage with stakeholders to ensure that the waiver process is working quickly, efficiently, and effectively.

**Second**, while providing the waiver determination to the MIAO will provide some measure of consistency, the Final Rule should provide more substance and clarity as to the meaning of the

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<sup>12</sup> Proposed Rule, 2 C.F.R. § 184.7(b).

<sup>13</sup> Proposed Rule, 2 C.F.R. § 184.7(c).

waiver conditions in Section 184.7 to ensure that federal agencies are acting in a timely manner consistent with OMB's direction.

*Third*, and most critically, there is no clear deadline for the federal agency to process the waiver request. As noted above, deadlines and timeliness are as important to the construction industry as cost. Nothing can be more detrimental to a contractor and a complex construction project than waiting for one or more waivers to be granted or denied. This should be avoided at all costs and necessitates a large increase in resources to the waiver processing office within federal procurement agencies.

Thus, the Final Rule should emphasize greater contracting certainty by including a "hard deadline" for federal agencies to process and respond to critical waiver determination requests. Specifically, Section 184.7(c) should be amended to require action by the federal agency within *30 days* of receiving the waiver request. Consider the following proposed amendment to Section 184.7(c):

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

...

- (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).

The proposed waiver will be granted unless the Federal awarding agency notifies the non-Federal entity of its final determination denying the proposed waiver and its detailed written explanation no less than 30

calendar days after the completed waiver request is submitted by the non-Federal entity.

Instituting a “hard deadline” with the proposed language serves two purposes: (1) it ensures some measure of accountability on federal agencies and (2) it gives contractors certainty in terms of when the agency will respond and the ability to effectively plan for contingencies, which ensures that construction projects are completed on time and on budget.

**VI. CONCLUSION**

SMACNA appreciates this important opportunity to provide specific policy reform recommendations to improve the “Buy America” procurement process and offers our continued assistance and engagement with the Administration to ensure that investment in American infrastructure be a generator of well-paid, family-supporting jobs for American workers.

We respectfully ask the Office of Management and Budget to carefully consider our recommendations to ensure the “Buy America” requirements can be expeditiously implemented in an effective and cost-efficient manner. Do not hesitate to call upon our association staff, technical experts or leading federal construction contractors should you have additional questions or concerns to reach the President’s goal of an improved “Buy America” program that works for the federal owner and its contractor allies.

Sincerely,



Aaron Hilger  
Chief Executive Officer

cc: Martin J. Walsh, Secretary  
U.S. Department of Labor