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Federally Funded Construction Regulatory Update: A Primer On The Revisions To The Davis-Bacon And Related Acts Regulations And The Build America Buy America Final Guidance

*By Jonathan D. Shaffer, Daniel H. Ramish, and Michael J. Maroulis**

The U.S. government spends more than $1 trillion a year on grants, cooperative agreements, and other federal assistance, outstripping even the large amounts spent on government procurement contracts.[1] Recent legislation such as the Inflation Reduction Act of 2022[2] and the Infrastructure Investment and Jobs Act[3] is adding billions of additional dollars in federal assistance funding. Much of that money will be spent on federally funded construction projects.

Construction contractors should be aware that federal projects involve mandatory requirements that differ from commercial construction, including complex rules regarding labor and supplies and materials used in the performance of the work. Failure to comply with these rules can result in penalties, termination, and in some cases False Claims Act liability or suspension or debarment. Compliance is critical.

The Department of Labor (DOL) and the Office of Management and Budget (OMB) recently promulgated rules and guidance on two of the most important areas of compliance for federally funded construction projects, which we address in this Briefing Paper in two parts. In Part 1, we discuss DOL's revisions to the Davis-Bacon and Related Acts (DBRA) regulations, which require payment of prevailing wages and fringe benefits to laborers and mechanics on federally funded construction projects. In Part 2, we discuss OMB's Build America, Buy America (BABA) Act final guidance, which requires that all iron and steel products, manufactured products, and construction materials incorporated in federally funded infrastructure projects must be produced in the United States.

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Part 1: Davis Bacon And Related Act Regulations

Overview

In March 2023, DOL published a Notice of Proposed Rulemaking (NPRM) to amend the regulations implementing the DBRA.[4] The NPRM proposed the most comprehensive revision to the regulations since the early 1980s.[5] After receiving over 40,000 comments, DOL published a final rule that became effective on October 23, 2023.[6] With some exceptions, the final rule applies only to contracts entered into after October 23, 2023. *The final rule requires that, until the FAR clauses are amended to conform to the revised DBRA regulations, agencies awarding procurement contracts must use the DOL clauses at 29 C.F.R § 5.5.*[7]

The Davis-Bacon Act (DBA) requires contractors to pay prevailing wages to all laborers or mechanics working at the site of the work on federal construction contracts over $2,000.[8] Since the 1930s, Congress has extended DBA requirements to almost 80 Related Acts (collectively, the DBRA).[9]

The DBRA final rule amends DOL's methodology for determining prevailing wages, which is anticipated to affect contractors over time by increasing the mandated wage rates.[10] This Paper, however, focuses on other changes in the rule that will affect contractors more directly. Such changes include expanding coverage at secondary worksites; confirming that energy infrastructure and related activities are covered by the DBA; establishing new standards for the material supplier exemption; clarifying (generally broadening) coverage of flaggers, truck drivers, and survey crew members; formalizing certain policies for calculating fringe benefits; imposing new requirements for updating wage determinations in existing contracts; increasing contractor recordkeeping obligations; providing for incorporation of DBA requirements by operation of law when DBA clauses or wage determinations are omitted; and enhancing enforcement provisions. While DOL recognized many changes as substantive revisions, it characterized others as codifying existing guidance or case law.[11]

Site Of The Work

● *Secondary Construction Sites*. DOL has extended DBRA coverage by expanding the definition of "secondary construction sites." Secondary construction sites now include sites where a "significant portion" of a building or work is constructed if the site is dedicated exclusively, or nearly so, to a DBRA-covered project for at least weeks, months, or a longer period.[12] In contrast, prior regulations limited secondary sites to sites that were "established specifically for the performance of the contract or project."[13] DOL explained that this expansion was motivated by concerns over technological advancements that facilitate large-scale pre-engineering or modular construction at sites away from the primary construction site.[14]

Sites where a significant portion of a building or work is constructed constitute DBRA-covered secondary construction sites if two conditions are met. First, the construction of a significant portion of a building or work "is for specific use in that building or work and does not simply reflect the manufacture or construction of a product made available to the general public."[15] Second, "the site is either [a] established specifically for

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the performance of the contract or project, or [b] is dedicated exclusively, or nearly so, to the performance of the contract or project for a specific period of time."[16]

A "significant portion" means "one or more entire portion(s) or module(s) of the building or work, such as a completed room or structure, with minimal construction work remaining other than the installation and/or final assembly" but does not include "materials or prefabricated component parts such as prefabricated housing components."[17] Although the amended regulation provides clarification on the use of the term "significant portion," DOL reiterated its earlier position that "a precise definition would be unwise because the size and nature of the project will dictate what constitutes a 'significant portion.' "[18] DOL suggested that the "magnitude of construction activity" and "near completeness of the modules or portions" are relevant factors.[19]

A "specific period of time" means "a period of weeks, months, or more," excluding "circumstances where a site at which multiple projects are in progress is shifted exclusively or nearly so to a single project for a few hours or days in order to meet a deadline."[20] However, directed or constructive acceleration might arguably bring an offsite facility within DBRA coverage. "Multiple projects" includes multiple DBRA-covered projects.[21] But a facility is not working on multiple projects if the only work on other projects is "merely token work."[22]

The correct wage determination for a covered secondary construction site depends on the location of the secondary site, not the location of the primary construction site.[23] Note that coverage is not limited to work performed on the site of the work under certain Related Acts (called "development statutes"), which include the United States Housing Act of 1937.[24]

● *Adjacent or Virtually Adjacent Dedicated Support Sites*. Unlike covered secondary construction sites, work at a "dedicated support site" is covered under the DBRA only if the site is "adjacent or nearly adjacent to a primary or secondary worksite."[25]

● *Flaggers*. The new definition for "site of the work" also states that "workers engaged in traffic control and related activities" are covered under the DBRA for work performed "adjacent or virtually adjacent to the primary construction site."[26] DOL noted that whether a worker is covered as a flagger does not depend on whether that worker has received "specialized training about directing personnel around work vehicles and operation."[27] Similarly, "title is not determinative" of a worker's coverage as a flagger under the DBRA.[28] DOL also acknowledged that workers of traffic service companies that rent equipment to contractors are not covered as flaggers if the traffic service company qualifies as a material supplier.[29]

● *"Building or Work" Coverage of Energy Infrastructure*. DOL revised the definition of "building or work" to make clear that energy infrastructure and related activities are subject to DBA requirements, expressly calling out solar panels, wind turbines, broadband installation, and installation of electric car chargers on the non-exhaustive list of covered buildings, structures, and improvements.[30]

Material Suppliers

The final rule revises the DBRA regulations by adding a bright-line rule for the material supplier exemption.[31] Material suppliers and their employees are not covered under the DBRA.[32] A company must meet three conditions to qualify as a material supplier. First, the company's contractual obligations cannot extend beyond material or equipment delivery or pickup and activities incidental to delivery or pickup.[33] Incidental activities include "loading, unloading, or waiting for materials to be loaded or unloaded."[34] But a company that is responsible only for picking up or hauling away materials, and not for their delivery, is not a material supplier.[35] Second, the company's material supply facilities cannot be located on primary or secondary construction sites.[36] But a company does not lose its status as a material supplier merely because its material supply facilities are located on adjacent or virtually adjacent dedicated support sites.[37] Finally, the company's material supply facility must either (a) have been established before opening of bids, or (b) not be dedicated exclusively or nearly so to the performance of the DBRA-covered contract.[38]

Truck Drivers

The final rule adds a new definition for "covered

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transportation."[39] The DBRA covers truck drivers employed by a contractor or subcontractor in five circumstances in which they engage in "covered transportation": (1) transportation wholly within a site of the work; (2) transportation of a significant portion of a building or work between primary and secondary construction sites; (3) transportation between a primary or secondary construction site and an adjacent or virtually adjacent dedicated support site; (4) "onsite activities incidental to offsite transportation"; and (5) transportation under a development statute.[40]

Under the final rule's de minimis standard for onsite activities related to offsite transportation, truck drivers transporting materials to or from the site of the work are not covered for de minimis onsite time.[41] "Onsite time" is the time a truck driver spends onsite "during a typical day or workweek—not just the amount of time that each delivery takes."[42] The final rule does not define "de minimis"; rather, DOL endorsed the Administrative Review Board's practice of reviewing the de minimis exception on a case-by-case basis under the totality of circumstances.[43]

Under the final rule, the DBRA's de minimis standard is not as strict as the de minimis standard under the Fair Labor Standards Act (FLSA).[44] DOL had adopted the FLSA's de minimis standard in the proposed rule, which would have exempted onsite incidental work only if the time spent doing that work was "so insubstantial or insignificant that it cannot as a practical administrative matter be precisely recorded."[45] After considering comments in opposition to the proposed rule, however, DOL opted for a flexible standard, recognizing the FLSA's strict standard "could impose unnecessary burdens on contractors for comparatively marginal benefits."[46]

Fringe Benefits

● *Annualization*. In the final rule, DOL codifies the principle of annualization.[47] To calculate the allowable fringe benefit credit, contractors must "annualize" all contributions to fringe benefit plans that (1) provide continuous benefits;[48] or (2) compensate both private and DBRA-covered work.[49] "Annualization" requires that contractors allocate fringe benefit contributions for each worker across the hours worked on both DBA and non-DBA projects to prevent contractors from taking credit under the DBA for fringe benefits associated with non-DBA jobs.[50] The final rule adopts a process for obtaining an exception to the annualization requirement,[51] as well as a safe harbor for qualifying defined contribution pension plans (DCPPs).[52] Although the regulations automatically exempt qualifying DCPPs from annualization, contractors should submit written requests for exemptions to the DOL Wage and Hour Division (WHD) Administrator if they have any concerns about whether a particular DCPP qualifies for this safe harbor.[53]

● *Creditable vs. Noncreditable Costs*. The final rule also adds a new provision distinguishing between creditable and non-creditable administrative expenses.[54] Contractors may claim a credit for costs paid to third parties that are "directly related to the administration and delivery of bona fide fringe benefits."[55] Premiums paid to an insurance carrier are one example of creditable costs.[56] On the other hand, a contractor may not claim a credit for its own "administrative expenses incurred in connection with the provision of fringe benefits."[57] Noncreditable costs also include certain human resources, recordkeeping, and compliance costs, such as "tracking the hours worked by [a contractor's] laborers and mechanics on DBRA-covered projects costs, tracking the contractor's fringe benefit contributions on behalf of these workers, and reconciling workers' hours worked with the contractor's contributions."[58]

The rationale behind prohibiting contractors from crediting these administrative expenses against their fringe benefit obligations to workers is that contractors do not incur these costs for the benefit of workers; rather, contractors incur these costs primarily for their own benefit—to comply with their legal obligations under the DBRA.[59] DOL cited concerns regarding an increase in "third-party businesses that promise to reduce contractors' costs if contractors hire them to perform the contractors' own administrative tasks and then claim a fringe benefit credit for the costs of those outsourced tasks," noting that outsourcing does not convert a noncreditable cost into a creditable one.[60] Whether an expense is creditable depends on the "type and purpose of the expense, rather than on whether it is paid by the contractor directly or through a third party."[61]

● *Apprenticeship Programs*. The revised regulations

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provide several rules for crediting apprenticeship program costs against a contractor's fringe benefit obligations.[62] For example, the rules explain how to annualize contributions to apprenticeship training funds, limit credits to amounts reasonably related to the costs of apprenticeship benefits actually provided, and prohibit contractors from crediting the costs of apprenticeship programs for one classification against prevailing wage obligations of other classifications.[63]

● *Unfunded Fringe Benefit Plans*. The final rule requires contractors to obtain DOL approval of unfunded fringe benefit plans.[64]

Updating Wage Determinations After Contract Award

A wage determination incorporated into a contract generally applies for the life of a contract. But the final rule clarifies that revised wage determinations issued after contract award apply to the contract under three circumstances: (1) if a contract is changed to add "substantial" covered work not within the original contract scope; (2) if the contracting agency exercises an option to extend the contract term; or (3) for long-term contracts not tied to the completion of a particular project, such as indefinite-delivery, indefinite-quantity (IDIQ) contracts.[65] If the contractor is merely given more time to complete its original scope, however, or if changes made to the contract scope are "merely incidental," that does not trigger the requirement to include a revised wage determination.[66] For long-term contracts like multi-year IDIQ contracts, revised wage determinations must be incorporated annually.[67]

Survey Crew Members

While the final rule does not amend the definition of laborer or mechanic, DOL discussed circumstances under which survey crew members would likely qualify as covered laborers or mechanics.[68] Whether a survey crew member qualifies as a laborer or mechanic is a question of fact focusing on whether the survey crew member's actual duties are manual or physical in nature as well as the "use of tools or . . . work of a trade."[69] Duties that are manual or physical in nature include "walking and carrying equipment and setting stakes."[70] Likewise, DOL stressed the importance of tool use, noting that as technology becomes more sophisticated, it can enable people "with less training and academic background to perform surveying tasks required on construction jobsites."[71] Although DOL stresses the fact-dependent nature of determining coverage for survey crew members, it also stated that "survey crew members who spend most of their time on a covered project taking or assisting in taking measurements would likely be deemed laborers or mechanics."[72]

It is unclear how broadly DOL intends to read the term "taking or assisting in taking measurements." DOL did not dispute that the March 18, 2022 NPRM was "the first time that the Department has ever referenced taking measurements as a physical or manual task."[73] And, DOL declined to address comments that coverage for survey crew members who spend most of their time taking or assisting in taking measurements contradicts DOL's Field Operations Handbook (FOH).[74]

Licensed professional surveyors may be exempt from DBRA coverage as "learned professionals."[75] But DOL suggested that the availability of the learned professional exemption may depend on whether state licensing requirements "customarily require a prolonged course of specialized intellectual instruction."[76]

Recordkeeping

The final rule expands recordkeeping requirements in three ways. First, contractors must now maintain records of each worker's last known telephone number and email address.[77] Second, contractors must retain all regular payrolls[78] and other basic records for at least three years after "all work" on the prime contract is completed.[79] Subcontractors cannot rely on prime contractors to maintain these records.[80] Third, contractors must also maintain all contracts, subcontracts, and related documents for at least three years after all work on the prime contract is completed.[81] Related documents include, without limitation, "bids, proposals, amendments, modifications, and extensions."[82]

If contractors fail to maintain accurate payroll records, DOL may calculate back wages by reconstructing payrolls through inferential proof.[83]

Contractors must sign certified payrolls with "an original handwritten signature or a *legally valid* electronic signature."[84] The final rule explains that a "a scan or

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photocopy of a written signature" is not a legally valid electronic signature.[85]

Incorporation By Operation Of Law

Contracting agencies sometimes fail to include in a covered contract either the required DBRA contract clauses or the correct wage determinations. When this happens, pursuant to the new rules, the required contract clauses and correct wage determinations will now be effective "by operation of law."[86] DOL analogized the new operation of law regulation to the *Christian* doctrine, under which omitted contract clauses are incorporated into a federal prime contract by operation of law under certain circumstances.[87] The DBRA operation of law provision also resembles the operation of law provisions in the Equal Employment Opportunity (EEO) regulations, except that the new DBRA operation of law regulation applies only to prime contractors, whereas EEO extends the requirements to subcontractors by operation of law as well.[88] The Administrator may limit the retroactive enforcement of DBRA contract clauses and wage determinations effective by operation of law.[89] If unsure whether DBRA provisions apply to a particular contract, contractors should request guidance from the Administrator before contract award.[90]

If DBRA clauses or wage determinations are read into a contract by operation of law, the prime contractor is entitled to an equitable adjustment under applicable law.[91] The Federal Acquisition Regulation (FAR) provides the applicable law for direct federal procurement contracts.[92] But it is unclear how the equitable adjustment provision will apply to grants to the extent a recipient lacks funding under the grant agreement to cover the difference in price when DBRA contract clauses or wage determinations have been omitted.[93]

In justifying the new operation of law provision, DOL flagged General Services Administration Multiple Award Schedule (MAS) contracts and blanket purchase agreements (BPAs) as areas where the existing regulations have proven especially challenging.[94] Likewise, DOL noted that the operation of law provision is unlikely to lead to an increase in bid protests because contractors must protest the terms of a solicitation before award under both Government Accountability Office and U.S. Court of Federal Claims bid protest law.[95] The final rule refers to protests "before award," but in most cases the protest would have to be filed before the proposal due date.[96]

Enforcement: Anti-Retaliation, Debarment, And Cross-Withholding

The final rule enhances enforcement by (1) adding a new anti-retaliation provision; (2) expanding remedies available to workers; (3) allowing the contracting agency to withhold funds from any DBRA-covered contracts that the prime contractor holds with other agencies; (4) prohibiting a contractor from introducing into evidence in an administrative proceeding records that the contractor had failed to timely provide to WHD upon request; and (5) making it easier to debar contractors, responsible officers, and related entities for Related Acts violations. The amended regulations also expressly provide for daily compounding interest on underpayments to workers.[97]

● *Prime and Upper-Tier Subcontractor Liability*. Prime contractors are strictly liable for unpaid back wages and monetary relief owed to subcontractor workers.[98] The final rule amends the DBRA contract clauses by imposing liability on upper-tier subcontractors "to the extent they are 'responsible' for the violations of their lower-tier subcontractors."[99] The regulations do not define what acts or omissions make an upper-tier subcontractor "responsible for" a lower-tier subcontractor's DBRA violations. But DOL stated that upper-tier subcontractors may be subject to liability for back wages and monetary relief "in appropriate circumstances (i.e., where the lower-tier subcontractor's violation reflects a disregard of obligations by the upper-tier subcontractor to workers of their subcontractors)."[100] DOL reasoned that this liability scheme strikes an appropriate balance because, like prime contractors, upper-tier subcontractors "can choose the lower-tier subcontractors they hire, notify lower-tier subcontractors of the prevailing wage requirements of the contract, and take action if they have any reason to believe there may be compliance issues."[101]

DOL also stated that an upper-tier subcontractor would face potential liability if it "repeatedly or in a grossly negligent manner fails to flow down the required contract clause, or has knowledge of violations by

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lower-tier subcontractors and does not seek to remedy them, or is otherwise purposefully inattentive to Davis-Bacon labor standards obligations of lower-tier subcontractors."[102]

DOL explained that in amending the DBRA regulations, it does not intend to prohibit contractors from allocating liability, for example, by indemnification agreements.[103]

● *Anti-Retaliation*. The final rule added a new anti-retaliation provision to ensure "that workers who raise concerns about payment practices or assist agencies or DOL in investigations are protected from termination or other adverse employment action."[104] The amended regulation lists the following protected activities: (1) notifying any contractor of any conduct that the worker reasonably believes constitutes a violation of DBRA; (2) asserting any right or protection under DBRA on behalf of the worker or others; (3) cooperating in any investigation or testifying in any proceeding; and (4) informing any person about their rights under DBRA.[105]

The new anti-retaliation provision also empowers the WHD Administrator to direct contractors to provide "make-whole" relief to workers who have been retaliated against.[106] Make whole relief includes monetary compensation such as back pay with interest and front pay, as well as equitable relief, such as reinstatement.[107]

● *Debarment*. DOL amended the DBRA regulations to align the DBA and Related Acts debarment standards. Changes include (1) relaxing the level of culpability required for debarment under Related Acts from "willful or aggravated" to "disregard of obligations"; (2) imposing a three-year minimum debarment period for Related Acts violations;[108] (3) expressly providing for debarment of responsible officers and related entities; (4) permitting debarment of related entities in which a debarred person has an "interest" as opposed to a "substantial interest"; and (5) aligning the scope of debarment under the DBRA.

The final rule changes the Related Acts' debarment standard to match the DBA's "disregard of obligations" standard. Until now, contractors who violated a Related Act were subject to debarment only if the violation was "willful or aggravated."[109] In most cases reaching the Administrative Review Board, the difference in culpability standards would not have changed the outcome.

A debarment proceeding involves a fact-intensive inquiry based on the totality of circumstances.[110] Boards have considered the following factors in deciding whether the totality of circumstances merits debarment:

- Failure to read the DBA provisions in the contract;[111]
- Failure to train clerical or management employees on how to file payrolls, classify workers, etc.;[112]
- Failure to pay workers on a weekly basis;[113]
- Failure to timely pay fringe benefits;[114]
- Lack of a good faith effort to correct past violations and avoid future violations;[115]
- Failure to flow-down required DBA/DBRA provisions in its subcontracts, including a failure to ensure that lower-tier subcontractors flow down DBA/DBRA requirements;
- Failure to "keep proper time card records tracking the actual work [a contractor's] workers performed";[116]
- Taking improper deductions;[117]
- Coercing or accepting kick-backs;[118]
- Retaliation, such as firing workers who complain about not being paid prevailing wages[119] or conditioning continued employment on workers signing statements that they had been paid prevailing wages;[120]
- Failure to submit certified payrolls on a weekly basis;[121]
- Failure to adopt adequate procedures to classify workers;[122]
- Failure to cooperate with WHD investigations;[123]
- Contractor's experience on government contracts;[124] and
- Failure to post the wage determination poster on the jobsite.[125]

DOL stressed that a DBRA violation does not automatically warrant debarment.[126] For example, contractors are not subject to debarment for violating the DBRA through mere inadvertence, negligence, or an innocuous mistake.[127]

Most Board decisions affirming debarment involve underpayment or misclassification coupled with falsification of certified payrolls that mask the violation.[128] In the final rule's preamble, DOL listed five examples of falsifying certified payrolls: "[1] overreporting prevailing wages and/or fringe benefits paid; [2] underreporting hours worked; [3] misclassifying workers who performed skilled trade work as laborers; [4] omitting workers (often because they are paid less tha[n] required wages) from the payroll; and [5] listing managers or principals who did not perform manual labor as laborers and mechanics."[129] On the other hand, falsification does not include mere inaccuracies in certified payrolls.[130]

The DBRA regulations now expressly provide for debarment of responsible officers and related entities, although DOL notes that caselaw and Board decisions previously ruled that debarment of responsible officers is permissible under the DBRA.[131] Further, DOL amended the debarment regulations for Related Act violations to provide for debarment of other entities in which a debarred person has an "interest" as opposed to a "substantial interest."[132]

● *Cross-Withholding*. Under the amended DBRA contract clauses, prime contractors must now consent to cross-withholding.[133] Cross-withholding allows the government to withhold payments otherwise due to the prime contractor on DBRA-covered contracts that the prime contractor holds with other agencies.[134] The final rule also revises the definition of "prime contractor" to include joint venturers and controlling shareholders or members in any entity holding a prime contract.[135]

● *Legal Challenges to the Final Rule*. On November 7, 2023, trade associations Associated Builders and Contractors (ABC) and Associated General Contractors of America (AGC) each filed a lawsuit to enjoin the final rule.[136] Collectively, these actions allege that the final rule violates the Constitution,[137] the Administrative Procedure Act,[138] and the Regulatory Flexibility Act.[139] The complaints challenge several aspects of the final rule, including the alleged unlawful expansion of coverage to workers who are not "mechanics and laborers"[140] and workers who are not working "directly on the site of the work."[141] They also challenge the new rules for cross-withholding[142] and incorporation by operation of law,[143] as well as DBRA coverage of material suppliers operated by contractors.[144] Additionally, the ABC Complaint challenges the final rule's changes to the methodology for calculating prevailing wage rates, which is beyond the scope of this Briefing Paper.[145]

Part 2: Build America, Buy America Act Final Guidance

On August 23, 2023, OMB issued final guidance implementing the Build America, Buy America provisions of the Infrastructure Investment and Jobs Act (IIJA),[146] which mandate that "none of the funds made available for a Federal financial assistance program for infrastructure . . . may be obligated for a project unless *all of the iron, steel, manufactured products, and construction materials used in the project are produced in the United States*."[147] The effective date for the final guidance is October 23, 2023, but it may apply to federal awards obligated on or after May 14, 2022.[148]

Section 70915 of the BABA Act contemplated implementing revisions to the Uniform Guidance.[149] The final guidance creates a new part to the Uniform Guidance for grants and other federal assistance, 2 C.F.R. Part 184, "Buy America Preferences for Infrastructure Projects," and adds a reference to the requirements of Part 184 to 2 C.F.R. § 200.322, "Domestic Preferences for Procurements." Note that, distinct from the DBRA regulations, the Uniform Guidance is not a regulation but is given regulatory effect through federal agency grant and agreement regulations, which adopt and supplement the guidance.[150]

OMB's final guidance follows proposed guidance issued February 9, 2023,[151] and addresses public comments submitted in response to the proposed guidance.[152] Before that, OMB had issued Memorandum M-22-11, Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure, on April 18, 2022.[153] On October 25, 2023, just after the final guidance went into

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effect, OMB released Memorandum M-24-02, which replaces and updates M-22-11 to conform to the final guidance.[154]

In the final guidance, OMB acknowledged that it "made changes and adjustments on several topics relative to the initial guidance," but characterized many of the changes in the revised guidance as "modest or limited in scope."[155] Substantive changes in the final guidance include clarifying that categorization of an item is based on its status at the time it is brought to the work site; generally limiting the "construction materials" category to only one of the listed construction materials and generally subjecting a construction material to only one test; making changes to the construction materials list and certain of the associated standards for "production in the United States"; adding affirmative language defining "manufactured products"; adding various definitions from the FAR with mostly minor modifications; specifying that BABA Act § 70917(c) materials (aggregates and cementitious materials exempted from BABA coverage as construction materials or inputs to construction materials) could in certain circumstances constitute components of manufactured products; providing for special treatment for "kits"; and specifying that only "recipients," not all "non-federal entities," may request a waiver from an awarding agency.

Part 2 of this Briefing Paper will first summarize the BABA Act requirements at 2 C.F.R. Part 184. Then, it will describe in greater detail the new and notable changes, clarifications, and responses to comments in the final guidance from the proposed guidance.

Summary Of BABA Act Buy America Preferences

Coverage Of Projects And Organizations; Implementation Through Award Terms

The BABA Act applies Buy America preferences to *infrastructure projects* in the United States that are funded by federal assistance.[156] Though the BABA Act was enacted as part of the IIJA, the Buy America preference applies to all infrastructure projects funded by federal assistance, not just those funded by the IIJA.[157] When a project is funded partly with federal funds and partly with non-federal funds, the Buy America preferences nevertheless will apply to the entire project.[158] On the other hand, the Buy America preferences only apply to articles, materials, and supplies that are consumed in, incorporated in, or affixed to an infrastructure project, and do not apply to non-infrastructure components of covered projects.[159]

"Infrastructure project" is defined in the final guidance to mean "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."[160] "Infrastructure" is intended to be interpreted "broadly" by awarding agencies.[161] Part 184 offers a lengthy list of types of infrastructure, which is intended to be "illustrative and not exhaustive."[162] In determining whether a project that is not one of the listed types constitutes an infrastructure project, federal awarding agencies are instructed to "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."[163]

The Buy America preferences, when they apply, must be included in the terms and conditions of the federal award.[164] The requirements must then also be flowed down to "subawards, contracts, and purchase orders for the work performed, or the products supplied under the Federal award."[165] 2 C.F.R. Part 184 does not prescribe the use of a particular award term to implement the Buy America requirements.[166] OMB Memo M-24-02 includes an example award term at Appendix I, which revises and updates a sample award term included in the initial implementing guidance (OMB Memo M-22-11) to reflect changes in the definitions and standards in the final guidance.[167]

One important limitation is that the BABA Buy America preferences do not automatically apply to for-profit prime award recipients.[168] The Buy America preferences under the BABA Act apply to assistance provided to *non-federal entities*, and for-profit organizations are not considered "non-federal entities" under the Uniform Guidance.[169] Note, however, that in the revised guid-

ance OMB informed awarding agencies that they have the authority to apply the BABA Act requirements to for-profit recipients.[170] The limitation also only applies at the prime recipient level: when the recipient is a non-federal entity, the Buy America requirements will flow down in subawards, contracts, and subcontracts to for-profit entities.[171]

Application Of The Requirements

On covered infrastructure projects, the BABA Act requires that all (1) iron or steel products, (2) manufactured products, and (3) construction material must be produced in the United States.[172] Articles, materials or supplies are assigned to one of the three categories, each of which is addressed separately in the Uniform Guidance and is subject to a different domestic content test.[173] The categories are mutually exclusive, and generally "[a]n article, material, or supply incorporated into an infrastructure project must meet the Buy America Preference for only the single category in which it is classified."[174]

In addition to the three covered categories, items may be categorized in a fourth category, BABA Act § 70917(c) materials (aggregates and cementitious materials, etc.), which are exempt from Buy America preferences for most purposes except to the extent they are components of manufactured products in certain circumstances.[175] Finally, some items may not fall into any of the four categories,[176] such as "temporary items brought to a work site," or "non-manufactured raw materials that do not meet the newly added affirmative definition of 'manufactured products.' "[177]

Categorization of an item is based on its "status at the time it is brought to the work site," rather than its status when it is incorporated into the project, or when the entire infrastructure project is complete.[178] The definitions in 2 C.F.R. Part 184 offer guidance for categorization and specify the tests for determining whether an item is "Produced in the United States" for each category.

Iron or steel products are products that consist wholly or "predominantly of iron or steel or a combination of both," which means that the cost of the iron and steel content, i.e., "the cost of the iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the product and a good faith estimate of the cost of iron or steel components," is more than 50% of the total cost of all components.[179] For iron or steel products to be produced in the United States, "all manufacturing processes, from the initial melting stage through the application of coatings [must occur] in the United States."[180]

Manufactured products are "[a]rticles, materials or supplies that have been . . . [p]rocessed into a specific form and shape" or "[c]ombined with other articles, materials, or supplies to create a product with different properties than the individual articles, materials, or supplies."[181] Manufactured products may include components that are construction materials or iron and steel products, but if an item meets the definition of construction material or iron or steel product it will not be treated as a manufactured product.[182] To be considered produced in the United States, manufactured products must meet a two-part test: (1) the manufactured product itself must be manufactured in the United States, and (2) the cost of the components of the manufactured product that are mined, produced, or manufactured in the United States must be greater than 55% of the total cost of all components of the manufactured product.[183] The final guidance notes that if there is a preexisting Buy America standard that meets or exceeds this minimum domestic content standard, that may apply here instead.[184] In contrast with the Buy American requirements in the FAR, the BABA domestic preferences offer no special treatment for commercially available off-the-shelf (COTS) items.[185]

Component means "an article, material, or supply, whether manufactured or unmanufactured, incorporated directly into: a manufactured product; or, where applicable, an iron or steel product."[186]

Cost of components for manufactured products under the final guidance is calculated using effectively the same methodology specified under the FAR for calculating the cost of components for construction materials, with separate approaches for manufactured versus purchased components.[187]

For purchased components, the cost of components includes "the acquisition cost, including transportation costs to the place of incorporation into the manufactured

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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)."[188]

For components that are manufactured by "the entity that performs the final manufacturing process that produces [the] manufactured product" (referred to as the "manufacturer"),[189] the cost of components also includes allocable overhead costs, but excludes profit.[190] The costs of manufacturing the manufactured product itself do not factor into the calculation.[191]

Construction materials are articles, materials, or supplies that either wholly consist of one of a list of identified materials, or consist of that material with "[m]inor additions of articles, materials, supplies, or binding agents."[192] The listed materials are as follows:

(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.[193]

For construction materials to be considered "produced in the United States," the test is that "*all manufacturing processes* for the construction material [must have] occurred in the United States."[194] 2 C.F.R. § 184.6 defines for each listed construction material what it means for "all manufacturing processes" of that material to occur in the United States.[195] Only one construction material standard will be applied to a single construction material except as specifically provided in the final guidance.[196]

Waivers And Exemptions

Federal awarding agencies can waive the Buy America preference on three grounds: nonavailability, unreasonable cost, or public interest.[197] These grounds track the three primary Buy American Act exceptions under the FAR.[198]

Nonavailability waivers are appropriate upon a finding that an item is "not produced in the United States in sufficient quantities or of a satisfactory quality."[199] Such waivers require recipients to perform "thorough market research" that "adequately consider[s], where appropriate, qualifying alternate items, products or materials."[200] The waivers must document the "market research activities and methods to identify domestically manufactured items capable of satisfying the requirement, including the timing of the research and conclusions reached on availability of sources."[201]

Unreasonable cost waivers are available when the use of United States-produced iron or steel products, manufactured products, or construction materials "will increase the cost of the overall infrastructure project by more than 25 percent."[202] Justifications for waivers on this basis "must include a comparison of the overall cost of the project with domestic products to the overall cost of the project with foreign-origin products."[203] However, where a preexisting agency Buy America statute provides for it, unreasonable cost waivers may instead be based on "a comparison of the cost of the domestic product to the cost of the foreign product."[204] The BABA Act and OMB guidance allow for use of "publicly available cost comparison data" in lieu of "proprietary pricing information."[205]

Public interest waivers require a finding that "[a]pplying the Buy America Preference would be inconsistent with the public interest."[206] "Public interest waivers may have a variety of bases" including the following:

- De minimis (i.e., waiving requirements for purchases below a certain threshold, e.g., "5 percent of project costs up to a maximum of $1,000,000");
- Small grants (e.g., exempting awards below the Simplified Acquisition Threshold);
- Minor components (allowing "minor deviations for miscellaneous minor components within iron and steel products");
- International trade obligations (allowing states that have "assumed procurement obligations pursuant to the [WTO] Government Procurement Agreement or any other trade agreement" to comply with their obligations).[207]

Recipients submit written requests for a waiver of the Buy America preference to the federal awarding agency[208] or, when a project is funded by awards from more than one agency, the agency contributing the greatest amount of federal funds for the project (the "Cognizant Agency").[209] Agencies are directed to provide recipients instructions for submitting waivers, including guidance as to "the format, contents, and supporting materials required."[210]

Recipients and contractors seeking waivers[211] of the Buy America preference should also note the proposed waiver requirements specified in OMB Memo M-24-02. The memo requires that "[a]ll waiver requests must include a detailed justification for the use of goods, products or materials mined, produced, or manufactured outside the United States and a certification that there was a good faith effort to solicit bids for domestic products supported by terms included in requests for proposals, contracts, or nonproprietary communications with potential suppliers."[212] These requirements derive directly from § 70937 of the BABA Act.[213] Though directed to awarding agencies, the information required for proposed waiver submissions and the criteria for agency justifications for nonavailability waivers, unreasonable cost waivers, and public interest waivers contained in the memo offer a helpful frame of reference in preparing waiver requests.[214]

Before issuing a proposed waiver, an agency must prepare its own written explanation justifying the grounds for the waiver, even if the recipient submitted a waiver request.[215] Before issuing a final waiver, the agency must then make the proposed waiver and associated explanation accessible to the public "on a website designated by the Federal awarding agency and the Office of Management and Budget."[216] Individual waivers require 15 calendar days for public comment on the proposed waiver.[217] Waivers also must generally be submitted for final review to the OMB Made in America Office, unless the director of OMB provides otherwise.[218] General applicability waivers across multiple federal awards are also authorized, subject to a minimum 30-day public comment period, including for modifications or renewals.[219] Proposed and approved waivers are required to be publicly posted on the internet at https://www.madeinamerica.gov/waivers/.[220]

In addition to waivers, in accordance with § 70912(4)(B) of the BABA Act,[221] the final guidance exempts from Buy America preferences expenditures relating to a major disaster or emergency declared by the President under certain sections of the Stafford Act and certain other expenditures authorized by other statutes in anticipation of or in response to major disasters or emergencies.[222]

Final Guidance Significant Changes, Clarifications, And Responses To Comments

In the final guidance, OMB included a preamble of more than 35 pages describing and responding to the approximately 1,950 comments received on the proposed guidance.[223] This section of the Paper highlights the changes, clarifications, and notable responses to comments from the final guidance. The preamble provided its own high-level summaries of significant changes made in the final guidance as compared to the proposed guidance and to the initial guidance in M-22-11 as well.[224]

Background

At the outset, OMB offered some perspective on the purpose of the final guidance, noting that 2 C.F.R. Part 184 "is not intended as comprehensive guidance on all topics related to the implementation of BABA," but is just "intended to be high-level coordinating guidance for Federal agencies to use in their own direct implementation of BABA" and to "help to ensure clear and consistent application of the key requirements" of the statute.[225] OMB noted that "Federal agencies, in directly implementing BABA, may issue further guidance and provide further information to their recipients and other stakeholders on their own Federal financial assistance programs for infrastructure," and said it may also issue further guidance in the future based on stakeholder feedback.[226]

OMB also stated that it planned to issue an updated M-Memorandum to replace M-22-11, incorporating changes made in the final guidance and generally retaining the parts of the memo that do not conflict.[227] The updated M-Memorandum will remain in effect "to provide supplemental guidance to Federal agencies on

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implementation of BABA."[228] On October 25, 2023, OMB issued the updated memorandum, OMB Memo M-24-02, which is addressed in greater detail below.[229]

General Comments; Alignment With Procurement Regulations

General comments urged that the final guidance be aligned as much as possible with the FAR and that other measures be taken to promote consistency of application by awarding agencies. OMB responded that it "aimed to provide general consistency with certain provisions in the FAR," including the definition of "predominantly of iron and steel or a combination of both" and the cost of components test, but noted that there were "many substantive differences between the BAA, implemented in the FAR, and the BABA Act," which "do not allow for complete consistency on all topics between the FAR and the implementing guidance for BABA in [2 C.F.R.] part 184."[230] OMB also cited the prescriptive language of the statute as limiting its discretion on many topics.[231]

The final guidance gave short shrift to commenters' practical recommendations for facilitating compliance with the new Buy America requirements, such as establishing a unified certification process or creating a website or database of BABA approved materials and manufacturers.[232] Industry groups such as the Associated General Contractors of America voiced concerns that under the final guidance contractors will have difficulty securing certifications from suppliers regarding BABA compliance.[233]

Effective Date; Projects Underway Before Issuance

The Buy America Preferences for Infrastructure Projects at 2 C.F.R. Part 184 are effective October 23, 2023.[234] The domestic preferences established in the BABA Act, however, apply to all federal awards obligated on or after May 14, 2022.[235] Commenters expressed concerns about applying the new guidance to projects that "were already in planning, design, or later implementation phases prior to its issuance, or that received prior Federal awards either before passage of BABA or under OMB's initial guidance in Memorandum M-22-11."[236]

Acknowledging these concerns, OMB explained that "[f]or infrastructure projects that received prior Federal awards on or after May 14, 2022 [the effective date of the BABA Act], but before the effective date of the revised guidance, OMB adds language clarifying that Federal agencies should allow a project that receives a subsequent Federal award within one year of the effective date to be subject to Memorandum M-22-11 instead of the revised guidance."[237] OMB gives agencies discretion, however, to apply the revised guidance if significant design or planning changes are made after the effective date of the revised guidance.[238] Further, if one or more additional federal awards are made to such projects more than a year after the effective date of the revised guidance, the revised guidance will apply.[239] For projects that were in the design or planning phases before the effective date of the revised guidance, but which had not received a federal award, OMB said "the waiver process is generally the appropriate mechanism for additional relief on [such] projects."[240] As further described below, Appendix II to OMB Memo M-24-02 provides "Guidance for Projects Identified at 2 CFR 184.2(b)-(c) as Remaining Subject to OMB Memorandum M-22-11."[241]

Scope Of Coverage

OMB offered clarification regarding the scope of coverage of the Buy America preference:

● *"Incorporation in the Building or Work" Limitation*. 2 C.F. R. Part 184 states that the BABA Act Buy America preferences apply to "iron, steel, manufactured products and construction materials *incorporated into the project*."[242] OMB elaborated on the "permanent incorporation" limitation:

> [The Buy America preference] does not apply to tools, equipment, and supplies, such as temporary scaffolding, brought to the construction site and removed at or before the completion of the infrastructure project. Nor does a Buy America preference apply to equipment and furnishings, such as movable chairs, desks, and portable computer equipment, that are used at or within the finished infrastructure project, but are not an integral part of the structure or permanently affixed to the infrastructure project.[243]

● *Interplay With Preexisting Buy America Act Statutes*. Section 70917(b) of the BABA Act contains a savings provision stating: "Nothing in this part affects a

domestic content procurement preference for a Federal financial assistance program for infrastructure that is in effect and that meets the requirements of section 70914."[244] OMB offered commentary in the preamble to the revised guidance addressing the interplay between the BABA Buy America preferences and preexisting Buy America obligations that applied to certain agencies, such as Department of Transportation operating administrations (e.g., Federal Transit Administration and Federal Highway Administration), and the Environmental Protection Agency.[245]

OMB noted that, as reflected in 2 C.F.R. § 184.2(a), the BABA Act did not affect preexisting Buy America preferences to the extent that they meet or exceed the BABA Act requirements, but that to the extent such preexisting preferences did not meet certain BABA Act requirements, federal agencies were required to supplement them.[246] By way of example, OMB cited the BABA Act preferences for construction materials and the prescribed waiver process as features that awarding agencies with preexisting regulations and guidance would need to incorporate.[247] Among other obligations, the new BABA Act waiver rules require agencies to review existing general applicability waivers every five years.[248] In accordance with that new requirement, the Federal Highway Administration's general applicability waiver for manufactured products, which has been in effect for some 40 years, is currently under review.[249] Beyond the construction materials and waiver examples, OMB said that federal awarding agencies are in the best position to advise how BABA, Part 184, and their own agency Buy America frameworks "apply to specific infrastructure projects or Federal financial assistance programs that they oversee and implement."[250]

● *Consistency With Trade Agreements Obligations*. Section 70925 of the BABA Act requires that the Buy America preferences "shall be applied in a manner consistent with United States obligations under international agreements."[251] Commenters inquired "how the implementation of BABA would interact with the various trade obligations of the U.S. through the Trade Agreements Act (TAA), such as the World Trade Organization Agreement on Government Procurement (WTO-GPA)," noting that Part 184 did not address the topic.[252] OMB declined to add an exemption or to otherwise incorporate a reference to trade obligations in the revised guidance.[253] Rather, OMB said its policy remains as stated in Memorandum M-22-11, which provided that when "a recipient is a State that has assumed procurement obligations pursuant to the Government Procurement Agreement or any other trade agreement, a waiver of a Made in America condition to ensure compliance with such obligations may be in the public interest."[254]

● *Optional Coverage of For-Profit Recipients*. Some commenters urged that the exemption of for-profit entities from the Buy America requirements of the BABA Act put non-profit organizations at a disadvantage in pursuing competitive federal grants and assistance.[255] OMB responded by noting that awarding agencies have authority under 2 C.F.R. § 200.101(a)(2) to apply the BABA Act Buy America preferences, if they so choose.[256] OMB added that agencies "may consider applying the revised guidance in this way, at their discretion, to create a level-playing field, with respect to application of BABA, for discretionary grant programs or other reasons."[257] If an awarding agency were to extend the Buy America preferences to a for-profit entity in a particular case, that must be specified in the terms and conditions of the federal award.[258]

Coverage And Standards By Category

● *Construction Materials*. Under § 184.3 of the final guidance "construction materials" generally consist of "only one" of a list of specified materials, a notable change from the proposed guidance.[259] The proposed guidance had provided for construction materials consisting of "only one or more" of the identified materials.[260] The change is intended to distinguish more clearly between construction materials and manufactured products.[261] The general rule is subject to two exceptions.[262] First, the listed construction materials are to be treated as "construction materials" notwithstanding that some of them include other listed materials as inputs (e.g., fiber optic cable contains glass and plastics).[263] Second, "[m]inor additions of articles, materials, supplies or binding agents to a construction material do not change the categorization of the construction material."[264] Awarding agencies have reasonable discretion to determine what constitutes a "minor addition."[265]

Regarding the listed construction materials, OMB

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notes that the list hews closely to the materials mentioned in Congress' Findings at § 70911(5) of the BABA Act, with the addition of three items that are "logical extensions" of Congress' list: fiber optic cable, optical fiber, and engineered wood.[266] The list was modified slightly in the final guidance. Engineered wood was added as a new material distinct from lumber, largely to ensure that it would not become a loophole to allow application of the less stringent "manufactured product" standard.[267] Composite building materials are not included as a standalone category and instead are treated (where applicable) as plastic or polymer-based products.[268] OMB clarified that "fiber optic cable" as that term is used in the final guidance includes "drop cable."[269]

The revised guidance made modest changes in the manufacturing standards for some categories of construction materials. The standards for fiber optic cable and optical fiber were revised to "more accurately reflect the discrete manufacturing processes" used in production and to incorporate the standards for glass and optical fiber in the standard for fiber optic cable.[270] The plastic or polymer-based product standard was revised to incorporate the composite building material standard.[271] More broadly, the final guidance clarifies that, "[e]xcept as specifically provided, only a single standard . . . should be applied to a single construction material."[272]

● *Manufactured Products*. The revised guidance added a new affirmatively framed portion of the definition for "manufactured products," which was intended to clarify the meaning of the term and assist with classification.[273] The revised definition clarifies that certain raw materials are not meaningfully manufactured or processed before they are brought to the work site, including natural resources such as topsoil, compost, and seed.[274] OMB said Congress did not intend to apply a Buy America preference to such materials.[275] Similarly, OMB observed that mixing raw or nonmanufactured materials with other raw or nonmanufactured materials of similar types or with similar but not identical properties, e.g., fill dirt or certain waste or recycled materials, "would not necessarily result in classifying the mixed material brought to the work site as a manufactured product if it remains in an unprocessed or minimally processed state."[276]

OMB also added definitions for "*component*" ("an item, whether manufactured or unmanufactured, incorporated directly into" a manufactured product or iron or steel product), and "*manufacturer*" ("the entity that performs the final manufacturing process that produces the manufactured product").[277] The revised guidance does not define "*end product*," but OMB noted that "the process for identifying end products—as distinguished from components—is generally addressed" at 2 C.F.R. § 184.4 (e)–(f), which specify (among other things) that classification is based on an item's status when it is brought to the work site, and that only one Buy America standard applies to a single item.[278] OMB elsewhere noted that it used the term "manufactured product" to refer to an "end product" in the context of determining the cost of components.[279]

"Kits" are subject to special treatment under the final guidance.[280] Kits are not defined in Part 184, but the preamble defines a kit as "a product that is acquired for incorporation into an infrastructure project from a single manufacturer or supplier that is manufactured or assembled from constituent components on the work site by a contractor."[281] Kits "may be treated and evaluated as a single and distinct manufactured product."[282] OMB notes that kits are "limited to discrete products, machines, or devices performing a unified function" and do not include "more wide-ranging system[s] of interconnected products, machines, or devices (such as a heating, ventilation, and air conditioning system for an entire building)."[283] OMB also notes a kit "should not include an entire infrastructure project."[284] In applying the components test to kits, the entity that "performs the final manufacturing process that produces the kit" is the "manufacturer" (vs. the on-site manufacturer assembler), so "transportation costs to the work site should not be considered."[285] The "place of incorporation" in this context means "the place at which the manufacturer established the elements of the kit" rather than the place of incorporation into the infrastructure project.[286]

● *Iron or Steel Products*. The final guidance added a definition of "predominantly of iron or steel or a combination of both" to 2 C.F.R. § 184.3, which OMB characterized as generally consistent with the FAR except that it does not include FAR-specific waivers or exemptions (notably, the exemption for COTS fasteners).[287] The pre-

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amble to the revised guidance clarifies that, in accordance with new language in 2 C.F.R. § 184.4(e) stating that each product falls in a single category and is subject to one standard, non-iron or steel components of iron or steel products are not subject to a Buy America preference.[288] For example, aluminum used to coat a steel guardrail would not need to be produced in the United States.[289] Further, there is no restriction on raw materials used to produce iron or steel; the requirement is just that all manufacturing processes for iron or steel products take place in the United States.[290]

● *Section 70917(c) Materials (Excluded Materials).* Section 70917(c) of the BABA Act, entitled "Limitation with Respect to Aggregates" excludes "cement and cementitious materials, aggregates such as stone, sand, or gravel, or aggregate binding agents or additives" from "construction materials" and "inputs of the construction material."[291] The final guidance affirmed that § 70917(c) materials are not construction materials or components or inputs of construction materials and also stated that such materials "should not be considered manufactured products when they are used at or combined proximate to the work site," as occurs with wet concrete or hot mix asphalt.[292] But OMB added that certain § 70917(c) materials—notably stone, sand, and gravel—may constitute components used to produce a manufactured product, such as precast cement.[293] The preamble offers further instructions for determining whether § 70917(c) materials should be treated as components of manufactured products and provides examples of how the provisions should be applied in practice to make that determination.[294]

Miscellaneous

● *Waivers.* OMB said it made some "editorial changes" but did not make any "material changes" to the waiver provisions.[295] There is one notable change from the proposed guidance, however, in which § 184.7(b) had referred to non-federal entities providing waiver requests to federal awarding agencies.[296] In the final guidance, 2 C.F.R. § 184.7(b) only provides for recipients to request waivers from awarding agencies.[297]

● *Severability clause.* The revised guidance adds a severability provision at 2 C.F.R. § 184.2(d), attempting to narrow the scope of any legal ruling that a portion of the guidance is invalid or unenforceable and to allow other provisions to remain in effect.[298] This addition may be in anticipation of forthcoming legal challenges to the BABA Act implementation.

OMB Memo M-24-02

Following on the heels of the final guidance, on October 25, 2023, OMB issued OMB Memo M-24-02, rescinding and replacing OMB's initial implementing guidance, OMB Memo M-22-11. OMB Memo M-24-02 includes notable information on three subjects. First, as further described earlier in this Paper, it provides detailed information regarding the waiver process, largely carried over from M-22-11, supplementing 2 C.F.R. § 184.7. That includes information for agencies regarding justification requirements, waiver principles and criteria, proposed waiver posting logistics, requirements regarding coordination with and approvals from the OMB Made in America Office, information required in proposed waiver submissions, and exceptions for unforeseen and exigent circumstances.[299] Second, it includes a sample award term implementing BABA Act domestic preferences, which the final guidance notably does not provide, and which has been updated to reflect changes in the definitions and standards in the final guidance.[300] Third, Memo M-24-02 includes a new Appendix II, which offers guidance for projects that are "grandfathered in," i.e., that will remain governed by the initial implementing Guidance at M-22-11 instead of 2 C.F.R. Part 184.[301] As Appendix II explains, awards subject to M-22-11 will follow the somewhat different guidance in that memo regarding categorization of items, materials, and supplies and will be subject to the shorter list of construction materials and less exacting standards for certain materials.

M-24-02 more generally fleshes out information about the BABA Buy America preferences consistent with the final guidance. One other point of interest is the expanded discussion regarding application of the BABA Act requirements to for-profit entities. The memo reiterates that for-profit entity recipients are generally not subject to the BABA Act, but observes that agencies have authority to apply BABA Act requirements to for-profit entity awards.[302] The memo goes on to clarify that when a state or other non-federal entity is the recipient, subawards to for-profit entities will be subject to the

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BABA Act: "[I]f a Federal agency obligates an award to a State government as a direct recipient, and the State issues a subaward to a for-profit entity to carry out the project as a subrecipient, then the Buy America preference requirements included in the Federal award would flow down to the for-profit entity."[303]

Guidelines

The *Guidelines* are intended to assist you in understanding the revisions to the DBRA regulations and the BABA Act final guidance. They are not, however, a substitute for professional representation in any specific situation.

1. *Ensure that recordkeeping systems are compliant with DBRA*. The amended regulations require contractors to keep DBRA records for at least three years after all work on the prime contract is completed and to retain additional records like proposals, subcontractor agreements, and contract amendments. Robust recordkeeping is essential to documenting compliance and defending against enforcement actions.

2. *Stay abreast of DOL's subregulatory guidance*. DOL states throughout the DBRA final rule that it plans to address ambiguities and recurring questions through subregulatory guidance (e.g., what constitutes a "significant portion" for coverage of secondary work sites, de minimis standard for truck drivers, etc.). Subregulatory guidance includes the Prevailing Wage Resource Book, Field Assistance Bulletins, Field Operations Handbook, and All Agency Memoranda. Contractors may find these documents useful in navigating their obligations under the revised DBRA regulations.

3. *Ask questions about DBRA coverage or requirements as early in the contracting process as possible*. Contractors can seek informal assistance from DOL's Wage and Hour Division but should also considering requesting formal ruling letters under 29 C.F.R. § 5.13. While contractors should also coordinate with contracting agencies, contractors should resolve questions about DBRA requirements and coverage with DOL.

4. *Consider DBRA requirements, including wage determination updates, in pricing proposals*. Contractors entering into multi-year IDIQ contracts, schedule orders, BPAs, or other contracts subject to revised wage determinations should consider at the bidding stage how price adjustments for wage increases will be handled. Likewise, contractors should be mindful of when wage determinations must be updated on these long-term agreements. Annually updated wage determinations must be included in task orders issued under IDIQ and other long-term contracts even if the master contract was effective prior to October 23, 2023.

5. *Draft lower-tier agreements with the amended DBRA regulations in mind*. Contractors should structure subcontract agreements, purchase orders, joint venture agreements, and similar contracts with the amended DBRA regulations in mind. For example, contractors should review the scope of work in subcontractor agreements and purchase orders to ensure that material suppliers are not inadvertently covered subcontractors.

6. *Be aware that BABA Act Buy America preferences may be more difficult to comply with than the Buy American Act implementation in the FAR or preexisting Buy America requirements*. BABA Act preferences prescribe different tests that lack some of the exceptions available under the FAR implementation of the Buy American Act and Defense FAR Supplement Balance of Payments program. For example, trading partner products are not treated as domestic for BABA Act Buy America purposes and are not otherwise exempt (though a waiver may be possible), and manufactured products that are COTS items are not exempt from the "components test." The BABA Act also imposes new requirements for agencies and programs under preexisting Buy America statutes, such as new preferences for construction materials and a mandatory new waiver process, which includes reviews every five years for existing general applicability waivers.

7. *Interpret BABA Act requirements by reading 2 C.F.R. Part 184 together with OMB's Implementing Memo, agency regulations and guidance, and the award*. The Uniform Guidance does not contain all information recipients and contractors need to know about BABA Act Buy America preferences. 2 C.F.R. Part 184, agency implementing regulations and guidance, and the terms of the award must be read in tandem with OMB's Implementation Memorandum (M-24-02), which provides supplemental mandatory guidance for implemen-

tation of the BABA Buy America preferences including, notably, waiver requirements.

8. *Continue to monitor developments from OMB and from individual awarding agencies.* OMB made clear that implementation is intended to be decentralized, and OMB and awarding agencies are likely to issue additional implementing guidance to address feedback from stakeholders, implementation challenges, and legal challenges.

9. *For-profit entities should keep an eye out for BABA requirements in funding opportunities and federal awards*. For-profit entities are not automatically covered by the new Buy America requirements, but in the revised guidance OMB informed awarding agencies that they have the authority to apply the BABA Act requirements to for-profit recipients.

ENDNOTES:

[1]"Federal Procurement and Grant Spending FY2001–2022" table in Schooner & Berteau, "Emerging Policy and Practice Issues," 2023 Gov't Contracts Year in Review Briefs 18 (2023 covering 2022) (reflecting grant spending of $1.1331 trillion in 2022, and $1.3699 trillion in 2021, compared to procurement spending in the same years of $644.3 billion and $637 billion respectively).

[2]Pub. L. No. 117-169, 136 Stat. 1818 (Aug. 16, 2022).

[3]Pub. L. No. 117-58, 135 Stat. 429 (Nov. 15, 2021).

[4]Updating the Davis-Bacon and Related Acts Regulations (Notice of Proposed Rulemaking), 87 Fed. Reg. 15,698 (Mar. 18, 2022); see also Ray Wilson Co., ARB No. 02-086, 2004 WL 384729, at *1 n.2 (citing Reorganization Plan No. 14 of 1950, 5 U.S.C.A. app. 1, 64 Stat. 1267) ("Reorganization Plan No. 14 of 1950 centralized Federal policy making and enforcement authority concerning the DBA and its related acts within the Department of Labor.").

[5]Updating the Davis-Bacon and Related Acts Regulations (Final Rule), 88 Fed. Reg. 57,526 (Aug. 23, 2023).

[6]88 Fed. Reg. at 57,526.

[7]88 Fed. Reg. at 57,695 ("For contracts entered into after the effective date of this final rule, but before the Federal Acquisition Regulation or the relevant Related Act program regulations are amended to conform to this rule, agencies must use the contract clauses set forth in § 5.5(a) and (b) of this rule to the maximum extent possible under applicable law.").

[8]40 U.S.C.A. § 3141 et seq. (formerly codified at 40 U.S.C.A. § 276a et seq.). For an overview and history of the DBA, see Whittaker, Cong. Research Serv., CRS Report 94-408, The Davis-Bacon Act: Institutional Evolution and Public Policy (Version 8, updated Nov. 30, 2007), https://crsreports.congress.gov/product/pdf/RL/94-408; Greenberg, Abrahams & Katz, "Complying with the Davis-Bacon Act," 03-11 Briefing Papers 1 (Oct. 2003).

[9]See https://www.dol.gov/sites/dolgov/files/WHD/government-contracts/DBRA-list.xlsx (listing Related Acts).

[10]See, e.g., 29 C.F.R. § 1.2 (defining "prevailing wage"); 88 Fed. Reg. at 57,532–53, 57,579–89; see also 65 No. 30 GC ¶ 221 (Aug. 16, 2023).

[11]DOL recognizes that even where changes in the final rule codify existing policy and case law, those changes might nevertheless amount to substantive changes in practice. See 88 Fed. Reg. at 57,719 (acknowledging "that some contracting agencies may not have been applying Davis-Bacon in accordance with those policies. Where this was the case, the clarity provided by this rule could lead to expanded application of the Davis-Bacon labor standards. . . .").

[12]29 C.F.R. § 5.2; see also 88 Fed. Reg. at 57,618. Unless otherwise noted, all citations to Title 29 of the Code of Federal Regulations refer to the regulations effective October 23, 2023.

[13]29 C.F.R. § 5.2(l) (Jan. 2017).

[14]88 Fed. Reg. at 57,615–16 (citing 65 Fed. Reg. 80,268, 80,273 (Dec. 20, 2000)) ("technological developments that had enabled companies in some cases to construct entire portions of public buildings or works offsite, leaving only assembly or placement of the building or work remaining"); see also 29 C.F.R. § 5.2 (defining "primary construction site(s)" as "physical place or places where the building or work called for in the contract will remain").

[15]29 C.F.R. § 5.2.

[16]29 C.F.R. § 5.2.

[17]29 C.F.R. § 5.2; see also 88 Fed. Reg. at 57,619 (declining "commenters' suggestions to expand coverage of offsite construction even further to include smaller custom-made components"); see also 88 Fed. Reg. at 57,619 (quoting GSA Schedule 56, at 5, and citing Bldg. & Constr. Trades Dep't, AFL-CIO v. U.S. Dep't of Labor Wage Appeals Bd. (Midway), 932 F.2d 985, 991 n.12 (D.C. Cir. 1991)) (distinguishing "prefabrication" from '"pre-engineering' or 'modular' construction, in which significant, often-self-contained portions of a building or work are constructed and then simply assembled onsite 'similar to a child's building block kit." ').

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[18]88 Fed. Reg. at 57,618–19 (quoting 65 Fed. Reg. at 80,275).

[19]88 Fed. Reg. at 57,620.

[20]29 C.F.R. § 5.2.

[21]88 Fed. Reg. at 57,618.

[22]88 Fed. Reg. at 57,618.

[23]88 Fed. Reg. at 57,620.

[24]29 C.F.R. § 5.2 (defining "development statute"); see also, e.g., 42 U.S.C.A. § 1437j.

[25]29 C.F.R. § 5.2; 88 Fed. Reg. at 57,620; see also 88 Fed. Reg. at 57,615–21.

[26]29 C.F.R. § 5.2; see also 88 Fed. Reg. at 57,620 (citing AAM 141 (Aug. 16, 1985); FOH 15e10(a); Superior Paving Materials, Inc., ARB No. 99-065 (June 12, 2002)).

[27]88 Fed. Reg. at 57,621.

[28]88 Fed. Reg. at 57,621.

[29]88 Fed. Reg. at 57,621.

[30]See 29 C.F.R. § 5.2 (definition of "building or work"); 88 Fed. Reg. at 57,597–98.

[31]29 C.F.R. § 5.2 (defining "material supplier").

[32]88 Fed. Reg. at 57,624 ("[U]nder the final rule, a worker employed by an employer meeting the criteria for the material supplier exemption is not employed by a contractor or subcontractor, and therefore is not entitled to prevailing wages and fringe benefits under the Davis-Bacon labor standards at all even for time spent on the site of the work.").

[33]29 C.F.R. § 5.2.

[34]29 C.F.R. § 5.2.

[35]29 C.F.R. § 5.2; 88 Fed. Reg. at 57,622–23 (citing Kiewit-Shea, ALJ Case No. 84-DBA-34, 1985 WL 167240, at *2 (Sept. 6, 1985), aff'd, Md. Equip., Inc., WAB No. 85-24, 1986 WL 193110 (June 13, 1986)).

[36]29 C.F.R. § 5.2; see also 88 Fed. Reg. at 57,623.

[37]29 C.F.R. § 5.2; see also 88 Fed. Reg. at 57,623.

[38]29 C.F.R. § 5.2.

[39]29 C.F.R. § 5.2 (defining "covered transportation"); see also 88 Fed. Reg. at 57,615 (explaining that DOL proposed to revise the DBRA regulations "to set clear standards for DBA coverage of truck drivers").

[40]29 C.F.R. § 5.2 (adding a sub-definition for "covered transportation" under the definition of "Construction, prosecution, completion, or repair"); see also 88 Fed. Reg. at 57,624–27.

[41]29 C.F.R. § 5.2; 88 Fed. Reg. at 57,625–26.

[42]88 Fed. Reg. at 57,626.

[43]88 Fed. Reg. at 57,626 (citing ET Simonds, ARB No. 2021-0054, 2022 WL 1997485, at *8).

[44]88 Fed. Reg. at 57,626 (quoting 29 C.F.R. § 785.47).

[45]87 Fed. Reg. at 15,734 (citing 29 C.F.R. § 785.47); see also 87 Fed. Reg. at 15,733–34, 15,792.

[46]88 Fed. Reg. at 57,626.

[47]88 Fed. Reg. at 57,644; see also 29 C.F.R. § 5.25(c).

[48]29 C.F.R. § 5.25(c)(3)(i) (defining "continuous in nature"); see also 88 Fed. Reg. at 87,648 (explaining that "the continuous in nature criterion focuses on the circumstances under which the fringe benefit is available, not the timing of the contractor's contributions toward the benefit").

[49]29 C.F.R. § 5.25(c)(3)(ii) (explaining when a benefit does not compensate both private and DBRA-covered work); see also 88 Fed. Reg. at 57,648 ("Benefits provided during periods of private work that are paid for, in whole or in part, by compensation earned during hours worked on DBRA-covered work do not meet this criterion."); 88 Fed. Reg. at 57,648 (explaining that "the purpose of annualization . . . is to prevent contractors from paying for benefits that cover hours worked on private projects with compensation due for hours worked on DBRA-covered projects").

[50]29 C.F.R. § 5.25(c); 88 Fed. Reg. at 57,645.

[51]29 C.F.R. § 5.25(c)(3).

[52]29 C.F.R. § 5.25(c)(2) (explaining that in addition to being non-continuous and not compensating for both private and DBRA-covered work, qualifying DCPPs must also provide for "immediate participation and essentially immediate vesting").

[53]88 Fed. Reg. at 57,647.

[54]29 C.F.R. § 5.33.

[55]29 C.F.R. § 5.33(a).

[56]29 C.F.R. § 5.33(a); see also 88 Fed. Reg. at 57,653 ("Additional examples of such creditable expenses include the reasonable costs of administering the plan, such as the cost of recordkeeping related to benefit processing and payment in the case of a healthcare plan, or expenses associated with managing plan investments in the case of a 401(k) plan.").

[57]29 C.F.R. § 5.33(b); see also 88 Fed. Reg. at 57,654.

[58]88 Fed. Reg. at 57,654.

[59]88 Fed. Reg. at 57,654.

[60]88 Fed. Reg. at 57,654.

[61]88 Fed. Reg. at 57,654.

[62]29 C.F.R. § 5.29(g); see also 88 Fed. Reg. at 57,651.

[63]29 C.F.R. § 5.29(g); see also 88 Fed. Reg. at 57,651.

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[64]29 C.F.R. §§ 5.28(b)(5), 5.29(e), 5.5(a)(1)(v); see also 88 Fed. Reg. at 57,649–51.

[65]29 C.F.R. § 1.6(c)(2)(iii); see also 88 Fed. Reg. at 57,694–95; 88 Fed. Reg. at 57,570 ("[T]he Department does not believe that these changes will affect contracts that are simply extended due to supply chain issues or other circumstances that interfere with the timely completion of a contract."); FAR 16.504.

[66]29 C.F.R. § 1.6(c)(2)(iii)(A).

[67]29 C.F.R. § 1.6(c)(2)(iii)(B); see also 88 Fed. Reg. at 57,569–70, 57,694–95.

[68]88 Fed. Reg. at 57,610–14.

[69]88 Fed. Reg. at 57,612.

[70]88 Fed. Reg. at 57,612.

[71]88 Fed. Reg. at 57,612 (citing comments by the American Road & Transportation Builders Association, California Land Surveyors Association, and General Contractors Association of New York).

[72]88 Fed. Reg. at 57,610, 57,612.

[73]88 Fed. Reg. at 57,612 (quoting comments by the Illinois Professional Land Surveyors Association).

[74]See Comments by Ohio Contractor's Association at 10 (quoting FOH 15e20(b)), Illinois Professional Land Surveyors Association at 4–5 (quoting FOH 15e20(b)); see also FOH 15e20(b) (Mar. 31, 2016 update) ("As a general matter, members of the survey party who hold the leveling staff while measurements of distance and elevation are made, who help measure distance with a surveyor chain or other device, who adjust and read instruments for measurement or who direct the work are not considered laborers or mechanics."); Federal Highway Administration, Davis-Bacon and Related Acts Questions and Answers, at 7 (Sept. 16, 2014) https://www.fhwa.dot.gov/construction/contracts/dbra_qa.pdf [https://perma.cc/YUD7-NRY9, archived Sept. 29, 2023] (stating that "[s]urvey crew members using the equipment for measuring heights, distances, and bearings" are generally not covered under the Davis-Bacon Act).

[75]88 Fed. Reg. at 57,613 (citing 29 C.F.R. pt. 541; 29 C.F.R. § 5.2(m) (Jan. 2017)); see 29 C.F.R. § 541.301.

[76]88 Fed. Reg. at 57,615 (citing Goebel v. Colorado, No. 93-K-1227, 1999 WL 35141269, at *7 (D. Colo. 1999)).

[77]29 C.F.R. § 3.4(b) ("The regular payroll records must set out accurately and completely the name; Social Security number; last known address, telephone number, and email address of each laborer and mechanic; each worker's correct classification(s) of work actually performed; hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents thereof); daily and weekly number of hours actually worked in total and on each covered contract; deductions made; and actual wages paid."); 29 C.F.R. § 5.5(a)(3)(i)(B) ("Such records must contain the name; Social Security number; last known address, telephone number, and email address of each such worker; each worker's correct classification(s) of work actually performed; hourly rates of wages paid (including rates of contributions or costs anticipated for bona fide fringe benefits or cash equivalents thereof of the types described in 40 U.S.C. 3141(2)(B) of the Davis-Bacon Act); daily and weekly number of hours actually worked in total and on each covered contract; deductions made; and actual wages paid."). As in the case of social security numbers and home addresses, contractors may not include worker email addresses and telephone numbers on certified payrolls. 29 C.F.R. § 5.5(a)(3)(ii)(B).

[78]See 88 Fed. Reg. at 57,628 ("[T]he term 'regular payroll' refers to any written or electronic records that the contractor uses to document workers' days and hours worked, rate and method of payment, compensation, contact information, and other similar information that provides the basis for the contractor's subsequent submission of certified payroll.").

[79]29 C.F.R. § 3.4(b) ("Each contractor or subcontractor must preserve the regular payroll records for a period of 3 years after all the work on the prime contract is completed."); 29 C.F.R. § 5.5(a)(3)(i)(A) ("Length of record retention. All regular payrolls and other basic records must be maintained by the contractor and any subcontractor during the course of the work and preserved for all laborers and mechanics working at the site of the work (or otherwise working in construction or development of the project under a development statute) for a period of at least 3 years after all the work on the prime contract is completed.").

[80]88 Fed. Reg. at 57,630.

[81]29 C.F.R. § 5.5(a)(3)(iii) ("The contractor or subcontractor must maintain this contract or subcontract and related documents including, without limitation, bids, proposals, amendments, modifications, and extensions. The contractor or subcontractor must preserve these contracts, subcontracts, and related documents during the course of the work and for a period of 3 years after all the work on the prime contract is completed."); see 88 Fed. Reg. at 57,632–34.

[82]29 C.F.R. § 5.5(a)(3)(iii).

[83]Enviro & Demo Masters, Inc., ALJ No. 2011-DBA-00002, Decision and Order, slip op. at 50–52 (Apr. 23, 2014) (citing the FLSA's burden-shifting framework under Anderson v. Mt. Clemens Pottery, 328 U.S. 680, 693 (1946) and collecting cases applying that standard to DBA violations).

[84]29 C.F.R. § 5.5(a)(3)(ii)(E) (emphasis added). Pre-2020 Armed Services Board of Contract Appeals (ASBCA) cases involving a failure to certify a claim

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under the Contract Disputes Act (CDA) provide examples of what would likely qualify as an invalid signature. See, e.g., Teknocraft Inc., ASBCA No. 55438, 08-1 BCA ¶ 33,846 (dismissing claim where the certification included "//signed//" above a typed name); Tokyo Co., ASBCA No. 59059, 14-1 BCA ¶ 35,590 (dismissing claim where the certification included a stamp of the company's name and address and the typed but unsigned name of the company's general manager, explaining that "this is not a case involving electronic signature"); see also Kamaludin Slyman CSC, ASBCA No. 62006, 20-1 BCA ¶ 37,694 (senior deciding group) ("Today, we hold that, so long as a mark purporting to act as a signature may be traced back to the individual making it, it counts as a signature for purposes of the CDA, whether it be signed in ink, through a digital signature application, or be a typed name.").

[85]88 Fed. Reg. at 57,631, 57,632.

[86]29 C.F.R. §§ 1.6(f), 3.11, 5.5(e).

[87]88 Fed. Reg. at 57,663 (citing G.L. Christian & Assocs. v. United States, 312 F.2d 418 (Ct. Cl.), reh'g denied, 320 F.2d 345 (Ct. Cl. 1963); K-Con, Inc. v. Sec'y of Army, 908 F.3d 719, 724 (Fed. Cir. 2018)); see also Greenberg, Abrahams & Katz, "Complying with the Davis-Bacon Act," 03-11 Briefing Papers 1, at *5 (Oct. 2003); Amorosi, The Contract Interpretation Handbook: A Guide for Avoiding and Resolving Government Contract Disputes § 5:27 (Thomson Reuters 2022 ed.).

[88]88 Fed. Reg. at 57,663 (citing 41 C.F.R. § 60-1.4(a)).

[89]29 C.F.R. § 5.5(e); 88 Fed. Reg. at 57,669.

[90]88 Fed. Reg. at 57,666 (citing 29 C.F.R. § 5.13).

[91]29 C.F.R. §§ 1.6(f)(3)(iv), 5.5(e).

[92]88 Fed. Reg. at 57,669 (citing FAR 52.222-30, 52.222-31, 52.222-32).

[93]See generally Shaffer & Ramish, Federal Grant Practice § 53:5 (Thomson Reuters 2023 ed.).

[94]88 Fed. Reg. at 57,661.

[95]88 Fed. Reg. at 57,668 (citing NCS/ EML JV, LLC, B-412277 et al., 2016 CPD ¶ 21, 2016 WL 335854, at *8 n.10 (Comp. Gen. Jan. 14, 2016); and Blue & Gold Fleet, L.P. v. United States, 492 F.3d 1308, 1312–13 (Fed. Cir. 2007)).

[96]See Raytheon Co. v. United States, 809 F.3d 590, 597 (Fed. Cir. 2015) (citations omitted) (describing Blue & Gold as "a general rule that a losing bidder waives a post-award challenge to the terms of a solicitation if it does not object to the terms before the bidding process closes").

[97]29 C.F.R. § 5.10(a).

[98]29 C.F.R. § 5.5(a)(6) ("In the event of any violations of these clauses, the prime contractor and any subcontractor(s) responsible will be liable for any unpaid wages and monetary relief, including interest from the date of the underpayment or loss, due to any workers of lower-tier subcontractors, and may be subject to debarment, as appropriate."); 29 C.F.R. § 5.5(b)(4) (same); see also 88 Fed. Reg. at 57,640 ("The strict liability for covering unpaid back wages only applies to prime contractors. . . .").

[99]88 Fed. Reg. at 57,640; 29 C.F.R. §§ 5.5(a)(6), 5.5(b)(4).

[100]88 Fed. Reg. at 57,638; see also New v. Dep't of Veterans Affs., 142 F.3d 1259, 1265 (Fed. Cir. 1998) (citing Black's Law Dictionary 746 (6th ed.1990)) (explaining that "i.e." means "that is to say" while "e.g." "means for the sake of an example and concluding that the court "must assume that . . . the drafters of the regulation apprehended the difference between the two").

[101]88 Fed. Reg. at 57,638–39.

[102]88 Fed. Reg. at 57,640.

[103]88 Fed. Reg. at 57,639–40.

[104]29 C.F.R. § 5.18; see also 29 C.F.R. § 5.5(a)(11) ("discharge, demote, intimidate, threaten, restrain, coerce, blacklist, harass, or in any other manner discriminate against" or causing any person to do the same); 88 Fed. Reg. at 57,529.

[105]29 C.F.R. § 5.5(a)(11); see also Field Assistance Bulletin No. 2022-02, Protecting Workers from Retaliation 1 (Mar. 10, 2022) ("Retaliation occurs when an employer, including through a manager, supervisor, administrator or other agent, takes an adverse action against an employee because they engaged in a protected activity. Examples of protected activity include making a complaint to a manager, employer, or WHD; cooperating with a WHD investigation; requesting payment of wages; refusing to return back wages to the employer; complaints by a third party on behalf of an employee; consulting with WHD staff; exercising rights or attempting to exercise rights, such as requesting certain types of leave; and testifying at trial."); 88 Fed. Reg. at 57,655 (explaining that the Department designed the new anti-retaliation provisions to "discourage contractors, responsible officers, and any other persons from engaging in—or causing others to engage in—unscrupulous business practices that may chill worker participation in WHD investigations or other compliance actions and enable prevailing wage violations to go undetected.").

[106]29 C.F.R. § 5.18.

[107]29 C.F.R. § 5.18(c) (providing nonexhaustive examples of make-whole relief: "employment, reinstatement, front pay in lieu of reinstatement, and promotion, together with back pay and interest; compensatory damages; restoration of the terms, conditions, and privileges of the worker's employment or former employment; the expungement of warnings, reprimands, or derogatory

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references; the provision of a neutral employment reference; and the posting of a notice to workers that the contractor or subcontractor agrees to comply with the Davis-Bacon Act and Related Acts anti-retaliation requirements"); see also 88 Fed. Reg. at 57,657 (explaining that "[m]ake-whole relief and remedial actions under this proposed provision were intended to restore the worker subjected to the violation to the position, both economically and in terms of work or employment status (e.g., seniority, leave balances, health insurance coverage, 401(k) contributions, etc.), that the worker would have occupied had the violation never taken place").

[108]29 C.F.R. § 5.12(a); 88 Fed. Reg. at 57,741–43. The Department also repealed the regulatory process for requesting removal from the debarment list after six months. Compare 29 C.F.R. § 5.12(c) (Jan. 9, 2017), with 29 C.F.R. § 5.12; see also Ocean Habitability, Inc., WAB No. 87-22, 1991 WL 494680, at *4 (Mar. 28, 1991) (reversing administrative law judge's (ALJ's) decision not to debar contractor where ALJ had found that "debarment would serve no useful purposes" due to the lack of evidence suggesting that "respondents have not been chastened by this experience or have continued to exhibit a disregard of obligations in their government contracting work" and explaining that "that regulation [29 C.F.R. § 6.33(b)(2)] cannot be read as empowering ALJs to decline to recommend debarment when an employer is found to have disregarded its Davis-Bacon Act obligations").

[109]See 29 C.F.R. § 5.12(a)(1) (Jan. 9, 2017).

[110]88 Fed. Reg. at 57,681.

[111]Coastal Energy, Inc., WAB No. 89-07, 1991 WL 494707, at *2 (June 26, 1991) (affirming debarment under a Related Act and noting that the ALJ had rejected as "obviously unacceptable" the contractor's argument that it was unaware of the obligations imposed by the contracts it had signed).

[112]Marvin E. Hirchert, WAB No. 77-17, 1978 WL 22700, at *3 (Oct. 16, 1978).

[113]Enviro & Demo Masters, Inc., ALJ No. 2011-DBA-00002, Decision and Order, slip op. at 49 (Apr. 23, 2014) ("Respondents did not pay their employees on a weekly basis, but instead paid their employees every 15 days to three weeks.").

[114]Jamek Eng'g Servs., Inc. (Jamek II), ARB No. 2022-0039, 2022 WL 6732171, at *8 (affirming debarment under DBRA where ALJ found that the contractor unlawfully deducted union initiation fees and did not intend to make timely fringe benefit payments when it submitted its certified payrolls).

[115]P&N, Inc./Thermodyn Mech. Contractors, Inc., ARB No. 96-116, 1996 WL 697838, at *7 (Oct. 25, 1996) (citations omitted) (WHD investigators held meeting with contractor and informed contractor of laborer/sheet metal mechanic misclassification; contractor failed to take adequate corrective action; ARB observed: "Having been reminded of its obligations under the DBA by the Wage and Hour investigator and advised of its failure to fulfill those obligations by misclassifying and underpaying employees, Thermodyn was responsible for policing the supervision of such employees to ensure compliance with DBA requirements. . . .Rather than simply relaying the direction to the sheet metal foreman at the BOTA site, Thermodyn managers should have taken steps, e.g., regularly visited the site, observed the work being done, and reviewed payroll records, to ensure that the employees who were actually performing the work or sheet metal mechanics were being paid the proper hourly rate.").

[116]Interstate Rock Prods., Inc., ARB No. 15-024, 2016 WL 5868562, at *8 (Sept. 27, 2016).

[117]Ocean Habitability, Inc., WAB No. 87-22, 1991 WL 494680, at *4 (Mar. 28, 1991) (citing FOH 15f08) ("The Board concludes that an employer—in this instance, OHI—cannot reduce employees' Davis-Bacon project wages below the prevailing rate with impunity simply by recording that reduction in the employees' rate of pay for non-government work."); Jamek Eng'g Servs., Inc. (Jamek II), ARB No. 2022-0039, 2022 WL 6732171, at *8.

[118]Killeen Elec. Co., WAB No. 87-49, 1991 WL 494685 (Mar. 21, 1991).

[119]Coastal Energy, Inc., WAB No. 89-07, 1991 WL 494707, at *2 (June 26, 1991) (rejecting contractor's argument that it violated DBRA "out of inadvertence or inexperience" because one employee testified that he was fired after asking to be paid prevailing wages while others testified that they were warned not to reveal their wage rates to anyone).

[120]Enviro & Demo Masters, Inc., ALJ No. 2011-DBA-00002, Decision and Order, slip op. at 56 (Apr. 23, 2014).

[121]Sealtite Corp., WAB No. 87-06, 1988 WL 384962, at *4 (Oct. 4 1988).

[122]Interstate Rock Prods., Inc., ARB No. 15-024, 2016 WL 5868562, at *8 ("failures to set up adequate procedures to ensure that their employees' labor was properly classified under the DBA").

[123]J&L Janitorial Servs., Inc., WAB No. 86-10, 1986 WL 193121 (CWHSSA & DBA) (affirming debarment under DBA where contractor refused to produce payroll records for WHD investigator, who eventually got the records from the contracting agency); Abhe & Svoboda, Inc., ARB No. 01-063, 2004 WL 1739870 (noting that contractor failed to produce time card upon request by WHD investigators).

[124]See Enviro & Demo Masters, Inc., ALJ No. 2011-DBA-00002, Decision and Order, slip op. at 49 (Apr. 23, 2014) ("The record shows that Jover Naranjo was an

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experienced government contractor who had been involved in at least 30 prior federally funded projects."); Marvin E. Hirchert, WAB Case No. 77-17, 1978 WL 22700 (affirming debarment under DBA and citing the WHD's argument that "[the contractor's] relatively long experience with government construction contracts since its first year of operations indicate that [the contractor] had disregarded its obligations to its employees and should therefore be debarred"); Interstate Rock Prods., Inc., ARB No. 15-024, 2016 WL 5868562, at *5–6 ("Given Interstate's experience of working on DBA contracts since the early 1980s and, therefore, its apparent awareness of the DBA classification requirements to segregate and record different classifications of labor, the ALJ found that Interstate 'disregarded its obligations to its workers to compensate them appropriately' due to inadequate procedures and found that Interstate's failure to properly classify rebar, carpentry, and cement finishing work showed a willful violation of the DBA, or at least gross negligence."). But see 88 Fed. Reg. 57,681 (citing Stop Fire, Inc., WAB No. 86-17, 1987 WL 247040, at *2 (June 18, 1987); and Morris Excavating Co., WAB No. 86-27, 1987 WL 247046, at *1) ("Government contractors may be subject to debarment regardless of size and even if their disregard of obligations occurs on their first DBRA contract, or if WHD has not previously found violations").

[125]Charles Randall, LBSCA No. 87-SCA-32, 1991 WL 733572 (Dec. 9, 1991) (SCA & CWHSSA) (ruling that the ALJ properly found that the contractor failed to post the wage determinations where "employees testified overwhelmingly that they never had seen a wage determination poster or notice at any time").

[126]88 Fed. Reg. at 57,675 (affirming the "bedrock principle that DBA violations, by themselves, generally do not constitute a sufficient predicate for debarment").

[127]See NCC Elec. Servs., Inc., ARB No. 13-097, ALJ No. 2012-DBA-006, 2015 WL 5781073, at *6 (Sept. 20, 2015) (explaining that debarment requires more than mere negligence and that "[a]n innocuous mistake may trigger a violation of the DBA, but such mistakes, especially those that do not result in harm to employees, do not necessarily evidence an employer's disregard of its DBA obligations"); Gaines Elec. Serv. Co., No. WAB Case No. 87-48, WAB No. 87-48, 1991 WL 494684, at *2 (Feb. 12, 1991) (remanding for further proceedings where the ALJ found that the subcontractor failed to report two employees on one certified payroll but did not find that the subcontractor falsified its certified payrolls and noting to assist the ALJ on remand that "we think that there is a difference—or, at least, that there can be a difference—between inaccurate payrolls and falsification of payrolls"); Interstate Rock Prods., Inc., ARB No. 15-024, 2016 WL 5868562, at *4 ("DBA violations do not, by themselves, constitute a disregard of an employer's obligations within the meaning of the law—to support debarment, the evidence must establish a level of culpability beyond negligence.").

[128]See, e.g., Gaines Elec. Serv. Co., No. WAB Case No. 87-48, WAB No. 87-48, 1991 WL 494684, at *2 (Feb. 12, 1991) (citations omitted) ("[I]n the vast majority of the Related Acts debarment cases reaching the Board—and in which the Board determined that debarment was appropriate—the record contained evidence that the employer falsified certified payrolls to conceal violations or to simulate compliance with the applicable labor standards."); R.C. Foss & Son, Inc., WAB No. 87-46, 1990 WL 484311, at *2 (Dec. 31, 1990) ("[F]alsification of certified payrolls warrants debarment under either the 'aggravated or willful' standard or the 'disregard of obligations' standard.").

[129]88 Fed. Reg. at 57,681–82. The Department stresses that these examples are not exhaustive. 88 Fed. Reg. at 57,681.

[130]See Structural Concepts, Inc., WAB No. 95-02, 1995 WL 732671, at *3 (Nov. 30, 1995) ("The Administrator points to a few discrepancies on the face of Bonafide's certified payrolls that allegedly should have been noticed by Moutis. But, these discrepancies are minor. One is a math error, and another involves the wrong date on a payroll record. The third involves a misclassification of workers, but does not support a finding that Moutis knew or should have known of Bonafide's violations. The Board cannot conclude, on the basis of the evidence presented, that Moutis knew or should have known of Bonafide's false certified payrolls because of these discrepancies.").

[131]88 Fed. Reg. at 57,677–78; see also 29 C.F.R. § 5.12.

[132]29 C.F.R. § 5.12; 88 Fed. Reg. at 57,678 (quoting 47 Fed. Reg. 23,658, 23,661 (May 28, 1982), implemented by 48 Fed. Red. 19,540 (Apr. 29, 1983)) (explaining that that the regulatory history of the DBA and Related Acts indicates that "the determination of 'interest' (DBA) and 'substantial interest' (Related Acts) was intended to be the same: 'In both cases, the intent is to prohibit debarred persons or firms from evading the ineligibility sanctions by using another legal entity to obtain Government contracts.' "); see also 40 U.S.C.A. 3144(b) (providing for debarment of related entities and firms in which a debarred person has an "interest").

[133]88 Fed. Reg. at 57,529 ("The Department also creates a mechanism through which contractors will be required to consent to cross-withholding for back wages owed on contracts held by different but related legal entities in appropriate circumstances—if, for example, those entities are controlled by the same controlling shareholder or are joint venturers or partners on a Federal contract."), 57,531 (citations omitted) ("The DBRA contract clauses also provide for 'cross-withholding' if sufficient funds are no longer available on the contract under which the violations took place. Under this procedure, funds may be withheld from any

other covered Federal contract or federally assisted contract held by the same prime contractor in order to remedy the underpayments on the contract at issue.").

[134]29 C.F.R. § 5.5(a)(2)(i).

[135]29 C.F.R. § 5.2; see also 88 Fed. Reg. at 57,605–08.

[136]Complaint, Associated Builders & Contractors of Se. Tex., Inc. et al. v. U.S. Dep't of Labor et al., No. 1:23-cv-00396 (E.D. Tex. Nov. 7, 2023), ECF No. 1 (ABC Compl.); Complaint, Associated General Contractors of Am. et al. v. U.S. Dep't of Labor et al., Case No. 5:23-cv-00272-C (N.D. Tex. Nov. 7, 2023), ECF No. 1 (AGC Compl.).

[137]E.g., ABC Compl. ¶¶ 116–127 (citing U.S. Const. art. II § 2) (arguing that the final rule is void in its entirety because the acting Secretary of the Labor had not been appointed with the advice and consent of the Senate as required under the Appointments Clause); AGC Compl. ¶¶ 61–68 (citing U.S. Const. art. I, § 1 and U.S. Const. art. II, § 3) (arguing that the final rule violates the separation of powers).

[138]E.g., ABC Compl ¶¶ 63–66; AGC Compl. ¶¶ 47–50; see also 5 U.S.C.A. § 706 (describing the scope of judicial review under the Administrative Procedure Act).

[139]E.g., ABC Compl. ¶¶ 104–115.

[140]E.g., AGC Compl. ¶¶ 37–39, 49; ABC Compl. ¶¶ 57–62.

[141]E.g., AGC Compl. ¶¶ 40–43, 50; ABC Compl. ¶¶ 91–95.

[142]E.g., AGC Compl. ¶¶ 54–55; ABC Compl. ¶¶ 29, 56.

[143]E.g., AGC Compl. ¶¶ 26–31, 47; ABC Compl. ¶¶ 51–56.

[144]E.g., AGC Compl. ¶¶ 32–36, 48.

[145]E.g., ABC Compl. ¶¶ 38–56, 67–90.

[146]Guidance for Grants and Agreements (Final Rule; Notification of Final Guidance), 88 Fed. Reg. 57,750 (Aug. 23, 2023).

[147]Build America, Buy America (BABA) Act, Pub. L. No. 117-58, § 70914(a), 135 Stat. 429, 1298 (Nov. 15, 2021) (emphasis added). This statutory policy prescription is mirrored in new Part 184, at 2 C.F.R. § 184.1(b), and is also reflected in the definition of "Buy America Preference" at 2 C.F.R. § 184.3.

[148]See infra "Effective Date; Projects Underway Before Issuance."

[149]BABA Act, Pub. L. No. 117-58, § 70915(a)(2), 135 Stat. 429, 1299–1300 (Nov. 15, 2021) (instructing the Director of the OMB to "if necessary, amend subtitle A of title 2, Code of Federal Regulations (or successor regulations), to ensure that domestic content procurement preference requirements required by this part or other Federal law are imposed through the terms and conditions of awards of Federal financial assistance").

[150]See 2 C.F.R. § 200.106. Agencies can only adopt provisions that differ from the Uniform Guidance to the extent authorized within the Guidance itself, or if authorized by statute or approved by OMB. 2 C.F.R. § 200.106.

[151]Guidance for Grants and Agreements (Proposed Rule; Notification of Proposed Guidance), 88 Fed. Reg. 8,374 (Feb. 9, 2023).

[152]88 Fed. Reg. at 57,751. For discussion of the proposed guidance, see Shaffer & Ramish, Federal Grant Practice § 53:6 (Thomson Reuters 2023 ed.).

[153]Office of Management and Budget (OMB) Memorandum M-22-11, Initial Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure (Apr. 18, 2022) [hereinafter OMB Memo M-22-11], https://www.whitehouse.gov/wp-content/uploads/2022/04/M-22-11.pdf. Authors Ramish and Shaffer wrote a prior Briefing Paper discussing supply chain issues in federal grantee contracting. Ramish & Shaffer, "Federal Grantee Contracting: Domestic Preferences and Other Supply Chain Issues," 22-9 Briefing Papers 1 (Aug. 2022).

[154]OMB Memorandum M-24-02, Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure (Oct. 25, 2023) [hereinafter OMB Memo M-24-02], https://www.whitehouse.gov/wp-content/uploads/2023/10/M-24-02-Buy-America-Implementation-Guidance-Update.pdf.

[155]88 Fed. Reg. at 57,756.

[156]2 C.F.R. § 184.4(a).

[157]See 2 C.F.R. § 184.4(a).

[158]88 Fed. Reg. at 57,768; OMB Memo M-24-02, at 4–5.

[159]88 Fed. Reg. at 57,768, 57,776; OMB Memo M-24-02, at 4.

[160]2 C.F.R. § 184.3.

[161]2 C.F.R. § 184.4(c), (d).

[162]See 2 C.F.R. § 184.4(c), (d).

[163]2 C.F.R. § 184.4(d).

[164]2 C.F.R. § 184.4(b).

[165]2 C.F.R. § 184.4(b).

[166]See generally 2 C.F.R. pt. 184; 88 Fed. Reg. at 57,750.

[167]OMB Memo M-24-02, at 15–19 (Appendix I); OMB Memo M-22-11, at 15–17 (Appendix I).

[168]88 Fed. Reg. at 57,774.

[169]BABA Act, Pub. L. No. 117-58, § 70912(4)(B), 135 Stat. 429, 1296 (Nov. 15, 2021); see 2 C.F.R.

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§ 200.1 (“Non-Federal entity (NFE) means a State, local government, Indian tribe, Institution of Higher Education (IHE), or nonprofit organization that carries out a Federal award as a recipient or subrecipient.”).

[170]88 Fed. Reg. at 57,774.

[171]OMB Memo M-24-02, at 5; see also 2 C.F.R. § 184.4(b).

[172]2 C.F.R. § 184.1(b) (citing BABA Act, Pub. L. No. 117-58, § 70914(a), 135 Stat. 429, 1298 (Nov. 15, 2021)).

[173]2 C.F.R. § 184.4(e)(1).

[174]2 C.F.R. § 184.4(f).

[175]See 88 Fed. Reg. at 57,771–73.

[176]2 C.F.R. § 184.4(e)(2).

[177]88 Fed. Reg. at 57,775.

[178]2 C.F.R. § 184.4(e)(2); see also 88 Fed. Reg. at 57,776.

[179]2 C.F.R. § 184.3 (definitions of “iron or steel products” and “predominantly of iron or steel or a combination of both”).

[180]2 C.F.R. § 184.3 (definition of “produced in the United States,” paragraph 1).

[181]2 C.F.R. § 184.3 (definition of “manufactured products,” paragraph 1).

[182]2 C.F.R. § 184.3 (definition of “manufactured products,” paragraph 2).

[183]2 C.F.R. § 184.3 (definition of “produced in the United States,” paragraph 2).

[184]2 C.F.R. § 184.3 (definition of “produced in the United States,” paragraph 2, subparagraph ii (citing 2 C.F.R. § 184.2(a)).

[185]Under the Buy American Act FAR clauses, COTS items are exempt from the “components test”; COTS items that are not predominantly iron or steel need only be manufactured in the United States to be considered “domestic.” See FAR 52.225-1(a) (definition of “domestic end product,” subparagraph (1)(ii)(B)), (b); FAR 52.225-9(a) (definition of “domestic construction material,” subparagraph (1)(ii)(B), (b)).

[186]2 C.F.R. § 184.3 (definition of “component”). The definition is similar to the FAR definition, which states: “Component means an article, material, or supply incorporated directly into an end product or construction material.” FAR 25.003.

[187]Compare 2 C.F.R. § 184.5 with FAR 25.003 (definition of “Cost of components”); see also FAR 52.225-1(a), 52.225-9(a). As discussed in the preamble, the components test in the final guidance uses the term “manufacturer,” meaning “the entity that completes the final manufacturing process that produces a manufactured product,” rather than the term “contractor,” used in the FAR, but otherwise “adheres closely to the FAR definition.” 88 Fed. Reg. at 57,777.

[188]2 C.F.R. § 184.5(a).

[189]2 C.F.R. § 184.3 (definition of “manufacturer”).

[190]2 C.F.R. § 184.5(b).

[191]2 C.F.R. § 184.5(b).

[192]2 C.F.R. § 184.3 (definition of “construction material”; see paragraph 2).

[193]2 C.F.R. § 184.3 (definition of “construction material,” paragraph 1).

[194]2 C.F.R. § 184.3 (definition of “produced in the United States,” paragraph 3) (emphasis added).

[195]2 C.F.R. § 184.6(a).

[196]2 C.F.R. § 184.6(b).

[197]2 C.F.R. § 184.7(a).

[198]See FAR 25.103(a)–(c).

[199]2 C.F.R. § 184.7(a)(2).

[200]OMB Memo M-24-02, at 10.

[201]OMB Memo M-24-02, at 10.

[202]2 C.F.R. § 184.7(a)(3).

[203]OMB Memo M-24-02, at 10.

[204]BABA Act, Pub. L. No. 117-58, § 70937(c)(2)(B), 135 Stat. 429, 1311 (Nov. 15, 2021); see, e.g., 49 C.F.R. § 661.7(d) (Federal Transit Administration Buy America regulations) (authorizing an unreasonable cost waiver when “inclusion of a domestic item or domestic material will increase the cost of the contract between the grantee and its supplier of that item or material by more than 25 percent”). Note that construction material waivers would still be addressed under the BABA Act project-wide waiver standard, for all agencies, because construction materials as defined in BABA were not covered under the preexisting Buy America statutes.

[205]BABA Act, Pub. L. No. 117-58, § 70937(c)(2)(B), 135 Stat. 429, 1311 (Nov. 15, 2021); OMB Memo M-24-02, at 10.

[206]2 C.F.R. § 184.7(a)(1).

[207]OMB Memo M-24-02, at 11-12. Awarding agencies have been exercising their public interest waiver authority. The Department of Transportation issued a de minimis and small grants waiver effective for awards obligated on or after August 16, 2023. 88 Fed. Reg. 55,817 (Aug. 16, 2023). The Department of Interior (DOI) and Federal Emergency Management Agency (FEMA) both obtained approval for small grant and de minimis waivers; FEMA obtained a minor components waiver; and the Department of Education (ED) proposed general applicability waivers of all three types pending as of early October 2023. See Federal Financial Assistance waiver listings by waiver type at https://www.madeinamerica.gov/waivers/.

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[208]2 C.F.R. § 184.7(b).

[209]OMB Memo M-24-02, at 8.

[210]2 C.F.R. § 184.7(b); see, e.g., Guidance on Submission of a DOE Buy America Requirement Waiver Request, https://www.energy.gov/sites/default/files/2022-11/Guidance%20on%20Submission%20of%20a%20DOE%20Buy%20America%20Requirement%20Waiver%20Request%2011-17.pdf; Guidance for Submission of a USDA Waiver Request by Recipients and Subrecipients, https://www.usda.gov/ocfo/federal-financial-assistance-policy/USDABuyAmericaWaiver; "Buy America" Domestic Sourcing Guidance and Waiver Process for DOI Financial Assistance Agreements, https://www.doi.gov/grants/buyamerica.

[211]Note that under the final guidance contractors and subrecipients cannot request waivers directly but must work through recipients. Only recipients "may request waivers from a Federal awarding agency." See 2 C.F.R. § 184.7(b).

[212]OMB Memo M-24-02, at 7.

[213]BABA Act, Pub. L. No. 117-58, § 70937(c)(2)(A), (D), 135 Stat. 429, 1311 (Nov. 15, 2021). The statute also prescribes certain of the specific waiver requirements for unreasonable costs, Pub. L. No. 117-58, § 70937(c)(2)(B), and nonavailability, Pub. L. No. 117-58, § 70937(d).

[214]OMB Memo M-24-02, at 7–12. Some of these requirements also originate in the statute. See BABA Act, Pub. L. No. 117-58, § 70937(c)(2)(B)–(C), 135 Stat. 429, 1311 (Nov. 15, 2021).

[215]2 C.F.R. § 184.7(c).

[216]2 C.F.R. § 184.7(d)(1).

[217]2 C.F.R. § 184.7(d)(2).

[218]2 C.F.R. § 184.7(d)(3).

[219]2 C.F.R. § 184.7(e). OMB Memorandum M-24-02 urges that "[t]o the greatest extent practicable, waivers should be targeted to specific products and projects." OMB Memo M-24-02, at 6.

[220]OMB Memo M-24-04, at 6–7; see BABA Act, Pub. L. No. 117-58, §§ 70936–70937, 135 Stat. 429, 1310–12 (Nov. 15, 2021). Anecdotally, not all waivers have been consistently centrally cross-posted at madeinamerica.gov; some waivers are only posted on awarding agency sites.

[221]BABA Act, Pub. L. No. 117-58, § 70912(4)(B), 135 Stat. 429, 1296–97 (Nov. 15, 2021).

[222]2 C.F.R. § 184.8.

[223]88 Fed. Reg. at 57,751. See generally 88 Fed. Reg. at 57,750–86.

[224]88 Fed. Reg. at 57,751–52.

[225]88 Fed. Reg. at 57,751.

[226]88 Fed. Reg. at 57,751.

[227]88 Fed. Reg. at 57,751.

[228]88 Fed. Reg. at 57,751.

[229]OMB Memo M-24-04, https://www.whitehouse.gov/wp-content/uploads/2023/10/M-24-02-Buy-America-Implementation-Guidance-Update.pdf.

[230]88 Fed. Reg. at 57,753.

[231]88 Fed. Reg. at 57,754. On the other hand, OMB said that it sought, where possible, to avoid being overly prescriptive and to leave significant discretion to agencies, citing as an example of an area where agencies have discretion the interpretation of what are considered a "minor additions" to construction materials. 88 Fed. Reg. at 57,754.

[232]88 Fed. Reg. at 57,752–53.

[233]Ichniowski, "New White House Buy America Guidance Draws Scrutiny," Eng'g News-Record (Aug. 20, 2023), https://www.enr.com/articles/56958-new-white-house-buy-america-guidance-draws-scrutiny (quoting Jimmy Christianson, Associated General Contractors of America vice president, government relations, stating that "The number-one issue contractors will run into is being able to find manufacturers that will certify to them that their product or their material meet the requirements" and observing that "contractors will be the ones that will have to state to a project owner that the materials used on the project meet the Buy America requirements").

[234]88 Fed. Reg. at 57,750; 2 C.F.R. § 184.2(b).

[235]See BABA Act, Pub. L. No. 117-58, § 70914(a), 135 Stat. 429, 1298 (Nov. 15, 2021); 2 C.F.R. § 184.2(b) (Buy America preferences were effective 180 days from the date the BABA Act was passed, which the revised guidance reflects translates to an effective date of May 14, 2022).

[236]88 Fed. Reg. at 57,755.

[237]88 Fed. Reg. at 57,756; 2 C.F.R. § 184.2(b).

[238]88 Fed. Reg. at 57,756; 2 C.F.R. § 184.2(c).

[239]88 Fed. Reg. at 57,756; 2 C.F.R. § 184.2(c).

[240]88 Fed. Reg. at 57,757.

[241]OMB Memo M-24-02, at 20–21.

[242]2 C.F.R. § 184.1(b) (emphasis added).

[243]88 Fed. Reg. at 57,754–55. This limitation bears some resemblance to the limitation in the FAR definition for "construction materials," which is limited to articles, items, or supplies "brought to the construction site by the Contractor or a subcontractor *for incorporation into the building or work*," including "an item brought to the site preassembled from articles, materials, or supplies." FAR 52.225-9(a) (definition of "construction material") (emphasis added).

[244]BABA Act, Pub. L. No. 117-58, § 70917(b), 135 Stat. 429, 1301 (Nov. 15, 2021).

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[245]88 Fed. Reg. at 57,753, 57,755.

[246]88 Fed. Reg. at 57,755.

[247]88 Fed. Reg. at 57,755.

[248]BABA Act, Pub. L. No. 117-58, § 70914(d), 135 Stat. 429, 1299 (Nov. 15, 2021).

[249]88 Fed. Reg. 16,517 (Mar. 17, 2023). The comment period was subsequently extended through May 22, 2023. 88 Fed. Reg. 24,651 (Apr. 21, 2023).

[250]88 Fed. Reg. at 57,755.

[251]BABA Act, Pub. L. No. 117-58, § 70925, 135 Stat. 429, 1308 (Nov. 15, 2021).

[252]88 Fed. Reg. at 57,784–85. For background on free trade agreement coverage of state and local government procurements and interactions with domestic preferences, see Ramish & Shaffer, "Federal Grantee Contracting: Domestic Preferences And Other Supply Chain Issues," 22-9 Briefing Papers 1 (Aug. 2022); Shaffer & Ramish, Federal Grant Practice § 53:5 (Thomson Reuters 2023 ed.).

[253]88 Fed. Reg. at 57,785–86.

[254]88 Fed. Reg. at 57,785–86.

[255]88 Fed. Reg. at 57,774.

[256]88 Fed. Reg. at 57,774.

[257]88 Fed. Reg. at 57,774. It is not clear from 2 C.F.R. § 200.101(a)(2) whether awarding agencies have authority to simply apply the BABA Buy America preferences to for-profit entities for a given award, or whether they must amend their grant and assistance regulations to extend coverage. Anecdotally, some agencies have been including for-profit entity BABA requirements in individual funding opportunities without changing their regulations.

[258]2 C.F.R. § 184.4(b).

[259]88 Fed. Reg. at 57,759; see 2 C.F.R. § 184.3 (definition of "construction materials"). OMB notes this represents a return to the approach taken in Memo M-22-11. 88 Fed. Reg. at 57,759.

[260]88 Fed. Reg. at 57,759.

[261]88 Fed. Reg. at 57,759.

[262]88 Fed. Reg. at 57,759.

[263]88 Fed. Reg. at 57,759.

[264]2 C.F.R. § 184.3 (definition of "construction materials," paragraph 2).

[265]88 Fed. Reg. at 57,767. The preamble provides further guidance regarding minor additions and binding agents. See 88 Fed. Reg. at 57,767.

[266]88 Fed. Reg. at 57,758 (citing BABA Act, Pub. L. No. 117-58, § 70911(5), 135 Stat. 429, 1295 (Nov. 15, 2021)).

[267]88 Fed. Reg. at 57,765.

[268]88 Fed. Reg. at 57,760–61.

[269]88 Fed. Reg. at 57,764; (definition of "construction materials," subparagraph (1)(iv)).

[270]88 Fed. Reg. at 57,781.

[271]88 Fed. Reg. at 57,778–79.

[272]2 C.F.R. § 184.6(b); 88 Fed. Reg. at 57,783.

[273]88 Fed. Reg. at 57,769.

[274]88 Fed. Reg. at 57,769.

[275]88 Fed. Reg. at 57,769.

[276]88 Fed. Reg. at 57,769.

[277]2 C.F.R. § 184.3; 88 Fed. Reg. at 57,757–58, 57,773.

[278]88 Fed. Reg. at 57,758.

[279]88 Fed. Reg. at 57,777.

[280]88 Fed. Reg. at 57,776.

[281]88 Fed. Reg. at 57,776.

[282]88 Fed. Reg. at 57,776.

[283]88 Fed. Reg. at 57,776.

[284]88 Fed. Reg. at 57,776.

[285]88 Fed. Reg. at 57,776.

[286]88 Fed. Reg. at 57,776.

[287]88 Fed. Reg. at 57,768.

[288]88 Fed. Reg. at 57,773.

[289]88 Fed. Reg. at 57,777.

[290]88 Fed. Reg. at 57,773.

[291]BABA Act, Pub. L. No. 117-58, § 70917(c), 135 Stat. 429, 1301 (Nov. 15, 2021); see also 2 C.F.R. § 184.3 (definition of "Section 70917(c) materials").

[292]88 Fed. Reg. at 57,771.

[293]88 Fed. Reg. at 57,771.

[294]88 Fed. Reg. at 57,771–73.

[295]88 Fed. Reg. at 57,783.

[296]88 Fed. Reg. 8,374, 8,378 (Feb. 9, 2023).

[297]88 Fed. Reg. at 57,789; 2 C.F.R. § 184.7(b).

[298]88 Fed. Reg. at 57,757.

[299]See generally OMB Memo M-24-04, at 6–14.

[300]OMB Memo M-24-04, at 15–19, Appendix I: Example of Award Term (Sample Language)—Required Use of American Iron, Steel, Manufactured Products, and Construction Materials.

[301]OMB Memo M-24-04, at 20–21, Appendix II: Guidance for Projects Identified at 2 CFR 184.2(b)–(c) as Remaining Subject to OMB Memorandum M-22-11.

[302]OMB Memo M-24-04, at 4.

[303]OMB Memo M-24-04, at 5.

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