



**American
Public Transportation
Association**

March 13, 2023

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Docket Operations
Office of Management and Budget
Via Regulations.Gov

Re: OMB-2023-0004-0001

Dear Docket Clerk:

The American Public Transportation Association (APTA) represents the \$80 billion public transportation industry that provides mobility for billions of Americans each year, directly employs 450,000 people, and supports millions of private-sector jobs. We are pleased to offer comments regarding the Office of Management and Budget's (OMB) proposed regulation and notification of proposed guidance published in the *Federal Register* at 88 FR 8374 on February 9, 2023 and corrected on March 8, 2023 at 88 FR 14514.

APTA understands OMB's intent to ensure the use of American materials when building American infrastructure because it is critical to job creation, timely project delivery, quality, and building domestic capacity. APTA's members share this goal but would like OMB to consider several important points.

Procedural Concerns

OMB's proposed guidance would add a new part 184 in 2 C.F.R. chapter 1 and make revisions to 2 C.F.R. 200.322, "Domestic Preferences for Procurements." The Infrastructure Investment and Jobs Act (IIJA) charged OMB with issuing guidance to Federal agencies to assist in "identifying deficient programs under 70913(c) and to assist in applying domestic content procurement preference under 70914 . . ." In response to the IIJA requirements, OMB published a request for information (RFI) on May 22, 2022. In that notice, OMB posed several questions to the public regarding how to define construction materials consistent with the IIJA's mandates. APTA submitted comments in response to OMB's RFI. Shortly thereafter, the Department of Transportation (DOT) issued an RFI on the same topic and also posed a number of questions to public. APTA submitted comments in response to that RFI as well.

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What is troubling to our members is the considerable time spent on responding to OMB's and DOT's RFIs, only to have OMB summarily dismiss and fail to respond to the thoughtful and extensive comments made on its proposed guidance, nonetheless stating "[t]hese proposed standards are based on industry feedback, agency consultation and market research conducted for each construction material." Yet nowhere in the February 9, 2023 publication is there even a reference to what exactly OMB is relying upon for this proposed guidance. It certainly does not reflect any of the input provided by the public transportation and construction industries.

Also, the *Federal Register* notice of March 8, 2023, correcting the caption of the proposed guidance to emphasize that it is not a proposed rule, but instead contains only proposed "guidance," calls into question the validity of the proposed addition of 2 C.F.R. § 200.322(c). The proposed provision would state "Federal awarding agencies providing Federal financial assistance for infrastructure projects must comply with the Buy America Preferences set forth in 2 C.F.R. part 184." Use of the term "must" as part of a 2 C.F.R. Part 200 provision indicates this is a proposed rule, particularly in light of the fact that 2 C.F.R. Part 200 has been adopted as a rule by the individual federal agencies. For example, DOT has adopted 2 C.F.R. 1201.1. As a proposed rule, 2 C.F.R. § 200.322(c) fails to meet procedural requirements for notice and comment before adoption.

In addition, APTA members would like to know how the OMB will apply the proposed guidance for 2 C.F.R. § 184.2, "Applicability", to the Federal Transit Administration (FTA). Specifically, the proposed guidance states that it applies only:

"[T]o the extent that a Buy America Preference meeting or exceeding the requirements of section 70914 of the Build American, Buy America Act did not apply to iron, steel, manufactured products, and construction materials in the Federal financial assistance program under which the Federal award is provided before November 15, 2021."

Furthermore, in January 2022, the DOT issued a report required under section 70913 of the Build America, Buy America Act (BABAA), titled "DOT's Identification of Federal Financial Assistance Infrastructure Programs Subject to the Build America, Buy America Provisions of the Infrastructure Investment and Jobs Act." That report concluded the degree of inconsistency between the DOT's existing Buy America requirements and BABAA's requirements "is relatively small, and . . . is largely based on the lack of specific domestic preference requirements for construction materials in DOT's programs"

For the FTA, the report pointed to 49 U.S.C. § 5323(j) as already requiring the FTA "to obligate funds for a project only if the steel, iron, and manufactured goods used in the project are produced in the United States." It also noted that "FTA's regulations at 49 CFR part 661 interpret and implement this statutory requirement." APTA requests that OMB revise its proposed guidance for 2 CFR § 184.2 to specifically list all of the pre-existing Buy America Preferences that meet or exceed the requirements of the BABAA, so that the OMB's guidance does not apply to those preferences. APTA would like confirmation that the guidance related to

construction materials only applies to FTA funded projects, and for FTA funded projects, the existing regulations at 49 C.F.R. part 661 control Buy America preferences for steel, iron, and manufactured products. By preserving continuity with existing regulations and previous interpretations regarding FTA's regulations will allow grantees and contractors to continue to comply with well-understood Buy America requirements that meet BABAA's mandates.

Response to Questions

APTA has surveyed its members and provides the following responses to OMB's questions:

(1) Cost of Components

It is not clear why OMB asks whether the cost of components should be determined at the contractor or manufacturer level. Either way this could be a very expensive endeavor and it is unlikely that in an extremely competitive procurement environment that either a contractor or manufacturer would/should share such information publicly. It could also be argued that Congress intended that existing Buy America statutes and regulations would continue to stand if they meet the requirements of BABAA and, therefore, OMB need not include the definition of "cost of components" from the federal acquisition regulations (FAR) because the FAR is based on the Buy American Act, which is very different from FTA's Buy America statute.

OMB should instead focus on its definition of end product. This determination is of utmost importance in carrying out the IIJA requirements and is a daunting task. OMB must reconcile end product under Buy America and Buy American. Our members prefer Buy American requirement's deference to contracting officers' determination of what is the end product. OMB should also refer to the FTA's manufactured end product analysis in "Bob Hope Airport-Regional Intermodal Transportation Center" dated July 11, 2014, and "NY MTA Securiplex's Water Mist Fire Suppression System for the Second Avenue Subway Project" dated August 24, 2014.

If OMB does not adequately define end products, it will be nearly impossible to determine the cost of components and not having clear definitions causes problems between auditors, contractors, manufacturers, etc.

(2) Other Construction Material Standards

APTA members would like to see how the initial list of construction materials is implemented before expanding the list. Our members also wonder why OMB is proposing to expand to all manufacturing processes?

(3) Proposed Definition of Construction Materials

Original list is clear. "Two or more" from the list could mean many things. Please refer to the FTA manufactured end product decisions mentioned above. FTA has a long history of applying Buy America requirements to construction materials even for materials on this limited list.

Further, construction materials should not be a combination of the seven items. It should just be the individual materials themselves, which would reduce the cost of compliance.

(4) Definition for “Predominantly” Iron or Steel Items

Why add predominantly at all? The word does not appear in statute, so why add it? Surcharges on iron and steel could move it to one category or another. For example, a cabinet with a circuit board, what is the end product? Components must be made of U.S. steel, but subcomponents need not be. Also, when do you determine the cost of steel? The day the contract is signed? The day of the purchase? Or the day the steel arrives in the yard?

(5) How to Distinguish Between Categories of Products

APTA members recommend that one item is considered construction material. If two or more items from the list are combined, then that is also a construction material. But, if two or more from the list are combined with something else, then that would be a manufactured product.

(6) Meaning of Composite Building Materials

APTA members recommend OMB follow the statutory language.

(7) Fiber Optic Cables and Optical Fibers

Same answer as above.

(8) Standards Applicable to Optical Fiber and Optic Glass

Why is optical fiber being included here since it is not in the statute. OMB must consider the impact of rushing to U.S.-sourced components given global supply chain realities. This is something APTA pointed out to OMB during its first RFI and also noted extensively in our comments to DOT’s RFI.

(9) Aggregates

Section 70917(c)(1) established an important limitation to the term “construction materials” as that term is used in the Build America, Buy America Act (BABAA). The limitation prohibits the term “construction materials” from including “cement and cementitious materials, aggregates such as stone, sand, or gravel, or aggregate binding agents or additives”. This limitation makes clear “construction materials” domestic content procurement preference does not exist under BABAA. In addition, section 70917(c)(2) prohibits the same construction materials from being included as “inputs” in “all manufacturing processes” that produce “construction materials”. OMB is required to “issue standards that define the term “all manufacturing processes” for construction materials to which BABAA does apply a domestic content procurement preference. Because Section 70917(c)(2) prohibits the definition of “all manufacturing processes” from including the listed items as inputs, the inclusion of the listed items as concrete or asphalt mix violates IIJA’s statutory mandate.

(10) *Specific Sections of Proposed Guidance*

Under §184.2 (Applicability) of the proposed guidance states it applies to a federal award for an infrastructure project. Furthermore under §184.3 (Definitions) of the proposed guidance includes the following definition: “Infrastructure project is any activity related to the construction, alteration, maintenance, or repair of infrastructure in the United States regardless of whether infrastructure is the primary purpose of the project.” Also, section 184.4 (Applying the Buy America Preference to a Federal Award) states:

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

Since the proposal references “public transportation” broadly, it is not entirely clear whether OMB intends to include rolling stock such as buses, subway cars, and commuter rail cars, in the definition of infrastructure. APTA members believe that since rolling stock is not listed in §184.4 of the proposed guidance, OMB does not consider rolling stock to be infrastructure and FTA’s rolling stock regulation at 49 C.F.R. Part 661.11 will continue to stand. If this is true, then OMB or DOT should quickly clarify whether a purchase of rolling stock is considered an infrastructure project and thus subject to the proposed guidance. Rolling stock should not be included in the definition of “infrastructure”, which would facilitate allowing FTA’s current regulation pertaining to rolling stock (49 CFR Part 661.11, discussed above) to survive as it exists today.

(11) *Reducing Burden on Recipients*

At the end of the day, based on the uncertainty that exists in the proposed “process,” the greater the practical impact will be that contractors will be forced to assume additional risk, which in turn will increase the cost of projects, something that runs contrary to the provisions and funding provided by the IJA.

BABAA’s objectives to increase domestic manufacturing is a priority and one APTA’s members share, but it must be weighed against the urgency of leveraging IJA funding to modernize and expand transit infrastructure. One should not affect the other adversely.

Federal agencies are the experts as it relates to the projects funded by their grants and know and understand their grantees. FTA has developed robust expertise in applying and enforcing existing Buy America requirements and should be given deference in the new process, rather than being subjected to OMB second-guessing. In other words, the best way to reduce the burden on the industry is to preserve the existing body of regulations, interpretations, and determinations as much

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as possible. Borrowing definitions from the FAR, which is based on the Buy American Act, will increase the burden on the industry by sowing confusion.

We appreciate the opportunity to once again comment, and hope that in this iteration our comments will be given appropriate and due consideration. If there are any questions regarding these comments, please contact APTA's General Counsel, Linda Ford at lford@apta.com.

Sincerely yours,

A handwritten signature in blue ink that reads "Paul P. Skoutelas". The signature is written in a cursive style with a blue ink color.

Paul P. Skoutelas
President and CEO