

March 13, 2023

Deidre A. Harrison  
Deputy Controller, Office of Federal Financial Management  
Office of Management and Budget  
725 17th St., N.W.  
Washington, DC 20503

**RE: Docket No. OMB-2023-0004, Guidance for Grants and Agreements [RIN: OMB-2023-0004]**

The National Utility Contractors Association (NUCA) appreciates the opportunity to submit comments on OMB's proposed guidance for implementation of the Build America, Buy America Act (BABAA) provisions contained within the Infrastructure Investment and Jobs Act (IIJA).

The National Utility Contractors Association (NUCA) represents represent construction contractors, manufacturers, and distributors who build and maintain a wide range of underground facilities and transportation infrastructure. Member companies provide the manpower, equipment, and expertise needed to build, repair, and maintain the infrastructure needed for water and wastewater infrastructure, gas distribution, broadband, electric and as well as the nation's surface transportation system. NUCA has over 1,900 member companies across 35 chapters in states and regions across the nation, and as the only nationwide trade association representing the American utility construction industry, NUCA members are uniquely positioned to comment on the major investment in subsurface utility infrastructure.

NUCA strongly supported the Infrastructure Investment and Jobs Act (IIJA, H.R. 3684), which delivered badly needed federal funding for a wide range of American infrastructure, including the nation's dilapidated water, wastewater, and stormwater systems and surface transportation network, as well as support for a nationwide broadband buildout. IIJA also supported a wide variety of other underground infrastructure, including funding for municipal gas main distribution replacement. NUCA is also a strong supporter of domestic manufacturing and supports policy which develops the domestic manufacturing base of our industry's essential products. However, a significant percentage of products and materials essential to utility construction are not currently made in America, or are not manufactured in sufficient quantities and/or in compliance with changing BABAA standards. Creating adequate manufacturing capacity for those products will take significant time and resources to build in the future.

As a key stakeholder, NUCA wishes to offer the following feedback in response to OMB's request for comment.

### **The Utility Construction Industry Continues to Face Severe Supply Chain Challenges**

NUCA members and others in related aspects of the construction industry continue to report supply chain challenges, long lead times for essential materials, and chronic shortages of essential construction materials and manufactured goods. Workforce challenges, price increases, and continued inflation all have a lasting and continued impact on the state of the construction supply chain.

Despite some progress, the construction industry is still facing lengthy delays and substantial price increases when trying to acquire certain critical materials. Some of the vital products required for water projects are not currently produced within the United States, while some of the domestically manufactured items are either inadequate in terms of quantity or are currently non-compliant with the BABAA standards for domestic production percentages. Many companies, including NUCA associate member manufacturers, are actively transforming their manufacturing processes and supply chains to increase domestic capacity. But it will take several years for the supply chain to adjust to these new requirements.

### **An Efficient and Transparent Waiver Process is Needed**

Significant inter-agency coordination and the development of an efficient and transparent waiver process will be essential to deliver on the historic investments provided by IIJA and related legislation. OMB must make this a priority and take supply chain challenges into account while implementing BABAA.

A Memorandum for Heads of Executive Departments and Agencies (M-22-11), issued by OMB in April 2022, outlines several categories of waivers that are potentially available to recipients in the event that BABAA requirements would be unfeasible and could call into question the ability to complete a project in a timely or cost-effective manner. Consistent with Section 70914(c) of the legislation in question, these categories are “public interest,” “nonavailability,” and/or “unreasonable cost.”

Ongoing supply chain challenges and the wide-ranging scope of BABAA application will no doubt result in a high volume of necessary waiver applications, and federal agencies must be prepared to process these in a timely manner. While OMB has made clear that the criteria for a successful waiver application are quite strict, many of these requests will still merit careful consideration across some or all of the aforementioned categories. Numerous requests have already been granted by various agencies, but the process has varied greatly from agency-to-agency, and associated guidance is unclear and in places contradictory.

Federal agencies will need to ensure that they have sufficient resources and staff to process incoming waivers, and OMB should look for ways to assist agencies in streamlining and improving the waiver application and decision processes. NUCA calls on OMB to consider methods including but not limited to; identifying inefficiencies and opportunities to streamline the waiver application and decision process; creating a clear set of criteria and a uniform process across all agencies; eliminating redundancy in requests for the same materials through issuance of government-wide waivers when necessary based on public interest and/or nonavailability, and hiring or outsourcing additional staff to keep up with the anticipated volume of requests. NUCA also calls on OMB to ensure that information regarding waiver applications and decisions is made readily available online, to ensure transparency and ease of understanding, and to make additional staff available to specifically support such.

### **Temporary Products Must be Explicitly Excluded From BABAA Standards**

In OMB memorandum M-22-11, Section VI (April 18, 2022), in which OMB outlined initial BABAA implementation guidance to agencies, and in keeping with the text of the legislation, OMB clearly stated

that Buy America requirements do not apply to items that are only used during the construction process, and are not installed permanently as a part of the infrastructure project. NUCA is concerned that this language has not been included in this proposed guidance and asks for its explicit inclusion. Items in the utility construction industry including but not limited to equipment, tools, vehicles, safety gear (hard hats, high-vis clothing, boots, etc.,) utility locating indicators including but not limited to flags and paint, trench safety boxes, shoring, and shields, scaffolding and temporary ground covers, electronic devices used at the job site, excavation equipment, and other items not permanently installed are not subject to BABAA requirements and should be clearly indicated as such.

### **Aggregates and Related Materials Should Not Be Considered Construction Materials, In Keeping With Congressional Intent; OMB Should Use Caution in Adding Additional Materials**

NUCA advises OMB to use caution when expanding the scope of the definition of “construction material” with regards to BABAA requirements, as doing so can potentially cause significant additional administrative burden and supply chain confusion.

The proposal to add products such as “paints, stains, and coatings applied at the job site” is one such example. This is a very broad category of items, and will impose significant administrative burden to determine what exactly is and is not compliant, and/or captured under the above definition. Defining such items as construction materials without a full dedicated period of notice and comment, and therefore not allowing for sufficient study and industry stakeholder input, will undoubtedly cause significant confusion and disruption in utility construction projects.

NUCA also cautions OMB not to adopt an overly broad interpretation of BABAA requirements. Sections 70917(c)(1) and 70917(c)(2) of IJIA explicitly and intentionally excludes aggregates, cement, cementitious materials, and related additives and binders from BABAA requirements. The subsections explicitly state that OMBs standards for “all manufacturing processes” “shall not include cement and cementitious materials, aggregates such as stone, sand, or gravel, or aggregate binding agents or additives as inputs of the construction materials.” In short, while these may be “construction materials” in a generic sense, Congress specifically exempted these materials from the definition of “construction materials” covered by BABAA – likewise, Congress also made clear that a combination of said materials did not fall under the definition of a manufactured good subject to BABAA domestic procurement requirements. OMB must comply with the clear Congressional intent of this section, and refrain from categorizing these items as either manufactured goods or construction materials subject to BABAA requirements. Failing to do so will result in significant additional confusion, supply chain burden, cost, and other challenges. NUCA strongly urges OMB to allow industry to maintain sourcing flexibility for this category of items in keeping with the legislative structure of BABAA.

### **Request for Clarification on Definitions of Construction Materials vs. Manufactured Goods**

The process of issuing a definition for construction material thus far has been haphazard and unclear, with a broad reading of guidance causing considerable confusion and uncertainty among contractors and their vendors. NUCA asks that OMB consider individual periods of notice and comment on each specific category of construction material, in order to gather specific information about supply chain

challenges, manufacturing and procurement process and challenges, and the current state of domestic American manufacturing on each category.

Regarding OMB's request for comment on avoiding disqualification of "construction materials with only de minimis additions of non-construction materials," NUCA believes that additional guidance is needed. OMB must establish clear and specific metrics for determining whether a material has undergone significant value addition or substantial transformation through the manufacturing process in order to prevent confusion among contractors, manufacturers, and distributors attempting to comply with BABAA requirements.

The proposed definition of the cost of components of manufactured products is also an issue of concern; it is far too vague to be effectively workable. BABAA compliance requires the cost of components of manufactured products produced in the United States to be greater than 55% of the total cost of all components, a standard that is set to rise significantly above that percentage through the end of the decade. Determining compliance is no easy feat – many critical products used in utility construction are composed of inputs from all over the world, with a variety of individual costs and manufacturing processes themselves. Without a clear definition and process for certification, contractors acting in good faith could easily find themselves running afoul of BABAA requirements at no fault of their own. OMB must develop specific and clear guidance and a set of best practices for stakeholders to follow to allow for self-certification of BABAA requirements. NUCA also asks that OMB engage in a period of additional notice and comment with stakeholders, and to engage directly with our manufacturer and distributor partners to help resolve this issue.

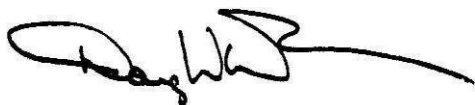
NUCA supports policies that grow and strengthen American manufacturing. However, we want to ensure that projects are not delayed due to inadequate supply of essential construction materials or manufactured products, or face a weighty administrative burden of implementing BABAA standards.

#### **A Delay in The Date of Effect is Warranted**

To ensure maximum clarity and guidance that accurately reflects the current state of the supply chain, and in lieu of extending the comment period on this guidance, OMB should consider delaying the date of effect. This additional time should be utilized to conduct further research on specific supply chain challenges and allow for more public comment and industry input.

NUCA stands ready to assist the Administration in implementation of BABAA requirements and looks forward to working with OMB to help devise appropriate policies. Thank you for your time and the consideration of our comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Doug Carlson", with a long, sweeping horizontal line extending to the right.

Doug Carlson  
Chief Executive Officer