March 13, 2022

Via Electronic Submission

Dede Rutberg
Office of Management and Budget
725 17th Street, NW Washington, DC 20503

Re: Proposed Rule, and Notification of Proposed Guidance; Guidance for Grants and Agreements (88 Fed. Reg. 8374, February 9, 2023)

Dear Ms. Rutberg:

NECA is a national trade association and the leading voice of the $202 billion electrical contracting industry that brings power, light, and communication technology to buildings and communities across the U.S. NECA collectively represents over 4,000 electrical contractor members served by 118 local Chapters across the country. NECA employs a unionized workforce with contracts collectively bargained with IBEW.

NECA submit comments on the Office of Management and Budget's ("OMB") Notice of Proposed Rulemaking in the above referenced proceeding ("NPRM") as part of the OMB implementation of Build America, Buy America Act ("BABA") contained in the Infrastructure Investment and Jobs Act ("IIJA").

I. Introduction

NECA supports the efforts to enhance the manufacturing sector in the United States, as there is a need to implement strategies that utilize federal infrastructure investments while prioritizing domestic sourcing. However, it is crucial to ensure that federal procurement policies remain flexible enough to support a federal procurement environment that supports safe, sustainable, and efficient infrastructure systems. In situations where critical materials or technologies necessary for infrastructure projects are unavailable domestically, strict domestic sourcing requirements could hinder cost-effective project completion.

NECA is additionally seeking better cross-agency coordination, collaboration between industry and government, and for OMB to propose best practices to assure compliance and certify project specifications to meet requirements that 55 percent of manufactured products are produced in the United States.

II. Request for Comments Regarding Proposed 2 CFR Part 184 Amendments

OMB requests public comment on the proposed guidance. Public comments are particularly invited on: (1) Cost of components. In determining the ''cost of components'' for manufactured

products for purposes of this guidance, should OMB adopt a definition based on the definition provided in the FAR at 48 CFR 25.003? We note that under 48 CFR 25.003, Cost of components means—

1. *For components purchased by the contractor, the acquisition cost, including transportation costs to the place of incorporation into the end product or construction material (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); or*
2. *For components manufactured by the contractor, all costs associated with the manufacture of the component, including transportation costs as described in item 1., plus allocable overhead costs, but excluding profit. Cost of components does not include any costs associated with the manufacture of the end product.*
    - *The definition for ''cost of components'' at 48 CFR 25.003 refers to components ''purchased by the contractor'' and ''components manufactured by the contractor.'' In the context of Federal financial assistance for an infrastructure project, is the ''contractor'' the appropriate subject for OMB to use in the standard proposed in this guidance? Should OMB delete ''by the contractor'' when used in the standard in this guidance? Should OMB insert an alternate subject in the standard? For example, the ''manufacturer'' or some other entity?*

NECA's Comment: If the OMB's definition of "contractor" covers capital improvement projects that might be completed by Department staff, then the current language would suffice.
Otherwise, a revision to recognize that capital improvement projects are not completed exclusively by contractors (outside parties) is recommended.

2. ○ The definition for ''cost of components'' at 48 CFR 25.003 uses certain terms defined in the FAR but not in this proposed guidance including ''end product'' and ''component.'' ''End product'' is defined in the FAR to mean ''those articles, materials, and supplies to be acquired for public use.'' 48 CFR 25.003. ''Component'' is defined in the FAR to mean ''an article, material, or supply incorporated directly into an end product or construction material.'' Id. In the context of manufactured products, should OMB use the FAR definitions for ''end product'' and ''component''? If OMB uses the FAR definitions for these terms, should it make any conforming changes for this guidance or changes to provide additional clarity?

NECA's Comment: It is recommended that OMB adopts the FAR definitions to prevent the creation of several definitions. Additionally, it is important to incorporate these FAR definitions in the proposed guidance to ensure that the guidance is comprehensive and self-contained. Failing to provide complete guidance and requiring end users to refer to multiple documents may result in higher compliance costs and a greater likelihood of misinterpretation.

(3) Proposed definition of construction materials. Is additional guidance needed on the proposed definition of construction materials? In this proposed guidance, OMB only intends to classify materials that consist of only one or more of the construction materials listed in § 184.3(c)(1) as construction materials. However, OMB also seeks to avoid disqualifying

construction materials with only de minimis additions of non-construction materials. For example, if de minimis additions of non-construction materials do not add significant value to, or substantially transform, the otherwise qualifying construction material, they should not change the categorization of the material under this guidance.

NECA's Comment: It is essential that the proposed guidance provides a clear definition of what is considered "de minimis" to avoid any ambiguity. This does not imply that the OMB's language should be excessively prescriptive. Instead, the language used should be transparent and straightforward for the reader to understand. One way to achieve this is by incorporating a de minimis rule that aligns with the established best practices in the construction industry. This approach would enhance the usefulness of the proposed guidance while ensuring clarity for end-users.

(7) Fiber optic cables and optical fibers. Congress identified the elements of a completed fiber optic cable as construction materials for which all manufacturing processes must occur in the United States. The definition of ''construction materials'' in § 184.3 of this proposed guidance includes ''polymers used in fiber optic cables'' as an example of ''plastic and polymer based products.'' This is based on the congressional findings on ''common construction materials'' in section 70911(5) of the Act. OMB also proposes in this guidance that the final fiber optic cable and optical fibers be treated as construction materials. Sections 184.3 and 184.6 of the proposed guidance include ''fiber optic cable'' and ''optical fibers'' as two stand-alone categories of ''construction materials.'' Is there any reason the standards in § 184.6 of this proposed guidance should be applied differently for optical fibers that include both plastic and polymer-based components and glass components? Is further guidance needed on the meaning of the terms ''fiber optic cable'' and ''optical fibers''?

NECA's Comment: No, to minimize potential confusion and compliance costs, it may be more appropriate to establish a consistent standard across both polymer-based and glass components. This approach would ensure that all types of "fiber optic cabling" are subject to a single rule, which would simplify compliance and eliminate the need to differentiate between various cable types. This would be especially useful as technology continues to evolve and blur the lines between different cable types. Therefore, additional guidance may not be necessary, and the focus should be on creating a uniform standard for all fiber optic cabling.

III. Additional Requests

a. Robust Engagement and Coordination

Proper implementation and scaling should be factored into OMB's decision making of how to effectively implement BABA. The country is currently undertaking a massive infrastructure and domestic manufacturing overhaul that has not be needed or invested in for decades. As a result, the domestic capabilities have not yet been completed to simply meet the demands that are needed. That is not to say that over a period of time it should be, but scaling up different products will allow projects to be completed in a timely manner and build out more materials.

A crucial aspect that needs improvement is the coordination among federal agencies and OMB regarding market research on product availability and the efficient management of associated waivers across the federal government. This coordination is crucial, given the current workforce shortages in the industry and staffing limitations in public sector clients. However, a threshold problem impacts most of the equipment, manufactured products, and materials necessary for constructing facilities financed under IIJA. It is crucial to acknowledge the reality that many crucial components required for these projects are either not manufactured in the United States or are not produced at a scale to meet domestic demands. As a result, these projects will necessitate waivers. The waiver request processes, managed by OMB, must not impede project delivery efficiencies across the federal and state government value chain, including design engineers, materials and equipment suppliers, and construction contractors. OMB needs to carefully target waivers on a product basis and project-specific based on market research provided the U.S manufacturing industry then project delays will ensure creating large bottlenecks. Thus, the result will have massive project costs and not deliver timely projects to the communities.

Additionally, Section 70914 of the IIJA, as per the memorandum issued by OMB on April 18, 2022, requires the head of the awarding federal agency to publish a draft determination on the potential waiver and provide a 15-day public comment period before issuing a waiver. Once the public review period ends, the federal agency must submit the draft waiver determination to the OMB Made in America Office (MIAO) for review, which then notifies the agency of its decision.

However, this multi-step approval process, involving the award officer, head of federal agency, public review, and MIAO, is time-consuming for all parties involved, especially for waiver applications related to nonavailability. The duplication of effort by multiple applicants, federal awarding entities, and MIAO seems unnecessary.

As federal agencies implement BABA waiver guidance, there are opportunities to avoid duplicating efforts for all parties involved and reduce the burdens on both government and applicants by allowing approved product waivers by one agency to be relied upon by other agencies.

b. Determination of 55 Percent Threshold

The cost requirement of components of manufactured products that are produced in the U.S be greater than 55 percent of the total cost of all components of the manufactured product raises numerous logistical calculation questions concerning how to properly evaluate those costs. In electrical construction an electrical panel consists of various of parts such as fuse blocks, motor starts, temp controllers, fuel strainer, thermostat, shat bit generator, and more. Trying to attempt to determine which parts adhere and do not adhere to BABA requirements would create confusion and prove to be extremely difficult. OMB should be cognizant of this and should first develop sufficient guidance.

c. Phased in Implementation Plan

There are several steps that OMB should take to ensure effective implementation of the Buy American, Build American Act (BABAA):

1. OMB should provide sufficient time for the supply chain to adjust to the final rules to minimize disruptions in the supply chain.
2. OMB should provide adequate time for public owners to educate their enforcement staff and update their existing policies to comply with BABAA requirements.
3. OMB should create a clear exemption to all raw material sourcing requirements, similar to the exemption for iron ore in iron and steel products.
4. OMB should provide enough time for project contracts to adjust to the new rules so that projects that already have BABAA-related language do not impose expanded requirements in the middle of construction due to new rules released by OMB.
5. OMB should establish a transparent and effective waiver process to address real-world supply chain limitations and hard deadlines for waiver consideration. This process should be clear, accessible, and efficient to ensure that BABAA requirements do not hinder project delivery.

OMB should consider implementing the Buy America requirements for specific construction materials gradually over a transitional period. Congress, in addition to IIJA passed the CHIPs and Science Act and Inflation Reduction Act which both included funding to assist in the domestic manufacturing capabilities of the U.S. By allowing these programs to ramp up manufacturing this will bring online new domestic manufacturing facilities that will help in the availability of a large array of products

This approach would allow domestic manufacturing capacity to catch up with the demands of the new requirements. OMB should prioritize the transition of materials for which sufficient domestic manufacturing capacity already exists over those that do not. Alternatively, OMB could provide sufficient notice to allow time for a ramp-up in capacity for materials that do not currently have sufficient domestic manufacturing capacity. This phased approach would minimize disruptions to the construction industry and reduce the risk of supply chain disruptions while promoting domestic manufacturing capacity.

In multiple National Defense Authorization Acts (NDAAs), Congress has expressly looked at supply chains of key industries such as PPE and pharmaceuticals. Section 860 directs DoD to undertake a series of actions related specifically to pharmaceutical supply chains. In particular, DoD is instructed to identify information gaps and risks in the supply chain management of scarce pharmaceuticals and to develop and issue implementing guidance to mitigate reliance on foreign supply sources. Section 857 requires contractors that provide to DoD a system with a permanent magnet that contains rare earth elements or "strategic and critical materials" to disclose the country or countries where those components were mined and where other relevant processes occurred. Of note, contractors are required to undertake a commercially reasonable inquiry before making this

disclosure. In the event the contractor cannot make the required disclosure, section 857 directs DoD to *require* that the contractor establish and implement a supply chain tracking system in order to be able to make the disclosure. Section 857 also provides DoD the authority to waive these requirements if the continued procurement of the system is necessary to meet the demands of a national emergency or if a contractor cannot currently make the required disclosure but is making significant efforts to comply. The OMB should take into consideration of actions the DoD is doing on these supply chains and implement themselves before imposing BABA requirements.

IV. Conclusion

NECA looks forward to working with OMB and the respective agencies on best practices to implement BABA. Establishing a reasonably expeditious process that results in the issuance of waivers of general applicability would be in the public interest and the interests of project developers, product manufacturers, and financial institutions. This process would help minimize disruptions in the supply chain and reduce the time and costs associated with obtaining individual waivers for each project.

To reduce uncertainties, there should be a clear description and consensus on best practices for calculating and certifying compliance with the 55 percent requirement of manufactured products produced in the United States. This would provide clarity and transparency for project developers and manufacturers, reducing the risk of errors or misinterpretations that could result in delays or penalties.

Better agency coordination and collaboration with the industry could help to address BABA implementation challenges. This collaboration would facilitate the exchange of information and best practices between agencies and industry, enabling more effective implementation of the requirements.

Lasty, by following DoD implementation of supply chains would help OMB make accurate decisions of what manufacturing capabilities and how to best issue waives that are indicative to the domestic market.

Sincerely,

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