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March 13, 2023

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

RE: Docket No. OMB-2023-0004 - Proposed Rule: Guidance for Grants and Agreements

Dear Ms. Rutberg:

The 33 national associations and construction trade unions of the Transportation Construction Coalition (TCC) appreciate the opportunity to provide input on implementation of the Build America, Buy America Act (BABAA) provisions of the Infrastructure Investment and Jobs Act (IIJA). We fully support the twin objectives of maximizing the benefits from the IIJA's historic investments, while growing domestic manufacturing, which is BABAA's particular focus. To that end, members of our coalition who use temporary products and aggregate materials on infrastructure projects have reviewed the draft guidance published by the Office of Management and Budget (OMB) and identified two areas in which we request clarification, so as not to diverge from Congress' intentions in enacting BABAA.

#### **I. OMB Should Reiterate BABAA Does Not Apply to Temporary Products**

In a previous memo (*See* Section VI of the [OMB Memorandum for Heads of Executive Departments and Agencies](#) (M-22-11), published on April 18, 2022), OMB reaffirmed that Buy America preference applies to articles, materials and supplies that are consumed in, incorporated into, or affixed to an infrastructure project, a longstanding policy that Congress reiterated in IIJA and every previous administration has followed. The draft is silent on the matter. Consequently, we urge OMB to restate the conclusion in the April 18, 2022 memo, which adhered to current law and affirmed that Buy America does not extend to temporary products used on construction projects.

#### **II. OMB Should Exclude Aggregates and Related Materials from Buy America Preferences, Consistent with Congress' Clear Intent**

In Section 70917(c)(1) of the IIJA, Congress established an important limitation to the term "construction materials" as used in BABAA. Congress explicitly exempted "cement and cementitious materials, aggregates such as stone, sand, or gravel, or aggregate binding agents or additives" from the "construction materials" covered under BABAA. This limitation makes clear no domestic content procurement preference under BABAA applies to aggregates and these related materials.

Section 70915(b)(1) of the IIJA requires OMB to "issue standards that define the term 'all manufacturing processes' in the case of construction materials" to which BABAA applies a domestic content procurement preference. These standards will help determine whether particular products comply with BABAA requirements. In Section 70917(c)(2), Congress reiterated the exemption for the above-listed materials in this additional context. The subsection states that OMB's standards for "all manufacturing processes" "shall not include

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202/289-4434 (ARTBA)  
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cement and cementitious materials, aggregates such as stone, sand, or gravel, or aggregate binding agents or additives as inputs of the construction material.”

The draft OMB guidance inquires as to whether a combination of these exempt materials could somehow form an end product subject to Buy America coverage. First, BABAA does not provide authority for the listed materials being considered manufactured products because only the combination of construction materials not included in the limitation produces a “manufactured product” under OMB’s proposed guidance.

Second, the combination of the listed items as concrete or asphalt mix are not a construction material for which BABAA establishes a domestic content procurement preference. Congress understood that the materials they were excluding from the term “construction materials” are, when combined, concrete and asphalt mix construction materials. Congress included Section 70917(c)(2) to ensure that the combination of construction materials in Section 70917(c)(1) into concrete and asphalt mix construction materials did not create a domestic content procurement preference for concrete or asphalt mixes. The Congressional intent and purpose of 70917(c)(2) cannot be interpreted any other way, because the consequence of 70917(c)(2) is singularly focused on their use as inputs that when combined together produce the construction material concrete or asphalt mix. As inputs, their obvious use together to form concrete or asphalt mix is indisputable. On this point it is pertinent that Congress did not add or subtract any of the items in 70917(c)(1) from 70917(c)(2). In repeating the identical list from 70917(c)(1) in 70917(c)(2), Congress clearly intended not to establish a domestic content procurement preference for their combination as concrete or asphalt mix.

Finally, no one disputes that aggregates and these related items are construction materials in the generic sense. However, as cited above, Congress enacted the language in these portions of the IIJA to explicitly exclude them from the “construction materials” for which BABAA establishes a domestic content procurement preference.

Thank you for considering the views of this coalition, and for your continued support of the IIJA’s implementation. Our associations and trade unions worked very hard to assist Congress with the development and passage of this legislation. Now we are working just as diligently to rebuild the nation’s infrastructure and ensure the success of this historic legislation.

Sincerely,

The Transportation Construction Coalition