



Clean Water
State Revolving Fund



United States
Environmental Protection
Agency

GUIDANCE DEEP DIVE:

2 CFR 184

M-24-02

M-24-11

Office of Water

AGENDA

- Codified guidance at 2 CFR 184 and the associated preamble
 - Covered Products
 - Iron and Steel
 - Manufactured Products
 - Non-Ferrous Construction Materials
 - 70917(c) Materials
- OMB Policy and Implementation Memos
 - M-24-02
 - M-24-11

Disclaimer

This presentation cannot substitute for official guidance, nor can it change or contradict existing guidance or statute. The purpose of this session is to provide an overview of the domestic preference requirements, including American Iron and Steel and the Build America, Buy America Act, as currently understood by the Environmental Protection Agency. We hope to provide you with a better understanding of the requirements, with the caveat that we are human and any potential incorrect statements or errors we may make during this presentation do not change official statute or guidance.

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OMB – FINAL GUIDANCE – 2 CFR 184

- Published Aug 23, 2023: [federalregister.gov/d/2023-17724](https://www.federalregister.gov/d/2023-17724)
- Effective for BABA projects October 23, 2023
- OMB requested comments addressing 11 topics
 - Preamble includes OMB response to comments received (~2000 comments)
 - Guidance text = last 10 pages
- Final guidance for manufactured products cost test, product categorization, non-ferrous construction materials

2 CFR 184 – FINAL GUIDANCE HIGHLIGHTS

- § [184.3](#) - definitions of key terms, including:
 - Manufactured Product
 - Component
 - Manufacturer
 - Produced in the United States
- Discusses determining the cost of components for manufactured products
 - Definition of “cost of components” mirrors Federal Acquisition Regulation (FAR) with some key changes/differences
- Additional construction materials added

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BABA: IRON AND STEEL

- BABA Iron and Steel \Leftrightarrow AIS products
- Includes items that are predominantly iron or steel, or a combination of the two materials, unless another standard applies under law or regulation
- All manufacturing processes, from the initial melting stage **through the application of coatings**, must occur in the U.S.



BABA: IRON AND STEEL REVISITING REINFORCED PRECAST CONCRETE

- The preamble of 2 CFR 184 states precast concrete is a manufactured product.
- Savings provision applies. **EPA will continue to categorize reinforced precast concrete as an iron and steel product under BABA.**
 - Reinforcing bar and wire must be domestic
 - Casting of concrete must occur domestically



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BABA: MANUFACTURED PRODUCTS

- Per [184.3](#), Manufactured Product means - articles, materials, or supplies that have been:
 - (i) Processed into a specific form and shape; or
 - (ii) Combined with other articles, materials, or supplies to create a product with different properties than the individual articles, materials, or supplies.
- Manufacturer means – the entity that performs the final manufacturing process that produces a manufactured product.

BABA MANUFACTURED PRODUCTS; 2 CFR 184 GUIDANCE HIGHLIGHTS

- Component means – an article, material, or supply, whether manufactured or unmanufactured, incorporated directly into: (i) a manufactured product; or, where applicable, (ii) an iron or steel product.
- The term “subcomponent” is not defined
 - Not relevant to cost test for Manufactured Products
 - Components do not have to meet a "component" cost test

BABA: MANUFACTURED PRODUCTS; HOW TO COMPLY

- Final manufacturing must occur in the United States
- Cost of components that are mined, produced, or manufactured in the U.S. must be **greater than 55% of the total cost of all components** of the manufactured product
- Manufacturers are responsible for assessing and documenting BABA compliance for their product(s)



BABA MANUFACTURED PRODUCTS; 2 CFR 184 GUIDANCE HIGHLIGHTS

§[184.5](#) Determining the cost of components for manufactured products

(a) For components purchased by the manufacturer, the acquisition cost, including **transportation costs** to the place of incorporation into the manufactured 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); or

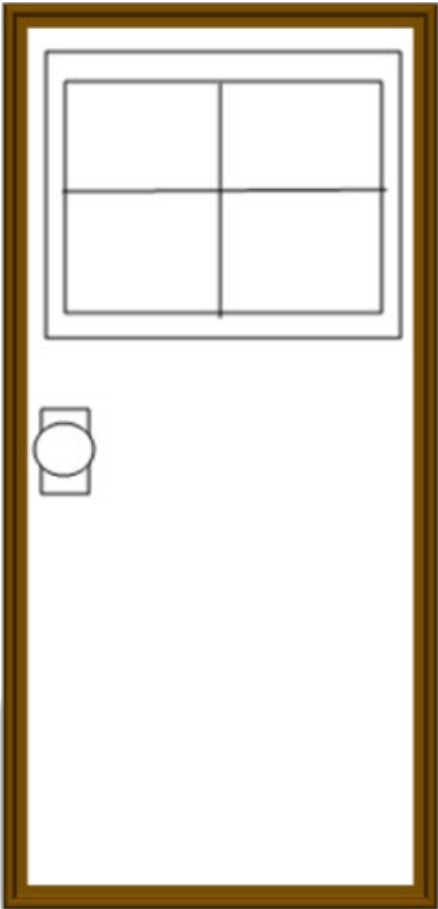
(b) For components manufactured by the manufacturer, all costs associated with the manufacture of the component, including transportation costs as described in paragraph (a) of this section, **plus allocable overhead costs, but excluding profit.**
Cost of components does not include any costs associated with the manufacture of the manufactured product.

BABA MANUFACTURED PRODUCTS; COMPONENT COST TEST

DISCLAIMER

The following four slides provide a representative example of EPA's understanding of the cost of component test for manufactured products found in 2 CFR 184 and further described in M-24-02. EPA developed the slides based on the plain language of the guidance. Nonetheless, the information provided does not represent a real product and cannot contradict nor supersede any official guidance and are to be used solely as a resource for understanding the final rule 2 CFR 184.

BABA MANUFACTURED PRODUCTS; COMPONENT COST TEST EXAMPLE

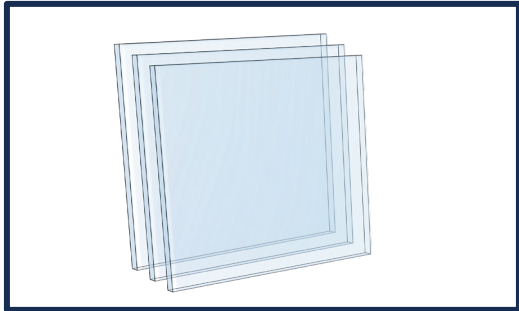


Total Cost: \$100

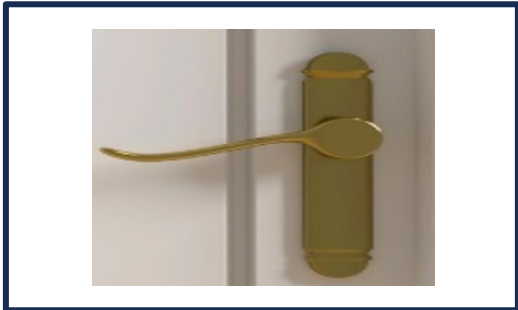
Components



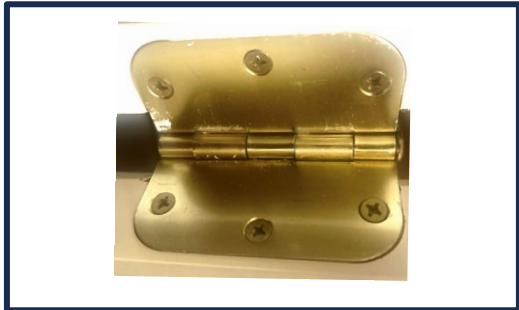
Manufacturer A
Frame



Manufacturer B
Glass Pane



Manufacturer C
Handle



Manufacturer D
Hinge(s)

BABA MANUFACTURED PRODUCTS; COMPONENT COST TEST EXAMPLE

Manufacturer A

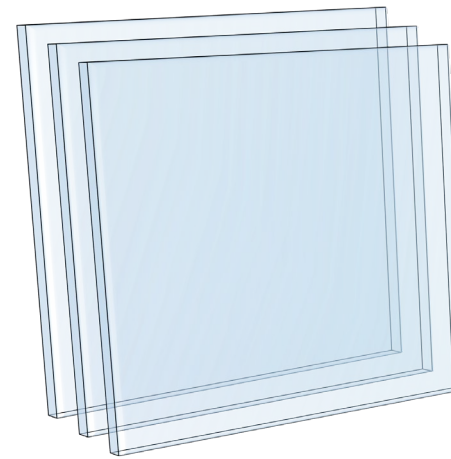
Frame



- Manufactured Domestically
- Manufacturer A manufactures this component and is the final manufacturer
- Cost associated with the manufacturing of the component: \$50

Manufacturer B

Glass Pane



- Manufactured Non-Domestically
- Cost paid by Manufacturer A to acquire the component: \$25

BABA MANUFACTURED PRODUCTS; COMPONENT COST TEST EXAMPLE

Manufacturer C

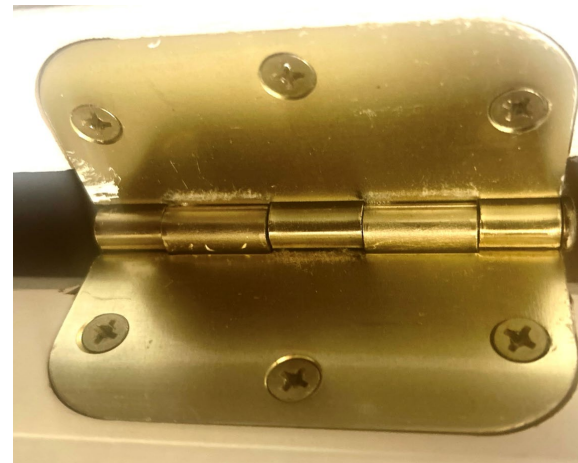
Handle



- Manufactured domestically
- Manufacturing processes performed by domestic manufacturer
- Cost paid by Manufacturer A to acquire the component materials: \$15

Manufacturer D

Hinge(s)



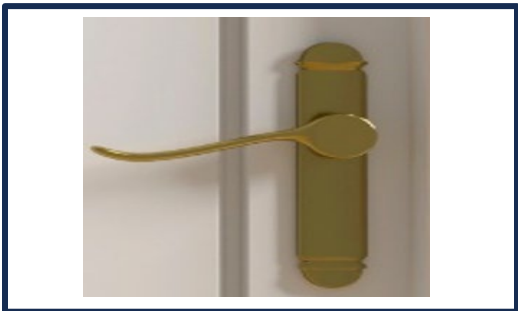
- Manufactured non-domestically
- Cost paid by Manufacturer A to acquire the component: \$10

BABA MANUFACTURED PRODUCTS; COMPONENT COST TEST EXAMPLE

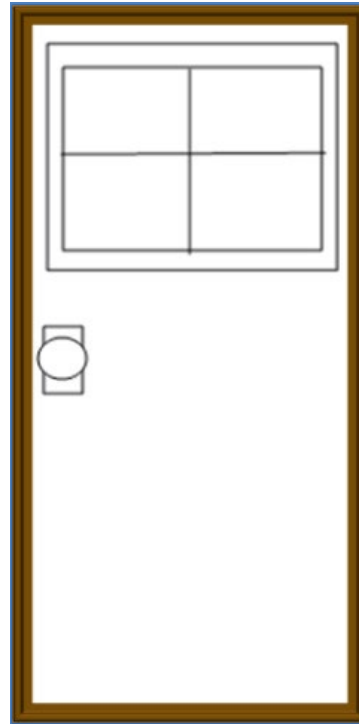
Domestic Components



Manufacturer A – Final
Manufacturer
Frame
\$50 = 50%

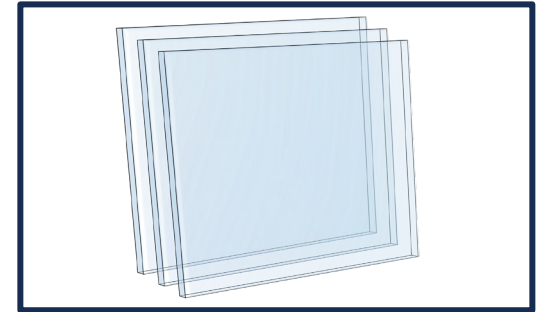


Manufacturer C
Handle
\$15 = 15%

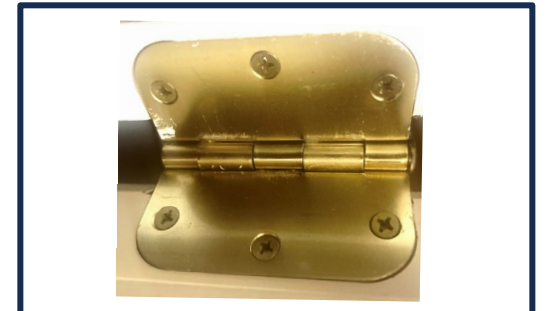


Domestic Content: 65%
Non-Domestic Content: 35%
Door is >55% Domestic - BABA Compliant

Non-Domestic Components



Manufacturer B
Glass Pane
\$25 = 25%



Manufacturer D
Hinge(s)
\$10 = 10%

BABA MANUFACTURED PRODUCTS AND KITS; 2 CFR 184 – PREAMBLE HIGHLIGHTS

- A product is a “**kit**” and can be evaluated as a single and distinct manufactured product when it is acquired from a single manufacturer and is **assembled on the work site**. Kits are limited to **discrete products** that **perform a unified function**. Kits are distinguished from more wide-ranging systems.
- See 88 FR [57776](#) in the Federal Register

BABA MANUFACTURED PRODUCTS AND KITS; 2 CFR 184 – PREAMBLE HIGHLIGHTS

- From [88 FR 57776](#): “...in certain cases a manufactured product purchased from a single manufacturer...as a ‘kit’ may be classified as a manufactured product even if its components are brought to the site separately or at different times.”
- “OMB does not define the term kit in the text of the revised guidance but leaves Federal agencies with reasonable discretion on how this concept should be applied in practice...”

BABA MANUFACTURED PRODUCTS AND KITS; 2 CFR 184 – PREAMBLE HIGHLIGHTS

- 88 FR 57776, cont.: “...Federal agencies should generally interpret the term kit as limited to discrete products, machines, or devices performing a unified function.”
- “A more wide-ranging system of interconnected products, machines, or devices (such as a heating, ventilation, and air conditioning system for an entire building) should not be considered a kit.”
- “OMB also instructs agencies that a kit should not include an entire infrastructure project.”

BABA MANUFACTURED PRODUCTS AND KITS; ADDITIONAL CONSIDERATIONS FOR EPA PROJECTS

A product that is acquired from a manufacturer as a kit is considered “manufactured in the United States” if final assembly or installation of the product occurs at the project. The manufacturer of the equipment must be able to demonstrate that:

1. Delivering the equipment as a kit (i.e., in separate components for assembly at the project) is standard business practice in the industry versus delivering the product as a single, complete unit;
2. The manufacturer produces components of the kit and / or is meaningfully involved in the manufacturing process of the components.

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BABA: CONSTRUCTION MATERIALS (NON-FERROUS)

1. Non-ferrous metals
2. Plastic and polymer-based products (including PVC, composite building materials, and polymers)
3. Glass
4. Fiber optic cable
5. Optical fiber
6. Lumber
7. Drywall
8. Engineered wood

CONSTRUCTION MATERIALS

Construction material	“Produced in the U.S.” means all manufacturing processes occurred in the U.S.
Non-ferrous metals	From initial smelting or melting through final shaping, coating, and assembly
Plastic and polymer-based products	From initial combination of constituent plastic or polymer-based inputs, or, where applicable, constituent composite materials, until the item is in its final form
Glass	From initial batching and melting of raw materials through annealing, cooling, and cutting
Fiber optic cable	From the initial ribboning (if applicable), through buffering, fiber stranding and jacketing, occurred in the United States.
Optical fiber	From the initial preform fabrication stage through the completion of the draw
Lumber	From initial debarking through treatment and planing
Drywall	From initial blending of mined or synthetic gypsum plaster and additives through cutting and drying of sandwiched panels
Engineered wood	From the initial combination of constituent materials until the wood product is in its final form

BABA CONSTRUCTION MATERIALS; PREAMBLE HIGHLIGHTS

- **Construction materials are intended to consist of only one of the listed materials.** If a listed construction material is combined with another, or with a material that is not listed as a construction material, it should be classified as a manufactured product.
 - Exceptions for minor additions.
- See 88 FR 57759 in the Federal Register

BABA CONSTRUCTION MATERIALS; PREAMBLE HIGHLIGHTS

- Coatings applied to a construction material as part of the manufacturing process are not required to be domestic if the Agency classifies the coating as a minor addition.
- See 88 FR 57760 in the Federal Register

BABA MANUFACTURED PRODUCTS; 2 CFR 184 – PREAMBLE HIGHLIGHTS

- Not every combination of materials = a manufactured product.
 - Example: fill dirt
- See [57769](#) in the Federal Register



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BABA: 70917(c) MATERIALS



70917(c) materials are specifically excluded from the Construction Materials Category

- Items made primarily of iron or steel
- Manufactured products
- Cement and cementitious materials
- Aggregates such as stone, sand, or gravel
- Aggregate binding agents / additives
- Flora (plantings, landscaping)
- Non-permanent / temporary items

BABA 70917(c) MATERIALS; PREAMBLE HIGHLIGHTS

- 70917(c) materials are excluded from the construction materials category only.
- 70917(c) materials should not be considered as manufactured products on their own, but if they are combined with other 70917(c) materials or other articles, materials, or supplies, the cost of components test applies.
- See 88 FR [57770](#)-57773 in the Federal Register (link directs to the beginning of the relevant section)



BABA 70917(c) MATERIALS; PREAMBLE HIGHLIGHTS



- Products that are explicitly excluded from covered construction materials, including **paint, coatings, and brick** should be treated as **manufactured products**.
- See 88 FR [57766](#) in the Federal Register

2 CFR 184 – OTHER FINAL GUIDANCE HIGHLIGHTS

- ✓ All federal financial assistance for infrastructure must include BABA in the terms and conditions.
- ✓ BABA must also be included in all subawards, contracts, and purchase orders for the work performed, or products supplied under the award.
- ✓ Terms and conditions “flow down” to subawards and subrecipients.

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OMB GUIDANCE: M-24-02



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

THE DIRECTOR

October 25, 2023

M-24-02

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: Shalanda D. Young *Shalanda D. Young*
SUBJECT: Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure

This memorandum provides supplemental implementation guidance to Federal agencies on: (1) the application of a Buy America preference¹ to Federal financial assistance programs for infrastructure; and (2) the process for waiving such a Buy America preference — including the circumstances under which waivers may be justified as consistent with applicable law and policy.² This memorandum rescinds and replaces Office of Management and Budget (OMB) Memorandum M-22-11. In addition, this memorandum removes direct conflicts between the earlier Memorandum M-22-11 and subsequent guidance issued by OMB in part 184 of Title 2 of the Code of Federal Regulations (“CFR”).³ This memorandum also provides updated guidance on a limited number of topics — including the waiver process — which modifies earlier guidance provided by OMB in Memorandum M-22-11. To the extent that any guidance provided in this memorandum conflicts with guidance in 2 CFR part 184, the guidance in part 184 prevails.

On November 15, 2021, President Biden signed into law the Infrastructure Investment and Jobs Act (“IIJA”), Pub. L. No. 117-58, which includes the Build America, Buy America Act (“BABA”). Pub. L. No. 117-58, §§ 70901-27. BABA strengthens Buy America preferences associated with Federal financial assistance for infrastructure and will bolster America’s industrial base, protect national security, and support high-paying jobs. BABA requires that the head of each covered Federal agency⁴ must ensure that none of the funds made available for a Federal financial assistance program for infrastructure are 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.⁵

BABA affirms, consistent with Executive Order 14005, *Ensuring the Future Is Made in All of America by All of America’s Workers* (“the Executive Order”), this Administration’s priority to

¹ 2 CFR 184.3.

² 2 CFR 184.7; Executive Order 14005, “Ensuring the Future Is Made in All of America by All of America’s Workers,” 86 FR 7475 (Jan. 28, 2021).

³ 88 FR 57750 (Aug. 23, 2023).

⁴ For the purposes of this guidance, the terms “Federal agency” and “agency” mean any authority of the United States that is an “agency” (as defined in section 3502 of title 44, United States Code), other than an independent regulatory agency (as defined in that section). IIJA, § 70912(3).

⁵ IIJA, § 70914(a).

- Released October 25, 2023
- “Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure”
- Supersedes their initial implementation M-22-11
- <https://www.whitehouse.gov/wp-content/uploads/2023/10/M-24-02-Buy-America-Implementation-Guidance-Update.pdf>

COGNIZANT AGENCY POLICY IN M-24-02

- Federal agency contributing the greatest amount of Federal funds typically takes on role as Cognizant Agency
- Cognizant Agency coordinates with the co-funding agency(ies)
- M-24-02 states that one agency cannot independently issue a waiver that applies to other agencies, but other agencies may rely on the work performed by the Cognizant Agency. Agencies may also propose a joint waiver.
- Other responsibilities include publicizing the proposed joint waiver and submitting the proposed joint waiver for review to MIAO.

PROHIBITION ON “RETROACTIVE WAIVERS” IN M-24-02

- Page 10 of M-24-02 includes new language regarding the timing of waivers
- MIAO states, “the waiver cannot apply to expenditures already incurred under the Federal award for items subject to a Buy America preference before the effective date of the waiver.”

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M-24-11

- Released April 4, 2024
- “Reducing Burden in the Administration of Federal Financial Assistance”
- Includes new recommendations for domestic supply chain sourcing plans with Notice of Funding Opportunities (NOFOs)
- <https://www.whitehouse.gov/wp-content/uploads/2024/04/M-24-11-Revisions-to-2-CFR.pdf>



Questions and Discussion