

Classification of Aggregate Binding Agents or Additives Under the Build America, Buy America Act

December 2022

Background

On November 15, 2021, President Biden signed into law the Infrastructure Investment and Jobs Act (IIJA), Pub. Law No. 117-58, which includes Build America, Buy America Act (BABAA), §§ 70901-52. The BABAA extends the domestic content procurement preferences to construction materials but explicitly limits that expansion.

Classification of Construction Materials

The scope of what constitutes “construction materials” was limited in the IIJA by Section 70917(c)(1). The limitation prohibits the term “construction materials” as used in BABAA from including “cement and cementitious materials, aggregates such as stone, sand, or gravel, or *aggregate binding agents or additives* (emphasis added).” This limitation makes clear that the expanded domestic content procurement preference for construction materials established under the BABAA does not extend to the enumerated materials. The Act does not explicitly define the enumerated terms; however, the use and purpose of these materials must define the scope of the limitation set forth in the Act. Where an agent or additive is used to bind aggregates for the purpose of building, preserving or maintaining roads, “cement and cementitious materials, aggregates such as stone, sand, or gravel, or aggregate binding agents or additives,” would not be considered “construction materials” for purposes of the BABAA expansion.

Classification during the Manufacturing Process

Section 70917(c)(2) prohibits the same enumerated construction materials from being included as “inputs” in “all manufacturing processes” that produce “construction materials.” The Office of Management and Budget (OMB) is required to “issue standards that define the term “all manufacturing processes” for construction materials to which BABAA applies a domestic content procurement preference. The restriction in Section 70917(c)(2) precluding “cement and cementitious materials, aggregates such as stone, sand, or gravel, or aggregate binding agents or additives” from being inputs into the “all manufacturing processes” standards developed by OMB prevents new domestic content procurement preferences for combinations of the listed items (“cement and cementitious materials, aggregates such as stone, sand, or gravel, or aggregate binding agents or additives”). The BABAA does not provide authority for establishing a combined material preference using these materials because the inputs are prohibited from being included in the required OMB analysis by Section 70917(c)(2).

Limitation Applies to Aggregate Binding Agents or Additives

Section 70917 (c)(1) & (2) of the Infrastructure and Jobs Act (IIJA) were clearly drafted to limit the construction materials and manufacturing process expansion of the domestic content procurement preference from including materials such as aggregate binding

agents and additives when these materials are used to bind aggregates as construction materials or inputs to the manufacturing process. When drafting the law, Congress understood how these materials work individually and when combined.

Pavement Preservation

Pavement preservation includes a wide range of pavement maintenance technologies that are planned at regular intervals to keep, or restore, the condition of a pavement and slow deterioration by binding aggregates. Aggregates on roads which remain bound are most likely to maintain their installation condition and continually exhibit a good ride quality and safety for the driving public. Typical pavement preservation treatments include: crack seals, fog seals, slurry seals, micro surfacing, and cold and hot in place recycling. These treatments act as aggregate binding agents and additives and as such do not fall within the expansion of the domestic procurement preference to certain construction materials and the manufacturing process in the BABAA.

Summary

Section 70917(c)(1-2) of the BABAA exempts, aggregate binding agents and additives when used as construction materials and inputs into the manufacturing process, from the expanded construction and manufacturing process provisions of BABAA.

Reference

Section 70917. APPLICATION

(c) LIMITATION WITH RESPECT TO AGGREGATES. – In this part-

(1) the term “construction materials” shall not include cement and cementitious materials, aggregates such as stone, sand, or gravel, or aggregate binding agents or additives; and

(2) the standards developed under section 701915(b)(1) 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 material.