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March 9, 2023

DeDe Ruthberg
Made in America Office
Office of Management and Budget
725 17th Street NW
Washington, D.C. 20503

RE: Comments on Proposed Amendments to 2 CFR 184 and 200 to implement the Build America, Buy America Act provisions of the Infrastructure Investment Act

Dear Ms. Ruthberg:

The California Asphalt Pavement Association, founded in 1953, is a non-profit trade association that represents 200 companies, including asphalt producers, refiners, paving contractors, suppliers, engineering firms, equipment manufacturers and other firms that make up the asphalt pavement industry in California. We write to share our concerns with regard to proposed amendments 2 CFR 184 and 200 to implement the Build America, Buy America Act (BABAA). Specifically, we are concerned the proposed guidance does not adhere to the authorities contained in the BABAA for the reasons outlined below.

Section 70917(c)(1) established an important limitation to the term "construction materials" as that term is used in BABAA. The limitation prohibits the term "construction materials" used in BABAA from including "cement and cementitious materials, aggregates such as stone, sand, or gravel, or aggregate binding agents or additives." This limitation makes clear no "construction materials" domestic content procurement preference for these construction materials is established under BABAA because the definition of the term "construction materials" used to establish a domestic content procurement preference under BABAA excludes these construction materials.

Section 70917(c)(2) prohibits the same 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 does apply a domestic content procurement preference. Because Section 70917(c)(2) prohibits the definition of "all manufacturing processes" from including the listed items as inputs, 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.

Neither of these sections establishes that the listed items are not construction materials, just that they are excluded from the "construction materials" for which BABAA establishes a domestic content procurement preference. 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. Congress considered cement and cementitious materials, aggregates such as stone, sand, or gravel, and aggregate binders and additives to be construction materials for which they were not creating a domestic content procurement requirement because the limitation [IIJA, Section 70917(c)] was drafted to the term "construction materials" as that term is used under BABAA. The limitation to the definition excludes from the definition what would otherwise be included in the definition. If the items in the limitation were not construction materials, there is no purpose, reason, or cognizable consequence to affirmatively removing them from that term as it is used under BABAA. Further evidence of this intent is found in the limitation extending the exclusion to "all manufacturing processes" for "construction materials."

Congress understood that the construction 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' intent to not establish a domestic content procurement preference for their combination as concrete or asphalt mix is clear. This intent and purpose of 70917(c)(2) is clear as it produces this singular consequence.

For these reasons, the California Asphalt Pavement Association urges the OMB to make significant amendments to the proposed guidance to reflect the exclusion of cement and cementitious materials, aggregates such as stone, sand, or gravel, or aggregate binding agents or additives, or the combination of these products as concrete and asphalt mix from Buy America requirements.

Please feel free to contact me at (916) 791-5044 if you have any questions.

Sincerely,

RUSSELL W. SNYDER, CAE
Executive Director