

# Construction Contractors' Guide to Compliance with Buy American and Other Domestic Preference Requirements

Presented to:  
Washington Building Congress

By:  
Owen Walker  
Julia Kopcienski

# Trump's Administration Focus on Domestic Preferences

- Buy American – Hire American Platform
- April 2017, Executive Order 13788



# Presidential Executive Order

(a) Buy American Laws. In order to promote economic and national security and to help stimulate economic growth, create good jobs at decent wages, strengthen our middle class, and support the American manufacturing and defense industrial bases, ***it shall be the policy of the executive branch to maximize, consistent with law, through terms and conditions of Federal financial assistance awards and Federal procurements, the use of goods, products, and materials produced in the United States.***

Sec. 3. Immediate Enforcement and Assessment of Domestic Preferences According to Buy American Laws. (a) ***Every agency shall scrupulously monitor, enforce, and comply with Buy American Laws, to the extent they apply, and minimize the use of waivers, consistent with applicable law.***

Sec. 4. **Judicious Use of Waivers.** (a) To the extent permitted by law, public interest waivers from Buy American Laws should be construed to ensure the maximum utilization of goods, products, and materials produced in the United States.

# Statutory Domestic Preferences

- ◆ Department of Transportation Buy America Laws
  - Applicable statutes and regulations differ according to administering agency within DOT
- ◆ Buy American Act (41 U.S.C. 8301 *et seq.*; FAR 25.1 & 25.2)
- ◆ Trade Agreements Act (19 U.S.C. 2501; FAR 25.4)



# BUY AMERICA

# Buy America Overview

- ◆ Set of laws applicable to state and local transportation projects using federal funds in the form of Department of Transportation (DOT) grants
- ◆ Comparison to BAA:
  - Applies to state and local transportation projects *using* federal funds, not direct purchases by federal government
  - Different administering agencies have different applicable statutes and regulations
  - Creates domestic content requirements/restrictions, not preferences

# Agency-Specific Buy America Laws

- ◆ **Federal Transit Administration (FTA)**
  - 49 U.S.C. § 5323(j)
  - 49 C.F.R. Part 661 (Buy America Requirements)
- ◆ **Federal Highway Administration (FHWA)**
  - 23 U.S.C. § 313 – Buy America
  - 23 C.F.R. § 635.410
- ◆ **Federal Aviation Administration (FAA)**
  - 49 U.S.C. § 50101
- ◆ **Federal Railroad Administration (FRA)**
  - 49 U.S.C. Chapters 244, 246; § 24405
- ◆ **National Railroad Passenger Corporation (AMTRAK)**
  - 49 U.S.C. § 24305
- ◆ States can add heightened domestic preferences/requirements

# Buy America Requirements, Generally

- ◆ Buy America laws generally require the following to be domestic if used on DOT-funded transportation projects:
  - Iron and steel
  - Manufactured products or goods
- ◆ DOT “*shall not obligate*” funds unless these items are domestic, i.e. produced in the United States
- ◆ Some agencies require certification with bid or offer
- ◆ Many waivers, both nationwide and individual, may apply



# Spotlight: FTA Requirements

FTA implementing regulations require:

- ◆ (b) All ***steel and iron*** manufacturing processes must take place in the United States, except metallurgical processes involving refinement of steel additives.
- ◆ (d) For a ***manufactured product*** to be considered produced in the United States:
  - (1) All of the manufacturing processes for the product must take place in the United States; and
  - (2) All of the components of the product must be of U.S. origin. A component is considered of U.S. origin if it is manufactured in the United States, regardless of the origin of its subcomponents.

49 C.F.R. § 661.5

# Spotlight: FTA Requirements

## *Manufactured Goods*

- ◆ Domestic Manufactured Product:
  - (1) Manufacturing processes take place in United States, AND
  - (2) All components are of U.S. origin
    - U.S. origin = manufactured in the United States, regardless of origin of subcomponents

# Spotlight: FTA Requirements

## *Manufactured Goods: Definitions*

### ◆ **Manufactured product**

- An item produced as a result of the manufacturing process.

### ◆ **Manufacturing process**

- The application of processes to alter the form or function of materials or of elements of the product in a manner adding value and transforming those materials or elements so that they represent a new end product functionally different from that which would result from mere assembly of the elements or materials.

### ◆ **End product**

- Any vehicle, structure, product, article, material, supply, or system, which directly incorporates constituent components at the final assembly location, that is acquired for public use under a federally-funded third-party contract, and which is ready to provide its intended end function or use without any further manufacturing or assembly change(s).

### ◆ **Component**

- Any article, material, or supply, whether manufactured or unmanufactured, that is directly incorporated into the end product at the final assembly location.

# Spotlight: FTA Requirements

## *Manufactured Goods: Wilson Station Example*

- ◆ Domestic Manufactured Product:
  - (1) Manufacturing processes take place in United States, AND
  - (2) All components are of U.S. origin
    - U.S. origin = manufactured in the United States, regardless of origin of subcomponents



Source: <https://chicago.curbed.com/2017/10/23/16520086/uptown-transportation-wilson-cta>

# Spotlight: FTA Requirements

## *Steel and Iron*

- ◆ Domestic Steel and Iron:
  - Manufacturing processes take place in the United States
    - Except metallurgical processes involving refinement of steel additives
- ◆ Steel and iron = all construction materials primarily of steel or iron and used in infrastructure projects
  - Includes:
    - Structural steel or iron, steel or iron beam and columns, etc.
  - Does not include:
    - Component or subcomponent of other manufactured products

# Spotlight: FTA Requirements

## *Steel and Iron: Is it a Component of an End Product?*

- ◆ Steel and iron = all construction materials primarily of steel or iron and used in infrastructure projects
  - Includes:
    - Structural steel or iron, steel or iron beam and columns, etc.
  - Does not include:
    - Component or subcomponent of other manufactured products



Source: <https://www.forms-surfaces.com/cabforms-2000-n-elevator-interiors>

# Overview: Buy America Certifications

- ◆ Certification requirements differ by agency
  - Timing
  - Certification level (prime, subs, suppliers, manufacturers, etc.)
  - Format
  - Consequences

## ***Certificate of Compliance with Buy America Requirements***

The bidder or offeror hereby certifies that it will comply with the requirements of 49 U.S.C. 5323(j)(1), and the applicable regulations in 49 CFR part 661.

Date  
Signature  
Company  
Name  
Title

## ***Certificate of Non-Compliance with Buy America Requirements***

The bidder or offeror hereby certifies that it cannot comply with the requirements of 49 U.S.C. 5323(j), but it may qualify for an exception to the requirement pursuant to 49 U.S.C. 5323(j)(2), as amended, and the applicable regulations in 49 CFR 661.7.

Date  
Signature  
Company  
Name  
Title

FTA Certification Requirements: 49 CFR 661.6

# Overview: Buy America Waivers

- ◆ Typical Waiver Justifications:
  - Inconsistent with public interest
  - Insufficient quantity or quality
  - Use of domestic products would increase total overall cost by 25 percent
- ◆ Most waiver requests must be submitted at time of bid, and must be posted in Federal Register





# BUY AMERICAN

# Buy American Act (BAA)

- ◆ Appears to prohibit the acquisition of foreign goods by federal agencies:

Only unmanufactured articles, materials, and supplies that have been mined or produced in the United States, and only manufactured articles, materials, and supplies that have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured in the United States, shall be acquired for public use. 41 U.S.C. § 8302

- ◆ BAA actually creates price preference for domestic end products and construction material.
  - For Supplies – 6% markup for non-domestic end products offered by a large business
  - For Supplies – 12% markup for non-domestic end products offered by a small business
  - Construction Material – 6% for non-domestic construction materials offered by all businesses
  - DOD procurements – 50%

# BAA Price Preference

Example: Construction Contract for Manufacture and Installation of  
Precast Concrete Panels

Foreign bid of \$2,077,000 lowest offer. Lowest domestic offer is  
\$2,265,569.

$\$2,077,000 \times 6\% = \$124,620$  results in contract evaluation amount of  
\$2,201,620.

Matter of: Concrete Technology, 81-2 CPD P 347.

# BAA Terms

## ◆ **“Construction Materials”**

- “[A]n article, material, or supply brought to the construction site by a contractor or subcontractor for incorporation into . . . any public building or public work in the United States.”

## ◆ **“Component”**

- Any article, material, or supply incorporated directly into an end product or construction material.

## ◆ **“Manufacture”**

- Not defined in BAA or in the FAR.

# Under BAA—Domestic Construction Material

## ◆ **Domestic construction material** means—

- (1) An unmanufactured construction material mined or produced in the United States;
- (2) A construction material manufactured in the United States, if—
  - (i) The cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components; or
  - (ii) The construction material is a COTS item.

# Components

- ◆ **Cost of components** means—
- ◆ (1) For components ***purchased by the Contractor***, the ***acquisition cost***, including ***transportation costs*** to the place of ***incorporation into the construction material***, and any applicable duty; or
- ◆ (2) For components ***manufactured by the Contractor***, all ***costs associated with the manufacture*** of the component, including ***transportation costs*** as described in paragraph (1) of this definition, ***plus allocable overhead costs, but excluding profit***.

# Components

<u>Ingredient</u>	<u>Weight</u>	<u>Cost of Raw Material</u>	<u>Ship Unloading &amp; Handling Via Silo</u>	<u>Delivery to Batch Plant</u>	<u>Transit- Truck* Loading</u>	<u>Delivery to Site **</u>	<u>Total***</u>	
Cement	451 lbs.	\$5.82	\$ .16	\$ .72	\$ .09	\$ .40	\$ 7.19	\$6.79 w/o delivery
Coarse Aggregate	1820 lbs.	2.50	-	1.64	.36	1.61	6.11	
Fine Aggregate	1260 lbs.	.56	-	.60	.25	1.11	2.52	
WRDA (Admix)	29.3 oz.	.46	-	-	-	-	.46	
Darex	.12 oz.	.02	-	-	-	-	.02	
Water (Well)	267 lbs.	-	-	-	.05	.24	.29	\$6.68 w/o delivery
	<u>3800 lbs.</u>	<u>\$9.36</u>	<u>\$ .16</u>	<u>\$2.96</u>	<u>\$ .75</u>	<u>\$3.36</u>	<u>\$16.59</u>	

\* Allocated by weight

\*\* 78 percent of cost of truck (22 per cent allocated to mixing)

\*\*\* Does not include allocated mixing cost in transit to site

Appeal of Dick Hollan, Inc. 77-1 BCA P 12540.

# Exceptions to BAA

- ◆ Public Interest – FAR 25.103(a)
- ◆ Unavailability - FAR 25.103(b)
  - Class determinations
  - Individual determinations: (construction material is not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality)
- ◆ Unreasonable Cost – FAR 25.103(c)
- ◆ Commercial Item IT – FAR 25.103(e)
- ◆ Trade Agreements Act – FAR 25.402(a)





# TRADE AGREEMENTS ACT

# Trade Agreements Act

- ◆ Implements international trade agreements by treating certain foreign products as domestic.
- ◆ Codified at 19 U.S.C. 2501, *et seq.* and implemented in FAR subpart 25.4 and DFARS subpart 225.4
- ◆ TAA kicks in at certain specified thresholds as determined by the United States Trade Representative (subject to revision approx. every two years)

TRADE AGREEMENT	Supply Contract	Construction Contract
WTO GPA	\$180,000	\$6,932,000
NAFTA Canada	\$25,000	\$10,441,216
NAFTA Mexico	\$80,317	\$10,441,216

# Trade Agreements Act

- ◆ If a construction contract performed in the US is valued at \$6,932,000 or more **52.225-11 Buy American-Construction Materials Under Trade Agreements** is the proper contract clause.
- ◆ Contracting Officer has determined that the WTO GPA and Free Trade Agreements (FTAs) apply to this acquisition
- ◆ Opens alternate sources of materials that are treated as domestic
- ◆ Examples of notable non-TAA countries:
  - China
  - Brazil
  - India
  - Malaysia
  - Thailand
  - Turkey

# Trade Agreements Act

- ◆ TAA treats as domestic: end products that are wholly grown, produced, manufactured in certain foreign jurisdictions, or **substantially transformed** into new and different articles within those jurisdictions.
- ◆ **Substantial Transformation**: Focus is on the changes to use and character—not 50% component test. It must undergo processes that result in transformation such that “a new and different article must emerge, having a distinctive **name, character, or use**.”

# Substantial Transformation

- ◆ Fact specific inquiry—each case must be decided on the facts.
- ◆ **Hand Tools** - The components were either cold-formed or hot-forged in Taiwan into their final shape before importation. The use of the imported articles was predetermined at importation. Each component was intended to be incorporated in a particular finished mechanics' hand tool therefore, no change in use as a result of processing performed in the United States. *Nat'l Hand Tool Corp. v. United States*, 16 C.I.T. 308, 309 (1992), *aff'd*, 989 F.2d 1201 (Fed. Cir. 1993)
- ◆ **LFRSs** - Agency sought to procure an indefinite quantity of LFRSs. These are large, portable, refrigerated containers. They consist of two primary components, a refrigeration unit (manufactured in Singapore) and an insulated container (manufactured in China). The integration occurred in China, thus it is there that the LFRS acquired its name, character, or use. *Klinge Corp. v. United States*, 82 Fed. Cl. 128 (2008)

# Changes to Buy American?

- ◆ **E.O., November 24, 2017** – Commerce Secretary to provide specific recommendations to strengthen implementation of Buy American Law, including domestic preference policies and programs.



# Recent Legislation

- ◆ S. 2284 - BuyAmerican.gov Act of 2018. Introduced January 9, 2018.
- ◆ H.R.5137 - Buy America 2.0 Act. Introduced March 1, 2018

# Thank You

Smith•Pachter•McWhorter PLC

8000 Towers Crescent Drive,  
Suite 900  
Tysons Corner, VA 22182  
703.847.6300

[www.smithpachter.com](http://www.smithpachter.com)