



**A CONSTRUCTION CONTRACTOR'S GUIDE
TO THE "BUY AMERICAN" RULES AND REGULATIONS**

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The federal government has a long-standing preference for using domestic products in federal manufacturing, supply, and construction procurements. Newer rules are applying this old-age preference to additional sectors of construction that the federal government has a hand in.

The general rule for federal procurements is that all physical products provided or sold to the government must be made in the United States, unless an exception to this rule applies. These domestic preferences are governed by a complex framework of statutes and regulations, prohibitions and waivers, and rules and exceptions that are oftentimes difficult for contractors to understand and follow. It is crucial that all construction contractors, especially federal contractors, understand these domestic preferences in order to avoid the significant penalties that may be imposed for any failure to comply.

The federal government's domestic preferences are generally governed by one of four statutory schemes: (1) the Buy American Act of 1933 ("BAA"), as modified by the Trade Agreements Act ("TAA"); (2) the Buy America provision of the Surface Transportation Assistance Act of 1982 ("Buy America"); (3) the American Iron and Steel Requirements ("AIS Requirements"), as part of the Consolidated Appropriations Act, 2014 ("Appropriations Act") and the Water Resources Reform and Development Act of 2014 ("WRRDA"); and (4) the American Recovery and Reinvestment Act ("Recovery Act").

Each of these statutory schemes provides a different layer of preferences for domestically-made products, applicable to various categories of federal procurements.

- The BAA generally requires that the federal government purchase domestic products for all federal procurements, defines what constitutes a domestic product, and addresses the limited circumstances in which a contractor may receive a waiver from the BAA domestic preferences. The TAA provides statutory waivers from the BAA's domestic product requirements for products made in designated countries that are subject to various trade agreements. In other words, the TAA recognizes certain foreign-made products as if they were domestic products for the purpose of the BAA.

- Buy America imposes a unique set of requirements for procurements funded in whole or in part by the Department of Transportation including highway, bridge, rail, and transit construction.

- The AIS Requirements, contained in the Appropriations Act and the WRRDA, restrict the use of certain iron and steel products for procurements funded in whole or in part by the Environmental Protection Agency's Clean Water State Revolving Fund or the Drinking Water State Revolving Fund.

- The Recovery Act contains its own specific "Buy American" requirements, which apply to federal procurements funded with Recovery Act funds and to specific types of specialty metals procured by the federal government.

Taken together, the BAA, TAA, Buy America, AIS Requirements, and Recovery Act create a complex framework of rules and regulations. Contractors must understand and comply with these requirements to avoid stiff penalties in the form of contract suspension and debarment as well as significant civil and criminal penalties.

This Guide addresses the key requirements of each of these statutory schemes and provides guidance to construction contractors on "best practices" to follow, to ensure compliance with these domestic preferences.

I. BUY AMERICAN ACT OF 1933 and TRADE AGREEMENTS ACT

The Buy American Act of 1933 ("BAA") requires that "domestic construction materials" be used on all federal construction projects performed in the United States. Federal construction contracts include all construction efforts of the federal government, such as federal utility, infrastructure, highway, and building projects.

A. Construction Materials

A "construction material" is defined as follows under the BAA regulations:

[A]n article, material, or supply brought to the construction site by a contractor or subcontractor for incorporation into the building or work. The term also includes an item brought to the site preassembled from articles, materials, or supplies. However, emergency life safety systems, such as emergency lighting, fire alarm, and audio evacuation systems, that are discrete systems incorporated into a public building or work and that are produced as complete systems, are evaluated as a single and distinct construction material regardless of when or how the individual parts or components of those systems are delivered to the construction site. Materials purchased directly by the Government are supplies, not construction material.

Federal Acquisition Regulation ("FAR") 25.003.

This definition makes clear that all materials "brought" to a construction site for incorporation into the project, whether they are actually used on the project or not, must be of domestic origin. Therefore, contractors must ensure that – before any material is actually shipped to a project site – the materials comply with the BAA requirements.

B. Domestic Construction Materials

A “domestic construction material” is defined as follows under the BAA regulations:

- (i) An unmanufactured construction material mined or produced in the United States;
- (ii) A construction material manufactured in the United States, if:
 - (A) The cost of the components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. Components of foreign origin of the same class or kind for which nonavailability determinations have been made are treated as domestic; or
 - (B) The construction material is a COTS [commercial off-the-shelf] item.

FAR 25.003.

This definition breaks down “domestic construction materials” into two categories: (1) unmanufactured, or (2) manufactured.

1. Unmanufactured Construction Material

Unmanufactured construction material is raw material brought to the construction site for incorporation into the project. An unmanufactured material is one that is not processed into a specific form or combined, in advance, with other raw materials to create a new material. For example, sand, unmodified gravel, and limestone would constitute unmanufactured construction materials, all of which are incorporated into a project in their natural form. All such unmanufactured construction materials must be mined or produced in the United States in order to comply with the BAA.

2. Manufactured Construction Material

Manufactured construction material is any material that does not qualify as “unmanufactured.” The term “manufactured” simply means the “substantial transformation” of a product into the required form for use on the construction project. In other words, a manufactured construction material is one that is modified from its mined or raw material state into something different, such as concrete mix, steel pipe, road base, asphalt, structural steel, cable, or any other product that has been processed, formed, or shaped into something other than its natural state.

Manufactured construction material is deemed to be a “domestic construction material” if it is “manufactured in the United States” and:

(A) The cost of the components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. Components of foreign origin of the same class or kind for which nonavailability determinations have been made are treated as domestic; or

(B) The construction material is a COTS [commercial off-the-shelf] item.

FAR 25.003.

The BAA requires that “substantially all” of the components of a manufactured domestic construction material be mined, produced, or manufactured in the United States. More specifically, the cost of domestic components directly incorporated into the product must exceed 50% of the total cost of all components. This analysis is referred to as the “Components Test,” and allows a manufactured construction material to contain some foreign made components as long as more than 50% of the cost of the item is comprised of domestic components or a domestic manufacturing process. For example, steel pipe comprised of foreign and domestic iron ore will satisfy the Components Test as long as the cost of domestically-produced iron ore exceeds 50% of the cost of all components.

Notably, if the product is a Commercial Off-The-Shelf (“COTS”) item, the BAA only requires that it be manufactured in the United States to be considered a “domestic construction material.” A COTS item does not need to meet the Components Test. For example, the COTS provision allows numerous foreign components to be incorporated into a COTS item as long as the item is actually manufactured in the United States.

C. Exceptions to the BAA

The BAA does not apply to certain federal procurements under a handful of different exceptions. Importantly, these exceptions only apply if they are recognized and approved by the procurement’s contracting officer before the offeror seeking the exception submits its proposal for the procurement.

In general, an exception to the mandatory use of domestic products under the BAA applies if:

- The application of the domestic preferences would yield unreasonable costs (a 6% price differential is used for most federal contracts, while a 12% differential is used if the contract involves a small business and a 50% differential is used for Department of Defense procurements);
- The procurement is seeking products or materials for the government for use outside of the United States;
- The products are not produced domestically in sufficient and reasonably available quantities and of a satisfactory quality;

- The value of the procurement is less than \$2,500; or
- The application of the domestic preferences would be inconsistent with the public interest.

In practice, such exceptions are rarely granted by contracting officers. Contractors that seek to request such an exception must plan to submit an exception request and be prepared to demonstrate to the contracting officer why such an exception is necessary.

D. Trade Agreements Act

The Trade Agreements Act (“TAA”) implements several international trade treaties regarding world-wide government procurements. Put simply, the TAA creates a statutory framework for ensuring reciprocity between the United States and cooperating “designated countries” in their respective governmental procurements. The goal of the TAA is to ensure that the United States provides preferences for products made in designated countries, in exchange for similar treatment of U.S. products in those countries. The effect of the TAA on federal procurements is that products made in designated countries are treated as if they are domestic products for purposes of the BAA. To qualify as a “designated country end product” under the TAA, the product must be manufactured or “substantially transformed” in a designated country.

The TAA regulations, which are generally found at FAR Subpart 25, are complex and consist of numerous rules and exceptions. It is imperative that contractors understand these rules to ensure that, when they provide a designated country end product for a federal procurement, the product truly complies with the BAA and TAA rules.

1. Designated Country End Product

A “designated country end product” is simply defined as a: (1) World Trade Organization country end product; (2) a Free Trade Organization end product; (3) a least developed country end product; or (4) a Caribbean Basin country end product. Each of these designated end product categories include lists of multiple countries whose products are treated as domestic products under the BAA, as long as the products are:

- “[W]holly the growth, product, or manufacture” of a designated country; or
- “[S]ubstantially transformed” into a product in the designated country, i.e., the product has been manufactured, altered, or substantially changed in a designated country.

FAR 25.003.

2. Triggers of the TAA Exceptions for Foreign Construction Materials

Whether the TAA exceptions apply to specific federal procurements is based on the dollar value of the federal procurement. *See* FAR 25.1102; 25.402.

- For federal procurements with a contract value of less than \$7,846,000 (or \$10,335,931 if the product is from Canada, Mexico, Oman, or Bahrain), the BAA requirements apply

and no TAA exceptions exist for designated country end products. In other words, all construction materials must be domestic products.

- For federal procurements with a contract value of more than \$7,846,000 (or \$10,335,931 if the product is from Canada, Mexico, Oman, or Bahrain), designated country end products are generally treated the same as domestic products for the purposes of the BAA.

A number of exceptions apply with regard to which designated country end products are acceptable substitutions for domestic products under this rule, so contractors must fully understand how these exceptions impact each specific federal procurement. Note also that these contract value thresholds are revised over time. So it is important to reference the appropriate federal regulations, for the most up-to-date dollar values.

3. Designated Countries

The following countries are deemed designated countries, and the products of these countries are therefore generally treated as domestic products under the BAA:

- World Trade Organization Government Procurement Agreement countries -- Armenia, Aruba, Austria, Belgium, Bulgaria, Canada, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea (Republic of), Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Taiwan (known in the World Trade Organization as “the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu” (Chinese Taipei)) or United Kingdom

- Free Trade Agreement countries -- Australia, Bahrain, Canada, Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Korea (Republic of), Mexico, Morocco, Nicaragua, Oman, Peru, or Singapore

- Least developed countries -- Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Djibouti, East Timor, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, Laos, Lesotho, Liberia, Madagascar, Malawi, Maldives, Mali, Mauritania, Mozambique, Nepal, Niger, Rwanda, Samoa, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, Somalia, Tanzania, Togo, Tuvalu, Uganda, Vanuatu, Yemen, or Zambia

- Caribbean Basin countries -- Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, Bonaire, British Virgin Islands, Curacao, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saba, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Sint Eustatius, Sint Maarten, or Trinidad and Tobago

As with all BAA provisions, there are numerous exceptions and exclusions that may apply to these designated countries and specific designated country end products for BAA compliance purposes. Therefore, all contractors should ensure that the products of a certain

country are permissible substitutes for domestic products on federal procurements before those foreign products are shipped to the project site.

II. BUY AMERICA, SURFACE TRANSPORTATION ASSISTANCE ACT OF 1982

The Buy America provision of the Surface Transportation Assistance Act of 1982 (“Buy America”) applies to federal highway and transit-related projects. Specifically, Buy America applies to projects funded by federal grants distributed by the Federal Highway Administration (“FHWA”) and Federal Transit Administration (“FTA”), such as a federally-funded state highway projects. Under Buy America, the FHWA and FTA cannot allocate federal grants to a project unless the iron, steel, and manufactured products used in the project are produced in the United States.

A. Buy America Restrictions

The Buy America restrictions are similar to, although not identical, to the BAA’s domestic preferences. In general, any “manufactured product” used on a FHWA and FTA project must meet the following criteria to comply with Buy America:

- All of the manufacturing processes for the product must take place in the United States; and
- 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.

According to the Department of Transportation (“DOT”), a manufactured product is subject to Buy America if it is manufactured predominantly of steel or iron. A product is deemed to be manufactured predominantly of steel or iron if the product consists of at least 90% steel or iron content. *See* Memorandum from John R. Baxter, Assoc. Admin’r for Infrastructure, Fed. Highway Admin., U.S. Dep’t of Transp., to Division Admin’rs, Dirs. of Field Servs., on Clarification of Manufactured Products under Buy America (Dec. 21, 2012).

The “manufacturing process” referred to in Buy America involves:

[T]he 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.

23 C.F.R. 635.410.

In simpler terms, manufacturing:

[B]egins with the initial melting and mixing, and continues through the coating stage. Any process which modifies the chemical content, the physical size or shape, or the final finish is considered a manufacturing process. These processes include rolling,

extruding, machining, bending, grinding, drilling and coating. “Coating” includes epoxy coating, galvanizing, painting, or any other coating that protects or enhances the value of the material.

U.S. Dep’t of Transp., Fed. Highway Admin. Contract Administration Core Curriculum Manual and Reference Guide, 2006,
<http://www.fhwa.dot.gov/programadmin/contracts/core02.cfm#s2B01>.

Practically, this includes any process that modifies the chemical content, physical shape or size, or the final finish of a product, which begins with initial melting and mixing and continues through the bending and coating stages. Further, if a domestic product is taken out of the United States during this process, it becomes a foreign-sourced material. *See Quick facts about “Buy America” requirements for Federal-aid highway construction*, U.S. Dep’t of Transp., Fed. Highway Admin. (last updated Dec. 12, 2013), <http://www.fhwa.dot.gov/programadmin/contracts/b-amquck.cfm>.

For manufactured products, the DOT has clarified that a manufactured product is subject to Buy America if it is manufactured predominantly of steel or iron. A product is deemed to be manufactured predominantly of steel or iron if the product consists of at least 90% steel or iron content. *See Memorandum from John R. Baxter, Assoc. Admin’r for Infrastructure, Fed. Highway Admin., U.S. Dep’t of Transp., to Division Admin’rs, Dirs. of Field Servs., on Clarification of Manufactured Products under Buy America (Dec. 21, 2012).*

Congress has also recently passed the Moving Ahead for Progress in the 21st Century Act (MAP-21). This law contains a provision that broadens the scope of the application of Buy America to any contract eligible for federal highway funding within the scope of an applicable finding, determination, or decision under the National Environmental Policy Act (“NEPA”), regardless of the funding source of such contracts, if at least one contract for the project is funded with federal-aid highway funds. Practically, this means that all of a project (as defined by the NEPA assessment) is subject to Buy America, if any part of the project is funded by DOT. This includes any utility work that is accomplished as a result of a federal-aid highway project. *See Letter from Victor M. Mendez, Admin’r, Fed. Highway Admin., U.S. Dep’t of Transp., to John Horsley, Exec. Dir., Am. Assoc. of State Highway and Transp. Officials (AASHTO) (Dec. 20, 2012).*

B. Exceptions to Buy America

Exceptions, though rare, can be granted from the restrictions of the Buy America preferences for domestic products by the procuring agency. In general, an exception may apply when:

- Iron, steel, and manufactured products are not available in sufficient and reasonably available quantities and of a satisfactory quality in the United States;
- The use of domestic products would increase the cost of the overall project by more than 25%; or

- The application of the Buy America provision would be inconsistent with the public interest.

However, the TAA's designated country exceptions to the BAA do not apply to Buy America, and the federal-aid transportation programs are excluded specifically from agreements like the North American Free Trade Agreement (NAFTA, Section 1001) and the World Trade Organization's Government Procurement Agreement. This creates a more significant preference for domestic products under the Buy America framework.

As with the BAA, permissible exceptions are rarely granted by DOT officials. Contractors that perform construction projects for the FHWA and FTA must be fully versed in the Buy America requirements to ensure full compliance with the act.

III. AMERICAN IRON AND STEEL REQUIREMENTS

A. Consolidated Appropriations Act, 2014

Recently, the Consolidated Appropriations Act, 2014 ("Appropriations Act") imposed domestic iron and steel sourcing requirements ("AIS Requirements") to two existing Environmental Protection Agency ("EPA") programs: the Clean Water State Revolving Fund ("CWSRF") and the Drinking Water State Revolving Fund ("DWSRF"). Specifically, the Appropriations Act requires that "all of the iron and steel products used" in projects funded by the CWSRF or the DWSRF for the construction, alteration, maintenance, or repair of a public water system or treatment works be "produced" in the United States. The term "iron and steel products" is defined to include the following, which are made primarily of iron or steel:

[L]ined or unlined pipes and fittings, manhole covers and other municipal castings, hydrants, tanks, flanges, pipe clamps and restraints, valves, structural steel, reinforced precast concrete, and construction materials.

Consolidated Appropriations Act, 2014, Pub. L. No. 113-76, § 436(a)(2) (2014).

The Appropriations Act's AIS Requirements apply to all assistance agreements to provide financing through the CWSRF or the DWSRF, which are executed on or after January 17, 2014 and before October 1, 2014. The Appropriations Act does not impose AIS Requirements on a project if the engineering plans and specifications were approved prior to January 17, 2014. Additionally, there are a series of nuanced applications of the AIS Requirements where a project funded by either the CWSRF or the DWSRF is financed or refinanced.

The Appropriations Act's AIS Requirements do not apply to certain procurements, even if they are funded by the CWSRF or DWSRF. These exceptions only apply if they are recognized and approved by the Administrator of the Environmental Protection Agency. Like Buy America, an exception may apply if:

- Iron and steel are not produced domestically in sufficient and reasonably available quantities and of a satisfactory quality;

- The use of iron and steel produced domestically would increase the cost of the overall project by more than 25%; or
- The application of the domestic preferences would be inconsistent with the public interest.

Like the DOT's interpretation of the Buy America provision, the EPA defines "produced in the United States" as follows:

Production in the United States of the iron or steel products used in the project requires that all manufacturing processes, including application of coatings, must take place in the United States, with the exception of metallurgical processes involving refinement of steel additives. All manufacturing processes includes processes such as melting, refining, forming, rolling, drawing, finishing, fabricating and coating. Further, if a domestic iron and steel product is taken out of the US for any part of the manufacturing process, it becomes foreign source material.

Memorandum from Andrew D. Sawyers, Dir., Office of Wastewater Mgmt. and Peter C. Grevatt, Dir., Office of Ground Water and Drinking Water, U.S. Env'tl. Prot. Agency, to Water Mgmt. Div. Dirs., Regions I-X, on Implementation of American Iron and Steel provisions of P.L. 113-76, Consolidated Appropriations Act, 2014 (Mar. 20, 2014).

However, EPA defines "primarily iron and steel" differently than DOT does for its manufactured products. For a product to be subject to the Appropriations Act's AIS Requirements, the product must be made of greater than 50% iron or steel, as measured by the material costs.

B. Water Resources Reform and Development Act of 2014

The Water Resources Reform and Development Act of 2014 ("WRRDA") contains a provision identical to the Appropriations Act language, except that it applies the AIS Requirements permanently to the CWSRF from the date of enactment of the WRRDA. Effectively, the CWSRF will be subject to the AIS Requirements beyond the September 30, 2014 expiration of the Appropriations Act, while the DWSRF will not under current law.

IV. AMERICAN RECOVERY AND REINVESTMENT ACT

The American Recovery and Reinvestment Act ("Recovery Act") was enacted in 2009 in an effort to stimulate the U.S. economy and promote long-term growth. The Recovery Act contains domestic preferences in Section 1605, which applies to construction contracts financed by Recovery Act funds. Specifically, it contains two sets of rules that govern direct federal work and federally-assisted work separately.

The Recovery Act imposes significantly stronger preferences for domestic products than the BAA for federal projects. In practice, Section 1605 and the BAA intersect. Before the Recovery Act was enacted, the BAA governed federal procurements. Now, Section 1605 supersedes the BAA for federal contracts funded by the Recovery Act. Notably, where a federal contract is funded by both Recovery Act and non-Recovery Act funds, and the Recovery Act funds are not segregated by line item, the entire contract is governed by Section 1605.

While Recovery Act-funded projects have diminished significantly in the past several years, these restrictions continue to apply to long-term projects that commenced several years ago with Recovery Act funds.

A. Direct Federal Work

Direct federal work is carried out by a direct contract with a federal agency. These federal contracts are governed by the FAR, which contains clauses (FAR Subpart 25.6) that implement Section 1605 for Recovery Act projects.

These provisions require that all projects funded by the Recovery Act use iron, steel, and manufactured goods produced the United States. This restriction does not apply to iron and steel *components* that are incorporated into a manufactured good – unless that manufactured good is predominantly comprised of iron or steel.

The Recovery Act permits exceptions to its general rule that domestic products must be used on all federal procurements. Specifically, non-domestic products may be used when domestic products are not available, would result in unreasonable costs, or would be inconsistent with the public interest. Additionally, the Recovery Act recognizes the same exceptions for designated country end products as the BAA, with the exception that Caribbean Basin countries are not deemed to be designated countries under the Recovery Act. Therefore, products produced by Caribbean Basin countries do not qualify for an exception from the Recovery Act's domestic preference.

B. Federally-Assisted Work

Federally-assisted work is funded by Recovery Act grants, financial assistance, and loans, but administered by state and local entities. This includes certain highway, bridge, and water system construction, as well as clean air investment. Federally-assisted work is not governed by the FAR. Instead, state and local entities administer these contracts under various different rules, many of which adopt the BAA and Recovery Act standards. However, these combined regulations are often confusing and require significant interpretation by contractors to understand.