

# BUY AMERICAN

## The Renewed Vigor of the Preference for Domestic Goods in Public Contracting

By *Tim Fandrey & Russell Jumper*

The Buy American Act, which was enacted in 1933, provides for a price preference in favor of domestic products on federal prime contracts for public buildings and public works for items for public use. Initially, state and local governments were largely left alone - they could either enact their own preferences or choose not to. Over the years, however, Congress enacted various pieces of legislation that tied “Buy American” type requirements to federal funding of state and local projects and procurements. Thus, the scope of the application of price preferences in government contracting expanded greatly. Thereafter, during the Trump administration, and continuing on into the Biden administration, new legislation, regulations and more pro-domestic interpretations of existing legislation through executive orders have come into play, further changing the landscape of government contracting at the state, federal and local levels.

These laws, regulations and orders specifically address iron and steel materials and goods. As a result, the burden they impose has a large impact on where, in what quantities, and for how much steel is purchased. With pundits expressing uncertainty regarding the US economy in the coming months and years, Congress’s passing of the 2021 Bipartisan Infrastructure Act represents an opportunity for many stakeholders in the steel industry. To benefit from that opportunity, though, businesses must be cautious of the applicable Buy American requirements, and wary of the substantial penalties for violations.

**Implementation of Buy American** - The concept of a price preference appears straightforward on the surface, but complications arise when products contain subparts with different countries of origin. To guide in the determination of a product’s Buy American status, federal agencies use the country-of-origin test. The test is comprised of two parts: (i) the item must be manufactured in the United States and (ii) the cost of the components mined, produced or manufactured in the United States must exceed 50% of the cost of all its components. During his presidency, President Trump increased the second component of the test to 55% for predominately steel and iron products. Every rule has exceptions, of course, and the Buy American Act is no different. The available exceptions (typically called waivers) are limited, though: (i) commercial IT acquisitions; (ii) if the item is unavailable in the United States; and (iii) if applying the preference is not in the public interest.

During, or even before the performance of a project, a general contractor must certify to the government that it is in compliance with the statute, or that one or more waivers is applicable. Accordingly, the general contractor must rely upon its own due diligence and on the representations and certifications of its subcontractors and suppliers downstream.

**Buy American vs. Buy America** - As stated above, “Buy American” comes from the Buy American Act of 1933. That Act applies only to government contracting at the federal level. “Buy America” on the other hand refers to federal legislation that applies “Buy American”-type domestic preferences and requirements to federal, state and local infrastructure projects that receive federal funding. The funding flows through the applicable federal agency to the state or local government agency that is constructing the infrastructure project. And the federal agency administers the “Buy American” requirements of the applicable provisions of the “Buy America” legislation.

As can be seen in the (non-exhaustive) table below, requirements vary depending upon the agency, the size of the contract and the types of materials.

Agency	Contract Threshold Value	Types of Goods	Requirements
Federal Transit Administration	\$150,000	Iron steel and other components of rolling stock  Non-rolling stock	70% made in the U.S. Final assembly must also take place in the U.S. 100% made in the U.S.
Federal Highway Administration	\$2,500 or 0.1% of the contract value, whichever is higher	Iron, steel and manufactured goods made of predominately steel and iron	100% made in the U.S.
Federal Railroad Administration (FRA) - Trains	\$100,000	Iron, steel and manufactured goods	100% made in the U.S.
Federal Aviation Administration	No threshold	Steel and manufactured goods	60% made in the U.S. Final assembly must also take place in the U.S.
Environmental Protection Agency	No threshold	Manufactured goods made with iron and steel funded by the following EPA programs: Clean Water State Revolving Fund; Drinking Water State Revolving Fund; Water Resources Reform and Development Act; and Water Infrastructure Finance and Innovation Act	100% of the total cost of iron and steel products must come from U.S. components

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Like the Buy American Act, Buy America has certain exceptions or “waivers” where one can deviate from the preferences or requirements for domestic products. There are generally four categories of waivers: (i) use of domestic product is inconsistent with the public interest; (ii) there is an insufficient quantity or quality of product in the domestic market; (iii) the cost of components and subcomponents of US materials is 60% more than the foreign item; and (iv) the use of the domestic product increases project costs more than 25% of the total value of the project. To complicate the issue further, application of the waiver of Buy America requirements have historically been interpreted by the federal agency responsible for the government contract at issue. For example, the Federal Aviation Administration approved waivers for projects funded by FAA funds, while the Federal Highway Administration approved waivers for its highway projects.

**Recent Changes** - Predictably, this delegated interpretation authority has led to as many interpretations as federal agencies interpreting the waiver categories. On January 25, 2021, shortly after President Biden was inaugurated, he signed Executive Order 14005. This executive order, among other things, required the various administrative agencies subject to Buy America and Buy American requirements to review their waiver processes to ensure it was consistent with the policy set forth in the order. More substantially, though, the order called for the establishment of the Made in America Office (MIAO), within the Office of Management and Budget (OMB). One of the purposes of the MIAO is to centralize and systemize oversight of the process of reviewing and granting or denying waivers to Buy American requirements. Accordingly, upon the full implementation of the order,

MAIO is to become the clearinghouse for waiver applications. Ideally, this consolidation of the process and the historical records of prior waivers will increase all government contractors’ ability to plan for projects with a greater level of confidence by knowing what waivers are likely to be available.

On November 15, 2021, President Biden signed into law the Infrastructure Investment and Jobs Act, which included further revision to “Buy American” requirements in government contracting. The Buy America, Build America Act (BABA) codified the MIAO and required, among other things, that each federal agency covered by the act ensure that “none of the funds made available for a Federal financial assistance program for infrastructure . . . may be obligated for a project unless all of the iron, steel and manufactured products and construction materials used in the project are produced in the United States.” The practical effect of BABA was to lower the tolerance for foreign products, and to expand the preference for domestic products to cover not just iron and steel, but all “construction materials.” The above-quoted language from the statute also effectively eliminated the previous waiver that allowed for foreign materials if the total cost of the US materials was more than 60% of the foreign items.

While the wheels of government slowly turn to implement BABA’s provisions, federal infrastructure projects must press forward. In the near term, federal agencies are continuing to make waiver decisions at the project level. Guidance from the OMB has encouraged the federal agencies to consider applying public interest waivers as a practical means for continuing to make progress on projects while the requirements of BABA are put in place: “Agencies should consider whether brief, time limited waivers to allow recipients and agencies to transition to new rules and processes may be in the public interest.”

**Penalties, Compliance and Best Practices** - Unfortunately, even with the Buy American laws in a state of flux, the consequences associated with non-compliance remain a very real and substantial threat to government contractors. These include audits and investigations to verify compliance, potential False Claims Act liability for incorrect certifications as to the origin of the materials used in the project, potential termination and debarment from future projects, and vulnerability in post-award protests.

Although there is no silver bullet to completely guard against this potential liability, upstream contractors can (and should) require certifications from its subcontractors and suppliers similar to those certifications that it must give to the government. Contractors may also consider including specific Buy America or BABA indemnities in their contracting documents as a means of protecting itself from potential violations. But even with those indemnity protections, contractors must remain vigilant. Passing the blame and turning a blind eye to potential fraudulent certifications from subcontractors and suppliers will not protect a contractor from the government’s wrath. Finally, contractors should reconsider their strategies for seeking waivers. Public interest waivers, for example, have rarely been granted prior to the enactment of BABA. Based on the OMB’s guidance, though, public interest waivers may provide practical relief on ongoing projects.

The Buy American Act is just one of the political issues impacting the steel industry. To hear more, be sure to attend Gray Reed attorney and Texas State Rep. Jeff Leach’s session titled “The Intersection of Business and Politics: What You Need to Know” at the NASPD Annual Convention in Ft. Worth, Texas, in February.

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Russell Jumper represents general contractors, subcontractors and owners throughout Texas that need creative solutions for the day-to-day and big-picture problems that arise during sophisticated commercial construction projects. While his practice is primarily focused on finding efficient ways to resolve payment, lien, delay and defect disputes both in and out of the courtroom, Russell also develops dispute avoidance strategies and crafts master service and sub-contract agreements that help clients address issues proactively, in an effort to prevent litigation altogether. He is based in Gray Reed's Dallas office and can be reached at [rjumper@grayreed.com](mailto:rjumper@grayreed.com). •

# Out & About

This past August, Kahn brothers, Fred and Ted (Kahn Steel Co.) celebrated their mother, Sybil's, 100th Birthday. Four generations of family and friends were in attendance for the milestone. In honor of the special occasion, Sybil was presented a proclamation from the Missouri State Senate, authored by Greg Razer, representing the 7th Senatorial District. The proclamation recognized Sybil Kahn as an Outstanding Missouri Citizen for her lifetime of innovation, entrepreneurship and philanthropy. Amongst several accomplishments referenced in the proclamation, Sybil's founding of the Kansas City Museum Without Walls and also the Jewish Community Archives of Greater Kansas City were highlighted.



Sybil with her grand daughter, Kara Kahn, celebrating 100 years young!

## GRAY REED KNOWS THE STEEL INDUSTRY

With an uptick in international trade cases, material shortages, cost escalation, changes to Buy America, and the unreliability of the mechanics of the Uniform Commercial Code, the pitfalls facing the steel industry are enormous.

With in-depth knowledge of these issues, including pre-litigation matters related to the sale of steel goods from a mill down the supply chain to an end-user, attorneys on Gray Reed's construction industry team guide clients through the minefield of the steel industry with solutions that are both practical and creative.

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