

# American Iron and Steel Requirements in Federally-Aided Projects

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# Overview

- “Buy America” Review
- AIS Updates
- Executive Order
- Tariffs
- Infrastructure Package



There are three primary "Buy America" requirements pertaining to iron and steel products in federal statute

- ▶ Buy American Act
- ▶ Buy America
- ▶ American Iron and Steel (AIS)



# The Buy American Act

- ▶ Applies to direct federal procurement
  - ▶ Department of Defense, NASA, Bureau of Reclamation, etc
  - ▶ Does **NOT** apply to State Revolving Fund (SRF) projects
- ▶ Established by Congress in 1933
- ▶ Very broadly applies to construction materials and supplies
  - ▶ Not as tightly worded as the other “Buy America” requirements



# The Buy American Act

- ▶ The Buy American Act Test
  - ▶ End product is considered domestic if it is:
    - ▶ Mined, produced or manufactured in the USA, and:
    - ▶ The cost of its domestic components exceed fifty percent of the cost of all of its components
- ▶ "Manufacturing" under the Buy American Act
  - ▶ Second part of Buy American Act test
  - ▶ Basic standard is:
    - ▶ If the operations performed on the foreign item create a new material or result in a substantial change in physical character, the item is manufactured in the United States.



# The Buy American Act

## Waivers of the Buy American Act Requirements

- *Use Abroad*
- *Public Interest*
- *Unreasonable Cost*
- *Unavailability*
- *Statutory waivers (micro-purchase, COTS)*
- *Exceptions Under Various International Agreements*



# Federal Transportation Buy America Requirements

- ▶ Buy America requirements apply to any project receiving funds from any federal program established under Title 23 of US Code:
  - ▶ Federal Highway Administration
  - ▶ Federal Aviation Administration
  - ▶ Federal Railroad Administration
  - ▶ Federal Transit Administration
  - ▶ Puerto Rico Highway Program
- ▶ Projects receiving these funds can include efforts to construct, maintain or improve (but not limited to):
  - ▶ Roads, Highways, Interstates, Bridges
  - ▶ Transportation Infrastructure Drainage Systems
  - ▶ Utility Relocations



# Federal Transportation Buy America Requirements

- ▶ Prohibits the granting of Federal Aid Highway funds to states for infrastructure projects unless steel, iron, and manufactured products used in such projects are produced in the United States
- ▶ Requires for iron and steel products that “all manufacturing processes” must occur within the United States to be considered of domestic origin
- ▶ Requirements are not subject to trade agreements
- ▶ Buy America requirements apply to any steel or iron component of a manufactured product regardless of the overall composition of the manufactured product



# Federal Transportation Buy America Requirements

- ▶ Assume that any DOT project is receiving federal aid and will have to adhere to the Buy America requirements
- ▶ The splitting of federal aided projects into separate and smaller contracts or assistance agreements to avoid Buy America requirements coverage on some portion of a large project is not permitted.
- ▶ The Buy America requirements are solely governed by the Federal Government and may not be waived or amended by any state or local entity.



## “Moving Ahead for Progress in the 21<sup>st</sup> Century Act” or “MAP-21”

- ▶ Requires application of Buy America law to all contracts eligible for assistance under title 23 (*Highways*) within the scope of a “finding, determination, or decision under the National Environmental Policy Act (NEPA), regardless of funding source, if at least one contract within the scope of the same NEPA document is funded with Federal funding provided under Title 23.
- ▶ **Utility Relocations:** Sec. 1518 ensures Buy America is applied to any contract or agreement involving utility work that uses any amount of Federal-aid Highway Program funding must comply with the Buy America requirements (23 U.S.C. 313).



# Federal Transportation Buy America Requirements

- ▶ Requirement may be waived where
  1. Its application would be inconsistent with the public interest;
  2. The materials and products are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or
  3. The inclusion of domestic material will increase the cost of the overall project contract by more than 25 percent.
- ▶ Does not apply to minimal amounts of iron/steel materials where:
  - ▶ The total cost of all foreign source items used in the project, as delivered to the project site, is less than \$2500; or
  - ▶ Does not exceed one-tenth-of-one-percent of the total contract amount, whichever is greater



# EPA American Iron and Steel (AIS) Requirements

The AIS requirement applies to the following funds:

- Clean Water State Revolving Fund (CWSRF)
- Drinking Water State Revolving Fund (DWSRF)
- Water Infrastructure Innovation Act Program (WIFIA)
- USDA Rural Utilities Service (RUS) Water Environmental Programs (WEP)

Projects receiving these funds can include efforts to construct, maintain or improve (but not limited to):

- Water/Wastewater Treatment Facilities
- Water Distribution Lines
- Water Storage Facilities
- Stormwater Management
- Sewage Collection and Intercepting Systems



# EPA American Iron and Steel (AIS) Requirements

SRF AIS requirement applies to:

- ▶ Products made primarily (> 50%, by material cost) of iron or steel;
- ▶ Steel is an alloy that includes at least 50 percent iron, between .02 and 2 percent carbon, and may include other elements.
  - ▶ May include metallic elements such as chromium, nickel, molybdenum, manganese, and silicon;
  - ▶ The definition of steel covers carbon steel, alloy steel, stainless steel, tool steel and other specialty steels.



# EPA American Iron and Steel (AIS) Requirements

All Iron and Steel products used in the project must be “Produced in the United States”

- 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.
- Includes processes such as melting, refining, forming, rolling, drawing, finishing, and fabricating.
- 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.
- However, there is an exception for coating applied to the external surface of a domestic iron or steel component that would otherwise be AIS compliant that takes place outside the U.S., provided final assembly occurs in the U.S.



# EPA American Iron and Steel (AIS) Requirements

- ▶ Assume that any state revolving fund project is subject to the AIS requirement.
- ▶ Assembling, fabricating or packaging alone does not meet the AIS requirement
- ▶ The AIS requirement is solely governed by the EPA and may not be waived or amended by any state or local entity.



# EPA American Iron and Steel (AIS) Requirements

## **Application To Projects Using Mixed-Funding**

- ▶ The AIS requirement applies to the “entirety of the project”
- ▶ A “project” consists of all construction necessary to complete the building or work regardless of the number of contracts or assistance agreements involved so long as all contracts or assistance agreements awarded are closely related in purpose, time and place.



# EPA American Iron and Steel (AIS) Requirements

## **Iron and Steel Items Specifically Covered by the AIS Requirement:**

- ▶ Lined or unlined pipes or fittings
- ▶ Manhole Covers and Other Municipal Castings
- ▶ Hydrants
- ▶ Tanks
- ▶ Flanges
- ▶ Pipe clamps and restraints
- ▶ Valves
- ▶ Structural steel
- ▶ Reinforced precast concrete
- ▶ Construction materials

# “Municipal Castings”

Access Hatches; Ballast Screen; Benches (Iron or Steel); Bollards; Cast Bases; Cast Iron Hinged Hatches, Square and Rectangular; Cast Iron Riser Rings; Catch Basin Inlet; Cleanout/Monument Boxes; Construction Covers and Frames; Curb and Corner Guards; Curb Openings; Detectable Warning Plates; Downspout Shoes (Boot, Inlet); Drainage Grates, Frames and Curb Inlets; Inlets; Junction Boxes; Lampposts; Manhole Covers, Rings and Frames, Risers; Meter Boxes; Service Boxes; Steel Hinged Hatches, Square and Rectangular; Steel Riser Rings; Trash receptacles; Tree Grates; Tree Guards; Trench Grates; and Valve Boxes, Covers and Risers.



# “Structural Steel”



Structural steel is rolled flanged shapes, having at least one dimension of their cross-section three inches or greater including: wide-flange shapes, standard I-beams, channels, angles, tees and zees. Other shapes include H-piles, sheet piling, tie plates, cross ties, and those for other special purposes.



# “Construction Material”

- ▶ Those articles, materials, or supplies made primarily of iron and steel, that are permanently incorporated into the project (but not including mechanical and/or electrical components, equipment and systems).
  - ▶ May overlap with “structural steel”.
  - ▶ Includes: wire rod, bar, angles, concrete reinforcing bar, wire, wire cloth, wire rope and cables, tubing, framing, joists, trusses, fasteners (i.e., nuts and bolts), welding rods, decking, grating, railings, stairs, access ramps, fire escapes, ladders, wall panels, dome structures, roofing, ductwork, surface drains, cable hanging systems, manhole steps, fencing and fence tubing, guardrails, doors, and stationary screens.



# EPA American Iron and Steel (AIS) Requirements

AIS may be waived where:

- ▶ Applying these requirements would be inconsistent with the “**public interest**”;
- ▶ Iron and steel products are not produced in the US in **sufficient and reasonably available quantities** and of a satisfactory quality; or
- ▶ Inclusion of iron and steel products produced in the US will **increase the cost of the overall project** by more than 25 percent.



# De Minimis Waiver

The EPA has granted a “nationwide” waiver of the AIS requirement for *de minimis* incidental components of eligible water infrastructure projects.

- ▶ Applies to “*de minimis*” and “incidental” components;
  - ▶ Capped at 5% of total cost of material used in project;
  - ▶ May not treat single large item as *de minimis*:
    - ▶ The cost of an individual item may not exceed 1 percent of the total cost of the materials used in and incorporated into a project.
- ▶ Does NOT apply to waterworks fittings or to pipes



# De Minimis Waiver

## ➤ **“Incidental” Components**

- Miscellaneous, low-cost individually and in total;
- Typically procured in bulk;
- Country of manufacture not always available in normal course of business;
- Examples cited by EPA include:
- “small washers, screws, fasteners (i.e., nuts and bolts), miscellaneous wire, corner bead, ancillary tube, etc.”



# *De Minimis* Waiver

## ► Items not “incidental”

- High-cost
- Generally described in detail via project specific technical specifications;
- Examples cited by EPA as not incidental include:
  - “significant process fittings (i.e., tees, elbows, flanges, and brackets), distribution system fittings and valves, force main valves, pipes for sewer collection and/or water distribution, treatment and storage tanks, large structural support structures, etc.”



# De Minimis Waiver

- ▶ Even if an Item is “incidental”, waiver does not apply if the aggregate cost of **all** incidental items exceeds 5% of the project cost. Standard *is not* whether a particular component cost is less than 5%.
- ▶ To qualify, aid recipients must retain documentation of:
  - ▶ Types/categories of items to which this waiver is applied,
  - ▶ Total cost for each, and
  - ▶ Calculations of the total cost of materials used to determine the dollar value of goods to which they have applied the waiver.

# Stainless Steel Fasteners

- ▶ **Final Expiration will occur on February 24, 2020**
  - ▶ Applies to Stainless Steel Nuts and Bolts used in pipe couplings, restraints, joints, flanges, and saddles
  - ▶ Always considered to be a “short-term” waiver
  - ▶ Does NOT exempt the whole product or any of the main iron and steel components
  - ▶ Will not be renewed
  - ▶ Determined by the purchase date of these products NOT the project/award date

# Other Waivers

- ▶ The EPA has granted a National Product Waiver of the AIS requirement for pig iron, direct reduced iron (DRI), and hot briquetted iron (HBI).
- ▶ Minor Components
  - ▶ Would except from AIS requirement “miscellaneous minor components within an otherwise domestically produced iron and steel product up to 5 percent of materials costs of product”;
  - ▶ Distinguished from prior “*de minimis*” national waiver as it applies to “components” within an iron and steel product. (The “*de minimis*” waiver applies to entire products.)
  - ▶ The “*de minimis*” waiver is intended for assistance recipients to use for their projects, whereas the “minor components” waiver allows manufacturers to certify that their products comply with AIS requirements.



# Manufacturer Certification

- ▶ Each handler (supplier, fabricator, manufacturer, processor, etc) of the iron and steel products certifies that their step in the process was domestically performed.
- ▶ Each time a step in the manufacturing process takes place, the manufacturer delivers its work along with a certification of its origin.
- ▶ These certifications should be collected and maintained by assistance recipients.
- ▶ Alternatively, the final manufacturer that delivers the iron or steel product to the worksite, vendor, or contractor, may provide a certification asserting that all manufacturing processes occurred in the US.
  - ▶ While this type of certification may be acceptable, it may not provide the same degree of assurance.



# Manufacturer Certification

Certifications must include:

- The name of the manufacturer, the location of the manufacturing facility where the product or process took place (not its headquarters);
- A description of the product or item being delivered;
- Identification of the project to which the certification applies; and
- A signature by a manufacturer's responsible party.



# Non-Compliance

The contracting officer *must*—

- (a) Review allegations;
- (b) Unless fraud is suspected, notify the contractor of the apparent unauthorized use of foreign construction material and request proposed corrective action; and



# Non-Compliance

- (c) If a contractor or subcontractor has used foreign construction material without authorization, take appropriate action, including one or more of the following:
  - (1) Request a waiver of the AIS requirement;
    - (1) Only EPA can issue waivers.
  - (2) Require the removal and replacement of the unauthorized foreign construction material; or
  - (3) Withhold payment for all or part of the project.
  - (4) Additional remedies are available to the EPA under Clean Water Act and Safe Drinking Water Act, such as contract termination and contractor suspension.
- (D) If the noncompliance appears to be fraudulent, refer to the officer responsible to the EPA Inspector General for criminal investigation. 1-888-546-8740 or [OIG\\_Hotline@EPA.gov](mailto:OIG_Hotline@EPA.gov)



# Key Notes and Suggestions

## **When required, AIS/Buy America trump all local and project specific product approvals and specifications**

- ▶ Just because a product is approved for use by a city or other political entity does not mean it meets the domestic requirements of AIS or Buy America
- ▶ A product that is specifically called out in an engineering plan or bid document does not take precedence over any domestic requirements associated with a project
- ▶ Weaker local domestic requirements do not take precedence over federal requirements



# Key Notes and Suggestions

## Manufacturer Certification

- ▶ It is not your job to certify or prove a product meets AIS/Buy America requirements
  - ▶ Force every manufacturer to provide detailed certification
    - ▶ Must be date, project and product specific
    - ▶ Must meet the required definition of “domestic”

## Waivers

- ▶ Only the political entity receiving the funds can request an AIS/Buy America product or requirement waiver
  - ▶ No local entity, engineering firm or general contractor can issue or grant a waiver



# Common Reasons for *Misapplication*

- Confusing which requirements apply
- Different funding sources of separate contracts within a broader project
- Products meeting some but not all of the requirements
- Granting waivers without proper authority
- Local government specifications given preference



# "Buy America" Program Updates

- ▶ Drinking Water SRF
  - ▶ The recently passed Water Resources Development Act (WRDA) extended the AIS provisions for the DWSRF through 2023
  - ▶ CWSRF is a permanent requirement
- ▶ USDA Rural Utilities Service program for Water and Wastewater
  - ▶ FY 2018 Omnibus Appropriations Bill retained AIS requirements



# "Buy America" Program Updates

- ▶ Water Infrastructure and Investment Act
  - ▶ AIS requirement is permanent
  - ▶ FY 2017 – FY 2018--Program has invited more than 50 projects to apply for loans
  - ▶ Would total more than \$7 Billion in loans

# 2019 Buy America Executive Order

- ▶ Executive Order signed on January 31, 2019
- ▶ Objective of the Executive Order
  - ▶ This new executive order directs the head of each executive department and agency administering a covered program to “encourage recipients of new Federal financial assistance awards to use, to the greatest extent practicable, iron and aluminum as well as, steel, cement, and other manufactured products produced in the United States in every contract, subcontract, purchase order, or sub-award that is chargeable against such Federal financial assistance award.”

# 2019 Buy America Executive Order

- ▶ Executive Order signed on July 15, 2019
- ▶ Objective of the Executive Order
  - ▶ “Maximizing Use of American-Made Goods, Products, and Materials”
  - ▶ Instructed Federal Agencies to consider and propose rules to increase the domestic component threshold of the Buy American Act from 50% to 55%

# 2019 Buy America Executive Order

## Current Trends

- ▶ Federal spending on American-made products has increased by \$24 billion over the previous three-year average
- ▶ The use of waivers to allow spending on foreign-made goods declined by 16% government-wide from the 2017 fiscal year to the 2018 fiscal year
  - ▶ Resulting in a 10-year low in spending on foreign-made goods

# Tariffs

## Section 301 Tariffs: US vs. China

*A Section 301 investigation determined that China's acts, policies, and practices related to technology transfer, intellectual property, and innovation are unreasonable and discriminatory.*

- Total US tariffs applied to Chinese goods: US\$550 billion
- Total Chinese tariffs applied to US goods: US\$185 billion
- Includes a 25% tariff on many of the commonly used iron and steel products in the water/wastewater industry
  - Such as pipes, fittings, restraints, municipal castings



# Tariffs

## Section 301 Tariffs: US vs. China

- ▶ US recently announced product exclusions and exemptions from tariffs
  - ▶ Driven from US exclusion request process
    - ▶ Primarily consumer and agriculture products
- ▶ On December 15<sup>th</sup>, the US is scheduled to add an additional round of tariffs on \$156 million worth of previously non-covered products.

## Section 232 Tariffs

- ▶ 25% on all Steel imported products
- ▶ 10% on all Aluminum imported products
- ▶ Certain countries have exemptions

# Future Infrastructure Package

“Both parties should be able to unite for a great rebuilding of America’s crumbling infrastructure,” President Trump—2019 State of the Union

- Priority of the Administration
- One of the very few “bi-partisan” initiatives
- The White House and Democratic Leadership have agreed on a \$2 Trillion price tag
- As an industry, we must push for “water infrastructure” funding
- How will it be funded?
  - New funding sources
  - Existing programs such as SRFs
  - Public/Private



# Questions?

For more information, please contact:

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