

Made in America?

BY ANGELA R. STEPHENS

The Buy America and Buy American Acts appear to promote domestically produced steel, but loopholes in both allow for other shopping destinations.

AS THIS ARTICLE GOES TO PRESS, more details of the Obama administration's 2009 Economic Stimulus Package are being released. Common wisdom is that, when complete, the Stimulus Package will include a public works component to fund construction and renovation of bridges, highways, and public buildings from the federal level down to local school districts. Included in the stated goals for building construction are increased energy efficiency and sustainability.

The rationale accompanying the Economic Stimulus Package emphasizes the "three P's": (1) Put money into the economy; (2) Put Americans back to work; and (3) Provide needed infrastructure upgrades (transportation, heavy civil/utility, and building construction). Sadly, under the current federal law there is no guarantee that American funds applied to rebuild the infrastructure will be paid to American workers or American companies. Under the interpretation of the current law there is every possibility that foreign mill steel and foreign fabricated steel could find its way into public works projects funded by the 2009 Stimulus Package. It is clear that most Americans are not aware of the loopholes in the current law. At this writing it is still unclear whether our legislators will take the action necessary to close those loopholes.

There are two separate "domestic only" provisions applicable to federal construction projects. On the surface, these provisions require using American materials. One set of provisions applies to bridge construction and is contained in the Federal Highway Administration (FHWA) and Federal Transit Administration (FTA) Buy America statutes, which, in turn, are derived from the Surface Transportation Assistance Act of 1982. The other set of provisions is contained in the Buy American Act, and applies to non-transportation federal construction projects.¹ (Note the subtle difference: "Buy America" for bridges and "Buy American" for buildings.)

In application, neither guarantees that American public works projects will be built exclusively with American material and American labor.

Bridge Construction

The current FHWA and FTA Buy America provisions were enacted 1978 when Congress sought to expand domestic procurement coverage to the federally funded highway construction projects. The Buy America provisions provide that federal-aid funds may not be used on federal-aid highway construction projects unless the iron and steel used on the projects are manufactured in America.

FHWA Buy America Statute and Regulations

The Federal Highway Administration Buy America statute and regulations apply to federally funded FHWA projects.² Essentially, this statute requires that all steel and/or iron materials that are permanently incorporated into a FHWA project must be manufactured and fabricated in the United States. Here is the first loophole: If a state DOT determines that a bridge structure (even a bridge structure that is to remain in place for years and possibly then moved for a secondary, continued use at another location) is temporary rather than permanent in nature, then the Buy America protection does not apply. Then there is a second loophole: Buy America protection does not apply to bridge structures funded totally from state revenue, even if application of federal funding to another state highway project freed state funds to be applied to build a bridge through loophole number two.

The FHWA Buy America statute also does not apply if: (1) the State accepts alternate bids from both foreign and domestic steel mills or fabricators and the foreign company's bid is lower than the domestic company's bid by more than 25%, or (2) the use of foreign steel and iron does not exceed 0.1% of the total contract value or \$2,500, whichever is greater.³

A state may apply for a waiver of the FHWA Buy America statute if: (1) the application is felt to be inconsistent with the public interest, (2) it is claimed that needed materials and products are not produced in America in sufficient quantity or quality, or (3) the

¹ 41 U.S.C. §§10a -10d.

² 23 U.S.C.S. §313 and 23 C.F.R. 635.410.

³ 23 C.F.R. 635.410(b)(1-4).

inclusion of domestic material will increase the cost of the overall project by more than 25%. Herein is loophole number three. Does the 25% rule apply to the total cost

The Buy America Act applies to bridges, while the Buy American Act applies to buildings.

of the entire project (in the case of a bridge, the entire span—including approaches—from shore to shore) or can it be applied to separate contracts for individual project components? Some states have broken bridge projects down into individual components, contracted separately for those components, and applied the 25% rule only to the individual contract component and not to the project as a whole.

Also, certain trade agreements may waive the applicability of the Buy America statute.

FTA Buy America Statute and Regulations

The FTA Buy America statute applies to FTA federal-aid highway construction projects.⁴ The FTA Buy America statute is substantially similar to the FHWA statute. Of importance, however, is that the FTA Buy America statute provides that a waiver may also be obtained if, when procuring rolling stock, the cost of components and subparts produced in America is more than 60% of the cost of all components of rolling stock and the final assembly of the rolling stock has occurred in America.

Building Construction

The Buy American Act (“the Act”) was enacted in 1933 in an effort to stimulate the domestic economy. It was designed by its drafters as a device “to foster and protect American industry, American workers, and American invested capital.”⁵ It provides that certain American materials, such as steel, must be used on any federally funded construction project where the federal agency makes a direct purchase or awards a contract. (Remember, “Buy America” applies to federally funded transportation projects; “Buy American” applies to everything else.)

The Act applies unless: (1) it is inconsistent with the public interest, (2) the cost is unreasonable, (3) the material will be used

outside the U.S. (say, an offshore DOD or DOS facility), (4) the material is insufficient and not reasonably available in commercial quantities and of a satisfactory quality, or (5) the contract award value is less than or equal to \$2,500. Additionally, trade agreements, such as NAFTA and the Trade Agreement Act, waive the requirements of the Buy American Act for construction materials purchased from certain countries if the estimated value of the construction project exceeds certain amounts.

Because of the many waivers and exceptions that have found their way into the Buy American Act, impacting building construction over the years, it has become riddled with loopholes. The Buy American Act notwithstanding, there are many instances where federal funds purchase steel from foreign mills and foreign fabricators for domestic federal construction projects.

Objections to Enforcement

Over the years proponents of incorporating foreign steel products into domestic public works projects have relied upon a common theme to press for progressive weakening or removal of domestic preference provisions in federally funded construction projects. Their argument normally contains the following theme: “Domestic steel producers and fabricators are not as efficient as their foreign competition. They cost too much, they run up the price of public works, and the public has no assurance that they are not hiding behind domestic preference provisions to artificially inflate their prices.”

This argument is strongly contested by the domestic steel industry. Domestic producers and fabricators argue that when competition is fair and grounded on a level, legal playing field (including application of fair and competitive structural design and fair application of international trade laws and environmental considerations) the American steel industry can compete with anyone in the world. Domestic mills and fabrication shops argue that they lead the world in efficiency and have not asked for a penny in government subsidies. Domestic producers consistently ask only for a level playing field.

However, the domestic industry contends that the playing field is not level, and that some foreign governments allow their

industries to operate under advantages that are simply not shared by their American competition. All of this can be rectified by our government, and sufficient safeguards (teeth) can be brought to bear by our government to safeguard the American public against price gouging.

But rectification of international trade abuses takes time, and, simply stated, the American economy is under stress—and American workers and companies believe that they do not have time to wait for diplomacy and the international courts to rectify

The Buy American Act notwithstanding, there are many instances where federal funds purchase steel from foreign mills and foreign fabricators for domestic federal construction projects.

what they perceive as the current imbalance.

Added Provision

Congress and/or the president have the inherent authority to strengthen the Domestic Preference provisions in federal procurement law and/or to temporarily close the current loopholes in the law during periods of national emergency. Participants in the domestic industry claim that we currently find ourselves in a period of national emergency and that strong action by government is required to maximize the benefits of the Economic Stimulus Package for American companies and American workers.

Many organizations, like AISC, have passed resolutions and asked members of Congress to include a “domestic only” provision in the 2009 Stimulus Package that would ensure that federal funds are being given to American workers and American companies. You can join these efforts by contacting your member of Congress and ask that he or she supports legislation that will close the loopholes in the current Buy America and Buy American provisions and/or add a “domestic only” provision to any stimulus packages. MSC

Angela R. Stephens is a civil engineer and lawyer with Stites & Harbison, PLLC, counsel to AISC. Angela has concentrated her practice in construction law. She is active in the National Association of Women in Construction (NAWIC) and will be speaking at the 2009 North American Steel Construction Conference in Phoenix this April. The views expressed here are those of Ms. Stephens and not necessarily those of either AISC or Stites & Harbison.

⁴ 49 U.S.C.S §5323(j) and 49 C.F.R. 661.1 - .21.

⁵ 76 Cong. Rec. 1896 (1933) (remarks of Rep. Eaton), cited in *Textron, Inc., Bell Helicopter Textron Division v. Adams*, 493 F. Supp. 824, at 830 (D. D. C. 1980).