



Buy American Requirements in a Globalized Economy

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Successful federal contracting today means navigating the “alphabet soup” of federal and other regulatory requirements that inevitably come along with government dollars. These include a maze of FARs, VARs, DFARs, or whatever other acquisition regulations are applicable to the project; EEOC rules and other non-discrimination requirements, Small Business Enterprise (“SBE”) subcontracting plans and reports, OSHA requirements, and LEED environmental building standards just to name a few.

Among the most challenging requisites on any federally funded project is “Buy American” requirements, which generally mandates that all construction materials be purchased from the United States or a specified list of trading partner countries that have been deemed acceptable. A brief glance at the specifics of the three major Buy American statutes that contractors face often cause the head to spin with questions. More specifically, what does it mean to be “manufactured” in the United States? What if raw materials from different countries are brought together to produce a multi-component “construction material” in a United States plant? What if foreign products are specified on a project with Buy American requirements?

The good news is that by acknowledging that these questions exist, and recognizing the complex grey areas inherent in these broad-brush standards, you will already have a leg up in addressing Buy American requirements successfully. While the intricate specifics of Buy American’s various laws is well beyond the scope of any singular article, the goal here is to simply introduce its three major laws, explain why the application of those laws is increasingly complex, and recommend an effective strategy for dealing with these laws on federally-funded projects.

1 INTRODUCTION

Throughout the last fifty years, the shift of American jobs heading overseas has become an emotionally charged political issue. As both major political parties have moved towards advocacy of free trade and opening up international markets for American products, previously well-paying blue collar jobs in the American Midwest have disappeared by the hundreds of thousands, leaving permanently high unemployment rates in those areas in their wake. At the same time, American consumers have increasingly been marketed cheap goods manufactured in foreign countries, where low wages and poor working conditions often prevail.

As a result, it has become a popular issue for politicians to advocate for government purchases of American goods and services in a way that will benefit American manufacturing sector workers. A significant percentage of government purchases involve new construc-

tion projects, or renovations of existing buildings or infrastructure. Even at the state and local level, projects are often marketed to the public on the promise of employing local workers. Consequently, ensuring that American construction projects utilize American labor and construction materials has been a growing focus.

With the recession of 2008-2010, this issue has taken on an even greater importance. As President Obama took office he began to push for passage of the American Reinvestment and Recovery Act (ARRA), also known as the "stimulus bill," which included massive funding for construction projects of varying natures. Large swaths of the American public asked the justifiable question: if we plan to spend nearly \$1 trillion in American taxpayer money to support American jobs, how can we ensure that this money achieves its intended aim? The answer, as it has been since the early 1930s, is to pass the newest version of a "Buy American" statute, which

has become ubiquitous on federally funded construction projects today.

Here we will discuss the history of federal Buy American type statutes amongst the construction marketplace, and discuss how the increasingly complex construction industry makes application of these statutes even more challenging. Strategies addressing these requirements will also be presented. Please note that there are many Buy American type statutes on both the federal and state level that this article does not address (such as the Berry Amendment for Department of Defense spending, for example). In addition, this article is not intended as legal or compliance advice, and should not be taken as such. The intersection of every project and Buy American law (and different versions of individual laws themselves) is unique, making a generalized guidance impossible and inadvisable. Obtaining legal counsel for each individual encounter with Buy American law is a necessity.

2 A BRIEF HISTORY

Buy American type statutes, as the brief history below will show, are the result of economic panic. Interestingly enough, the three major laws that construction firms encounter on federal work were passed at roughly the same time as the three highest spikes in unemployment over the past 80 years. Unsurprisingly then, the requirements imposed are often unclear and have significant unintended consequences. This makes determining bright-line rules difficult to impossible. However, an understanding of the background of these statutes makes it easier to place these laws in context and to implement an effective compliance strategy.

2.1 THE 1933 BUY AMERICAN ACT

The first Buy American statute was passed during the depths of the Great Depression. In November of 1932, with unemployment rising to previously unimaginable numbers, the American people had elected new President-elect Franklin Delano Roosevelt in a landslide, rejecting the leadership of then-President Herbert Hoover.

With the economy in free fall, and banks failing almost daily, President Hoover invited President-elect Roosevelt and his economic team to the White House to discuss a joint economic strategy. Unfortunately, these sessions produced little agreement, and no productive economic policy-making.

With little to do but sit and wait for President-elect Roosevelt and a newly elected Democratic Senate to take office, a divided Congress helplessly twiddled its collective thumbs, taking the few ineffectual measures that could generate bipartisan support as the news worsened by the week. Among these measures was the 1933 Buy American Act. Sponsored by a progressive Republican Senator (and former Governor) from California, Hiram Johnson, the law was a nod towards economic isolationism and protectionism that had characterized Hoover's presidency. Hurriedly passed as Roosevelt's inauguration approached, the law was literally signed on President Hoover's last day in office, March 3, 1933, and required the use of American materials and manufactured goods in projects paid for by the American federal government.

The law has evolved throughout the last eighty years, but remains on the books to this day. Located in the United States Code at 41 U.S.C. 10a – 10d, it now affects nearly all federal government construction projects. As its rushed passage would suggest, the law was never a model of clarity. The law now contains several major exceptions, applies in some instances to construction materials from "designated countries" with whom the United States has treaties, and generally produces confusion amongst federal contractors trying to do the right thing.

2.2 THE 1982 SURFACE TRANSPORTATION ASSISTANCE ACT

Federal procurement law became even more complex with the passage of the 1982 Surface Transportation Act, or the "Buy America Act" (as compared to the original "Buy American Act"). With unemployment at its highest rate since the end of 1982, then-President Ronald Reagan and his Democratic counterpart in the House of Representatives, Speaker of the House Tip O'Neill from Massachusetts, collaborated to produce a highway-funding bill called the Surface Transportation Assistance Act of 1982 (STAA). The STAA's primary purpose was to levy a 5-cent per gallon gas tax on the American public, in order to fund highway and transit construction across the country, and stimulate the American economy.

Just as the preceding period of the 1933 Buy American Act, the American economy was in desperate shape in early 1982. The American public had endured years of high inflation, oil shortages and the resulting gas price spikes, and rapidly rising unemployment that spanned from the late 1970s into the early 1980s. The "misery index" – a measure combining unemployment and inflation – remained near post-World War II highs, where it had been holding since the late 1970s. The steel industry in particular suffered, with hundreds of thousands of Americans losing jobs to overseas competition. Pittsburgh, Pennsylvania steel mills alone saw the loss of over 150,000 jobs during the 1981-82 recession.

The STAA was an attempt to increase government spending on American infrastructure by directly supporting American construction jobs and indirectly supporting American manufacturing. In order to ensure that the \$5 billion per year raised by the gas tax levy produced a maximum impact on the recovering economy, lawmakers included a provision within the law known as the 1982 "Buy America Act."

The 1982 Buy America statute, while confusingly similar in name to the 1933 Act, addressed a completely different set of circum-

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stances. Where the 1933 version placed restrictions on direct federal spending, much of the money raised by the 1982 act would be given to cities and states in order to fund local highway and transit projects. Thus, the Buy America language included in the statute restricts how “grantees;” i.e. state and local governments could spend money given to them for highway and transit projects, as opposed to defining how the federal government spends its own money.

The differences do not end there. With the hemorrhaging of steel industry jobs as a backdrop, the lawmakers who passed the 1982 version decided to provide separate and more restrictive steel and iron rules when compared to “other manufactured products.” These steel and iron rules have been interpreted several times by the Federal Transit Administration (FTA), the agency that administers transit projects; each time causing more confusion as to what the rules actually mean. As a result, by 1982 there were two separate federal Buy America (or “American”) Acts, each with completely different rules, and applicable in two different situations.

2.3 THE ARRA BUY AMERICAN ACT (SECTION 1605 OF ARRA)

The third and most recent iteration of major federal Buy American lawmaking came just two years ago as one of President Barack Obama’s first acts in office. In 2009 the American stock market was again in free fall, following the onset of one of the worst financial crises in our nation’s history the previous fall. The Obama administration’s preferred policy response was to shock the economy into improvement, or at least slow the deterioration by infusing a massive amount of federal money into the economy. This “stimulus package,” which eventually totaled \$787 billion, included billions in additional funding targeted primarily towards “shovel-ready” construction projects. It is worth noting how much the United States economy has grown in the last 80 years. The total federal spending in 1932 during President Herbert Hoover’s final year in office amounted to \$4.3 billion – about 0.5% of President Obama’s 2009 stimulus bill alone.

In any event, this large new federal spending bill, in a time of increased anxiety and job loss, produced the same reaction as in 1933 and 1982: hastily put-together legislative efforts by politicians to ensure that the new federal spending would result in new Ameri-

can jobs. However, by 2009, significant countervailing forces were affecting the political climate. Both political parties had developed strong strains of pro-“free trade” international trade policy, and other major economies, who were similarly suffering, posed potential retaliation threats if the United States entered into an overly protectionist stance.

These forces combined to produce an end result that was a compromised version of the now significantly modified 1933 Buy American Act. This new statute, codified as Section 1605 of the American Recovery and Reinvestment Act, changed some of the standards applied by the 1933 Act, yet kept its basic framework. Consequently, at this point, different rules will likely apply to: (1) a federal project funded from the normal yearly budgets passed by Congress; (2) a state highway or transit project built, at least in part, with federal dollars; or (3) a federal project with stimulus funding. In addition, contracting officers often have different contract clause options within each law to choose from. Thus, the first step on any job where such requirements might apply, at this point, is simply figuring out which law (and which version of a particular law) is in play on the particular project.

3 DECADES-OLD STATUTES IN A GLOBALIZED WORLD

Further complicating the task of the contractor or government contracting officer trying to interpret and apply these statutes is the ever-increasing interconnectivity and complexity of the modern economy and, by extension, individual manufactured goods. Even if the multitude of existing Buy American-type statutes had been clearly and methodically written—which they were not—it is not at all clear that they would be easily applicable in the modern construction context, for the simple reason that defining an “American” product is now a very difficult task.

For example, in the first half of the twentieth century, it was a very simple task to determine whether most products were “American.” Using the automobile as an example, most, if not all, General Motors and Ford Motor Company cars and trucks were designed and developed in the Detroit, Michigan area, built with parts primarily manufactured in the “rust belt” states of Ohio, Indiana, and Michigan, and manufactured in Detroit by American autoworkers.

However, in the age of globalization, interconnected commerce, and instant communication, it can be extremely difficult to categorize products by nationality. For example, Toyota Motor Corporation, with its global headquarters in Toyota, Aichi, Japan, has for many decades been a major component of the industrial rise of modern Japan. Similarly, Ford Motor Company, with its headquarters in Detroit, Michigan (a sister

city of Toyota since 1960) has been a giant of American industry for over 100 years running. Yet when shiny new Toyota Prius Hybrids rolls off the assembly line in Tupelo, Mississippi – and that fact is instantly transmitted back to Toyota Motor North America headquarters in Torrance, California – it can hardly be argued that the new gas sipping hybrid has not become an “American” car. Conversely, when the new owners of a 2010 North American Car of the Year Award-winning Ford Focus drives their gleaming new purchase off of the automobile dealership lot, they might be surprised to learn that their new “American” car was manufactured in Hermosillo, Senora, Mexico.

The construction industry is no different. An operable louver sunshade, for example, might include electrical components from Taiwan or Japan, Chinese aluminum, American steel fasteners, and be manufactured in an American plant. A specialized fabricated steel piece may be extracted and smelted down in China, shipped to the United States for fabrication, included in a larger assembly at a Mexican plant, and shipped back to an American jobsite for installation.

In any such instance, it obviously begs the question to require that the product be “American made,” or “manufactured in the United States.” A contractor attempting to comply with such regulations may have to make tricky judgment calls in the absence of clear guidance and with varying degrees of input and help from contract documents and the contracting officers who must implement the statutes.



Figure 1 (left): The three Buy America laws that construction firms encounter on federal work today were initiated immediately following the United States’ highest rates of unemployment: the early 1930’s, early 1980’s, and most recently in 2009.

WHAT TO DO?
ENCLOS RECOMMENDS

1. Find Out As Early As Possible Which Law Applies

If you are working on a government-funded project, there is a good chance that some form of Buy American law applies. If the project is federally funded, the application of one form or another of Buy American law is a virtual certainty, in the absence of some sort of explicit waiver granted by the contracting officer. Often, a quick review of the bid documents will reveal a reference to specific Buy American requirements. If no such reference is found, it is important to ask whether Buy American requirements will apply. The worst possible thing that can happen is to find out that you are on a Buy American project at such a late date that it puts your planned method of designing or building the project or executing your scope of work in jeopardy.



2. Hire Legal Counsel

This point cannot be emphasized enough. The key to effective compliance with Buy American requirements is to hire legal counsel with expertise in this arena. Buy American statutes are very complicated, often coming in multiple different versions. In addition, and frustratingly enough, Buy American statutes sometimes do not mean what they seem to say, owing to interpretations on the part of the federal agencies that administer these laws.

No matter what the situation, an experienced lawyer can help navigate the complexities of complying with a particular law, and can help formulate strategy for engaging in the bidding and other project processes in the safest and most productive way possible.

3. Scope It Out

Once you have determined which law applies to the project and obtained legal guidance on the nuances and intricacies of that particular law, often the next step is to determine which scopes of work may be problematic, and begin working on those. For example, it is not uncommon for a Buy American project to include specified products from other countries. Depending on the specifics of that particular law, those products may or may not seemingly comply with the applicable law.

In this sort of situation, it is important to determine whether that product is problematic with respect to Buy American compliance, and to either switch to a different compliant product, or develop a strategy for determining compliance or pursuing a clarification or change to the specifications. No matter what the Buy American problem, it is better raised on the front end than after the project is well underway, when there may be no easy way to comply.

4. Communicate Early and Often

Making sure that all involved parties are on the same page and have the same understandings is a critical component of strategy on any Buy American project. In keeping with the old axiom that “two heads are better than one,” at a minimum, discussing the statute and various compliance issues with involved parties may lead to better ideas. Even more helpfully, it may bring to light a previously undiscovered issue, and prompt a collaborative solution that is better for the project as a whole.

5. Document Compliance

Finally, as with any government compliance issue, documentation is key. While a contractor may face challenges in procuring particular items from Buy American-compliant sources, and may also face challenges in verifying that particular raw materials or manufactured products came from the right

places, proper documentation can help to mitigate those risks. We recommend not only documenting expectations from vendors and suppliers in the form of proper certifications and purchase order language, but also documenting the sourcing and transit of the materials themselves, to the extent possible. If as comprehensive a documentation plan as possible is undertaken, involved parties can reduce the risk of unpleasant future surprises.

CONCLUSION

As with most project processes, doing your homework and planning ahead are the keys to navigating Buy American compliance in our interconnected modern global economy. The typical federal contractor will see these requirements on most, if not all, federally-funded government projects, yet may also be procuring products that either must be purchased overseas or can be purchased much more cheaply. The multiple existing Buy American laws, and their seemingly overlapping nature, may make it difficult to generalize simple rules or a standard compliance process ahead of time. However, with proper preparation and diligence, careful compliance with Buy American laws can become a competitive advantage, enabling confident bidding and successful performance on the large numbers of government projects that make up a significant percentage of the commercial construction marketplace today.

Figure 2 (right): Enclos' work on the new San Diego United States Courthouse closely followed Buy America requirements.

