

Key Takeaways From The NY Buy American Act

By **Justin Ganderson**, **Scott Freling** and **Sandy Hoe** (April 2, 2018, 6:43 PM EDT)

This was not an April Fool's Day joke: The New York Buy American Act went into effect on April 1, 2018. Signed by Gov. Andrew M. Cuomo in December 2017 and championed by state legislators on both sides of the aisle, the NY BAA amends the existing domestic content restrictions in Section 146 of the New York State Finance Law and Section 2603-a of the New York Public Authorities Law by adding another layer of “Buy American” requirements focused on structural iron and structural steel products used in certain construction projects.

Although Gov. Cuomo has noted that this new law is intended “to support hardworking men and women, revitalize infrastructure across the state, bolster the strength of our manufacturing industries and cement our status as a global economic leader”[1] — a sentiment in step with President Donald Trump’s stated “Buy American” policy[2] — the economic impact of this legislation remains to be seen. As will be discussed, this set of requirements is focused on only two categories of items (structural iron and structural steel) used on a specific set of construction projects (roads and bridges) that will be awarded by certain New York agencies or authorities during a two-year window.

Notwithstanding, the NY BAA is a noteworthy development because it further reinforces the general rallying cry behind “Buy American.” Most importantly, this new law serves as a reminder to contractors that an already cumbersome regime of federal and state domestic preferences will continue to remain complex.

Overview of the New York Buy American Act

Covered Contracts

The domestic content restrictions contained in the NY BAA apply to contracts for the “construction, reconstruction, alteration, repair, maintenance or improvement” of a road or bridge that are:

- over \$1 million,
- “executed and entered into on or after” April 1, 2018, and



Justin Ganderson



Scott Freling



Sandy Hoe

- “made and awarded” by any of the following New York agencies or authorities — the Department of Transportation, the Office of General Services, and the State University of New York Construction Fund; or the Dormitory Authority, the Metropolitan Transportation Authority, the Bridge Authority, and the Thruway Authority, “on its account or for the benefit of a state agency or authority.”

However, the NY BAA does not apply to any contracts resulting from “pending bids or pending requests for proposals issued as of April 1, 2018,” nor does it apply to “projects that have commenced project design and environmental studies prior to such date.”

New Domestic Content Restrictions

Contracts subject to the NY BAA must contain a provision requiring that all “structural iron and structural steel used and supplied” and “permanently incorporated” by a contractor (or subcontractor) into the project “be produced or made in whole or substantial part in the United States, its territories or possessions.”

The NY BAA clarifies that “all manufacturing” for structural iron or structural steel products “must take place in the United States, from the initial melting stage through the application of coatings, except metallurgical processes involving the refinement of steel additives.” The term “permanently incorporated” means that the iron or steel product must “remain in place at the end of the project contract, in a fixed location, affixed to the public work to which it was incorporated.” In other words, the steel or iron product “cannot be capable of being moved from one location to another.”

Exceptions

Like the federal Buy American Act (41 U.S.C. §§ 8301-8305) and other domestic preference regimes, the NY BAA domestic content restrictions are not absolute. For example, the head of the agency or department constructing the public work may determine that the domestic content restrictions should not apply where:

- the compliant products would “increase the cost of the contract by an unreasonable amount,”
- the compliant products are not manufactured in the United States “in sufficient and reasonably available quantities or of satisfactory quality or design,”
- complying with these restrictions would result in the “loss or reduction of federal funding,”
- an emergency or critical need arises where the use of non-compliant products is necessary, or
- a reciprocal trade agreement with a state or foreign government requires that these restrictions not apply.

As to the last exception, the NY BAA also makes clear that this law is not “intended to contravene any existing treaties, laws, trade agreements, or regulations of the United States or subsequent trade agreements entered into between any foreign countries and the state or the United States.”

Implementing Regulations

The NY BAA authorizes each agency and authority to establish implementing regulations. However, the legislation notes that a contractor will not be required to certify that the structural iron or structural

steel was made in whole or in substantial part in the United States.

Formation of a Working Group

The NY BAA requires the formation of a working group that will, among other things, assess the impact of these new domestic content restrictions, “evaluate reciprocal trade access for any foreign state that may be significantly impacted,” and assess the potential expansion of the NY BAA “to include other products manufactured in the United States, which shall include but not be limited to concrete, cement and aluminum.”

By Jan. 1, 2019, the working group must submit an interim report to the governor of New York, the temporary president of the New York state senate and the speaker of the New York assembly. The final report must be submitted on Jan. 1, 2020.

Expiration

By its own terms, the NY BAA will “expire and be deemed repealed April 15, 2020.”

Takeaways

1. The NY BAA Does Not Repeal New York’s Existing Restrictions

The existing domestic content requirements related to steel in Section 146 of the New York State Finance Law and Section 2603-a of the New York Public Authorities Law [3] have not been repealed. However, the new NY BAA requirements, if applicable, would supersede the existing provisions. As a result, contractors must consider the differences between each set of requirements and plan accordingly.

2. More Requirements, More Challenges

Although the new domestic content requirements under the NY BAA appear to be limited in scope and application,[4] with each new requirement comes a new compliance challenge. This is especially true for contractors performing under multiple federal and state construction contracts, which may be subject to different domestic content requirements and nuances, including:

- Section 146 of the New York State Finance Law: All “structural steel, reinforcing steel and/or other major steel items to be incorporated in the work of the contract shall be produced or made in whole or substantial part in the United States, its territories or possessions,” unless an exception applies.
- The NY BAA: All “structural iron and structural steel used and supplied” and “permanently incorporated” by a contractor (or subcontractor) into the project must “be produced or made in whole or substantial part in the United States, its territories or possessions,” unless an exception applies. Unlike Section 146 – which applies to “structural steel, reinforcing steel or other major steel items,” but not iron – the NY BAA applies to “structural iron and structural steel.” The NY BAA also clarifies that “all manufacturing” for structural iron or structural steel products “must take place in the United States, from the initial melting stage through the application of coatings, except metallurgical processes involving the refinement of steel additives.”

- The Federal “Buy American Act” (41 U.S.C. §§ 8301–8305; implemented at FAR 25.2): Only “domestic construction materials” can be used in the project, unless an exception applies. The domestic preference regime for federal construction projects subject to the Buy American Act is significantly different than those discussed above. Unless an exception applies, contractors may only incorporate “domestic construction materials” into a project. A domestic construction material includes the following categories of items that are brought to the site for incorporation: (1) an “unmanufactured construction material mined or produced in the United States,” (2) a commercial-off-the-shelf “construction material manufactured in the United States,” or (3) a noncommercial-off-the-shelf “construction material manufactured in the United States” that is comprised of “components mined, produced, or manufactured in the United States” that exceed a certain cost threshold. FAR 25.003. [5] This would include almost any item brought to the site – from iron and steel items to carpet to pre-fabricated doors to nails and bolts.
- Federal Transit Administration “Buy America” Requirements (23 U.S.C. § 313; implemented at 49 C.F.R. Part 661): Only “steel, iron, and manufactured goods ... produced in the United States” can be used in the project, unless an exception applies. The domestic preference regime for projects subject to “Buy America” requirements presents another set of specific requirements. For example, the implementing regulations state that “[a]ll steel and iron manufacturing processes must take place in the United States, except metallurgical processes involving refinement of steel additives.” And for a “manufactured product to be considered produced in the United States: (1) All of the manufacturing processes for the product must take place in the United States; and (2) All of the components of the product must be of U.S. origin.”

These varied provisions impose a series of requirements that make undertaking construction projects funded by the state or the federal government extremely complex.[6]

Accordingly, it is critical that contractors have processes and procedures in place to ensure compliance with each contract’s particular domestic content requirements, and to ensure that any subcontractors and suppliers are aware of and complying with such requirements, where applicable. Compliance failures can have serious consequences — from breach of contract to fraud.

3. The Potential for Retaliatory Actions

The NY BAA also has been mentioned in recent headlines because it sparked retaliatory actions from the government of Ontario.

On March 8, 2018, Ontario’s “Fairness in Procurement Act, 2018” received Royal Assent.[7] This statute permits the government of Ontario to “make regulations designating an American jurisdiction as an offending American jurisdiction if, in the Minister’s opinion, the government of the American jurisdiction has enacted legislation or otherwise provided direction to entities under its authority to apply requirements, restrictions, policies, sanctions or other measures that may inhibit or prevent Ontario suppliers from participating or succeeding in procurement processes initiated by purchasers from the offending American jurisdiction.”

A designation as an “offending American jurisdiction” is significant because it may subject American suppliers to potential retaliatory actions, e.g., “excluding” a supplier “from participating in procurement processes or being awarded procurement contracts,” or “evaluating” a supplier’s proposal “according to additional or more stringent criteria than applies to other proposals.” In fact, late last month, the government of Ontario enacted regulations targeting New York contractors supplying structural iron.[8]

Accordingly, any new domestic “Buy American” requirements may have significant consequences for contractors performing work under contracts with foreign governments.

4. What’s Next?

Given the Trump administration’s “buy American” focus and recent “buy American” actions at the federal and state levels,[9] contractors should not be surprised if more federal and state domestic content restrictions and preferences are enacted in the future.

In fact, in the near term, it is very possible that “buy American” (or “buy America”) provisions could find their way into whatever legislation arises from President Trump’s infrastructure plan.[10] For example, earlier this year, Sen. Tammy Baldwin, D-Wis., and nine other senators wrote a letter to President Trump “encourag[ing]” him to “not only protect existing ‘Buy America’ laws, but to work with Congress to expand these protections and address coverage gaps” with regard to the infrastructure plan. [11] Early last month, Rep. Brendan Boyle, D-Pa., co-sponsored the “Buy America 2.0 Act,” which was aimed to “standardize and extend certain Buy America provisions,” in part, by ensuring that “[f]unds made available to carry out a transportation or infrastructure project using Federal funds may not be obligated for a project unless the steel, iron, and manufactured goods used for the project are produced in the United States.”[12] And, most recently on March 29, 2018, Sen. Sherrod Brown, D-Ohio, issued a press release “calling” on President Trump to support “bipartisan legislation” that Senator Brown co-sponsored in early 2017 with Sen. Rob Portman, R-Ohio, to “apply Buy America rules to all federal infrastructure projects.”[13]

Given the dialogue, it would not be surprising if the president and Congress agreed to an approach similar to what was employed under the American Recovery and Reinvestment Act of 2009,[14] which mandated that construction projects funded thereunder be subject to specific domestic content requirements.[15]

Conclusion

Although the NY BAA currently is slated for a relatively short life and is fairly focused, contractors should not overlook these requirements. Given the nuances associated with each applicable domestic preference regime, a one-size-fits-all general compliance approach may not be adequate. Contractors should carefully review and consider each applicable domestic preference regime before bidding on a project and commencing performance, and should continue to monitor future developments at both the state and federal levels.

Justin M. Ganderson is special counsel, Scott A. Freling is a partner, and E. Sanderson Hoe is senior of counsel in the Washington, D.C., office of Covington & Burling LLP.

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[1] See Gov. Cuomo Press Release (Dec. 15, 2017) at <https://www.governor.ny.gov/news/governor-cuomo-signs-buy-american-legislation-all-structural-iron-and-steel-new-york-roads-and>.

[2] See, e.g., “4 Takeaways From The ‘Buy American’ Executive Order,” Law360 (Apr. 19, 2007) available at <https://www.law360.com/articles/914680/4-takeaways-from-the-buy-american-executive-order> (analyzing President Trump’s “Buy American” Executive Order).

[3] Pursuant to Section 146, a contract with a state or department agency in excess of \$100,000 for the “construction, reconstruction, alteration, repair, maintenance or improvement of any public works” must “require” that “structural steel, reinforcing steel and/or other major steel items to be incorporated in the work of the contract shall be produced or made in whole or substantial part in the United States, its territories or possessions,” unless an exception exists. Section 2603-a applies to any contract awarded by a public authority that “involv[es] steel products.” In addition to including the same requirements found in Section 146, Section 2603-a also requires that the “steel components” in any item of supply, material, or equipment must “be produced or made in whole or substantial part in the United States, its territories or possessions” if the contract for the item of supply, material, or equipment exceeds \$50,000, unless an exception exists.

[4] The NY BAA also is much more limited than the “New York State Buy American Act,” which was introduced in 2014, but failed to make it onto the floor calendar. See NY Senate Bill S7206, “New York State Buy American Act” (May 6, 2014) available at <https://www.nysenate.gov/legislation/bills/2013/s7206/amendment/original>. Even though the 2014 legislation was not enacted, Gov. Cuomo has continued to push for significant “Buy American” action. See, e.g., Gov. Cuomo Press Release titled “Governor Cuomo Presents 27th Proposal of the 2017 State of the State: ‘Buy American’ Plan will Implement the Nation’s Strongest State Procurement Laws Mandating the Preference of American Products” (Jan. 11, 2007) available at <https://www.governor.ny.gov/news/governor-cuomo-presents-27th-proposal-2017-state-state-buy-american-plan-will-implement-nations>.

[5] Of course, if the Trade Agreements Act waiver applies, a contractor must comply with a different set of rules.

[6] “Buy American” requirements also exist for items of supply or end products delivered under certain government contracts. These requirements are just as complex as the construction rules discussed in this article.

[7] See “Fairness in Procurement Act, 2018,” S.O. 2018, C.4, Bill 194 (Mar. 8, 2018) available at <https://www.ontario.ca/laws/statute/S18004#s8s1>.

[8] See Ontario Regulation 117/18 (Mar. 28, 2018) available at <https://www.ontario.ca/laws/regulation/r18117>.

[9] See, e.g., “5 Takeaways From Bipartisan BuyAmerican.gov Bill,” Law360 (Jan. 25, 2018) available at <https://www.law360.com/articles/1005403/5-takeaways-from-bipartisan-buyamerican-gov-bill> (discussing a bipartisan Senate bill regarding “Buy American” requirements); TX Senate Bill 1289, “Relating to the Purchase of Iron and Steel Products Made in the United States for Certain Governmental Entity Projects” (enacted Sept. 2, 2017) available at <https://legiscan.com/TX/text/SB1289/2017> (recent Texas “Buy American” law).

[10] See “Legislative Outline for Rebuilding Infrastructure in America,” The White House (Feb. 2018) available at <https://www.whitehouse.gov/wp-content/uploads/2018/02/INFRASTRUCTURE-211.pdf>.

[11] Letter from Sen. Baldwin, et al. (Jan. 26, 2018) available at <https://www.baldwin.senate.gov/imo/media/doc/Signed%20Letter%20to%20POTUS%20on%20Buy%20America%20Infrastructure%201.26.18.pdf>. See also Letter from Rep. DeFazio, et al. (Dec. 18, 2017) available at <https://democrats-transportation.house.gov/news/press-releases/top-transportation-democrats-push-for-stronger-buy-america-requirements-request-copy-of-buy-america-report> (letter to OMB Director Mulvaney and Commerce Secretary Ross “welcom[ing] the opportunity to explore provisions to strengthen Buy America and Buy American laws” related to potential legislation arising from the Administration’s “infrastructure package”).

[12] See H.R.5137, “Buy America 2.0 Act” (Mar. 1, 2018).

[13] Sen. Brown Press Release (Mar. 29, 2018) available at <https://www.brown.senate.gov/newsroom/press/release/brown-calls-on-trump-to-support-buy-america-bill>.

[14] See Pub. L. 111-5, Section 1605. ARRA was an economic stimulus package signed into law by President Barack Obama.

[15] See FAR Subpart 25.6 (American Recovery and Reinvestment Act--Buy American Statute--Construction Materials).