

Evolution of the Buy America Requirements for Highway Bridge Projects

by Dr. Timothy R. Wyatt, Esquire, Conner Gwyn Schenck PLLC

Federally assisted highway construction projects are subject to the Buy America statute codified at 23 U.S.C. §313. In conjunction with associated regulations issued by the Federal Highway Administration (FHWA) at 23 C.F.R. §635.410, this Buy America provision requires practically all steel or iron products used on such projects to be manufactured in the United States.

The FHWA Buy America provision originally enacted by Congress in November 1978 permitted only domestic materials and domestic manufactured products to be used on FHWA-funded projects. However, the provision only applied to projects whose total cost exceeded \$500,000. Also, waivers were available for public interest, nonavailability, and price differential exceptions. (Price differential waivers could be requested when using foreign material would result in cost savings of at least 10%.) Eleven days after the legislation was enacted, FHWA issued “emergency regulations,” which included a public interest waiver for *all* materials and products *except* structural steel, significantly limiting the scope of FHWA Buy America requirements.

The price differential exception was examined in *Wampler v. Goldschmidt*, a 1980 federal case involving the Richard I. Bong Memorial Bridge (replacement for the Arrowhead Bridge) between Minnesota and Wisconsin, which had been segmented into 14 prime contracts. In *Wampler*, the U.S. District Court for Minnesota upheld a waiver allowing foreign steel on the main span because it resulted in a more than 10% cost savings for that contract, although the cost savings was much less than 10% of the entire \$60 million project. The court concluded that the only reasonable

application of the price differential exception was to a single contract, not the overall project; otherwise, foreign steel could never be used on an FHWA-funded bridge project.

In January 1983, Congress enacted legislation significantly revising the FHWA Buy America provision, requiring *all* steel, cement, and manufactured products used on FHWA-funded contracts to be domestic. The 1983 legislation retained waivers for public interest, nonavailability, and price differential. However, to obtain a price differential waiver, foreign material must result in cost savings of at least 25%, a significant increase from the earlier 10% threshold, making a waiver much less likely.

As in 1978, 11 days after enactment of the 1983 legislation, FHWA again issued emergency regulations, granting a public interest waiver for *all* manufactured products other than steel and cement. In November 1983, FHWA permanently adopted this manufactured products waiver, which specifically exempted asphalt from FHWA Buy America requirements. Congress exempted cement from FHWA Buy America requirements in 1984.

Congress added iron to the FHWA Buy America provision in 1991. Therefore, with the manufactured products waiver still in place, the FHWA Buy America provision has since 1991 been effectively limited to steel and iron. The regulations adopted by FHWA in 1983 require all manufacturing processes to take place in the United States, which is understood to require steel and iron to originate from a smelting furnace at a domestic steel mill, with all subsequent processes such as rolling, machining, bending, cutting, drilling, or coating taking place

in the United States. In 1995, FHWA issued a waiver allowing certain foreign constituent materials (including pig iron, iron ore, or alloys containing insubstantial amounts of steel or iron) to be introduced in the initial melt at the domestic steel mill. However, aside from those express exceptions, steel or iron used on FHWA-funded projects cannot incorporate ferrous material that has undergone any manufacturing process outside the United States, such as scrap steel originally smelted at a foreign steel mill.

The 1983 legislation eliminated the \$500,000 project cost threshold, expanding FHWA Buy America requirements to all FHWA-assisted contracts. However, the regulations adopted by FHWA in 1983 include a minimal use exception, permitting a minimal amount of foreign steel or iron, where the cost does not exceed 0.1% of the contract price or \$2500, whichever is greater.

Notwithstanding the manufactured products waiver, FHWA has long taken the position that steel or iron components of manufactured products must be domestic. However, in a 2012 memo, FHWA reexamined the manufactured products waiver and concluded retroactively that it exempted all steel and iron components of manufactured products, except in predominantly steel or iron products. The 2012 FHWA memo defined a predominantly steel or iron product to consist of at least 90% steel or iron. The implication was that any manufactured product consisting of less than 90% steel or iron was exempt from FHWA Buy America requirements.

However, in December 2015, in *United Steel v. FHWA*, the U.S. District Court for the District of Columbia invalidated

significant portions of the 2012 FHWA memo. The court determined that FHWA improperly waived Buy America requirements for all products with less than 90% steel or iron content by issuing the 2012 FHWA memo without following the required rule-making process. However, the court did not disturb the 2012 FHWA memo's conclusion that the manufactured products waiver permits the use of foreign steel and iron components of manufactured products that are not predominantly steel or iron.

In 2016, as a result of *United Steel*, FHWA proposed a new nationwide waiver for commercially available off-the-shelf (COTS) products with steel or iron components. The proposed COTS waiver would have waived FHWA Buy America requirements for manufactured products broadly used in construction, notwithstanding steel or iron content. At the same time, FHWA proposed a list of specific products *not* covered by the COTS waiver, to which FHWA Buy America requirements would still apply. The list of products excluded from the COTS waiver included structural steel, steel or iron products used in bridges (such as anchor bolts or prestressing strand), and reinforcing steel, including steel fibers for ultra-high-performance concrete (UHPC).

However, the COTS waiver was not adopted, due in part to an April 2017 executive order requiring federal agencies to minimize waivers of Buy America requirements. Accordingly, after *United Steel*, there is no clear rule for determining whether a manufactured product is predominantly steel or iron. This could result in inconsistent treatment, as different FHWA divisions may reach different conclusions regarding whether the manufactured products waiver applies to a given product. FHWA's rule-making efforts to better define the manufactured products waiver, such as the proposed 2016 COTS waiver, have proven controversial and have been effectively abandoned.

This assessment of FHWA efforts to clarify what constitutes acceptable foreign steel or iron content of manufactured products is not to be construed as a criticism. FHWA's regulations, waivers, and guidance over the years (including the 2012 FHWA memo canceled in the wake of *United Steel*) reflect earnest efforts to balance

the FHWA Buy America provision with the realities of manufacturing in today's global economy. Congress imposed an impossible requirement on FHWA in 1983 by requiring all steel and manufactured products to be domestic, and Congress exacerbated the problem in 2005 and 2012 by practically eliminating the price differential exception for bridge projects.

Although the *Wampler* decision in 1980 had endorsed FHWA's policy of applying the price differential exception to individual contracts, Congress stated in the 2005 Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU) reauthorization bill that the FHWA Buy America provision requiring domestic steel unless foreign steel would result in cost savings of 25% applies to an entire bridge project—not individual contracts. This was in response to a California Department of Transportation (Caltrans) plan to apply the price differential exception to the eastern span contract of the Bay Bridge between Oakland and San Francisco, which would allow use of foreign steel. After SAFETEA-LU, Caltrans elected to defederalize the eastern span contract so FHWA Buy America requirements would not apply. Congress responded in the 2012 Moving Ahead for Progress in the 21st Century Act (MAP21) reauthorization bill by extending FHWA Buy America requirements to all contracts in a project eligible for FHWA assistance if FHWA helped fund *any* contract in the project.

Following MAP21 and *United Steel*, there are limited options for using foreign steel or iron on FHWA-funded projects. To use a predominantly steel or iron product that has had any manufacturing process performed outside of the United States, the minimal use exception must be satisfied or FHWA must issue a project-specific nonavailability waiver. Nonavailability waivers are typically granted within a couple of months after the waiver request is published on FHWA's Buy America Notice of Waiver Request website (<https://www.fhwa.dot.gov/construction/contracts/waivers.cfm>), provided no domestic sources are identified in the subsequent 15-day public comment period. However, if comments opposing the waiver are received, there may be a months-long delay while FHWA determines whether the commenter has identified a viable domestic source, in

which case a nonavailability waiver is not appropriate and will be denied.

For example, prior to 2014, the use of UHPC on FHWA-funded projects was limited because the steel-fiber reinforcement used in the UHPC mixture was not manufactured domestically. UHPC could not be used on a project unless the steel fibers satisfied the minimal use exception or FHWA issued a project-specific nonavailability waiver. In 2014, FHWA identified a domestic supplier that could produce UHPC steel-fiber reinforcement commercially that would be available to all potential purchasers and indicated that nonavailability waivers for UHPC are not appropriate. FHWA has not granted any nonavailability waivers for UHPC since that time, although FHWA divisions may allow foreign-sourced UHPC fibers based on a minimal use exception.

In summary, notwithstanding the actual text of 23 U.S.C. §313, the FHWA Buy America provision has never, in practice, prevented the use of foreign manufactured products that are not predominantly steel or iron. However, the FHWA Buy America provision has proven to be very effective in ensuring that steel and iron construction materials used on FHWA-funded highway construction projects are manufactured in the United States and entirely of domestic content. For specialty products used in bridge construction, the key unanswered question is how to determine whether the product is predominantly steel or iron for purposes of the FHWA Buy America provision. ▲

Dr. Timothy R. Wyatt is a construction lawyer with Conner Gwyn Schenck PLLC in Greensboro, N.C.

EDITOR'S NOTE

Dr. Timothy R. Wyatt is the author of the National Cooperative Highway Research Program (NCHRP) Legal Research Digest 80, titled Buy America Requirements for Federal Highway Projects, which was published in April 2020. The 52-page report provides a complete discussion of this topic and references to documents mentioned in this article. The report is available at <https://doi.org/10.17226/25799>.