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Uncertainty about DOT's "Buy America" Requirement for Federally Funded Highway Projects

Are you a manufacturer providing goods for federal highway or other Department of Transportation (DOT) funded projects? If so, you know that compliance with DOT Buy America requirements is crucial. Unfortunately, a court ruling in late December has created significant uncertainty as to how the Buy America requirements will be applied going forward. Even goods previously provided for DOT projects may no longer qualify, thus severely limiting your ability to bid on such projects.

Background

Federal highway projects have long been subject to the "Buy America" requirements of the Surface Transportation Assistance Act of 1982 (the "Act"). See 23 U.S.C. § 313. Traditionally, the Act has been interpreted to require that all steel, iron and manufactured products (defined as products containing 90% or greater steel or iron content – the "90% Manufactured Product Threshold") used in a DOT funded project must be produced in the U.S., with the exception of certain miscellaneous "off-the-shelf" products. However, a [recent federal court decision](#) struck down longstanding guidance on the Buy America rule that will affect both manufactured products and the miscellaneous products previously exempted.

The 90% Manufactured Product Threshold was the result of two Federal Highway Administration (FHWA) memorandums. In 1997, the FHWA issued a memorandum stating that the Buy America requirements only apply to manufactured products (i.e. products containing materials other than steel or iron) that consist "predominately" of steel or iron (the "1997 Memorandum"). In a 2012 memorandum, the FHWA further clarified its position, finding that a manufactured product would be considered "predominately" made of steel or iron if the product consisted of at least 90% steel or iron

content (the “2012 Memorandum”). As a result, since the 2012 Memorandum, manufactured products consisting of 0 – 89.9% iron or steel content have not been subject to the Buy America requirements. Additionally, the FHWA found in the 2012 Memorandum that miscellaneous steel or iron products, which includes those available “off-the-shelf” or those “necessary to encase, assemble and construct” manufactured products, were also exempt from the Buy America requirements (the “Miscellaneous Products Exemption”).

However, the U.S. District Court for the District of Columbia recently heard a challenge to the 2012 Memorandum and, on December 22, 2015, vacated both the 90% Manufactured Product Threshold and the Miscellaneous Products Exemption based on the fact that the FHWA did not follow the necessary administrative procedures in making those rules. The court did not strike down the 1997 Memorandum, meaning that the requirement that manufactured products be made “predominantly” of steel or iron before the Buy America requirements apply still exists, but the threshold for “predominantly” is now up for debate. While the court acknowledged “predominately surely means more than 50 percent,” it remanded the matter to the FHWA to determine a new percentage threshold.

What you need to know

As a result of the December 22, 2015 court ruling, FHWA has cancelled the 2012 Memorandum and is currently in the process of updating its regulatory policy. In the meantime, projects that have already been awarded DOT funds will not be affected; however, new projects will be analyzed without regard to the 90% Manufactured Product Threshold and the Miscellaneous Products Exemption. Therefore, manufacturers that incorporate foreign-made iron and steel into their products and contractors that rely on such products during the bid process should take notice that the regulatory landscape for federally funded highway projects is in a state of flux. For specific guidance, please contact us so that we may assist you in determining the Buy America compliance of your products under this new regime.

If you have any questions, please contact [Katherine Berkley](#) or [Jan de Beer](#) in Frost Brown Todd's [Regulated Business Practice Group](#) or [Aaron Bernay](#) in the firm's [Business Litigation Practice Group](#).

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