



LORI ANN LANGE



MICHAEL COX

Federal Court Vacates FHWA's 2012 Memorandum on Clarification of Manufactured Products under Buy America

As a result of litigation in the United States District Court for the District of Columbia, the Federal Highway Administration ("FHWA") has cancelled its December 21, 2012 memorandum regarding the application of FHWA's Buy America requirements to manufactured products. The memorandum had provided a clear standard for determining when manufactured products are subject to Buy America. With the cancellation of the memorandum, contractors are once again facing subjective standards in determining the application of the Buy America requirements to predominantly iron and steel manufactured products.

Under FHWA's Buy America requirements, contractors must supply only domestic iron and steel unless a waiver applies or the foreign iron or steel is encompassed by the minimal use exception. In order to be considered domestic, all of the iron and steel manufacturing processes, including coatings, must be performed in the United States. FHWA considers manufacturing to be any process that modifies the chemical content, the physical shape, size, or the final finish of the product. Manufacturing starts with smelting and ends with coating. It includes rolling, extruding, machining, bending, grinding, drilling, and coating. If any manufacturing process on domestic iron or steel is performed outside the United States, the entire product, not just the work done or the components added, is considered to be foreign material.

As a result of confusion regarding to whether FHWA's Buy America requirements applied to manufactured products, on December 22, 1997, FHWA issued a memorandum on Buy America Policy Response. In the memorandum, FHWA clarified that it considers a manufactured product to be any item that must undergo one or more manufacturing processes before it can be used in the project. A manufactured product can be usable as a stand-alone product (such as rebar and structural steel) or a component within a more complex manufactured product (such as steel wire mesh or steel reinforcing components of a precast reinforced concrete pipe).

FHWA also advised that it does not apply the Buy America requirements to manufactured products, but does apply the requirements to specific components within those products. In other words, the steel components of a predominately steel product must be of domestic manufacture unless the value of the components is less than the minimal use threshold for the project. In the 1997 memorandum, FHWA did not provide any guidance on when a manufactured product would be considered to be made predominately of steel, which led to confusion regarding the application of FHWA's Buy America requirements.

Please Contact

Lori Ann Lange, Esq.
llange@pecklaw.com
202.293.8815

or

Michael Cox
mcox@pecklaw.com
202.293.8815

As a result, on December 21, 2012, FHWA issued a second memorandum to further clarify its Buy America policy with regard to manufactured products. The 2012 memorandum stated that, in order for a manufactured product to be considered subject to Buy America, the product must be manufactured predominantly of steel or iron. FHWA clarified that a product was considered to be manufactured predominantly of steel or iron if the product consists of at least 90% steel or iron content when it is delivered to the job site for installation. The memorandum also exempted all miscellaneous steel and iron products (i.e., manufactured products that are available off-the-shelf or are necessary to encase, assemble and construct manufactured products, such as nuts, bolts, and screws) from the Buy America requirements.

In February 2013, a number of plaintiffs, including the United Steel, Paper, and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union filed suit challenging both the 90% threshold and the miscellaneous product exemption. The plaintiffs asserted that the 90% threshold and miscellaneous product exemption were substantive rules that should have been subject to notice and comment rulemaking under the Administrative Procedures Act. The United States District Court for the District of Columbia agreed in large part with the plaintiffs. *United Steel, Paper and Forestry, Rubber, Energy, Allied Industrial and Service Workers International Union v. Federal Highway Admin.*, Civil No. 13-cv-01301 (D.D.C. Dec. 22, 2015).

The Court held that the 90% threshold was a substantive rule for which FHWA was required to seek notice and comment under the Administrative Procedures Act. It also found that the 90% threshold was arbitrary and capricious because FHWA failed to provide any basis for why the 90% threshold was selected as opposed to an 80% or 70% threshold. The Court similarly found that the miscellaneous products exemption was invalid because the exemption was not subject to notice and comment. The Court vacated the memorandum.

As a result of the Court's decision, on January 6, 2016, FHWA officially cancelled its December 21, 2012 memorandum for federal-aid construction projects awarded after December 22, 2012. FHWA has stated that the withdrawal does not impact federal-aid construction projects that already have been awarded. FHWA advised that State Departments of Transportation and local public agencies administering federal-aid projects should use the existing statute, regulations, and implementing policy memorandums to administer the Buy America requirements. Unfortunately, the current statute, regulations, and policy memorandums leave open the question of when a manufactured product is considered to be predominantly made of iron or steel.

It remains to be seen whether FHWA will seek to re-implement the 90% threshold and the miscellaneous products exemption by going through the notice and comment procedure. Should FHWA decide to take that step, it is likely that a final rule would not be issued for a year or more. In the meantime, contractors once again are facing subjective standards in determining the application of the Buy America requirements to predominantly iron and steel manufactured products and may need to discuss Buy America requirements with their State Department of Transportation or project owner.

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