

The Buy American Act and the Structural Steel Industry

BY ANGELA R. STEPHENS, LEED AP

Even with a keen understanding of the regulations, predicting the court's interpretation of the provisions of the Act can be quite tricky.

THE BUY AMERICAN ACT, 41 U.S.C. §§10a–10d (“Act”), applies when a federal agency makes a direct purchase or awards a contract to a prime contractor. The contract between the federal agency and the prime contractor should identify which regulations the federal agency will be using to enforce the Act. The prime contractor is then required to flow down those regulations into its subcontract with a steel supplier, fabricator and/or erector. Thus, for those supplying structural steel to a federal project where the Act applies, one of the first things you should look at are the applicable Buy American Act regulations. This article will discuss the application of the Buy American Act and the regulations contained at 48 CFR 52.225–9 and 11.

It is important to note that the Buy American Act does not apply if a waiver is obtained from the federal government. A waiver can be obtained when (1) the Act is inconsistent with the public interest, (2) the cost is unreasonable, (3) the material will be used outside the U.S. (e.g., an offshore DOD or DOS facility), or (4) the material is insufficient and not reasonably available in commercial quantities and of a satisfactory quality. The Act is also not applicable when the contract award value is less than or equal to \$2,500. Also, if the Trade Agreements Act applies and the total estimated value of the construction project is greater than the trade agreement threshold (typically \$7.804 million or more), the construction materials may be purchased in designated countries that are identified in the regulations.

If the Act applies, companies must procure products that are manufactured in the U.S. “*substantially* all from articles, materials, or supplies mined, produced, or manufactured” in the U.S. **This means that for each piece of structural**

steel delivered to the jobsite, more than 50% of the cost of the components for that piece of steel are mined, produced, or manufactured in the U.S. Two questions arise from this test: What is a component? And what is included in the cost of each component?

What Is a Component Versus a Subcomponent?

Components are “articles, materials, and supplies incorporated directly into construction materials.” Whether something is a component depends upon a factual analysis that differs for each product and each project. A component will be deemed domestic if it was substantially transformed in the U.S.

Subcomponents are materials incorporated into components. The origin of subcomponents does not matter for purposes of the component analysis under the Act. In order to determine whether something is a subcomponent of a component, (1) there must be a separate component manufacture stage that (2) substantially transforms the subcomponent into a component.

Courts, when determining whether something is a subcomponent, will look at whether there were two separate stages of manufacture, meaning a component manufacture stage and an end-product manufacture stage. For example, one court found that foreign steel rods were subcomponents because they were first transformed into bright wire and made components, and then were transformed/galvanized to create galvanized wire (a domestic end-product/construction material). Additionally, in order to be deemed a subcomponent, that subcomponent must be substantially transformed into a component. Substantially transformed means that the material acquires a new name, character or use. For example, in one case, foreign steel ingot was found to be a subcomponent that was substantially transformed into billets (components) and then substantially transformed into rebar (a domestic end-product/construction material).

What Is Included in the Cost of Components?

As discussed above, for a construction material to be deemed domestic, more than 50% of the *cost of components* for any construction item shipped to a jobsite must be domestic. The question then is, what can be included in the cost of components?

For components *purchased* by the fabricator, the cost of the component includes the acquisition cost, including transportation costs to the place of incorporation into the construction material (whether or not such costs are paid to



Angela R. Stephens, LEED AP, is a civil engineer and lawyer with Stites & Harbison, PLLC, counsel to AISC. Stephens has concentrated her practice in construction law, and often helps clients with questions related to the Buy American Act, Buy America statutes, and the Buy American provision of the ARRA. For additional information, she can be contacted at astephens@stites.com or 502.681.0388.

a domestic firm), and any applicable duty (whether or not a duty-free entry certificate is issued). For components *manufactured* by the fabricator, the cost of components includes all costs associated with the manufacture of the component, including transportation costs to the place of incorporation into the construction material, plus allocable overhead costs, but excluding profit. Importantly, labor applied by a fabricator assembling components is not a component and cannot be considered when conducting the cost analysis for components. Stated differently, the test is the cost of the components themselves, and not the cost of manufacturing (cutting, drilling, applying clips, coping, notching, welding, and priming) the components.

For example, the Court in *Glazer Const. Co., Inc. v. U.S.* held that the cost of labor involved in manufacturing locally certain steel angle parts imported from Canada, including various steps such as cutting the steel components to size, drilling, clipping, coping, notching, welding, and priming them, cannot be included in the “cost” of the component for purposes of the 50% requirement. Only the value of the component itself was to be considered. Similarly, in *Appeals of Wright Contracting, Inc.*, the Board found that fabrication of structural steel involving cutting, drilling, shaping and welding structural pieces from *foreign* steel plate and beams did not substantially change the metallurgical properties of the material, and, therefore, cannot be considered in the cost. Likewise in *S.J. Amoroso Const. Co., Inc. v. U.S.*, the Court found that “operations done on the foreign steel, such as drilling and cutting, do not result in its being combined with domestic materials and are not considered to alter the imported component percentage.” Additionally, “labor costs and transportation to the jobsite are not within this definition and, therefore, should not be considered in calculating percentages of foreign and domestic costs under construction contracts.” This is because components are deemed articles, materials, or supplies, and labor and transportation are not.

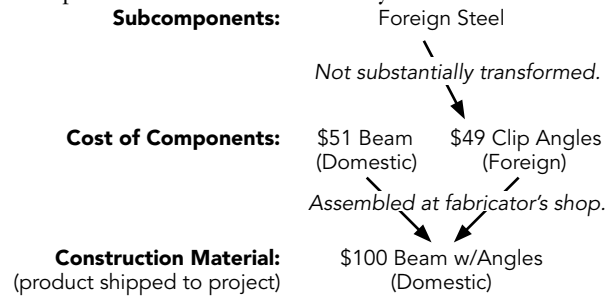
Hypothetical Scenarios Applying to the Buy American Act

Unfortunately, interpretation of the Act is not fully developed and is highly fact-sensitive. Court cases have not been published addressing all possible factual scenarios that could be encountered in fabrication and assembly of structural steel containing foreign components.

The following hypotheticals are presented for general guidance only. All relevant facts actually experienced by fabricators on specific contracts that incorporate the Buy American Act must be analyzed in detail before a decision is made to attempt to incorporate foreign material. Legal advice should be sought when questions arise about the applicability of the Buy American Act or whether something is deemed a domestic component or construction material for purposes of the Buy American Act. This is important because if the Government, a protestor, or the Comptroller General disagrees with your analysis, the project could be delayed, sanctions issued, or you could be forced to remove and replace all of the steel which does not comply with the Buy American Act.

► **Example 1.** Fabricator A purchases a domestic beam and, in the fabrication shop, attaches clip angles cut from foreign steel. The cost of the clip angles, not including the cost of shop labor to process (cut to length and drill) the angles, is less than the cost of the beam, not including shop labor to fabricate the beam. The assembly is shipped to the jobsite. This is a very straightforward calculation; the assembly qualifies as a domestic product under the Buy American Act.

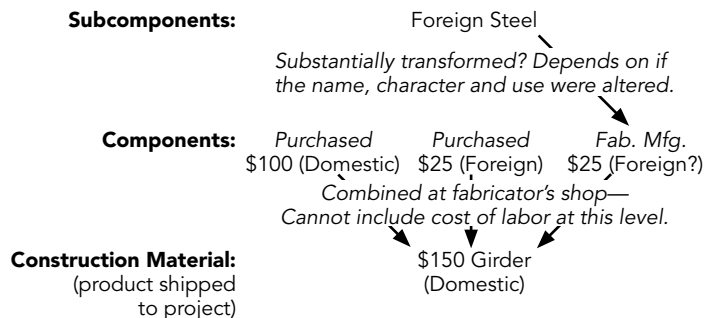
The cost of domestic components must be greater than 50% of all components. In this case, the domestic components were 51% of the cost of the total components, making the construction material end-product domestic under the Buy American Act.



► **Example 2.** Same as Example 1, above, except the clip angles are shipped separately to the jobsite and assembled to the beam in the field. Because processing the clip angles from foreign angle stock is not considered a “substantial transformation” the angles are considered foreign components and are not allowed under the Buy American Act. This result is predicted because the foreign component was shipped to the jobsite and not combined with the domestic beam in the fabrication shop.

► **Example 3.** Same as Example 1, above, except instead of just assembling clip angles to a domestic beam, fabricator A is shop-assembling a section of a complex girder with multiple foreign components connected to domestic components. Fabricator A has purchased a fully fabricated domestic beam from fabricator B, where the “raw” beam itself had cost fabricator B \$51, and fabricator B had added another \$49 in value to the beam before selling it to fabricator A. The purchased beam cost \$100. The purchased and processed foreign components cost an additional \$50. The three components are assembled in fabricator A’s shop and shipped to the jobsite. The assembly qualifies as a domestic construction material under the Buy American Act.

The cost of domestic components must be greater than 50% of all components. In this case, the domestic components were 66.67% of the cost of the total components, making the Construction Material/end-product domestic under the Buy American Act.



► **Example 4.** Same as Example 3, above, except fabricator A decides to purchase fully processed components (assume cut and drilled clip angles) from a domestic service center, apply some to the assembly in the shop and ship others to the jobsite for assembly. The service center provides fabricator A with a letter indicating that the service center’s processing cost is the largest component of the total cost of the subcomponents and that all processing work was performed in the United States; but the unprocessed steel itself is foreign. Based on the foregoing, the fabricator wishes to claim

that the processed subcomponents are domestic. However, determining whether the component is domestic or foreign depends on whether the foreign steel was *substantially transformed* into a component, which is then incorporated into the construction. The fact that the fabricator purchased the component from a service center weighs in favor of the fabricator's position; however, if the processing consisted only of cutting and drilling, this weighs against the argument that the foreign steel was substantially transformed. In theory, it should make no difference whether the processed material was assembled in the shop or in the field; but the overall trend of cases would appear to support a more favorable outcome if the material is shop assembled.

► **Example 5.** Same as Examples 3 and 4, above, only fabricator A buys tube stock that has been shaped and welded from foreign sheet stock by a domestic tube producer and sold to fabricator A for further fabrication and shop/field assembly into the complex girder shipping section. This outcome is somewhat clearer. Because the subcomponent processing by the tube producer is more extensive than the service

center's processing of the clip angles, there is a greater probability that the tubes will be considered to be "substantially transformed" and, therefore, a domestic component. The probability increases if the tube undergoes additional fabrication and is assembled to the girder in the shop.

► **Example 6.** Also, assume a fabricator is buying a clip angle component from a domestic vendor for assembly with other components in the fabrication shop and subsequent shipment to a jobsite. The vendor uses foreign angle stock, cuts it to length, punches holes in it (this is known as "processing" in the service center industry) and ships it to the fabricator. The test to determine whether the clip angles are domestic is whether the foreign angle stock was substantially transformed such that the clip angle is a new material with a different physical or structural identity from the angle stock.

► **Example 7.** A fabricator takes a \$25 domestic beam that it purchases from the mill and applies another \$25 in fabrication labor to it before it is ready to be assembled with a \$30 foreign component. The completed assembly is then shipped to

the jobsite. The issue is whether, for the purpose of calculating compliance with the Buy American Act, the pre-assembly labor performed on the beam can be included as part of the cost of the component (the domestic beam). The law is clear that the fabricator cannot include any additional labor involved in processing the foreign component or in assembling the domestic beam with the foreign component. However, it is not clear whether the fabricator can include the cost to fabricate the domestic beam as part of the calculation of its "manufacturing cost." There are strong factual and logical arguments that the cost of pre-assembly fabrication of the beam should be included in determining whether the completed assembly contains more than 50% domestic material. However, it is impossible to determine how federal agency administrators or a court might react to this argument; consequently, a fabricator who makes this argument would be taking a risk that the assembly could be rejected for non-compliance with the Buy American Act. MSC