

# Management Alert



## The State of Buy America: Changes to New York's Domestic Preference Regime for Public Works and Infrastructure Projects

By Anthony LaPlaca

The state of New York has adopted legislation tightening the regulatory regime governing the use of steel in construction and infrastructure projects, including structural steel, structural iron, reinforcing steel, and the like. Effective April 1, 2018, the New York Buy American Act ("NYBAA") imposes domestic preference requirements on any state construction project valued over \$100,000 and any state road or bridge project over \$1 million. This alert generally outlines the applicability, substantive requirements, and limited grounds for exemption to the NYBAA.

### Applicability of the NYBAA

The first step in navigating the NYBAA is to determine whether domestic preference requirements even apply. In summation, the NYBAA governs: (1) public projects; (2) that reach specified monetary threshold; and (3) which are for the construction, reconstruction, alteration, repair, or maintenance of public works and infrastructure located in New York.<sup>1</sup>

### Monetary Threshold

The NYBAA only applies to contracts awarded by an agency of the state of New York, and which trigger the monetary thresholds set forth in the statute. For vertical construction, the NYBAA applies to any contract for the "construction, reconstruction, alteration, repair, maintenance, or improvement of any public works" and which is over \$100,000.<sup>2</sup> With the exception of infrastructure projects, this \$100,000 threshold applies to every state contract, regardless of the letting agency. With respect to the construction, reconstruction, repair, or alteration of surface roads and bridges, the NYBAA only applies to public contracts valued over \$1 million. The \$1 million threshold applies only to contracts awarded by the New York Department of Transportation (DoT), the Office of General Services, or the State University of New York Construction Fund.<sup>3</sup>

### Timing of the Solicitation, Bid, and Award

The NYBAA only covers public works contracts that are "executed and entered into" on or after April 1, 2018. However, the

1. Importantly, even where the New York State NYBAA does not apply, federal Buy America/Buy American requirements may govern any public works project that receives partial funding from federal appropriations, or which is subsidized by the U.S. Department of Transportation.

2. N.Y. State Fin. Law § 146.1; see N.Y. State Pub. Authorities Law § 2603-a.

3. *Id.* § 146.2.

state legislature explicitly chose to exclude contracts that were solicited or awarded prior to April 1, 2018. Thus, the NYBAA does not apply to projects for which a contractor has, before April 1, 2018: (1) already received a request for proposals; (2) already submitted a bid, or; (3) already received a notice of award.<sup>4</sup> The NYBAA also expressly excludes “projects that have commenced project design and environmental studies” prior to April 1, 2018. Finally, the NYBAA includes a sunset provision that automatically repeals its provisions as applied to contracts let, bid, or awarded on or after April 15, 2020.

## Substantive Requirements of the NYBAA

### What construction materials are covered by the NYBAA?

For vertical construction, the NYBAA covers “structural steel, reinforcing steel and/or other major steel items to be incorporated in the work of the contract.”<sup>5</sup> For road and bridge projects, the NYBAA covers the “structural iron and structural steel used or supplied in the performance of the contract or any subcontract thereto and permanently incorporated into such surface bridge or road.”<sup>6</sup> Thus, the NYBAA governs virtually all steel components in public works construction including, without limitation, structural columns, beams, and angles; trusses and joists; steel rebar and framing; stainless steel piping; and prefabricated steel components.

### When is a steel item “incorporated in the work”?

The domestic preferences for steel only applies to items that are to become a permanent fixture in a building, bridge, or road. The statute explains that an iron or steel product is permanently incorporated when it “is required to remain in place at the end of the project contract, in a fixed location, affixed to public work to which it was incorporated.”<sup>7</sup> On the other hand, steel products that can be moved from one location to another are **not** fixtures. For practical purposes, the vast majority of steel items utilized in construction are likely to be “incorporated into the work” at the end of the project.

### What does it mean to be “made in whole or substantial part in the United States?”

Under the NYBAA, covered steel articles for both vertical and horizontal construction “shall be produced or made in whole or substantial part in the United States, its territories or possessions.”<sup>8</sup>

Specifically as it relates to structural components, the NYBAA provides that “all manufacturing 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 activities.”<sup>9</sup> This provision effectively preempts outright the importation of structural steel for covered projects. However, unlike the federal Buy American/Buy America regime, Subsection 5 of the NYBAA does not require bidders and contractors to certify that all structural iron or steel is made in whole or in substantial part in the United States.<sup>10</sup>

## Grounds for Exemptions to the NYBAA

The exemptions to the NYBAA generally mirror the principal exemptions set forth in the federal Buy American Act,<sup>11</sup> though the exemptions in New York are somewhat more expansive. The head of any agency constructing public works has sole discretion to determine that the NYBAA requirements should not apply because: (1) domestic preferences would not be in

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4. *Id.* § 1, 5, cmt. 451.

5. *Id.* § 146.1.

6. *Id.* § 146.2.

7. *Id.*

8. *Id.*

9. *Id.* § 146.2.

10. *Id.* § 146.5.

11. 41 U.S.C. § 10a, *et seq.*

the public interest; (2) imposing the preferences would result in unreasonable costs; (3) the iron and steel products cannot be produced in the United States in sufficient and reasonably available quantities and of satisfactory quality; (4) the requirements would result in the loss or reduction of federal funding for the subject contract or the ability to obtain such federal funding; (5) there is an immediate or urgent need for structural steel or structural iron; (6) obtaining the steel or iron product in the United States would increase the cost of the contract by an unreasonable amount; (7) steel or iron is necessary for the operation of or repairs of critical infrastructure that is necessary to avoid a delay in the delivery of critical services that could compromise the public welfare, or; (8) a reciprocal trade agreement or treaty has been negotiated by the state or federal government for nondiscriminatory governmental procurement practices.

Seyfarth Shaw will be regularly monitoring developments to the NYBAA and is always available to address questions, provide strategy recommendations, or navigate the process. [Anthony LaPlaca](#) is an associate in the firm's Washington, D.C. office. If you have any questions, you can contact Anthony LaPlaca at [alaplaca@seyfarth.com](mailto:alaplaca@seyfarth.com) or any Seyfarth Construction attorney on our [website](#).

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