

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 619 United States-produced Iron and Steel in Public Works Projects

SPONSOR(S): Rodriguez and others

TIED BILLS: **IDEN./SIM. BILLS:** SB 1336

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Government Operations Subcommittee	17 Y, 0 N	Skinner	Toliver
2) Local Administration & Veterans Affairs Subcommittee	16 Y, 0 N	Leshko	Miller
3) State Administration & Technology Appropriations Subcommittee	12 Y, 2 N	Lee	Topp
4) State Affairs Committee		Skinner	Williamson

SUMMARY ANALYSIS

Florida law specifies procedures that must be followed in the procurement of construction services for public property and public owned buildings and directs the Department of Management Services to establish certain applicable procedures.

Federal law and regulations impose numerous restrictions requiring federal agencies to procure, in certain circumstances, domestic end products and construction materials produced or manufactured in the United States and require the use of specific United States made construction materials in certain federally funded infrastructure-related projects. Such laws and regulations permit waivers under specific circumstances.

The bill requires a governmental entity entering into a contract for a public works project or for the purchase of materials for a public works project to include in such contract a requirement that any iron or steel product used in or purchased for the project must be produced in the United States.

The bill waives the required contract term if the governmental entity entering into the contract for a public works project or the purchase of such materials determines that:

- Iron or steel products produced in the United States are not produced in sufficient quantities, reasonably available, or of satisfactory quality.
- The use of iron or steel products produced in the United States will increase the total cost of the project by more than 20 percent.
- Compliance is inconsistent with public interest.

Lastly, the bill provides that it must be applied in a manner consistent with the state's obligations under any international agreement and may not be construed to impair any such obligations.

The bill has an indeterminate, but likely significant, negative fiscal impact on state and local government expenditures. See Fiscal Comments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Procurement of Construction Services

Chapter 255, F.S., specifies the procedures to be followed in the procurement of construction services for public property and public owned buildings. The Department of Management Services (DMS) is responsible for establishing by rule:

- Procedures for determining the qualifications and responsibility of potential bidders prior to advertising for and receiving bids for building construction contracts;
- Procedures for awarding each state agency construction project to the lowest qualified bidder;
- Procedures to govern negotiations for construction contracts and contract modifications when such negotiations are determined to be in the best interest of the state; and
- Procedures for entering into performance-based contracts for the development of public facilities when those contracts are determined to be in the best interest of the state. These procedures include prequalification of bidders, criteria for developing requests for proposals, accelerated scheduling, and evaluation of proposals and award of contracts considering factors such as price, quality, and concept of the proposal.¹

State contracts for construction projects that are projected to cost in excess of \$200,000 must be competitively bid.² A county, municipality, special district, or other political subdivision seeking to construct or improve a public building must competitively bid the project if the estimated cost is in excess of \$300,000.³

Current law requires the solicitation of competitive bids or proposals for any state construction project that is projected to cost more than \$200,000 to be publicly advertised in the Florida Administrative Register (FAR) at least 21 days prior to the established bid opening. If the cost of the construction project is projected to exceed \$500,000, the advertisement must be published in the FAR at least 30 days prior to the bid opening, and at least once in a newspaper of general circulation in the county where the project is located at least 30 days prior to the bid opening.⁴

In contrast, construction projects under the Department of Transportation (DOT) are governed by Chapter 337, F.S. Any person who wants to bid for a construction contract in excess of \$250,000 must be certified by DOT as qualified.⁵ Certification is also required to bid on a road, bridge, or public transportation construction project of more than \$250,000.⁶ The purpose of certification is to ensure professional and financial competence relating to the performance of construction contracts by evaluating bidders “with respect to the equipment, past record, experience, financial resources, and organizational personnel of the applicant necessary to perform the specific class of work for which the person seeks certification.”⁷

¹ S. 255.29, F.S.

² See s. 255.0525, F.S.; see also Rr. 60D-5.002 and 60D-5.0073, F.A.C.

³ S. 255.20(1), F.S. For electrical work, local governments must competitively bid projects estimated to cost over \$75,000.

⁴ For counties, municipalities, and political subdivisions, similar publishing provisions apply. See s. 255.0525(2), F.S.

⁵ S. 337.14(1), F.S. and ch. 14-22, F.A.C.

⁶ S. 337.14(2), F.S.

⁷ S. 337.14(1), F.S.

Public Works Projects

Current law prohibits the state and political subdivisions from taking certain actions when procuring for public works projects except as required by federal or state law. The state and political subdivisions may not:

- Prevent a certified, licensed, or registered contractor, subcontractor, or material supplier or carrier, from participating in the bidding process based on the geographic location of the company, offices, or residences of employees;
- Require the contractor, subcontractor, or material supplier or carrier to pay employees a predetermined amount of wages or prescribe any wage rate; provide a specified type, amount, or rate of employee benefits to employees; control, limit, or expand staffing; or employ individuals from a designated, restricted, or single source; or
- Prohibit a contractor, subcontractor, or material supplier or carrier who is able, qualified, licensed, or certified to perform such work from receiving information about public works opportunities or from submitting such bids.⁸

DMS manages projects throughout the state, including new construction, renovations, and consulting services for various public works projects. Currently, DMS follows guidelines established by The Leadership in Energy and Environmental Design (LEED) Green Building Rating System, which recommends that steel and iron be purchased from within a 500-mile radius. This encompasses a large portion of the Southeastern United States.⁹

Federal Laws and Regulations

Federal law and regulations impose numerous restrictions (domestic preference restrictions) requiring federal agencies to procure, in certain circumstances, domestic end products and construction materials produced or manufactured in the United States¹⁰ and requires the use of specific United States made construction materials in certain federally funded infrastructure-related projects.¹¹

Buy American Act of 1933: Restrictions on Federal Agency Procurement

The Buy American Act of 1933¹² (BAA) generally requires federal agencies to purchase “domestic end products” and use “domestic construction materials” for public use¹³ and contracts above the micro-purchase threshold¹⁴ (typically \$10,000).¹⁵

The standard for what is considered a domestic end product differs depending on whether the end product in question is unmanufactured or manufactured.¹⁶ In order to qualify as domestic for BAA purposes, unmanufactured end products and construction materials must be mined or produced in the United States.¹⁷ Generally, manufactured end products and construction materials qualify as domestic if manufactured in the United States and either:

- The cost of the components mined, produced, or manufactured in the United States exceeds 55 percent of the cost of all components; or
- The items are commercially available off-the-shelf.¹⁸

⁸ S. 255.0992, F.S.

⁹ Department of Management Services (DMS), Agency Analysis of 2022 House Bill 619, p. 2 (Jan. 21, 2022).

¹⁰ *The Buy American Act and Other Federal Procurement Domestic Content Restrictions*, Congressional Research Service, available at <https://crsreports.congress.gov/product/pdf/R/R46748> (last visited February 18, 2022).

¹¹ *Congress Expands Buy America Requirements in the Infrastructure Investment and Jobs Act*, Congressional Research Service, available at <https://crsreports.congress.gov/product/pdf/IF/IF11989> (last visited February 18, 2022).

¹² 41 U.S.C. §§ 8301–8305.

¹³ 41 U.S.C. § 8302.

¹⁴ 41 U.S.C. § 8302(a)(2)(C); See also 41 U.S.C. § 1902(a)(1).

¹⁵ *The Buy American Act and Other Federal Procurement Domestic Content Restrictions*, Congressional Research Service, available at <https://crsreports.congress.gov/product/pdf/R/R46748> (last visited February 18, 2022).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*; See generally 48 C.F.R. § 2.101.

Determining whether a product is “manufactured” is a fact-specific question as this term has not been defined for BAA purposes.¹⁹ Determining the cost of components is generally based upon certain costs the contractor incurs when purchasing or manufacturing the components.²⁰

Under BAA, it generally requires that a construction contract for public buildings or public works include a requirement that the contractor acquire domestic construction materials.²¹ The methodology for considering whether an end product is domestic under BAA applies to construction materials.²²

Further, federal law has established numerous exceptions to BAA where a federal agency may waive BAA requirements and purchase non-domestic end products or allow the use of non-domestic construction materials.²³ These exceptions apply when:

- Compliance would be impracticable or inconsistent with public interest;
- Domestic end products or construction materials are not available “in sufficient and reasonably available commercial quantities and of a satisfactory quality;”
- The goods are acquired specifically for commissary resale;
- The agency procures information technology that is a commercial item;
- The value of the procurements is at or below the micro-purchase threshold;²⁴
- The items are procured for use outside the United States; and
- The procuring agency determines that the cost of domestic end products or construction materials would be “unreasonable.”²⁵

The “unreasonable” standard under BAA is determined by the procuring agency applying a price preference for domestic construction materials and end products.²⁶ If the domestic offer is not the lowest offer and BAA restrictions apply to the lowest offer, the procuring agency must determine the reasonableness of the cost of the domestic offer by adding to the price of the low offer (non-domestic offer):

- If it is an end product, 20 percent of the low offer, if the lowest domestic offer is from a large business;²⁷
- If it is an end product, 30 percent of the low offer, if the lowest domestic offer is from a small business;²⁸ or
- If it is a construction material, 20 percent of the low offer.²⁹

The domestic offer’s price is determined reasonable if it does not exceed the price of the low offer following the calculation with the appropriate percentage.³⁰

Further, pursuant to the Trade Agreements Act of 1979 (TAA), BAA requirements may also be waived. The TAA generally authorizes the waiver of the application of any law, regulation, procedure, or practice regarding government procurement that would result in eligible products from countries with a United States trade agreement, or that meet certain other criteria, being treated less favorably than domestic products and suppliers.³¹

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ 41 U.S.C. § 8302(a)(2)(C); *See also* 41 U.S.C. § 1902(a)(1).

²⁵ *Id.*

²⁶ 48 C.F.R. § 25.105(b).

²⁷ *Id.*

²⁸ *Id.*

²⁹ 48 C.F.R. § 25.204.

³⁰ 48 C.F.R. § 25.105(c).

³¹ *The Buy American Act – Preferences for “Domestic” Supplies: In Brief*, Congressional Research Service, available at <https://sgp.fas.org/crs/misc/R43140.pdf> (last visited February 18, 2022).

Buy America

Buy America, in contrast to BAA, does not refer to one specific law but concerns several statutes and regulations that apply to federal financial assistance used to support certain infrastructure-related projects carried out by state and local governments.³² Recipients of federal funds are responsible for complying with Buy America statutes and regulations.³³ Historically, Buy America has generally required the procurement and use of United States made iron and steel and the domestic production and assembly of certain other manufactured goods in covered federally funded projects.³⁴ Traditionally, this has applied to airports, aviation, highways, intercity passenger rail, public transportation, and certain water-related infrastructure projects.³⁵

Recently, under the Infrastructure Investment and Jobs Act (IIJA),³⁶ Buy America requirements have expanded to apply to other federally-funded infrastructure projects, including broadband infrastructure, real property and buildings, structures and equipment of electric utilities, and transmission facilities.³⁷ The IIJA also expanded requirements to apply not only to iron, steel, and certain manufactured goods, but to other construction materials, such as nonferrous metals, plastic and polymer-based products, glass, lumber, and drywall.³⁸

Laws and regulations governing Buy America requirements differ depending on the specific federal funding program and administering agency.³⁹ Waivers may be granted in limited circumstances at the discretion of the administering agency. Waivers authorized under previous Buy America laws are also authorized under the IIJA, including waiving Buy America requirements when such requirements are inconsistent with the public interest, when domestic end products and materials are not available in sufficient quantities or of satisfactory quality, and if the use of domestic products will increase the project cost by a specific threshold.⁴⁰

Several Buy America laws and regulations prohibit the administering agency from imposing funding restrictions on federal assistance that restricts a state's ability to impose stricter requirements on the federal financial assistance.⁴¹ In addition, several states have enacted their own Buy America laws.

State Revolving Fund American Iron and Steel (AIS) Requirement

The Clean Water State Revolving Fund (CWSRF) is a federal-state partnership that provides communities low-cost financing for a wide range of water quality infrastructure projects.⁴² The United States Environmental Protection Agency (EPA) provides grants to all states to capitalize the loan programs.⁴³ The states then contribute an additional 20 percent to match the federal grants.⁴⁴ States are responsible for operating their program and may provide various types of assistance, including loans, refinancing, purchasing, or guaranteeing local debt and purchasing bond insurance, and have flexibility to target financial assistance to their community and environmental needs.⁴⁵ The CWSRF funds a wide range of water infrastructure projects.⁴⁶

³² *Buy America, Transportation, Infrastructure, and American Manufacturing*, Congressional Research Service, available at <https://www.everycrsreport.com/reports/IF10628.html> (last visited February 18, 2022).

³³ *Congress Expands Buy America Requirements in the Infrastructure Investment and Jobs Act*, Congressional Research Service, available at <https://crsreports.congress.gov/product/pdf/IF/IF11989> (last visited February 18, 2022).

³⁴ *Id.*

³⁵ *Id.*

³⁶ Infrastructure Investment and Jobs Act of 2021, Pub. L. No. 117-58, H.R. 3684, 117th Cong. (Nov. 15, 2021).

³⁷ *Congress Expands Buy America Requirements in the Infrastructure Investment and Jobs Act*, Congressional Research Service, available at <https://crsreports.congress.gov/product/pdf/IF/IF11989> (last visited February 18, 2022).

³⁸ *Id.*

³⁹ *Buy America, Transportation, Infrastructure, and American Manufacturing*, Congressional Research Service, available at <https://www.everycrsreport.com/reports/IF10628.html> (last visited February 18, 2022).

⁴⁰ *Congress Expands Buy America Requirements in the Infrastructure Investment and Jobs Act*, Congressional Research Service, available at <https://crsreports.congress.gov/product/pdf/IF/IF11989> (last visited February 18, 2022).

⁴¹ 23 U.S.C. § 313(d); 49 U.S.C. § 5323(j)(9); 49 U.S.C. § 22905(8).

⁴² United States Environmental Protection Agency, *Clean Water State Revolving Fund (CWSRF)*, available at <https://www.epa.gov/cwsrf> (last visited February 18, 2022).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

The Drinking Water State Revolving Fund (DWSRF) is also a partnership between the EPA and states where the EPA provides grants to the states and then states contribute an additional 20 percent to match the federal grants.⁴⁷ This program provides low interest loans to eligible recipients.⁴⁸ Assistance through this program has been provided for improving drinking water treatment, fixing leaky or old pipes, improving source of water supply, replacing or constructing finished water storage tanks, and other public health infrastructure projects.⁴⁹

An AIS requirement has been applied to these programs through various appropriations acts.⁵⁰ As such, CWSRF and DWSRF assistance recipients are required to use United States produced iron and steel products for projects for the construction, alteration, maintenance, or repair of a public water system or treatment works.⁵¹

Federal law provides circumstances where the EPA may waive AIS requirements.⁵² The agency may issue waivers where it finds:

- Compliance would be inconsistent with public interest;
- Iron and steel products are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or
- Use of iron and steel products produced in the United States will increase the cost of the overall project by more than 25 percent.⁵³

Other federal programs are subject to an AIS requirement as well.⁵⁴

Effect of the Bill

The bill requires a governmental entity⁵⁵ entering into a contract for a public works project, or for the purchase of materials for a public works project, to include in the contract a requirement that any iron or steel product used in or purchased for the project be produced in the United States.⁵⁶ The bill waives this requirement if the governmental entity entering into the contract determines all of the following:

- Iron or steel products produced in the United States are not produced in sufficient quantities, reasonably available, or of satisfactory quality;
- The use of United States produced iron or steel products will increase the total cost of the project by more than 20 percent; and
- Compliance is inconsistent with public interest.

The bill defines “public works projects” to mean an activity paid for with any state-appropriated funds or funds administered by a governmental entity that consist of the construction, maintenance, repair, renovation, remodeling, or improvement of a building, road, street, sewer, storm drain, water system, site development, irrigation system, reclamation project, gas or electrical distribution system, gas or

⁴⁷ United States Environmental Protection Agency, *How the Drinking Water State Revolving Fund Works*, available at <https://www.epa.gov/dwsrf/how-drinking-water-state-revolving-fund-works#tab-1> (last visited February 18, 2022).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ United States Environmental Protection Agency, *State Revolving Fund American Iron and Steel (AIS) Requirement*, available at <https://www.epa.gov/cwsrf/state-revolving-fund-american-iron-and-steel-ais-requirement> (last visited February 18, 2022).

⁵¹ *Id.*

⁵² 33 U.S.C. § 1388.

⁵³ *Id.*

⁵⁴ See generally United States Department of Agriculture, *American Iron and Steel Requirement Overview (AIS)*, available at <https://www.rd.usda.gov/water-and-waste-disposal-programs-american-iron-and-steel-requirement> (last visited February 18, 2022).

⁵⁵ The bill defines “governmental entity” to mean the state, or any office, board, bureau, commission, department, branch, division, or institution thereof, or a separate agency or unit of local government created or established by law or ordinance and the officers thereof. The bill specifies that the term includes counties, cities, departments, commissions, authorities, school districts, taxing districts, water management districts, boards, public corporations, institutions of higher education, and other public agencies or bodies thereof authorized to expend public funds for the construction, maintenance, repair, renovation, remodeling, or improvement of public works.

⁵⁶ The bill defines the phrase “produced in the United States” to mean to require all manufacturing processes, from initial melting through application of coatings, to occur in the United States. The bill provides an exception under this definition, excluding metallurgical processes to refine steel additives. Accordingly, the bill also defines “manufacturing process” to mean the application of a process to alter the form or function of materials or elements of a product in a manner that adds value and transforms the materials or elements into a new finished product that is functionally different from a finished product produced merely from assembling materials or elements into a product without applying such process.

electrical substation, or other facility, project, or portion thereof that is owned in whole or in part by any governmental entity.

Lastly, the bill provides that this law must be applied in a manner consistent with the state's obligations under any international agreement and may not be construed to impair any such obligations.

B. SECTION DIRECTORY:

Section 1. Creates s. 255.0993, F.S., relating to public works projects; definitions, United States-produced iron and steel products.

Section 2. Provides an effective date of July 1, 2022.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill will likely have an indeterminate significant positive fiscal impact on domestic entities that produce iron and steel.

D. FISCAL COMMENTS:

The bill requires governmental entity contracts for a public works project, or for the purchase of materials for a public works project, to require the use of only iron and steel products produced in the United States, unless a specified circumstance exists. To the extent that state and local governments are unable to apply one of the exceptions provided in the bill, overall project costs will potentially increase due to purchasing iron or steel that may be more expensive.⁵⁷ While the amount of potential cost increases is unknown, the bill could result in increases of public works project costs by up to 20 percent. For example, a \$10 million project could increase as much as \$2 million to meet the requirement for United States-produced iron and steel. As such, the bill will have an indeterminate but likely significant negative fiscal impact on state and local governments.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The county/municipality mandates provision of article VII, section 18 of the Florida Constitution may apply, because this bill requires governmental entities, including local governments, to contract for

⁵⁷ DMS, *supra* note 6, at 3.
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the use of iron or steel products produced in the United States when contracting for a public works project. Such requirement may require the governmental entity to spend more funds than they otherwise would have. An exemption may apply, however, if the fiscal impact is insignificant. Even though the bill applies to similarly situated persons, an exception does not apply because the bill does not declare that it fulfills an important state interest.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

As drafted, lines 57-68 of the bill provide three conditions for waiver of the contract requirement but do not clarify whether all three conditions must exist, or whether the existence of any one of the three conditions alone is sufficient to create an exemption from the requirement laid out in paragraph (2)(a), that the contract must include a term that any iron or steel product used in or purchased for the project be produced in the United States.

Lines 36-38 assert that a public works project as defined in the bill is subject to the United States produced steel and iron requirement if it is paid for by “any state-appropriated funds or funds administered by a governmental entity.” As drafted, the bill does not define state-appropriated funds. Section 255.0991(1)(b), F.S., regarding contracts for construction services, defines state-appropriated funds to mean “all funds appropriated in the General Appropriations Act, excluding federal funds.” It is unclear whether the term state-appropriated funds used in HB 619 has the same meaning as s. 255.0991, F.S. This could create confusion for state and local governments when determining the applicability of HB 619 for federally funded public works projects.

The bill defines “public works project” differently than in s. 255.0992(1)(b), F.S., which includes other restrictions in contracting for a public works project when the value exceeds \$1 million. The definition in the proposed bill language would result in a broader application of the purchasing iron and steel requirement than the limitations for public works projects set forth in s. 255.0992(1)(b), F.S. Both sections include the phrase “as used in this section” to indicate the scope of applicability, creating two different sets of contractual restrictions that would not necessarily both be applicable in a public works project.⁵⁸

IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

None.

⁵⁸ DMS, *supra* note 6, at 5.
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