

“Buy America” and Country of Origin Requirements

Session 8: “Buy America” Round-Up

David S. Gallacher

Ariel E. Debin

Sheppard Mullin | Supply Chain Team

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(1)

Overview of the Series

- January 11: Buy American Act
- January 25: Trade Agreements Act
- February 8: Buy America Requirements under Federally-Funded Transportation Programs
- February 22: Country of Origin Requirements under Federal Grant Programs
- March 8: Customs and “Made in the USA” Labeling
- March 22: The Berry Amendment
- April 12: Specialty Metals Restrictions
- April 26: “Buy America” Round-Up
- May 10: Sanctions and Other Prohibited Sources

The “Country of Origin” Maze



The Buy American Act



The Trade Agreements Act

**Executive Orders –
Products + Pharmaceuticals**



**Buy America Act
(Infrastructure/
Transportation)**

DoD Specialty Metals

**The 2009
Recovery Act**

DHS Kissell Amendment

DoD Berry Amendment

DoD Photovoltaic Devices

**Build America,
Buy America**

And Many, Many More...

Other Domestic Preference Regimes

- ✓ This session is aimed at addressing situations the “major” regimes do not cover
- ✓ Some restrictions apply only to:
 - Specific federal agencies and/or programs
 - Funds spent by entities that are not federal agencies
- ✓ Other provisions merely incentivize “Buy American”
- ✓ Some provisions prohibit the procurement of named items

Other Domestic Preference Regimes (cont'd)

- ✓ Codified in the U.S. Code
- ✓ Mandated by Executive Order
- ✓ Mandated by Congressional Appropriations
- ✓ State and Local Ordinances

Today's Agenda: Welcome to the Round-Up!

1. Construction Materials under the Buy American Act (BAA)
2. DOD Photovoltaic Devices
3. DOD Miscellaneous Products
4. Jones Act / Cargo Preference Act
5. USAID Grant Regulations
6. EPA American Iron & Steel (AIS)



1. “CONSTRUCTION MATERIALS” UNDER BUY AMERICAN ACT (FAR 52.225-9)



FAR 52.225-9, Buy American – Construction Materials

“The Contractor shall use only **domestic construction material** in performing this contract, except as provided in paragraphs (b)(2) and (b)(3) of this clause.”

“Construction Material” Under the BAA

- “An article, material, or supply brought to the construction site by the Contractor or a subcontractor for incorporation into the building or work”
- Includes items brought to the site preassembled from articles, materials, or supplies
- Does not include materials purchased directly by the Government
 - *Those would be considered “supplies”*

“Construction Material”

Unmanufactured Products

- Sand
- Unmodified gravel
- Limestone

Manufactured Products

- Concrete Mix
- Road Base
- Asphalt
- Cable

Iron & Steel

- Steel Pipe
- Structural Steel

“Domestic Construction Material”

Unmanufactured Products

Mined or
produced in the
U.S.

Manufactured Products

Manufactured in
the U.S. + meet
domestic content
threshold

Iron & Steel

All manufacturing
processes (from
melting through
application of
coatings) occurs in
the U.S.

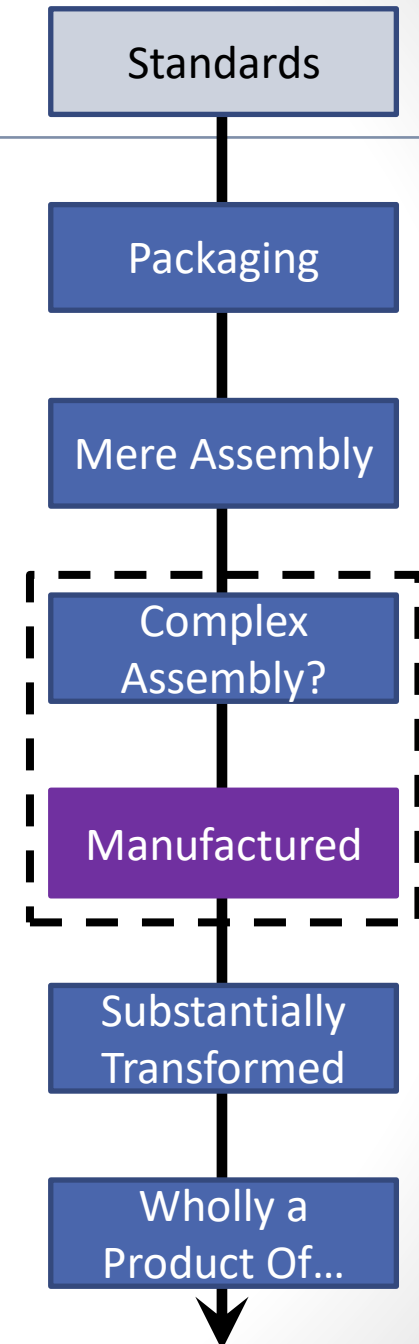
Manufactured Products

Manufactured products ***not*** made wholly or predominantly from iron or steel are “manufactured” in the United States if:

1. The product is “**manufactured**,” and
2. The cost of components mined, produced, or manufactured in the United States exceeds **60%** of the cost of all its components
 - *Unless* the construction material is a COTS item and that product is *not* made wholly or predominantly from iron or steel...
 - If the product is made wholly or predominantly from iron or steel, then domestic content must be > 95% (more on this in a few slides...)

Manufactured Products (cont'd)

- The BAA does not define “manufactured”
- Inconsistent interpretations by courts/Boards
- Key takeaways
 - “Manufacturing” requires more than mere U.S. packaging, but assembly of discrete items into a final form **may** be sufficient
 - **Highly fact-dependent**
 - Reassembly in the U.S. of a disassembled product is not enough
 - Considers whether the item being purchased by the government “is made **suitable for its intended use** and its identity established” in the U.S.
 - Does not necessarily require “substantial transformation” (which must be established under the TAA)



Iron & Steel Products

- “Wholly or predominantly of iron or steel or a combination of both”
- Must be “manufactured” in the United States
- Manufactured = the cost of foreign iron and steel constitutes less than 5% of the cost of **all components** used in such construction material
- No COTS exception for content requirement

Iron & Steel Products (cont'd)

Key Questions:

1. Does the product consist “wholly or predominantly of iron or steel”?
2. Is the product “manufactured” or “produced” in the United States?
3. What percentage of the product is made of “foreign iron and steel”?

Iron & Steel Products (cont'd)

- Made “predominantly from iron or steel or a combination of both”
 - Cost of iron and steel content > 50% of the total cost of all its components
- “Foreign iron and steel”
 - “Iron or steel products not produced in the United States”
- “Produced in the United States”
 - “All manufacturing processes of the iron or steel must take place in the United States, from the initial melting stage through the application of coatings, except metallurgical processes involving refinement of steel additives. The origin of the elements of the iron or steel is not relevant to the determination of whether it is domestic or foreign”

2. DOD PHOTOVOLTAIC DEVICES (DFARS 225.7017 & 252.225-7017)

DFARS 225.7017

- National Defense Authorization Act FY 2011
“**Photovoltaic devices** provided under any covered contract shall comply with 41 U.S.C. chapter 83, **Buy American [the Buy American Act]**, **subject to the exceptions to that statute provided in the Trade Agreements Act**”
- Covered contracts:
 - DOD energy saving performance contract
 - DOD utility services contract
 - DOD private housing contract



“Photovoltaic Device”

- “A device that converts light directly into electricity through a solid-state, semiconductor process”

Domestic

Manufactured in the
U.S.
(source of component
parts irrelevant)

Foreign

Not manufactured in
the U.S.

BUT...
Designated Country or
Qualifying Country
products may be
acceptable

U.S.-Made

**Manufactured or
substantially
transformed** in the
U.S. (source of
component parts
irrelevant)

“Photovoltaic Device” (cont’d)

- Restriction applies to the **individual solar cells** – **not** the manufactured “end product”/ solar arrays
- But the **dollar amount** is measured based on the total contract value
- Materials in the manufactured array (e.g., batteries, cabling, framing, etc.) will need to separately meet the BAA or TAA



DFARS 252.225-7017, Photovoltaic Devices

Contract value between \$10,000 (MPT) and \$92,318:

1. Domestic Photovoltaic devices
2. Qualifying Country devices

Contract value between \$92,319 and \$99,999:

1. Domestic Photovoltaic devices
2. Qualifying Country devices
3. Tier 1 FTA Country Photovoltaic devices

Contract value between \$100,000 and \$182,999:

1. Domestic Photovoltaic devices
2. Qualifying Country devices
3. Tier 1 + 2 FTA Country Photovoltaic devices

Contract value \geq \$183,000:

1. US.-Made
2. Qualifying Country devices
3. Tier 1 + 2 + 3 FTA Country Photovoltaic devices
4. Designated Country Photovoltaic devices

“Qualifying Country”

- | | | |
|------------------|---------------|------------------|
| ✓ Australia | ✓ Germany | ✓ Poland |
| ✓ Austria | ✓ Greece | ✓ Portugal |
| ✓ Belgium | ✓ Israel | ✓ Slovenia |
| ✓ Canada | ✓ Italy | ✓ Spain |
| ✓ Czech Republic | ✓ Japan | ✓ Sweden |
| ✓ Denmark | ✓ Latvia | ✓ Switzerland |
| ✓ Egypt | ✓ Lithuania | ✓ Turkey |
| ✓ Estonia | ✓ Luxembourg | ✓ United Kingdom |
| ✓ Finland | ✓ Netherlands | |
| ✓ France | ✓ Norway | |

Free Trade Agreement (FTA) Countries

Tier 1

- Australia
- Chile
- Colombia
- Costa Rica
- Dominican Republic
- El Salvador
- Guatemala
- Honduras
- Mexico
- Nicaragua
- Singapore

Tier 2

- Tier 1 Countries
- South Korea

Tier 3

- Tier 1 + 2 Countries
- Bahrain
- Morocco
- Panama
- Peru
- WTO GPA

Countries: Armenia, Aruba, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Montenegro, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, South Korea, Spain, Sweden, Switzerland, Taiwan, Ukraine, United Kingdom

“Designated Country”

- 125 countries (missing Oman for DOD contracts)
- Four types of countries:
 - ✓ Countries with a Free Trade Agreement with the U.S.
 - ✓ Countries that have signed on to the World Trade Organization Government Procurement Agreement (WTO GPA)
 - ✓ “Caribbean Basin Countries”
 - ✓ “Least Developed Countries”



“Designated Country” (cont’d)

- Afghanistan
- Angola
- Antigua and Barbuda
- Armenia
- Aruba
- Australia
- Austria
- Bahamas
- Bahrain
- Bangladesh
- Barbados
- Belgium
- Belize
- Benin
- Bhutan
- Bonaire
- British Virgin Islands
- Bulgaria
- Burkina Faso
- Burundi
- Cambodia
- Canada
- Central African Republic
- Chad
- Chile
- Colombia
- Comoros
- Costa Rica
- Croatia
- Curacao
- Cyprus
- Czech Republic
- Democratic Republic of Congo
- Denmark
- Djibouti
- Dominica
- Dominican Republic
- El Salvador
- Equatorial Guinea
- Eritrea
- Estonia
- Ethiopia
- Finland
- France
- Gambia
- Germany
- Greece
- Grenada
- Guatemala
- Guinea
- Guinea-Bissau
- Guyana
- Haiti
- Honduras
- Hong Kong
- Hungary
- Iceland
- Ireland
- Israel
- Italy
- Jamaica
- Japan
- Kiribati
- Laos

“Designated Country” (cont’d)

- Latvia
- Lesotho
- Liberia
- Liechtenstein
- Lithuania
- Luxembourg
- Madagascar
- Malawi
- Mali
- Malta
- Mauritania
- Mexico
- Moldova
- Montenegro
- Montserrat
- Morocco
- Mozambique
- Nepal
- Netherlands
- New Zealand
- Nicaragua
- Niger
- Norway
- ~~Oman~~
- Panama
- Peru
- Poland
- Portugal
- Romania
- Rwanda
- Saba
- Saint Kitts and Nevis
- Saint Lucia
- Saint Vincent and the Grenadines
- Samoa
- Sao Tome and Principe
- Senegal
- Sierra Leone
- Singapore
- Sint Eustatius
- Sint Maarten
- Slovak Republic
- Slovenia
- Solomon Islands
- Somalia
- South Korea
- South Sudan
- Spain
- Sweden
- Switzerland
- Taiwan
- Tanzania
- Timor-Leste
- Togo
- Trinidad and Tobago
- Tuvalu
- Uganda
- Ukraine
- United Kingdom
- Vanuatu
- Yemen
- Zambia

DFARS 252.225-7018, Certificate

- Requires a **specific certification** at the time of offer of what will be delivered:
 - “Domestic Photovoltaic Device” or “U.S.-made Photovoltaic Device”
 - “Qualifying Country Photovoltaic Device”
 - “WTO GPA country Photovoltaic Device”
 - “Caribbean Basin country Photovoltaic Device”
 - “Designated Country Photovoltaic Device”



3. DOD MISCELLANEOUS PRODUCTS (DFARS SUBPARTS 225.70 AND 225.71)

DFARS 225.70 – Authorization Acts, Appropriations Acts, and Other Statutory Restrictions on Foreign Acquisition

- 225.7002 – Restrictions on food, clothing, fabrics, and or measuring tools, and flags (Berry Amendment)
- 225.7003 – Restrictions on acquisitions of specialty metals
- 225.7004 – Restriction on acquisition of foreign buses
- 225.7005 – Chemical Weapons Antidote
- 225.7006 – Restriction on air circuit breakers for naval vessels
- 225.7007 – Restrictions on anchor and mooring chain
- 225.7009 – Restriction on ball and roller bearings
- 225.7010 – Restriction on certain naval vessel components
- 225.7011 – Restriction on carbon, alloy, and armor steel plate
- 225.7012 – Restriction on supercomputers
- 225.7013 – Restriction on construction or repair of vessels in foreign shipyards
- 225.7014 – Restriction on military construction
- 225.7015 – Restriction on overseas architect-engineer services
- 225.7017 – Photovoltaic Devices
- 225.7018 – Restriction on acquisition of certain magnets, tantalum, and tungsten
- 225.7019 – Prohibition on use of certain energy sourced from inside the Russian Federation
- 225.7022 – Prohibition on certain procurements from the Xinjiang Uyghur Autonomous Region (XUAR)
- 225.7023 – Restriction on acquisition of personal protective equipment and certain other items from non-allied foreign nations.

DOD Miscellaneous Products

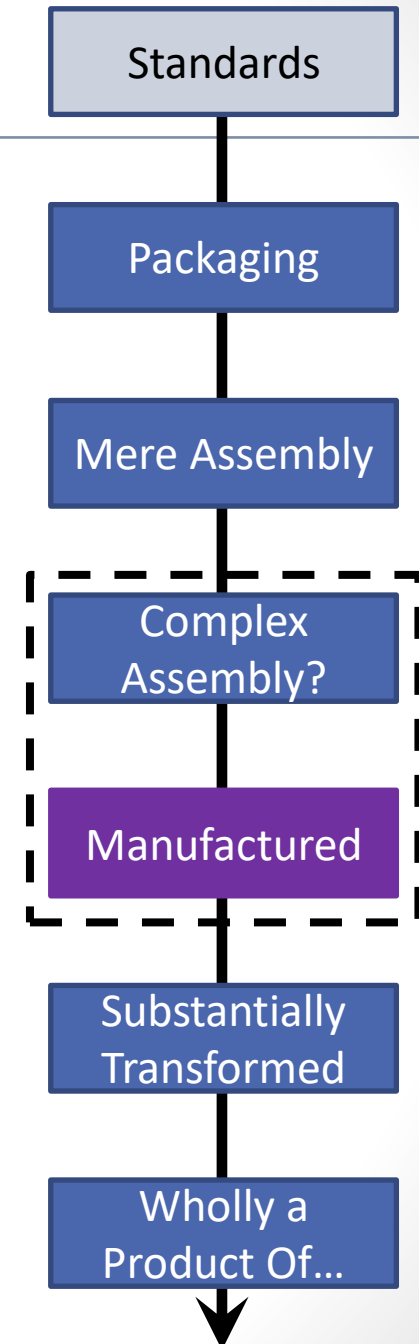
- ✓ Buses
- ✓ Chemical weapons antidote contained in automatic injectors
- ✓ Air circuit breakers for naval vessels
- ✓ Welded shipboard anchor and mooring chain, four inches or less in diameter
- ✓ Ball and roller bearings
- ✓ Gyrocompasses, electronic navigation chart systems, steering controls, pumps, propulsion and machinery control systems, totally enclosed lifeboats
- ✓ Supercomputers

DFARS 225.71 – Other Restrictions on Foreign Acquisition

- When acquiring the following forging items, whether as end products or components, acquire items that are of domestic manufacture to the maximum extent practicable.
 - ✓ Ship Propulsion Shafts
 - ✓ Periscope Tubes
 - ✓ Ring Forgings for bull gears

Manufacturing Requirements

- Most of these DOD-unique requirements require **U.S.-based manufacturing of the end product**
- “Manufacturing” is typically the same as under the BAA
- Requirement does not normally look at **source materials/components**, except for:
 - Anchor/mooring chain
 - Ball/roller bearings
 - Magnets



4. JONES ACT AND THE CARGO PREFERENCE ACT

Cargo Preferences for U.S.-Flag Shipping

- Longstanding policy treats U.S.-flag international fleet as a naval auxiliary to be available during times of war
 - Over 90% military cargoes are carried by ship
- To support U.S. merchant marine, Congress requires that “government-impelled” cargo sent overseas be carried on U.S.-flag ships
 - Government-owned cargo (military supplies and food aid)
 - Cargo financed by the Federal government
- In 2008, Congress extended the law to require state and local governments and private entities importing goods with federal financial assistance ship at least 50% of cargo in U.S.-flag vessels



Jones Act

- Merchant Marine Act of 1920, 46 U.S.C. 55102
- Regulates *cabotage* – naval transport in U.S. coastal waters and between domestic ports
- Foreign carriers and crews are banned from domestic water routes
- Cabotage from one U.S. port to another is restricted to U.S.-built, U.S.-crewed, and U.S.-flagged vessels
 - But note that this requirement does not prohibit foreign *ownership*...
- Violations = seizure of vessel and forfeiture of cargo



Cargo Preference Act of 1954

- Post-WWII, DOD controlled the bulk of U.S.-based ocean traffic
 - Marshall Plan utilized primarily military transport
- U.S.-based civilian fleet was small after the War
- Lobbied Congress to scale back Military Sea Transportation Service (MSTS) and to create shipping priorities for civilian vessels
- The Cargo Preference Act, 46 USC 55305, is frequently criticized as inefficient and costly (especially compared to foreign shippers)



FAR 52.247-64, Preference for Privately Owned-U.S. Flag Commercial Vessels

- Required in all contracts that may involve ocean transportation of supplies subject to the Cargo Preference Act, *including* contracts for commercial products (52.212-5(e) and 52.244-6)

Contractor shall use **privately owned U.S.-flag commercial vessels** to ship at least **50 percent of the gross tonnage** involved under this contract (computed separately for dry bulk carriers, dry cargo liners, and tankers) whenever shipping any equipment, materials, or commodities under the conditions set forth in paragraph (a) of this clause, to the extent that such vessels are available at rates that are fair and reasonable for privately owned U.S.-flag commercial vessels.



5. U.S. AGENCY FOR INTERNATIONAL DEVELOPMENT (USAID) PROCUREMENT* REGULATIONS, 22 CFR PART 228



USAID, 22 CFR Part 228

- Applies to grants and cooperative agreements financed by USAID
- Applies to goods and services purchased by the Recipient through a contract mechanism
 - Does NOT apply to the grant/cooperative agreement itself – only to procurement
- USAID uses geographic codes to specify the authorized “source” of commodities and the “nationality” of suppliers financed with USAID funds

22 CFR 228.11, Source of Commodities

The **source** of all **commodities** financed with Federal program funds appropriated under the **Foreign Assistance Act of 1961**, as amended, shall be **Code 937** (unless Code 935 or 110 are designated in the implementing instrument).

22 CFR 228.11, Nationality of Suppliers of Commodities and Services

The **suppliers** of all **commodities and services** financed with federal program funds appropriated under the **Foreign Assistance Act of 1961**, as amended, shall:

- If an **individual**: “**citizen or lawful permanent resident** (or equivalent immigration status to live and work on a continuing basis) of a country in **Code 937...**”
- If an **organization**:
 - Be **incorporated or legally organized** under the laws of a country in Code 937 (or other principal geographic procurement code designated in an implementing instrument);
 - Must be **operating as a going concern** in a country in Code 937 (or other principal geographic procurement code designated in an implementing instrument), and either
 - Be **managed by a governing body**, the majority of whom are citizens or lawful permanent residents (or equivalent immigration status to live and work on a continuing basis) of countries in Code 937 (or other principal geographic procurement code designated in an implementing instrument), or
 - **Employ citizens or lawful** permanent residents (or equivalent immigration status to live and work on a continuing basis) of a country in Code 937 (or other principal geographic procurement code designated in an implementing instrument), in more than half its permanent full-time positions and more than half of its principal management positions.

USAID, 22 CFR Part 228 (cont'd)

SOURCE: A country from which commodity is shipped or country where the commodity is located at the time of purchase, irrespective of the place of manufacture or production unless it is a “prohibited source” country. However, if a commodity is shipped from a free port or bonded warehouse in the form in which received therein, “source” means the country from which the commodity was shipped to the free port or bonded warehouse

SUPPLIER: Any person or organization, governmental or otherwise, who furnishes services, commodities, and/or commodity related services, including delivery or incidental services, financed by USAID

NATIONALITY: The place of legal organization of suppliers, or citizenship of an individual

Principal Geographic Procurement Codes

Code 937

- United States
- Recipient Country
- Developing Countries
- ~~Advanced Developing Countries~~
- ~~Prohibited Source Countries~~

Code 935

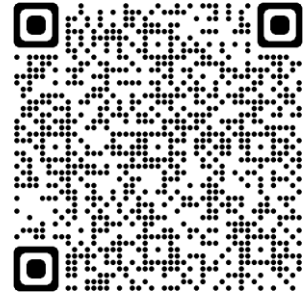
- United States
- Recipient Country
- Developing Countries
- Advanced Developing Countries
- ~~Prohibited Source Countries~~

Code 110

- United States
- The New Independent State of the Former Soviet Union
- Developing Countries
- ~~Advanced Developing Countries~~
- ~~Prohibited Source Countries~~

Principal Geographic Procurement Codes (cont'd)

- **DEVELOPING COUNTRY:** Any country categorized by the World Bank as a low or lower middle-income country according to its gross national income per capita (about 82 countries)
- **ADVANCED DEVELOPING COUNTRY:** Any country categorized by the World Bank as an upper middle-income country according to its gross national income per capita, except for any such country in which USAID provides assistance when the procurement is for USAID assistance to that country (*i.e.*, the “cooperating” or “recipient” country)
- **PROHIBITED SOURCE COUNTRY:** As updated by the Department of Treasury/OFAC (ADS 310)



Special Rules

- ✓ Awards for construction and engineering (22 CFR 228.17)
- ✓ Awards to foreign governmental organizations (22 CFR 228.13)
- ✓ Construction awards to foreign government organizations (22 CFR 228.14)
- ✓ Procurement of cars, pharmaceuticals, and agriculture products (22 CFR 228.19)



Domestic Preferences (22 CFR 228.19)

✓ **Agricultural Commodities**

- Identified in ADS 312
- Must be procured in the United States if the domestic price is less than parity, unless the commodity cannot reasonably be procured in the U.S.

✓ **Motor Vehicles**

- Must be manufactured in the United States to be eligible for USAID financing

✓ **Pharmaceutical Products**

- USAID cannot finance pharmaceutical products manufactured outside the United States, if the pharmaceutical is covered by a valid U.S. patent, unless the U.S. patent holder expressly authorizes manufacture of the pharmaceutical in the U.S.

6. EPA AMERICAN IRON & STEEL (AIS)

State Revolving Fund American Iron & Steel (AIS) Requirement

- Requires Clean Water State Revolving Fund (CWSRF) and Drinking Water State Revolving Fund (DWSRF) assistance recipients to use iron & steel products that **are produced in the United States**
- Applies to projects for the construction, alteration, maintenance, or repair of public water system or treatment works
- *Build America, Buy America likely expands existing AIS domestic preference requirements*



AIS: Key Questions

1. Is the product a listed product covered by AIS?

- ✓ Lined or unlined pipes or fittings
- ✓ Manhole covers
- ✓ Municipal castings
- ✓ Hydrants
- ✓ Tanks
- ✓ Flanges
- ✓ Pipe clamps and restraints
- ✓ Valves
- ✓ Structural Steel
- ✓ Reinforced precast concrete
- ✓ Construction Materials

AIS: Key Questions (cont'd)

2. Is the product primarily iron or steel?
 - Products greater than 50% iron or steel, measured by material costs only (no labor, overhead, shipping, etc.)
3. Is the product permanently incorporated in the project?
 - Products intended to be permanently installed at the project site, including spare parts and materials left in place or buried

AIS: “Produced in the United States”

- Manufacturing and processing of iron or steel must occur in the U.S.

- ✓ Melting
- ✓ Refining
- ✓ Forming
- ✓ Rolling
- ✓ Drawing
- ✓ Finishing
- ✓ Fabricating Assembly



- All processes must take place in the U.S. ***except***
 - Steel additives refining
 - External coating surface of iron/steel components

AIS: Exceptions

- Products do not have to be produced in the United States if:
 - Raw materials, such as iron ore, limestone and iron and steel scrap
 - Non-iron or non-steel components of a primarily iron and steel product
 - Products that do not fall under any of the listed products
 - Mechanical/electrical equipment (if not a listed product)
 - Appurtenances of assemblies where the primary component is a non-covered product
 - Non-construction materials

CONCLUSION

The “Country of Origin” Potpourri Round Up

The Buy American Act

The Trade Agreements Act

**Executive Orders –
Products + Pharmaceuticals**



**Buy America Act
(Infrastructure/
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Certification Reminders...

- Be careful when you certify your products
- Ask for clarifications!

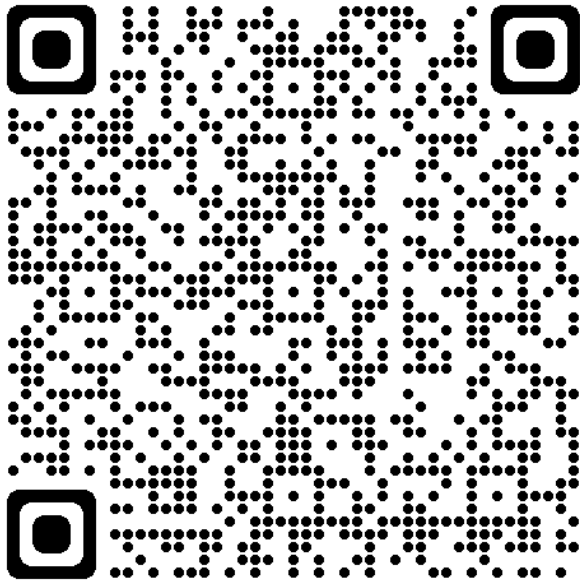


Questions?

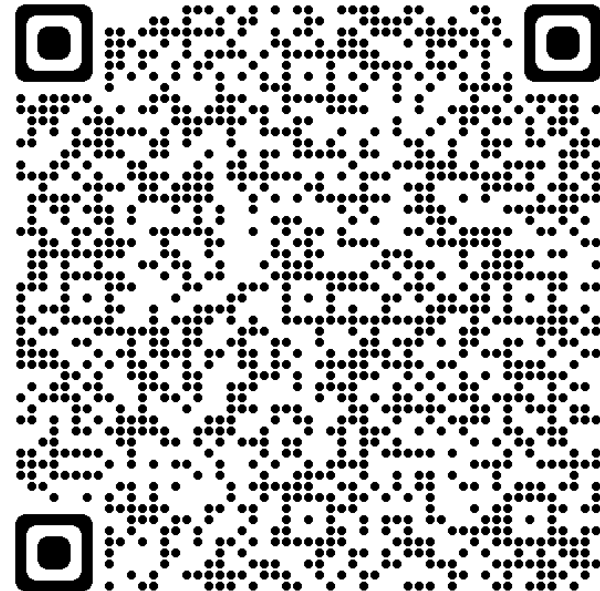


Final Session on May 10, 2023

- Session 9: Sanctions & Other Prohibited Sources



Section 889/Prohibition
on Chinese
Telecommunications
Equipment



Russia Sanctions

Sheppard Mullin Supply Chain Team



Ariel Debin

Associate

+1 202.747.2646 | Washington, D.C.
adebin@sheppardmullin.com



David Gallacher

Partner

+1 202.747.1921 | Washington, D.C.
dgallacher@sheppardmullin.com