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April 7, 2017

Earl Comstock
Director, Office of Policy & Strategic Planning
U.S. Department of Commerce
1401 Constitution Ave. NW
Room 5863
Washington, D.C. 20230

RE: Construction of Pipelines Using Domestic Steel and Iron [DOC-2017-0002]

Dear Mr. Comstock,

AGC represents more than 26,000 members—the largest commercial construction trade association—through a network of over 90 chapters in 50 states, the District of Columbia and Puerto Rico. Our commercial construction companies build many forms of infrastructure, including energy transportation infrastructure and pipelines. As such, they know the challenges facing construction of these facilities first-hand and—through AGC—can share some insight.

Per the instructions in your March 16, 2017, request for information—issued in accordance with the presidential memorandum—AGC would like to educate the Department on the multiple different domestic content requirements that construction contractors face. The federal government has a long-standing preference for using domestic products in federal manufacturing, supply, and construction procurements. Newer rules are applying this antiquated preference to additional sectors of construction that the federal government has a hand in.

I. Background on Domestic Materials Statutory Requirements in Federal Procurement

The general rule for federal procurements is that all physical products provided or sold to the federal government must be made in the United States, unless an exception to this rule applies. These domestic preferences are governed by a complex framework of statutes and regulations, prohibitions and waivers, and rules and exceptions that are oftentimes difficult for contractors to understand and follow. It is crucial that all construction contractors, especially federal contractors, understand these domestic preferences in order to avoid the significant penalties that may be imposed for any failure to comply.

The federal government's domestic preferences are generally governed by one of three statutory systems: (1) the Buy American Act of 1933 ("BAA"), as modified by the Trade Agreements Act ("TAA"); (2) the Buy America provision of the Surface Transportation Assistance Act of 1982 ("Buy America"); and (3) the American Iron and Steel Requirements ("AIS Requirements"), as part of the Consolidated Appropriations Act, 2014 ("Appropriations Act") and the Water Resources Reform and Development Act of 2014 ("WRRDA").

Each of these statutory systems provides a different layer of preferences for domestically-made products, applicable to various categories of federal procurements:

- The BAA generally requires that the federal government purchase domestic products for all federal procurements, defines what constitutes a domestic product, and addresses the limited

circumstances in which a contractor may receive a waiver from the BAA domestic preferences. The TAA provides statutory waivers from the BAA's domestic product requirements for products made in designated countries that are subject to various trade agreements. In other words, the TAA recognizes certain foreign-made products as if they were domestic products for the purpose of the BAA.

- Buy America imposes a unique set of requirements for procurements funded in whole or in part by the U.S. Department of Transportation including highway, bridge, rail, and transit construction.
- The AIS Requirements, contained in the Appropriations Act and the WRRDA, restrict the use of certain iron and steel products for procurements funded in whole or in part by the Environmental Protection Agency's Clean Water State Revolving Fund or the Drinking Water State Revolving Fund.

Taken together, the BAA, TAA, Buy America, and AIS Requirements create a complex framework of rules and regulations. Contractors must understand and comply with these requirements and comply with the complex paperwork requirements needed to verify compliance to avoid stiff penalties in the form of contract suspension and debarment as well as significant civil and criminal penalties.

II. Buy American vs. Buy America

A. Buy American

As noted above, there are multiple, complex statutory and regulatory systems that govern the various domestic content requirements that are applied to different sectors of the construction economy. For projects directly procured by the federal government, the BAA or Buy American is the controlling law. It requires steel to be "substantially transformed" in the U. S. and is the current standard for the Department of Defense, General Services Administration, Federal Aviation Administration, and other federal agencies in determining eligibility for products used in countless federal projects for nearly a century. It has been updated and modified as the global supply chain and the system of global trade have developed and matured. As we have developed bilateral, multilateral, and plurilateral trade agreements, those too have also been taken into account.

The standard cited in the President's Pipelines Memorandum, however, is not Buy American, but rather Buy America.

B. Buy America

Buy America is an antiquated, narrow, process-based definition created by the Federal Highway Administration (FHWA) in 1983. It requires that steel be "melted" domestically. FHWA based its "melting" requirement on the domestic steel production landscape during that time, and at the time of its adoption, this "melting" standard encompassed all domestic steel facilities. Since the 1980s, however, the domestic steel industry has evolved, outpacing Buy America's narrow "melting" definition.

1. Evolution and Balkanization of the U.S. Steel Industry

Due to the less intensive process and ability to employ a fraction of the employees required to produce the same products as integrated mills, scrap remelters have come to dominate the domestic steel industry. Remelters take scrapped finished products such as cars and refrigerators, combine them with other cheap forms of iron, and "remelt" them. Remelters make the same products as integrated mills with one-third of the labor and at a much lower cost. Most of the integrated mills that existed in the early 1980's have shut down due to this increased competition within the industry.

As integrated mills shut down over the past three decades, slab converter mills began opening – often restoring operations to shuttered integrated mills and putting people back to work in communities that had come to greatly rely on the steel industry. The slab converter model is almost as labor intensive as the integrated mills – and far more than remelting. Rather than “melting,” U.S. slab converter steel mills “hot roll” 20- to 30-ton steel slabs to just 50 to 100 degrees short of melting, converting 8- to 10-inch thick slabs to paper thin sheets of coil that can extend to more than one mile in length.

2. Memorandum as Written Would Harm—Not Help—Many U.S. Steel Facilities and Workers

The Memorandum requires “that all manufacturing processes for such iron or steel products, from the initial melting stage through the application of coatings, occurred in the United States” and “[s]teel or iron material or products manufactured in the United States from semi-finished steel or iron of foreign origin are not “produced in the United States” for purposes of this memorandum.” By defining “produced in the United States” as “melting,” the Memorandum excludes U.S. facilities and workers from continuing to participate in the private pipeline market, ultimately punishing U.S. companies and their workers alongside foreign producers.

All U.S. steel mills rely on imported materials for their feedstock. However, some segments of the industry have waivers and exemptions from Buy America, which allow their foreign feedstock to be considered as if it were of U.S. origin. Steel slabs are not commercially available in the U.S., nearly all are consumed internally by the integrated mills that make them.¹ Slab converters have no choice but to import their feedstock.

Yet the Memorandum singles out slab imports – “semi-finished steel” – as not qualifying under the “produced in the United States” definition to supply pipeline projects in the U.S. As a result, this segment of the U.S. steel industry would be shut out of the entire pipeline market – including projects funded entirely with private funds. This broad expansion of restrictions from access to the U.S. market for certain products will create uncertainty in the market and stifle redevelopment, U.S. capital expenditure and job creation.

If a key aim of the Memorandum is to maximize jobs in the U.S. steel industry, we are concerned that it will more likely have the effect of shuttering many U.S. operations spread around the country and replace some of those operations with a consolidated finished steel industry that will be limited both geographically and by corporate ownership. Slab converters have revived the U.S. steel industry, putting American steelworkers back to work, yet the Memorandum specifically excludes these mills because of the nature of their steel production process and their feedstock, even though other types of mills also import their feedstock.

¹ A study by the Dept. of Commerce and U.S. International Trade Commission in December 2001 (Publ. 3479) found “The vast majority of U.S.-produced slabs are internally consumed by the domestic slab producers in the production of other steel products, with a very minor portion being sold on the commercial market.” In 2000, 99.4 percent of domestic slab shipments were internally consumed. In a 2002 paper “Using Safeguard Protection to Raise Domestic Rival’s costs” by James P. Durling and Thomas Prusa, it is noted that slab converters rely on imported slab due to the scarcity of domestic slab availability. Firms that do not need to use imported slab due to their own production of “melt and pour” steel, have no “incentive to enable their rivals to compete for downstream higher margin sales.” They go on to write, “In other words if left to their own devices, domestic mills can and do choke off the supply of slab and thus can largely eliminate the competition from these new firms [conversion mills].”

AGC cannot support policies that will specifically exclude certain American companies and jobs over others. We do not believe the government should be in the business of picking winners and losers among American companies. Promoting the antiquated Buy America standard will ultimately undermine the President's vision of protecting all American jobs, including construction jobs.

III. Domestic Content Requirements on Privately Funded Construction Projects

What all three aforementioned statutory systems that regulate domestic content have in common is that they each apply to construction projects that have some level of federal funding involved. Unlike these steel and iron restrictions designed as conditions of federal funding or federal assistance eligibility, this Memorandum would govern commercially-built projects paid for entirely without federal funding. As such, this language would establish a precedent whereby the federal government can shut off U.S. Companies from access to wholly privately-funded, privately-built pipeline projects in the U.S.

AGC strenuously objects to this model of attaching federal content rules, derived from statutes designed to apply to federal and federally-assisted purchasing, to non-federal requirements. The Memorandum states that these provisions should be put in place "to the extent permitted by law" and it is AGC's position that the Department lacks statutory authority to extend these requirements as a condition of receiving a federal pipeline safety permit. Such expansions of domestic content sourcing requirements to private markets are also likely to be judged as violations of long-established international trade law.

Attaching such conditions to the receipt of a federal permit is a very dangerous slippery slope that opens the door to all sorts of federal requirements that have never before been conditions on privately funded construction work. Such an action could lead to the creation of more federal impediments—not fewer—to the building of the nation's infrastructure. The federal government denying access to private markets to U. S. companies is unprecedented and will result in job losses for U.S. workers.

It is also important to note that many of the U.S. companies locked out of these projects are west of the Mississippi River. There are no integrated mills that melt steel in the West. This means that compliance will increase the costs of pipeline projects in the West as materials must be transported longer distances from integrated mills in the South and East. So in addition to pitting some U.S. companies against others and picking winners and losers, the definitions used in the Memorandum also pit U.S. regions against one another and pick winners and losers.

IV. Compliance and Administrative Burden

In addition to the outright objection to placing such requirements on privately funded projects, AGC objects to the additional compliance and administrative burden such an expansion of domestic content sourcing requirements on construction materials would have on contractors. Such requirements have never been a part of the private construction process before, and as such contractors who specialize in building pipelines for private companies could find themselves facing the same minefield of compliance and administration as their colleagues who do federal or federally-assisted construction.

Many private construction firms specifically avoid public work because of the additional strings and red tape that accompany public projects. And indeed, as we saw with the American Recovery and Reinvestment Act, which applied brand new domestic content requirements for construction materials on markets like water and wastewater infrastructure (also very pipe intensive construction projects) that had never before had to comply with such requirements, project delays ensued.

Contractors will have to create new administrative procedures that track the origins of all their materials in a product they install. This usually involves obtaining some form of certification from the manufacturer

for every installed product. And when the project is audited, if the manufacturer provided certification of any element of the project is found to be nonexistent, erroneous or otherwise not in compliance the contractor is on the hook for fines and penalties, and can be asked to remove and replace the offending materials at their own cost.

V. Conclusion

AGC and its members have experience in the morass of federal domestic content requirements on construction materials. This memorandum will result in restrictive, punitive and complex procurement policies and those are seldom seen as the pathway to either increased competition or economic growth. We ask you to reconsider the presidential memorandum to take into account the global supply chain that U.S. companies sell into and buy from. We believe that when you take an objective look at the unintended consequences of this memorandum you will resolve to design a system that will not expand the scope of domestic content laws that govern government procurements to private construction. You will also design a memorandum that will not lead to U.S. manufacturing job dislocation, compliance confusion and, complex administrative burdens. We thank you for the opportunity for the Association to provide comments for your consideration and would welcome further discussion on this topic at the Department's request.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeffrey D. Shoaf", written in a cursive style.

Jeffrey D. Shoaf
Senior Executive Director, Government Affairs