The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Fiscal Policy

BILL: SB 674

INTRODUCER: Senator Boyd

SUBJECT: United States-produced Iron and Steel in Public Works Projects

DATE: January 29, 2024 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Harmsen	McVaney	GO	**Favorable**
2.	Harmsen	Yeatman	FP	**Pre-meeting**

I. Summary:

SB 674 requires a governmental entity that contracts for a public works project or for the purchase of materials for a public works project to require that any iron or steel product that will be permanently incorporated into the project be produced in the United States.

The bill waives this contract requirement if the governmental entity determines that any of the following apply:

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

A governmental entity may allow a minimal use of foreign iron or steel materials in the project, if they are ancillary to the primary product and the cost of the materials does not exceed 0.10 percent of the total contract cost, or $2,500, whichever is greater.

These provisions do not apply to contracts procured by the Florida Department of Transportation that are subject to the federal Buy America requirements.

The bill requires the Department of Management Services to develop guidelines and procedures by rule to implement the bill.

The bill has an indeterminate negative fiscal impact on state and local expenditures.

The bill takes effect July 1, 2024.

II. Present Situation:

United States Steel

China is the largest global producer of steel, and makes approximately 55 percent of the world's crude steel output.[1] The U.S. ranks fourth, behind China, India, and Japan, and produces 4.5 percent of the world's crude steel output.[2]

Steel produced in the U.S. is relatively more expensive compared to its global competitors[3] for several reasons; the primary cause is that restrictions on steel imports into the U.S. create a more narrow market. However, the U.S. has trade agreements that allow a specified amount of duty-free steel to enter the U.S. from the EU, Japan, and the United Kingdom.[4] Additionally, the U.S.-Mexico-Canada Agreement allows steel mill products to move throughout the three countries duty-free.[5] In 2022, the U.S. imported approximately 30 million net tons of finished steel products.[6] In 2021, Canada accounted for 47 percent, and Mexico for 46 percent, of total imports. China accounts for approximately 2 percent of imports.[7]

Additionally, the U.S. market has transitioned to harder-to-make steel products, which ultimately incentivizes exporting those higher quality (and higher priced) items, and importing less sophisticated products, such as ingots and rebar.[8] In 2022, the U.S. exported 8 million net tons of steel product.[9]

The price of steel has been relatively volatile in recent years, due largely to supply chain issues. The chart below represents the price for specific steel commodities over the last 6 years.[10]

[1] These figures represent monthly steel outputs for September 2023. U.S. Department of Commerce, International Trade Administration, U.S. *Steel Executive Summary: July- September 2023*, 5, https://www.trade.gov/data-visualization/us-steel-executive-summary#:~:text=From%20August%202023%20to%20September,to%202.0%20million%20metric%20tons.&text=In%20September%202023%2C%20capacity%20utilization,from%2076.6%25%20in%20August%202023. (last visited Jan. 8, 2024).

[2] *Id*.

[3] In September 2023, U.S. price per metric ton of hot rolled band (a global benchmark for the price of steel) was $753, compared to Europe's $665, and China's $453. *Id*. at 4.

[4] CONGRESSIONAL RESEARCH SERVICE, Christopher Watson, *Domestic Steel Manufacturing: Overview and Prospects,* 6 (May 17, 2022) https://crsreports.congress.gov/product/pdf/R/R47107 (last visited Jan. 8, 2024).

[5] THE HILL, Sylvan Lane, *Canada, Mexico lift tariffs on US goods after Trump Scraps Steel, Aluminum Levies* (May 20, 2019), https://thehill.com/policy/finance/444581-canada-mexico-lift-tariffs-on-us-goods-after-trump-scraps-steel-aluminum/ (last visited Mar. 14, 2023). *See also*, CONGRESSIONAL RESEARCH SERVICE, Christopher Watson, *Import Monitoring Systems: Steel and Aluminum* (Mar. 29, 2023), https://crsreports.congress.gov/product/pdf/IF/IF12363 (last visited Jan. 8, 2024).

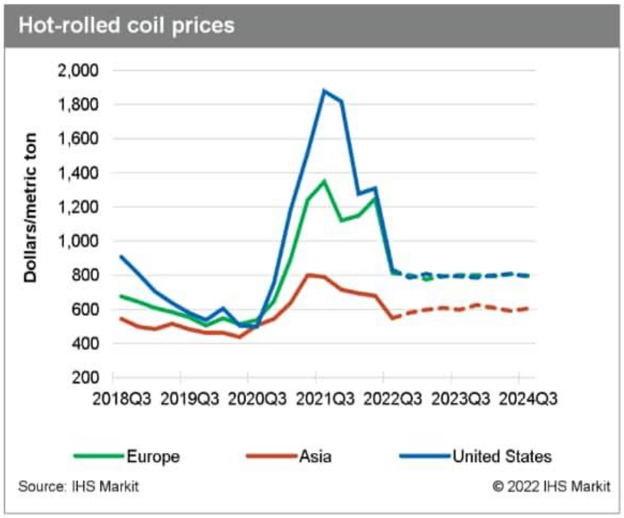
[6] AMERICAN IRON AND STEEL INSTITUTE, *Finished Steel Imports up 11% in 2022* (Jan. 26, 2023), https://www.steel.org/wp-content/uploads/2023/01/IMP2212.pdf (last visited Jan. 8, 2024).

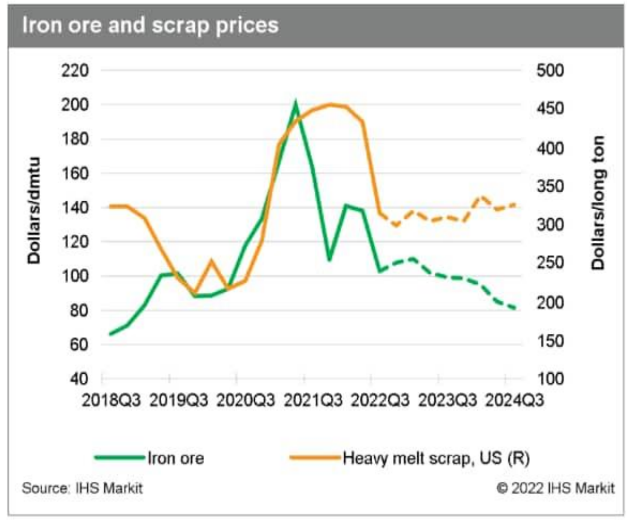
[7] Watson, *supra* note 4 at 4.

[8] Watson, *supra* note 4 at 7.

[9] OECD, *Steel Market Developments: Q4 2022*, 21 https://www.oecd.org/industry/ind/steel-market-developments-Q4-2022.pdf (last visited Mar. 14, 2023)

[10] John Anton, S&P GLOBAL MARKET INTELLIGENCE, *Steel Price Forecast and Steel Market Outlook: Prices Soften on Weaker Steel Demand Outlook* (https://www.spglobal.com/marketintelligence/en/mi/solutions/steel-forecast.html (last visited Jan. 8, 2024).





Federal Provisions

A suite of federal laws and rules require federal agencies that procure specific goods, products, and materials, and other entities that use federal financial assistance, to give preference to those goods, products, and materials manufactured primarily in the United States.[11]

Buy American Act of 1933

The Buy American Act (BAA)[12] of 1933 requires federal agencies to purchase domestic end products and use domestic construction materials in any contract valued at more than $10,000. For purposes of the BAA, iron or steel products are considered domestic if the cost of the domestic components within the iron or steel product constitute at least 95 percent of the total cost of the product.[13]

Under the BAA, a federal agency may purchase a foreign-made product if it determines that the domestic product will cost unreasonably more.[14] A price for an end product that is not a critical item and that does not contain critical components is unreasonable under the BAA if the domestic offer is not the lowest offer after applying the following domestic preference price offsets:[15]

- 20 percent added to the low offer for end products, if the lowest domestic offer is from a large business;
- 30 percent added to the low offer for end products, if the lowest domestic offer is from a small business; or
- 20 percent added to the low offer for construction materials.

[11] General Services Administration, Made in America.gov, *Frequently Asked Questions: Are Buy America and Buy American the Same?*, https://www.madeinamerica.gov/ (last visited Jan. 8, 2024).
[12] BAA, 41 U.S.C. §§8301-8305.
[13] 41 U.S.C. §8302(c)(1) and 48 C.F.R. §25.003. This definition differs from that which applies to the subsequent Build America, Buy America Act.
[14] D. Carpenter and B. Murrill, Congressional Research Service, *The Buy American Act and Other Federal Procurement Domestic Content Restrictions* (Nov. 8, 2022), available at https://crsreports.congress.gov/product/pdf/R/R46748 (last visited Jan. 8, 2024).
[15] 48 C.F.R. §25.106

Other exceptions to the BAA apply when:[16]

- The procurement of domestic goods, or the use of domestic construction materials is "impracticable" or "inconsistent with the public interest";
- Domestic end products or construction materials are unavailable "insufficient and reasonably available commercial quantities and of a satisfactory quality";
- The contracting officer determines that the cost of domestic end products or construction materials would be "unreasonable"; or
- The items are procured for use outside the United States.

Build America, Buy America Act

The Build America, Buy America Act[17] (BABA), enacted as part of the Infrastructure Investment and Jobs Act of 2021, amends the Build American Act and related Buy America provisions. BABA requires that all infrastructure projects that use federal financial assistance programs use iron and steel that is produced in the United States; this includes public works projects taken on by state or local governments and even private entities that receive federal funds for the project.[18]

BABA defines iron or steel products produced in the United States as those made, through all of their manufacturing processes (from melting through application of coatings), in the United States.[19] If American made iron or steel will increase the total cost of the project by more than 25 percent, then an award may be given to a bid that uses foreign iron or steel.[20] This price preference does not apply in pre- and post-disaster or emergency response expenditures, or in cases in which a treaty or WTO agreement allows the use of a foreign product.

Florida Construction Contracts

The Department of Management Services (DMS) manages projects throughout the state, including new construction, renovations, and consulting services for various public works projects. The Bureau of Building Construction (Bureau), within the DMS, oversees public building construction statewide. The Bureau is also responsible for managing fixed capital outlay funds appropriated by the Legislature and for overseeing the repair and renovation of DMS-managed facilities.[21]

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[16] 48 C.F.R. §25.202

[17] Pub. L. 117-58, Title IX (Nov. 15, 2021), available at https://www.hud.gov/sites/dfiles/GC/documents/Build%20America,%20Buy%20America%20Act%20Provisions.pdf (last visited Jan. 8, 2024).

[18] *See*, Christopher Watson, Congressional Research Service, *OMB Issues Final Guidance on "Buy America" Domestic Preference Requirements* (Aug. 24, 2023), available at https://crsreports.congress.gov/product/pdf/IN/IN12230 (last visited Jan. 8, 2024). *See also*, Office of Management and Budget, *Memorandum regarding Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure*, M-24-02, 4 (Oct. 25, 2023), available at https://www.whitehouse.gov/wp-content/uploads/2023/10/M-24-02-Buy-America-Implementation-Guidance-Update.pdf (last visited Jan. 8, 2024).

[19] Pub. L. 117-58, Title IX, s. 70912.

[20] 2 C.F.R. §184.7

[21] DMS, *Building Construction*, https://www.dms.myflorida.com/business_operations/real_estate_development_and_management/building_construction (last visited Jan. 8, 2024).

Chapter 255, F.S., specifies the procedures required in the procurement of construction services for public property and publicly owned buildings. Section 255.29, F.S., authorizes the DMS to adopt rules for bidding on building construction contracts. These rules must establish the procedures to:

- Determine the qualifications and responsibility of potential bidders prior to advertising for and receiving bids for building construction contracts;
- Award each state agency construction project to the lowest qualified bidder;
- Negotiate for construction contracts and contract modifications when such negotiations are determined to be in the best interest of the state; and
- Enter into performance-based contracts for the development of public facilities when those contracts are determined to be in the best interest of the state.[22]

State contracts for construction projects that are projected to cost in excess of $200,000 must be competitively bid.[23] The solicitation of competitive bids or proposals for such state construction projects must be publicly advertised in the Florida Administrative Register (FAR) for at least 21 days prior to the bid opening. If the project is expected to cost more than $500,000, the advertisement must be published for 30 days in the FAR, and at least one time, at least 30 days prior to bid opening, in a newspaper of general circulation in the county where the project is located.[24]

A county, municipality, special district, or other political subdivision that seeks to construct or improve a public building must competitively award each project estimated to cost more than $300,000.[25] Like state construction project procurements, these county and municipality procurements are subject to publishing requirements.[26]

Chapter 337, F.S., governs contracts entered into by the Florida Department of Transportation (FDOT). FDOT has authority to enter into contracts for the construction and maintenance of all State Highway or State Park systems' roads, rest areas, weigh stations, parking areas, supporting facilities, and any associated building.[27] The FDOT must certify as qualified any bidders for a construction contract, road, bridge, or public construction project that exceeds $250,000 in cost.[28] The certification process ensures that the bidders have professional and financial competence by evaluating them "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.[29]

[22] *See* Rule 60D-5.001-60D-5.010, F.A.C.
[23] Section 255.0525, F.S.
[24] Section 255.0525(1), F.S.
[25] Section 255.20, F.S.
[26] *See*, s. 255.0525(2), F.S., which requires a project of $200,000 or more to be advertised in a newspaper of general circulation in the county where the project is located at least **21** days prior to bid opening, and at least 5 days prior to any prebid conference. If the project will cost more than $500,000, it must be advertised in a newspaper of general circulation in the county where the project is located for at least **30** days prior to bid opening, and 5 days prior to any prebid conference.
[27] Section 337.11, F.S.
[28] Section 337.14(1), F.S.
[29] *Id*.

III. Effect of Proposed Changes:

Section 1 creates s. 255.0993, F.S., to require a governmental entity that contracts for a public works project or for the purchase of materials for a public works project to require, by terms incorporated into the contract, that any iron or steel product that will be used permanently in the project be produced in the United States.

Governmental entities are exempt from this requirement if the administering governmental entity determines that:

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

Therefore, a project manager that agrees to use domestically produced iron or steel in its public works project may be awarded the contract even though its bid is up to 20 percent higher than the next lowest bid which does not use domestic iron or steel.

It is not clear at what point the administering governmental entity must decide to waive the requirement to use U.S. iron or steel product based on the above factors, although it would likely vary depending on the type of procurement used.

Additionally, a project may use a minimal amount of foreign steel and iron materials if the materials are incidental or ancillary to the primary product and are not separately identified in the project's specifications, or if the cost of those materials does not exceed .10 percent of the total contract cost, or $2,500—whichever is greater.

Electrical components, equipment, systems, and appurtenances (including supports, covers, shielding, and other appurtenances that are related to the electrical system and that are necessary for operation or concealment) are not considered iron or steel products for purposes of this bill. However, electrical transmission and distribution poles *are* considered iron and steel products.

Public works projects subject to this pricing preference include any activity that is paid for with state-appropriated funds or state funds administered by a governmental entity, which consists of construction, maintenance, repair, renovation, remodeling, or improvement of the following: a building, road, street, sewer, storm drain, water system, site development, irrigation system, reclamation project, gas or electrical distribution system, gas or electrical substation, or other facility, project, or portion thereof that is owned, in whole or in part, by a governmental entity.

For purposes of this bill, a "governmental entity" is the state, or any of its offices, boards, bureaus, commissions, departments, branches, divisions, or institutions, and any separate agency or unit of local government that is created or established by law or ordinance, and those entities' officers. Therefore, any county, city, town, municipality, school district, taxing district, water management district, higher education institution, and other public agency or body is a "governmental entity."

The bill also defines iron or steel "produced in the United States" as that which undergoes all of its manufacturing processes,[30] from initial melting through application of coatings, in the United States. Mere assembly and any metallurgical process to refine steel additives are not considered manners of production under this bill.

The bill requires the DMS to develop guidelines and procedures by rule to implement the bill.

The bill does not apply to contracts procured by the FDOT that are subject to the federal Buy America requirements of 23 C.F.R. s. 635.410.[31] Additionally, the bill states that it must be applied consistent with, and not construed to impair, the state's obligations under any international agreement.

Section 2 makes a legislative finding that the bill fulfills an important state interest.

Section 3 provides that the bill will take effect on July 1, 2024.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

Article VII, s. 18(a) of the State Constitution provides, in pertinent part, that "no county or municipality shall be bound by any general law requiring such county or municipality to spend funds or take an action requiring the expenditure of funds unless the legislature has determined that such law fulfills an important state interest and unless:"

- The law requiring such expenditure is approved by two-thirds of the membership in each house of the legislature; or
- The expenditure is required to comply with a law that applies to all persons similarly situated, including state and local governments.

The bill requires a county or municipality that enters into a contract for a public works project to select bidders that agree to use iron or steel products that are produced in the United States, and pay up to 20 percent more of the total cost of the project for that preference. To the extent that a local government uses any amount of state funds, and pays for the remaining portion of the project with its own funds, this requirement could increase the local government's costs.

[30] The term "manufacturing process" is also defined by the bill as 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 only by assembling materials or elements into a product without applying such a process.

[31] 23 C.F.R. s. 635.410 requires highway construction projects that use federal aid to either (1) include no permanently incorporated steel or iron materials, or use all U.S.-manufactured iron or steel; (2) use a state contract provision that requires the use of domestic materials and products to the same, or greater extent as this section; (3) Require all bidders to submit a bid that uses domestic steel and iron materials and clearly state that the contract will be awarded to the bidder who submits the lowest bid using domestic steel and iron, unless the bid exceeds the lowest total bid based on using foreign steel and iron by more than 25 percent; or (4) Use only a minimal amount of foreign steel and iron, the total of which does not exceed 0.1 percent of the contract cost or $2,500, whichever is greater. This provision also includes waivers.

The bill applies to all similarly situated governmental entities in the State of Florida, including state agencies, school districts, universities, and colleges. Section 2 of the bill contains a legislative finding that the bill fulfills an important state interest. Thus, the bill appears to be binding on counties and municipalities.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None identified.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The requirement to buy American steel could increase the cost of some projects, such as building highway bridges and procuring transit railcars and buses. This may result in fewer projects being undertaken.[32]

A private contractor that use iron or steel products that are produced in the United States may be able to seek higher payments for its work on a public works project, whether or not the materials cost more than foreign iron or steel. This may open the field to smaller contractors that require a larger margin to cover their costs on potential public works projects.

C. Government Sector Impact:

The cost to state and local governments is indeterminate. These costs, however, may be significant because the bill requires government entities to enter into contracts for public works projects using American-produced iron or steel that may be up to 20 percent more expensive than a lower bid that uses foreign-produced iron or steel. This 20 percent cost

[32] *See*, M. Platzer and W. Mallett, Congressional Research Service, *Effects of Buy America on Transportation Infrastructure and U.S. Manufacturing*, p. 1 (July 2, 2019), https://crsreports.congress.gov/product/pdf/R/R44266 (last visited Jan. 8, 2024).

differential relates to the overall cost of contract inputs, not solely to the iron and steel inputs.

There may be additional workload relating to the documentation of and research related to application of a waiver from the requirement to use US iron or steel in construction projects. This workload will likely be absorbed within current resources.

VI. Technical Deficiencies:

The bill appears to contemplate application of its price preference to FDOT contracts that use state funds (a similar price preference is currently in place for highway projects that use federal funds). However, this preference contradicts s. 337.11(4), F.S., which requires the FDOT to award construction and maintenance work for contracts over $250,000 to the lowest responsible bidder, or the lowest evaluated responsible bidder in the instance of a time-plus-money contract. For clarity, the Legislature may consider including the price preference in s. 337.11, F.S., as well.

VII. Related Issues:

It is unclear how the governmental entity will determine whether the use of domestic steel increases the cost of the total project by 20 percent or more. One possibility would be to draft the procurement for construction services to allow bidders to submit two bids—one that uses U.S. steel, and one that uses foreign steel. Alternatively, the solicitation could allow bidders to specify which type of steel they are using in their bid, and then the contract manager (if enough bids that use domestic and foreign steel are submitted) could compare the costs prior to moving on to the next phase of the bid or negotiation process.

The federal Office of Management and Budget requires an agency that approves a waiver from BABA price preference requirements to demonstrate its due diligence of its determination by documenting the following:

- List of iron or steel item(s), manufactured products, and construction material(s) proposed to be excepted from Buy America requirements, including name, cost, country(ies) of origin (if known), and relevant Product and Service Code (PSC) and North American Industry Classification System (NAICS) code for each.
- A description of efforts made (e.g., market research, industry outreach, etc.) by the Federal awarding agency and, in the case of a project or award specific waiver, by the recipient, in an attempt to avoid the need for a waiver. Such a description may cite, if applicable, the absence of any Buy America-compliant bids received in response to a solicitation.
- Market research, where applicable, should include relevant details, including who conducted the market research, when it was conducted, sources that were used, and the methods used to conduct the research.
- Anticipated impact if no waiver is issued.[33]

[33] Memorandum regarding Implementation Guidance on Application of Buy America Preference in Federal Financial Assistance Programs for Infrastructure, *supra* note 18.

VIII. Statutes Affected:

This bill substantially amends section 255.0993 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.