

Client Alert

International Trade & Litigation Practice Group

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EPA Issues Guidance On American Iron And Steel Requirement For \$2.4 Billion In FY 2014 Clean Water And Drinking Water State Revolving Funds

First round of agency guidance provides key interpretations and details on draft waivers

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On January 17, 2014, President Obama signed into law the Consolidated Appropriations Act of 2014 (the “2014 Appropriations Act”), which requires the use of specific American iron and steel (“AIS”) products in (1) all treatment works projects funded by a Clean Water State Revolving Fund (“CWSRF”) assistance agreement, and (2) all public water system projects funded by a Drinking Water State Revolving Fund (“DWSRF”) assistance agreement.

The 2014 Appropriations Act, itself, provides \$2,480,783,000 for infrastructure assistance, including \$1,448,887,000 for the CWSRF and \$906,896,000 for the DWSRF in Fiscal Year 2014 (“FY 2014”), which ends on September 30, 2014. Pursuant to language in the 2014 Appropriations Act, no funding from either of the above sources may be used for “a project for the construction, alteration, maintenance, or repair of a public water system or treatment works unless all of the iron and steel products used in the project are produced in the United States.”

“Iron and steel products” are defined by the legislation to include the following types of “products made primarily of iron and steel”:

- lined or unlined pipes or fittings,
- manhole covers,
- municipal castings,
- hydrants,
- tanks,
- flanges,
- pipe clamps and restraints,
- valves,
- structural steel,
- reinforced precast concrete, and
- construction materials.

EPA Guidance

On March 21, 2014, the U.S. Environmental Protection Agency (EPA) issued guidance regarding how EPA will implement the AIS requirement (the “EPA AIS Guidance”).¹ EPA explained that if any of the covered products are made of greater than 50 percent iron or steel, measured by material cost, then they are subject to the AIS requirement. EPA further clarified that non-iron or non-steel components of an iron or steel product covered by the AIS requirement do not have to come from U.S. sources, so long as the end-product itself is manufactured in the United States.

Waivers

On March 21, EPA also published two draft waivers associated with the AIS requirement. Both draft waivers are subject to an informal 15-day notice and comment period before EPA will take final action.

The first draft nationwide waiver would permit the use of non-domestic iron and steel products in CWSRF and DWSRF projects, so long as the engineering plans and specifications for an eligible project had been submitted to an appropriate state agency by January 17, 2014 (the date of enactment of the 2014 Appropriations Act), and so long as the project was approved during the period from January 17, 2014 until the date of issuance of any final waiver. The draft waiver also requires that the state agency that approved such plans and specifications “did so under the normal course of business for that agency.” EPA explained that this waiver is in the public interest, because the projects covered by the waiver otherwise would be affected by time consuming and expensive redesigns to account for the AIS requirement.

The second draft waiver proposed by EPA is a nationwide *de minimis* waiver of the AIS requirement for “incidental” components. Under the draft waiver, up to five percent of the total cost of the materials used and incorporated into a project may be for *de minimis* incidental components, so long as the cost of an individual item may not exceed one percent of the total cost of the materials used and incorporated into a project. Examples of incidental components provided by EPA include small washers, screws, fasteners (*e.g.*, nuts and bolts), miscellaneous wire, corner bead, and ancillary tube. EPA also provided examples of “items that are clearly not incidental” and thus not subject to the *de minimis* waiver, which include significant process fittings (*i.e.*, tees, elbows, flanges, and brackets), distribution system fittings and valves, force main valves, pipes for sewer collection and/or water distribution, treatment and storage tanks, and large structural support structures. The draft waiver, moreover, has been proposed on a project-specific basis. EPA explained that “Assistance recipients who wish to use this waiver should in consultation with their contractors determine the items to be covered by this waiver, must retain relevant documentation (*i.e.*, invoices) as to those items in their project files, and must summarize in reports to the State the types and/or categories of items to which this waiver is applied, the total cost of incidental components covered by the waiver for each type or category, and the calculations by which they determined the total cost of materials used in and incorporated into the project.”

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This alert provides a general summary of recent legal developments. It is not intended to be and should not be relied upon as legal advice. In some jurisdictions, this may be considered “Attorney Advertising.”

¹ The EPA guidance is available at http://water.epa.gov/grants_funding/aisrequirement.cfm.