



## **MARKET PARTICIPANT DOCTRINE: STATES MAY IMPOSE DOMESTIC PROCUREMENT PREFERENCE POLICIES TO TAXPAYER-FINANCE GOVERNMENT SPENDING**

A State may lawfully enact and enforce domestic procurement preferences applicable to the government procurements of the State or its subdivisions. Federal courts agree that state “Buy American” statutes, which require, with exception, that suppliers contracting with a public agency provide materials of United States origin, are neither preempted by federal law nor are they unconstitutional infringements of the Commerce Clause of the United States Constitution (U.S. Const. art. 1 § 8). Rather, the courts agree that:

- 1) Federal “Buy America” laws including the Buy American Act apply to federal procurements and do not represent a comprehensive scheme that would preempt state Buy America laws (rather state laws are consonant with these federal laws); and
- 2) A State or State subdivision is not subject to Commerce Clause restraints where it acts as a market participant rather than as a market regulator. *See Trojan Technologies, Inv. v. Com. of Pennsylvania*, 916 F2d 903 (3<sup>rd</sup> Cir. 1990).

Courts agree that federal policies in this area and the U.S. Constitution do not restrict a State’s authority to enact Buy America statutes. Indeed, more than 20 states already have. These state preferences laws and regulations are lawful actions of a market participant. When a State government through its agencies or local subdivisions procures goods or services for its own use, it is considered to be a market participant similar to a private party. As a market participant, a State enjoys the same rights as a private purchaser does in choosing its suppliers to carry out contracts for the State’s purchases of goods and services. A State’s procurement policies under state law neither have an effect in foreign countries nor involve the State in the actual conduct of the foreign affairs of the United States and so do not infringe upon the U.S. government’s constitutional authority to conduct foreign policy.