

The Buy American–Hire American Executive Order: There Will Be Devils in the Details When Buying American

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Following up on his repeated promises that the government will buy American and hire American, President Trump signed a Presidential Executive Order on Buy American and Hire American (the “Order”) on Tuesday, April 18, 2017, directing executive agencies to enhance acquisition preferences for domestic products and labor under federal contracts and federal grants. Federal contractors should note that the Order serves only as a blueprint for the administration’s intentions and imposes no immediate requirements. Those will follow — but in what form and to what degree, we can only guess. Contractors should prepare for those changes and be assured that – with respect to the Order’s impact on supply chains and contractor purchasing systems – the devil will indeed be in the details.

Understanding the Order

The Order requires federal agencies to maximize the use of domestic goods, products, and materials, and to minimize the use of exemptions or waivers from “Buy American Laws.” As defined in the Order, these “Buy American Laws” encompass all statutes, regulations, rules, and orders relating to domestic procurement preferences, including:

- The Buy American Act, 41 U.S.C. §§ 8301 – 8305 (establishing federal procurement preference for articles, materials, and supplies manufactured in the U.S., or mined or produced in the U.S. if the item is an unmanufactured article, material, or supply);
- The Trade Agreements Act, 19 U.S.C. §§ 2501 – 2581 (approving and implementing trade agreements negotiated under the Trade Act of 1974, 19 U.S.C. § 2101 et seq., and expanding opportunities for U.S. commerce in international trade);
- The Berry Amendment, 10 U.S.C. § 2533a (prohibiting the Department of Defense (DoD) from using funds appropriated or otherwise available to DoD for procurement of food, clothing, fabrics, fibers, yarns, other made-up textiles, and hand or measuring tools that are not grown, reprocessed, reused, or produced in the U.S.); and
- Infrastructure-Related Buy America Rules (ensuring transportation infrastructure projects are built with products produced in the U.S., including steel, iron, and manufactured products), including:

- The Surface Transportation Assistance Act of 1982 (23 U.S.C. § 103 (3)(4) and 49 U.S.C. § 5323(j)); applicable to civil construction and transportation projects);
- The Federal Public Transportation Act of 2015(49 U.S.C. § 5323(j));
- The Passenger Rail Investment and Improvement Act of 2008 (49 U.S.C. §§ 24305(f) and 24405(a)); and
- The Federal Aviation Administration Authorization Act of 1994 (49 U.S.C. § 50101).

While emphasizing the Buy American policy, the primary goal of the Order is to develop a report by November 24, 2017 (the day after Thanksgiving), providing “specific recommendations to strengthen implementation of Buy American Laws.” To that end, federal agencies must assess their compliance, monitoring, enforcement, and implementation of the Buy American Laws, each reviewing its use of permitted Buy American waivers, and proposing policies to ensure compliance with the domestic preferences provided by Buy American regulations. Moreover, consistent with a recommendation in a February 2017 GAO report titled [United States Reported Opening More Opportunities to Foreign Firms Than Other Countries, but Better Data Are Needed](#), the Order instructs the Secretary of Commerce and the U.S. Trade Representative to assess the impacts of U.S. trade agreements and the World Trade Organization Agreement on Government Procurement (WTO GPA) on the Buy American Laws.

Near-Term Effects of the Order

Under the Order, the scope of work for government agencies is substantial, especially for those agencies still awaiting the Senate’s confirmation of their leadership (Robert Lighthizer, the U.S. Trade Representative nominee, for example). This means that agencies are likely to be both overwhelmed and hesitant when addressing exemptions. As such, companies in the process of formally pursuing Buy American exemptions, such as those provided for products deemed insufficiently available or too costly to be purchased from domestic providers, are likely to lose out on any previously justifiable exemptions and the opportunity to use abundant or less expensive foreign sources. While *some* exemptions may survive, they will most certainly receive strict scrutiny, and any application for their use will likely require significant justification far exceeding current requirements.

Although the Order requires a report in the President’s hands within 220 days, the November deadline is by no means the end point. The Buy American Law exemption most thoroughly in the Order’s crosshairs is the operation of the Trade Agreements Act (TAA) in federal procurement, and that will take some time to unravel. As reflected in FAR Subpart 25.4, the TAA addresses sourcing products and components subject to a number of international agreements, including the WTO GPA, inclusive of countries designated as “least developed” and the Caribbean Basin Trade Initiative, a dozen Free Trade Agreements, and the Israeli Trade Act. While the U.S. Trade Representative (once confirmed) is authorized to alter the application of these exemptions, he may have the devil to pay – internationally and domestically – if he too quickly severs an element of economic relations with more than 60 countries.

Even without knowing the substance of new rules and regulations spurred by the Order, we are sure they will alter the federal contracting landscape. Domestic preference provisions have a storied history that is written in the bedrock of U.S. federal procurement policy, including playing pivotal roles in bid protests, contractor claims for breach of contract, and False Claims Act (FCA) litigation. In fact, compliance with TAA requirements has been a relatively easy and lucrative “go to” claim for FCA *qui tam* relators and Department of Justice intervenors. Revisions to these rules and regulations affected by the Order – and to their underlying international agreements and associated treaties – will reanimate those practices, and federal contractors need to be prepared to face these demons.

Practical Guidance Moving Forward

With the Order released, threats looming, uncertainty everywhere and the clock ticking, here are 10 suggested courses of action that contractors should take while details are being sorted out:

1. Carefully review the inventory of all products currently being sold, including those your company wants to sell, to the government.
2. Detail the manner by which the products are manufactured.
3. Examine the impact of existing Buy American Act and Buy America regulations on those manufacturing processes.
4. Identify the supply chain elements involved in the manufacturing process.
5. Stay vigilant as to rule changes effecting FAR Part 25.
6. Assess the impact of long-lead supplies used in manufacturing and the products into which those supplies are placed.
7. Analyze the impact of existing Buy American Act exemptions (including TAA) on current supply chains.
8. Assess “substantial transformation” of products under the TAA, if certain sources are no longer exempt as a Designated Country.
9. Locate alternative sourcing of U.S.-made alternatives.
10. Prepare market documentation to justify a public interest exception, a class or individual determinations of nonavailability exception, or an unreasonable cost exception.

The silver lining is that the Order does not detract from the government’s long history of contracting. To the contrary, the Order appears to cement federal contractors (and their labor and supply chains) as a cornerstone of the Trump Administration’s efforts to address concerns about the American economy. The bad news, of course, is that federal contractors will be under additional regulatory scrutiny in the sourcing of their products. This may not affect many traditional government contractors. But it is more than capable of impacting larger commercial companies, and their complex supply chains, that choose to dabble in direct government sales or sales through the General Services Administration Multiple Award Schedules (GSA MAS) program.

Ultimately, the Order puts all existing and potential federal contractors on notice. All contractors need to examine how they are manufacturing and sourcing products; this is no small task, and it is not quickly achieved. Therefore, while the government reassesses the Buy American Laws, contractors must use this time wisely or risk falling out of compliance and into significant legal liability. Put another way, a contractor’s idle hands now could lead it right into the devil’s workshop in 220 days.