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Focus

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FEATURE COMMENT: Keep American Businesses Workin' 9 To 5—Bipartisan Changes To Buy American Requirements In Federal Procurements

In this day and age, few policies unite Democrats and Republicans. Don't believe us? Just turn on the television and tune in to any cable news channel. This near-universal absence of consensus makes it all the more remarkable when an issue receives broad, bipartisan support. No, we're not talking about the question of whether Dolly Parton is a national treasure (*of course she is*). We're talking about strengthening domestic preference restrictions in federal procurement by the prior Trump administration and the new Biden administration.

Here You Come Again—On the eve of President Biden's inauguration, a lingering Trump-era policy finally made its way into the Federal Acquisition Regulation. On Jan. 19, 2021, the Federal Acquisition Regulatory Council issued a final rule implementing changes first revealed in Executive Order 13881, Maximizing Use of American-Made Goods, Products, and Materials (84 Fed. Reg. 34257 (July 18, 2019)). EO 13881 mandated significant modifications to FAR clauses implementing the Buy American statute 41 USCA §§ 8301–8305 by (1) substantially increasing specific domestic content requirements and (2) elevating price evaluation preferences for contractors offering domestic products. The final rule addressed these mandates by increasing the FAR's existing domestic content cost threshold from 50 percent to 95 percent for end products or construction materials that consist wholly or predominantly of iron or steel or a combination of both. It also seeks to raise the cost threshold for "domestic construction material" or a "domestic end product" that does not consist wholly or predominantly of iron or steel or a combination of both from 50 percent to 55 percent. The final rule also increased domestic pricing preferences for acquisitions of end products or construction material. Suppose the potential awardee is a large business offering domestic end products. In that case, the price of an offer consisting of non-domestic end products will now be increased by 20 percent for evaluation purposes (up from six percent). Small businesses offering domestic end products receive even greater preferential treatment, such that offers including foreign end products would be comparatively increased by 30 percent (up from 12 percent). The changes outlined in the final rule will apply to solicitations and resultant contracts issued on or after Feb. 22, 2021.

But the changes don't end there. On Jan. 25, 2021, President Biden issued a sweeping EO titled "Ensuring the Future Is Made in All of America by All of America's Workers" (86 Fed. Reg. 7475), which is much broader in scope than the final rule and intended as the first step toward fulfilling his campaign promise to strengthen domestic preference rules in Government procurement. EO 14005 articulates the administration's policy that the U.S. Government should "use terms and conditions of federal financial assistance awards and federal procurements to maximize the use of goods, products, and materials produced in, and services offered in, the United States." The EO also introduces dramatic steps in furtherance of that objective that may ultimately have significant implications for contractors.

These steps include the following:

- Directing revisions to the FAR designed to (i) replace the existing "component test" with a "test under which domestic content is measured by the value that is added to the product through U.S.-based production or U.S. job-supporting economic activity"; (ii) increase the numerical threshold for

domestic content requirements for end products and construction materials; and (iii) expand the price preferences for domestic content requirements for end products and construction materials.

- Establishing a "Made in America Office" within the Office of Management and Budget (OMB), which will manage a revamped waiver process intended to increase scrutiny of waiver requests and ultimately reduce the number of waivers granted.
- Developing a public website that will include information on all proposed waivers and their status as granted.
- Requiring that agencies account for sources of the cost advantage of foreign-sourced products before granting a waiver in the public interest by determining whether a "significant portion" of that cost advantage is due to the use of dumped steel, iron, or manufactured goods.
- Increasing agency efforts to seek out U.S. sources of supply by requiring them to undertake "supplier scouting" in partnership with the Hollings Manufacturing Extension Partnership.
- Critically examining the exception from Buy American requirements for information technology that is a commercial item.
- Increasing scrutiny of the list of domestically nonavailable articles at FAR 25.104(a).
- Requiring that agencies report on their ongoing enforcement of "Made in America Laws," as well as those agencies' continued use of "longstanding or nationwide" waivers from any Made in America laws, to aid the Made in America Office in determining whether the agencies are acting in compliance with the policies outlined in the EO.

As the EO primarily focuses on policy statements and the establishment of administrative infrastructure for implementing those policies, contractors likely will not see immediate impacts from this EO. However, it is clear that significant regulatory developments are inbound, and affected contractors should use this time productively to ensure that they are aware of and preparing for these changes.

Back Through The Years, I Go Wonderin' Once Again—As seasoned Government contractors know, the U.S. domestic preference laws and regulations are a mismatched set of requirements sewn together into a "coat of many colors." Enacted in 1933, the Buy American Act (BAA) established a preference for domestic end products to be delivered to the U.S. Government. Codified at 41 USCA §§ 8301–8305, the BAA provides:

> Only unmanufactured articles, materials, and supplies that have been mined or produced in the United States, and only manufactured articles, materials, and supplies that have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured in the United States, shall be acquired for public use unless the head of the department or independent establishment concerned determines their acquisition to be inconsistent with the public interest or their cost to be unreasonable.

41 USCA § 8302(a)(1). The statute also explicitly provides exceptions to the requirement to "Buy American":

> Exceptions.—This section does not apply—
> (A) to articles, materials, or supplies for use outside the United States;
> (B) if articles, materials, or supplies of the class or kind to be used, or the articles, materials, or supplies from which they are manufactured, are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and are not of a satisfactory quality; and
> (C) to manufactured articles, materials, or supplies procured under any contract with an award value that is not more than the micro-purchase threshold under section 1902 of this title.

41 USCA § 8302(a)(2). Similar requirements and exceptions exist for the acquisition of construction materials under contracts for public works. See 41 USCA § 8303. The statutory "public interest," "unreasonable cost" and "nonavailability" exceptions, as they are colloquially called, are the most frequently used exceptions to the Government's obligation to "Buy American."

The general requirement that "only" manufactured or unmanufactured articles mined, produced or manufactured in the U.S. "shall" be acquired for public use is softened not only by the statutory exceptions noted above but also by relevant implementing regulations. For example:

- FAR 25.003 defines "domestic end product" and "domestic construction material" as either

an unmanufactured item mined or produced in the U.S. or an item manufactured in the U.S. that meets a "component test." Under the current "component test," as modified by the recent final rule, product or material may be considered "domestic" if the cost of components mined, produced, or manufactured in the U.S. exceeds 55 percent of the cost of all its components (or 95 percent in the case of end products made wholly or predominantly of iron, steel or a combination of both).

- Under the public interest exception, the head of any agency may determine that U.S. domestic purchasing would be "inconsistent with the public interest." FAR 25.103(a). Most notably, this exception implements the Trade Agreements Act (TAA) by providing that the exception applies "when an agency has an agreement with a foreign government that provides a blanket exception to the Buy American statute." Id. The TAA, codified at 19 USCA § 2501, et seq., provides the president with the authority to waive the BAA and other discriminatory provisions for eligible products from countries that have signed an international trade agreement with the U.S., or that meet certain other criteria, such as being a least developed country. The value of the acquisition is a determining factor in the applicability of trade agreements—once the value of a contract exceeds a certain threshold, which varies based on the underlying trade agreement, the BAA is waived for those eligible products. These thresholds are subject to revision by the U.S. Trade Representative approximately every two years; currently, the thresholds for TAA applicability are as high as $182,000 for supply and service contracts and $10,802,884 for construction contracts, depending on the country of origin and the associated trade agreement. FAR 25.402.
- The nonavailability exception applies where "articles, materials, or supplies of the class or kind to be acquired, either as end items or components, are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality." FAR 25.103(b). A class determination of nonavailability has been made for articles listed in FAR 25.104. These class determinations cover a broad range of items, ranging from bananas to vanilla beans. However, contracting activities may make individual determinations of nonavailability as well. Individual determinations may be submitted for possible addition to the list in FAR 25.104 if the article's nonavailability is likely to affect future acquisitions. FAR 25.203(b)(2)(ii). However, under the current regulations, agencies need not document one-off individual determinations of nonavailability where (1) the acquisition was conducted through full and open competition, (2) the acquisition was synopsized per FAR 5.201 and (3) no offer for a domestic end product was received. FAR 25.203(b)(3).
- The unreasonable cost exception is implemented by applying a price preference, whereby a contracting officer will determine the reasonableness of the cost of a domestic offer by adding a price premium to a non-domestic low offer. As revised by the final rule, that premium is 20 percent if the lowest domestic offer is from a large business concern or 30 percent if the lowest domestic offer is from a small business concern. In addition to implementing these three significant statutory exceptions, the regulations also incorporate exceptions for foreign end products, specifically for commissary resale and information technology that is a commercial item. FAR 25.103(d)–(e).

Complicating things further, many agencies have domestic preference statutes that are similar but not identical to the BAA. Most notably, the Department of Transportation (DOT) is subject to several statutes (the "Buy America" statutes) that attach domestic restrictions to funds administered by the DOT for various transportation projects. For example, 49 USCA § 5323(j) requires that the steel, iron and manufactured goods used in all Federal Transit Administration funded projects (i.e., public transportation projects) must be produced in the U.S. Like the BAA, these statutes and their implementing regulations contain nuanced compliance requirements, as well as idiosyncratic procedures for waiving these requirements that are similar to—but distinct from—the procedures that exist to waive the BAA requirements. This intricate statutory and regulatory scheme has required contractors to become fluent

in several different domestic preference "languages" to avoid running afoul of their contractual requirements.

I'm Begging of You, Please Don't ... Buy Foreign End Products—President Biden issued the EO Jan. 25, 2021, as the first step toward monumental changes to the BAA's existing regulations. Unlike Dolly Parton—who pleaded with Jolene not to take her man because she "could not compete" with her—the Biden administration appears poised to go well beyond pleading. The Biden administration's EO telegraphs many new requirements that will force agencies to favor U.S. supply sources. In light of these forthcoming new requirements, contractors should begin planning now for the changes that may need to be made to supply chains to comply with increased domestic preference restrictions.

Waiver from Made in America Laws: The EO first takes the hodgepodge of domestic preference statutes, regulations and executive actions and combines them under one umbrella definition for purposes of achieving its policy objectives. The EO defines "Made in America Laws" broadly to encompass "all statutes, regulations, rules, and Executive Orders relating to Federal financial assistance awards or Federal procurement, including those that refer to 'Buy America' or 'Buy American,' that require, or provide a preference for, the purchase or acquisition of goods, products, or materials produced in the United States, including iron, steel, and manufactured goods offered in the United States." This omnibus definition is significant because it encompasses the BAA (and the accompanying FAR clauses implementing that statute), the DOT "Buy America" statutes and the accompanying regulations implementing the DOT's domestic preference rules, and any other idiosyncratic agency rules and regulations. It signals that the changes to the waiver process apply across agencies that previously operated according to their idiosyncratic procedures.

Having established the scope of its applicability, the EO sets forth the administration's goal to "crack down on unnecessary waivers" by consolidating and imposing increased scrutiny on the process to obtain a waiver from the restrictions in the Made in America laws. The EO centralizes the Made in America waiver process by creating a new Made in America Office within OMB, headed by a new Made in America director. This office, the Biden administration announced, will "oversee the implementation of this Executive Order, make sure the President's new rules are followed, work with key stakeholders, and carry through the President's vision in conjunction with their executive agency partners."

Notably, the Made in America director is tasked with reviewing and approving waivers from the Made in America laws. Previously, waivers were handled inconsistently, depending on the underlying domestic preference statute and the agency from which a waiver was sought. One of the Made in America director's first acts will be to create the director's own waiver review procedures. Within 45 days of the date of the EO, the Made in America director will (i) publish a list of the information that granting agencies shall include when submitting descriptions of proposed waivers and justifications to the Made in America director; and (ii) publish a deadline, not to exceed 15 business days, by which the Made in America director will notify the head of the agency that the Made in America director has either waived the review or will notify the agency in writing of the result of the evaluation. The EO is not clear when the waiver review itself will be "waived" by the Made in America director. Still, the EO does appear to recognize that the review will not be possible or practicable in some cases. The EO acknowledges that in certain situations, an agency may be "obligated by law to act more quickly than the review procedures established in [the EO] allow[.]" In such situations, the head of the agency is required to "notify the Made in America director as soon as possible" and comply with the waiver review requirements "to the extent practicable."

Under the process established by the EO, before an agency grants a waiver from the requirements of any of the Made in America laws, the agency must first "provide the Made in America Director with a description of its proposed waiver and a detailed justification for the use of goods, products, or materials that have not been mined, produced, or manufactured in the United States." The EO broadly defines waiver as "an exception from or waiver of Made in America laws, or the procedures and conditions used by an agency in granting an exception from or waiver of Made in America Laws," but does not state whether this process applies only to individual waivers or to statutory and regulatory waivers that already exist. Still, the broad definition of "waiver" in the EO suggests that the administration may intend for the use of all waivers—whether long-standing or individually considered—to be examined. We expect that the

upcoming procedures to be published by the Made in America director will clarify the waiver types that will trigger the review. The Made in America director will then determine whether the proposed waiver is consistent with the policy outlined in the EO before informing the agency of the Made in America director's determination within the timeline to be established (but not to exceed 15 business days). Waivers that are not found to be consistent with the EO's policy will be returned to agencies for "further consideration." The EO also sets forth a dispute resolution process under which agencies and the Made in America director are to resolve disagreements regarding the Made in America director's determination.

The EO also intends to "[promote] transparency in Federal procurement" by requiring the General Services Administration to develop a public website that will include information on all proposed waivers and whether those waivers have been granted. On receiving a waiver request, the Made in America director will "promptly" report the proposed waiver to GSA, along with the associated descriptions and justifications for the waiver, and whether the waiver has been granted. Under the EO, GSA is then required to post that information within five days of receipt. This GSA website will also include publicly available contact information for each granting agency—increasing the opportunity for manufacturers and other stakeholders to track and voice their opinions on the proposed waivers. Contractors should bookmark this website and take advantage of the opportunity to make their voices heard, as the Biden administration appears to be signaling that it will take industry concerns into account when considering whether to grant waivers.

Accounting for Sources of Cost Advantage: The EO also aims to end the use of "dumped" or "injuriously subsidized" steel, iron, or manufactured goods. The act of "dumping"—where foreign producers flood foreign markets with cheap, subsidized products—results in a situation where suppliers prefer inexpensive foreign-made steel, iron, and manufactured products over U.S.-made products due to the cost advantage associated with those products. The EO requires agencies to take dumping into account before granting a public interest waiver and assess whether a "significant portion" of the cost advantage of a foreign-sourced product results from the use of dumped or injuriously subsidized steel, iron, or manufactured goods. Agencies will then be required to integrate any findings from the assessment into their waiver determinations "as appropriate," but the EO doesn't specify exactly what this means as a practical matter. However, the suggestion here is that the Made in America Office will take a particular interest in an agency's decision that the application of domestic treatment is "inconsistent with the public interest" where that determination is based on the lower cost of imported "dumped" products. Thus, contractors that use "dumped" steel, iron, and manufactured goods will want to carefully consider whether to continue to rely on that "cost advantage" in submitting proposals to the Government, as that "advantage" will likely disappear as agencies increase their scrutiny on the use of these materials.

Supplier Scouting: The EO requires that agencies increase their due diligence in seeking American sources of supply. Agencies are required to partner with the Hollings Manufacturing Extension Partnership (MEP) to conduct supplier scouting to identify American companies that can produce goods, products, and materials in the U.S. that meet federal procurement needs. This partnership with the MEP, a national network in all 50 states and Puerto Rico that supports small and medium-sized manufacturers, is intended to help agencies connect with new domestic suppliers who can make the products they need while employing U.S. workers. It is not clear from the EO when, how, or to what extent agencies are to undertake this review. However, at a minimum, this requirement will force agencies to undergo an additional step in their procurement process to identify U.S. sources of supply, which is designed to further the administration's policy to procure goods from U.S. businesses "whenever possible." Small and medium-sized companies should ensure they are connected with their local MEP center to increase their visibility to agencies and thus take advantage of this increased due diligence.

Enforcement of the BAA: The EO also promotes more stringent enforcement of the BAA, requiring the FAR Council to "consider" amendments to the FAR within the next 180 days that would:

- Replace the "component test" in FAR pt. 25 with a test "under which domestic content is measured by the value that is added to the product through U.S.-based production or U.S. job-supporting economic activity."
- Increase the numerical threshold for domestic content requirements for end products and construction materials.

- Increase the price preferences for domestic end products and domestic construction materials.

In remarks made at the signing of the EO, President Biden aimed for the existing component test, explaining that because of "loopholes that have been expanded over time," offerors can "count the least valuable possible parts as part of that 50 percent to say 'Made in America,' while the most valuable parts—the engines, the steel, the glass …—are manufactured abroad." The component test's replacement appears to be calculated to address this loophole by imposing a "value-added" test. However, the EO provides no clues as to the mechanics of this new process. If and when this change is implemented, it will undoubtedly dramatically impact the way contractors do business. For now, however, the "value added" test represents only a vague idea that will need to be fully developed by the regulators tasked with translating the EO's vision into reality. It seems as though the "value added" test will include some recognition of the value added by U.S.-based labor—which has been included as part of the cost of manufactured components but not as part of the overall calculation of the domestic content of the item in question—but only time (and the FAR Council) will tell.

If the last two proposed amendments sound familiar, it is because they parallel the two significant changes to the Buy American rules proposed by the Trump administration and implemented in a final rule issued Jan. 19, 2021. The EO does not specify what it would like to see in terms of an "increased" numerical threshold for domestic content requirements for end products and construction materials and "increased" price preferences for domestic end products and domestic construction materials. We assume, however, that it will represent larger increases than those enacted by the Trump administration. As a reminder, the final rule issued by the Trump administration on Jan. 19, 2021, (i) increased the domestic content requirements from 50 percent to 95 percent for end products or construction materials that consist wholly or predominantly of iron or steel or a combination of both, and from 50 percent to 55 percent for other end products or construction materials; and (ii) increased the domestic price preference from six percent to 20 percent for large businesses, and from 12 percent to 30 percent for small businesses.

While the EO is silent on whether the final rule will stand, the EO declines explicitly to revoke EO 13881, the Trump EO underlying the final rule, though noting that it is "superseded to the extent … inconsistent with this order." In light of President Biden's remarks that the "content threshold of 50 percent [isn't] high enough," we assume the administration will conclude that the final rule represents a step in the right direction. Thus, we would not be surprised if the Biden administration leaves the final rule alone while the actions outlined by the EO unfold. However, contractors should not get too comfortable with the revisions implemented by the final rule. It may well be that the increased thresholds and price preferences leftover from the Trump administration are merely a stepping-stone to more robust domestic preference restrictions signaled by the EO.

Note, however, that not all Trump-era domestic preference EOs survived the new EO. The EO specifically revokes (i) EO 13788 of April 18, 2017 (Buy American and Hire American), which articulated the Trump administration's version of domestic preference goals; (ii) Section 5 of EO 13858 of Jan. 31, 2019 (Strengthening Buy-American Preferences for Infrastructure Projects), which provided a revision to EO 13788; and (iii) EO 13975 of Jan. 14, 2021 (Encouraging Buy American Policies for the U.S. Postal Service), which "strongly encourages" the Postal Service to "consider" changes to its Buy American domestic procurement preferences in line with those changes made by EO 13381. The EO does not explain the revocation of these Trump EOs. Still, as the revoked actions did not result in any real change to agencies' processes or regulations, the revocation appears to be merely replacing one administration's policy statement with another.

Other Changes to FAR Part 25: Information Technology that Is a Commercial Item. The EO also implies that commercial item information technology products may soon be subject to Buy American requirements. In this respect, the EO requires the FAR Council to "promptly review" constraints on the extension of the requirements of Made in America laws to commercial information technology and "develop recommendations for lifting these constraints" to promote further the policy outlined in the EO. While this sounds like good news for domestic producers of information technology, the history of the exception may limit the administration's ability to make real changes on this front without congressional action. The information technology exception was initially recognized in the Consolidated Appropriations Act of 2004. It was permanently incorporated into the FAR

by a final rule in 2006 when it "became clear that [the exception] was not just for one year." In that final rule, the FAR Council stated that it "expect[ed] this exception to continue to appear in future appropriations acts." If the exception did not appear in a future appropriations act, the council stated that it would "promptly change the FAR to limit the applicability of the exception to the fiscal years to which it applies." As predicted, the information technology exception appears in appropriations acts, most recently in the Consolidated Appropriations Act for Fiscal Year 2021. The administration's actual ability to limit the information technology exception will be limited unless Congress removes the exception from future appropriations acts. Even so, suppliers of commercial item information technology will want to keep a very close eye on the FAR Council's "recommendations" and should make their voices heard at every opportunity.

Nonavailable Articles. Class determinations of "nonavailability" made under FAR 25.103(b) and listed at FAR 25.104, Nonavailable Articles, will also be subject to heightened scrutiny. Under FAR 25.103(b)(1), a nonavailability determination does not necessarily mean that there is no domestic source for the listed items but that domestic sources can only meet 50 percent or less of the total U.S. Government and nongovernment demand. The EO requires that before the FAR Council proposes any amendment to the FAR to update the list of domestically "nonavailable" articles at FAR 25.104, the director of OMB (through the Office of Federal Procurement Policy) must review the amendment in consultation with the secretary of commerce and the Made in America director. This review will include economic analyses of relevant markets and available market research to determine whether there is a "reasonable basis" to conclude that the item in question is genuinely unavailable in the U.S. The added surveillance of the list of nonavailable articles—which includes items from bananas and thyme oil to certain microprocessor chips and spare and replacement parts for foreign manufactured equipment—underscores the Biden administration's position that no waiver is too peculiar to escape its notice. However, FAR 25.104 has not been updated since 2010, so the practical impact of this additional scrutiny may be limited. Nevertheless, suppliers that rely on these class determinations may want to reevaluate whether they can identify domestic sources of supply in anticipation of agencies' increased scrutiny on the use of the nonavailability waiver.

Made in America Accountability—Reporting and the TAA: One of the biggest questions surrounding the issuance of the EO is how, if at all, the Biden administration will impact contractors' ability to supply products from designated countries under the TAA, which is implemented through the public interest exception to the BAA. The EO is silent on direct impacts to this widely used exception. Still, it does provide some clues that the administration may take future action through reporting requirements designed to increase scrutiny on agencies' implementation and enforcement of the BAA.

The EO dictates initial and biannual reporting to the Made in America director regarding agencies' implementation of, and compliance with, the Made in America laws. The initial report, due 180 days following the date of the EO, must also include an accounting of agencies' "ongoing use of any longstanding or nationwide waivers of any Made in America Laws, with a written description of the consistency of such waivers with the policy set forth in [the] order," as well as recommendations for how to further the policy goals of the EO. The biannual reports must also include recommendations for how to promote the policy goals of the EO, as well as an accounting of agencies' "analysis of goods, products, materials, and services not subject to Made in America Laws or where requirements of the Made in America Laws have been waived," as well as an "analysis of spending as a result of waivers issued pursuant to the Trade Agreements Act of 1979," separated by country of origin.

While framed as a reporting requirement, this last item portends potentially significant changes to how agencies and their contractors use the TAA. Currently, contractors can sidestep BAA restrictions as long as they supply goods and services from designated countries. While the EO makes no pronouncements regarding how the TAA's applicability may change as a result of the administration's policy, this is an issue that contractors should carefully track as it may have seismic implications for contractors' supply chain management.

The Light of a Clear Blue Morning—The EO articulates broad policy goals and sets in motion several processes that may ultimately reshape the rules applicable to the Government's domestic procurement landscape. While the Trump administration issued several EOs over the past four years proclaiming its commitment to American manufacturing, the actual

regulatory output of those EOs was generally limited to the final rule issued on the last full day of Trump's presidency. While it remains to be seen whether the Biden administration will make good on the promises of its campaign and this EO, it is increasingly evident that a renewed commitment to U.S. suppliers is a bipartisan issue that is likely to result in real change. Accordingly, in the short term, contractors should take this opportunity to examine their supply chains to determine the extent to which they can make changes to increase the domestic content of the end products or construction materials supplied to the Government. However, in the long term, contractors should note that the replacement of the components test with a vaguely described "value added" test is likely to dramatically change the way contractors have been doing business for years. But the good news is, the Biden administration and U.S. businesses appear to be islands in the stream, with no one in between, and will rely on each other (a-ha)—and that is a refrain that will be music to many ears.

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