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**12**  
**DEFENDING**  
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**17**  
**VISION TEAM**  
**OPPORTUNITY**

**22**  
**BIG CHANGES TO**  
**BUY AMERICAN**

**25**  
**STRATEGIES FOR**  
**PANDEMIC SURVIVAL**



# *Big Changes to Buy American—* Biden Issues Broad Executive Order on the Future of Domestic Purchasing in Federal Procurement

by **Cara A. Wulf**, McCarter & English, LLP

**O**n January 25, 2021, President Biden issued a sweeping Executive Order titled “Ensuring the Future Is Made in All of America by All of America’s Workers” (Order). The Order states that the U.S. government should “maximize the use of goods, products, and materials produced in, and services offered in, the United States.” While this is not a novel policy objective—indeed, the Trump administration articulated similar goals—the Order introduces specific steps in furtherance of that objective that may ultimately have significant implications for contractors.

These steps include the following:

- Revisions to the Federal Acquisition Regulation (FAR) to (i) replace the existing “component test” with a “value added” test; (ii) increase the numerical threshold for domestic content requirements; and (iii) increase the price preferences for domestic end-products and construction materials
- Creation of a “Made in America Office,” headed by a new Made in America Director (Director), to manage a revamped waiver process
- Development of a public website that will include information on all proposed and granted waivers
- A requirement that agencies account for sources of 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
- Increased agency efforts to seek out American sources of supply by requiring them to undertake “supplier scouting”
- A critical examination of the exception from Buy American requirements for information technology that is a commercial item
- Increased scrutiny of the list of domestically nonavailable articles at FAR 25.104(a)



- A requirement that agencies report on their ongoing enforcement of “Made in America Laws,” as well as those agencies’ ongoing use waivers from any Made in America Laws

As the Order primarily focuses on policy statements and the establishment of administrative infrastructure for implementing those policies, contractors likely will not see immediate impacts from this Order. However, significant regulatory developments are on their way.

## **Waiver from Made in America Laws**

The Order 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. Under the process

established by the Order, before an agency grants a waiver, it must first provide the Director with a description of, and a justification for, its proposed waiver. The Director will then determine whether the proposed waiver is consistent with the Order's policy. Waivers found not to be consistent with the Order will be returned to agencies for "further consideration."

The Order also requires the General Services Administration (GSA) to develop a public website including information on all proposed waivers and their status. This website will also include contact information for each granting agency—increasing the opportunity for stakeholders to track and voice their opinions on the proposed waivers.

### **Accounting for Sources of Cost Advantage**

The Order also aims to address "dumped" steel, iron, or manufactured goods. "Dumping," where foreign producers flood foreign markets with cheap, subsidized products, results in situations where suppliers prefer inexpensive foreign-made products over American-made products. The Order 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 steel, iron, or manufactured goods.

### **Supplier Scouting**

The Order requires that agencies increase their due diligence in seeking American supply sources in partnership with the Hollings Manufacturing Extension Partnership. This requirement forces agencies to undergo an additional step in their procurement process to identify American sources of supply, furthering the administration's policy to procure goods from American businesses "whenever possible."

### **Enforcement of the Buy American Act**

The Order also promotes more stringent enforcement of the Buy American Act, requiring amendments to the FAR that would:

- Replace the "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"
- 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

While the value-added test would be a seismic change from the existing component test, the Order provides no clues about this new process's mechanics. Similarly, the Order does not specify what it would like to see in terms of an "increased" numerical threshold for domestic content requirements and "increased" price preferences.

### **Other Changes to FAR Part 25**

#### *Information Technology that Is a Commercial Item*

The Order also requires the FAR Council to "promptly review" constraints on the extension of the requirements of Made in America Laws to commercial item information technology and "develop recommendations for lifting these constraints" to promote further the policy outlined in the Order. However, the administration's ability to make real changes on this front is limited due to the fact that the exception is mandated by the annual appropriations acts.

#### *Nonavailable Articles*

The Order also demands heightened scrutiny of class determinations of "nonavailability" listed at FAR 25.104, Nonavailable Articles. It requires the Director of OMB to review any amendment, in consultation with the Secretary of Commerce and the Director, before the FAR Council proposes any update to this list of domestically "nonavailable" articles. However, FAR 25.104 was last updated in 2010, so the practical impact of this additional scrutiny may be limited.

### **Made in America Accountability—Reporting and the Trade Agreements Act**

The Order also mandates initial and biannual reporting to the Director regarding agencies' implementation of the Made in America Laws. The reports must include an accounting of agencies' use of waivers and recommendations for how to further the policy goals of the Order. The biannual reports must also include 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 item portends potentially significant changes to how agencies and their contractors use the Trade Agreements Act, which currently allows contractors to sidestep Buy American Act restrictions as long as they supply goods and services from designated countries.

### **Conclusion**

The Order articulates broad policy goals and sets in motion several processes that may ultimately reshape the domestic preference rules. Accordingly, in the short term, contractors should examine their supply chains to determine the extent to which they can make changes to increase the domestic content of items supplied to the government. In the long term, however, contractors should note that the replacement of the components test with a "value added" test is likely to dramatically change the way contractors have been doing business for years. As such, contractors should carefully follow the rule-making process that attends to this Order. ■

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