

The 'Buy American, Hire American' Executive Order, Digested

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JULY 31, 2017

The domestic-preference provisions of President Donald Trump's April 18 executive order on "Buy American, Hire American" are ambitious in scope, requiring government-wide action to maximize the use of U.S. goods.¹ While the order's provisions will prove tricky to effectively implement, it is nonetheless a harbinger of things to come.

All government contractors — and especially those with nondomestic supply chains — should be paying attention.

SYNOPSIS OF THE 'BUY AMERICAN' PROVISIONS

'Buy American': An all-encompassing definition

The order defines "Buy American laws" broadly as all statutes, regulations, rules and executive orders relating to federal procurement or federal grants, including those that refer to "Buy America" or "Buy American" and that require, or provide a preference for, acquiring goods, products or materials produced in the United States, including iron, steel and manufactured goods.

Under the executive order, all agencies are to develop and propose policies to maximize the use of U.S. goods, products and materials in federal procurements, to the extent permitted by law.

These laws include the Buy American Act, or BAA, the Buy America Act, the Berry Amendment and the Trade Agreements Act. Of these, the two most important to federal procurement are generally the BAA and TAA. See the accompanying infographic for background on when and how these statutes apply.

A 'new' mandate

Under the executive order, all agencies are to develop and propose policies to maximize the use of U.S. goods, products and materials in federal procurements, to the extent permitted by law. Agencies have until mid-September to propose these new policies, but the order offers no guidance as to what specifics the policies should include.

Agency assessments and waivers

The order directs agencies to "minimize the use of waivers," and it changes who, within an agency, has the authority to waive BAA

requirements. There are exceptions to the BAA — and, to a lesser extent, the TAA — that allow U.S. agencies to purchase foreign goods and services despite these statutes' requirements.

For example, BAA requirements can be waived if domestic products are significantly more expensive (usually 6 percent, or 12 percent for some small business procurements) than the same product imported.

The requirements may also be waived if the imported product is not available domestically or if a waiver is otherwise "in the public interest." Similarly, TAA requirements may be waived if domestic products are unavailable or insufficient to fulfill procurement needs.

The order requires that these waivers be granted by the head of each agency, presumably on a nondelegable basis.

Additionally, prior to granting a public-interest waiver, agencies must assess whether the cost advantage of acquiring "a foreign-sourced product is the result of the use of dumped steel, iron, or manufactured goods or the use of injuriously subsidized steel, iron, or manufactured goods." They must also carefully document their waiver findings.

Furthermore, the order commissions several Buy American-related studies. To establish a baseline for policies and compliance, agencies must complete, by mid-September, a comprehensive assessment of how they monitor, enforce and comply with their Buy American requirements.

Going beyond individual agency evaluations, the order also requires that by the secretary of commerce and the U.S. Trade Representative assess the effect of U.S. free trade agreements and the World Trade Organization Agreement on Buy American requirements. A report of their findings is to be submitted to the president by late November.

OK, FINE, BUT WHAT DOES THIS REALLY MEAN?

Fewer waivers/strict enforcement

The elevation of waiver authority to the agency head — coupled with heightened monitoring — likely will make a significant difference on BAA waivers for the duration of the Trump administration. Action at this level requires input from more government stakeholders, who likely will exercise caution before executing waivers.





APPLICABILITY OF THE BUY AMERICAN ACT AND TRADE AGREEMENTS ACT

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WHICH ACT APPLIES?

BUY AMERICAN ACT	TRADE AGREEMENTS ACT
GOODS	GOODS AND SERVICES
<ul style="list-style-type: none"> • Greater than \$3,000 but less than the Trade Agreements Act threshold (generally \$191,000). <i>See FAR 25.402.</i> • Contracts above the Trade Agreements Act threshold (generally \$191,000) if they are otherwise excluded from the Trade Agreements Act. 	<ul style="list-style-type: none"> • Greater than \$191,000 generally, although this threshold may be lower for certain countries of origin. <i>See FAR 25.402.</i> Note that, as a general rule, GSA schedule contracts require Trade Agreements Act compliance.
<p>EXCLUSIONS:</p> <ul style="list-style-type: none"> • Contracts for goods to be used outside the United States. • Contracts for goods that are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality. • Contracts for information technology commercial items. 	<p>EXCLUSIONS:</p> <ul style="list-style-type: none"> • Contracts for certain services (e.g., research and development, dredging, utility services, military support services) listed in FAR 25.401. • Some contracts set aside for small businesses. <ul style="list-style-type: none"> - But note that where an overarching IDIQ contract requires Trade Agreements Act compliance, this requirement will flow down to task orders, even if those orders are set aside for small businesses. • Contracts for the acquisition of arms, ammunition, or war materials, or purchases indispensable for national security or for national defense purposes. • Government acquisition of end products for resale. • Sole source acquisitions below the Simplified Acquisition Threshold (currently \$150,000). • Other acquisitions authorized in FAR subparts 6.2 and 6.3 not subject to full and open competition that specifically preclude application of the TAA. • There are no offers of eligible products, or the products offered are insufficient to fulfill government requirements.
<p>WAIVERS:</p> <ul style="list-style-type: none"> • Public Interest. Agency may waive the Buy American Act if determined to be inconsistent with the public interest. • Unreasonable Cost. Agency may waive the Buy American Act if the price of a domestic end product is unreasonable. Generally, a 6% price premium over foreign end products is considered unreasonable (raised to 12% in a small business procurement or 50% in procurements by DOD). 	

TEST FOR COMPLIANCE

(italicized terms are specifically defined by statute/regulation)

BUY AMERICAN ACT	TRADE AGREEMENTS ACT
<p>MANUFACTURED GOODS:</p> <ol style="list-style-type: none"> 1. Do domestic <i>components</i> make up at least 50% of the <i>cost of components</i> of the <i>end product</i>? (Note: This component test is waived for Commercial-Off-The-Shelf items) 2. Was the <i>end product</i> manufactured in the United States? 	<p>SERVICES:</p> <p>Is the firm that is providing services established in the United States or a <i>designated country</i>? (See map on next page)</p>
<p>NON-MANUFACTURED GOODS:</p> <p>Was the <i>end product</i> mined or produced in the United States?</p>	<p>GOODS:</p> <ol style="list-style-type: none"> 1. Is the <i>end product</i> wholly the growth, product, or manufacture of the United States or a <i>designated country</i>? (See map on next page) 2. If not, has the <i>end product</i> been <i>substantially transformed</i> in the United States or a <i>designated country</i> into a new and different article of commerce with a name, character, or use distinct from that of the articles from which it was transformed?

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And political appointees will be hesitant to act boldly or contradict the tenor of the president. This will be especially true when it comes to the potential use of the BAA's public-interest waiver, as use of that exception will likely require a much higher showing.

Similarly, assertions of dumping and unfair subsidies may prevent some waivers that are based on price differences. While such allegations are notoriously hard to prove, the very fact that they are made may make agency officials hesitant to grant a waiver.

Fairly or unfairly, certain countries, such as China, will likely be easier targets for these accusations than others, and products sourced from these countries could see a disproportionate number of waivers denied.

The Trump administration might move to change the Federal Acquisition Regulations' definition of what, by default, constitutes an unreasonably priced domestic end product. This currently defaults to a 6 percent (or 12 percent for small business) premium per FAR 25.105, but can be changed by agency action or by changing the FAR rule.

Exceptions for goods made by foreign trade partners will remain

The biggest loophole to BAA requirements is that under the TAA many countries will get a pass because their goods must be treated as U.S. goods under various trade agreements. These agreements include World Trade Organization procurement agreements, regional free trade agreements, country-specific free trade agreements, and Defense Department reciprocal procurement agreements. See the accompanying infographic for a depiction of some of these agreements.

Eliminating the TAA loophole would result in many more procurements requiring American-made goods, but it could also trigger significant trade disputes.

Despite some of the rhetoric, it seems highly unlikely that the White House would eliminate such BAA/TAA exceptions if doing so would violate trade agreements. The White House has suggested that trade agreement waivers might be "renegotiated or revoked" if the United States is a "net loser" under the trade deal.

In theory, the administration would be looking to target trade deals where American industry has not gained a foothold in the reciprocal country. While possible, a country-by-country trade renegotiation will take significant time and effort, and is likely to result in more "renegotiations" than "revocations."

In short, BAA/TAA exemptions for foreign trade partners are unlikely to change significantly any time soon, if at all.

False Claims Act liability is coming

The Trump administration almost certainly will endeavor to step up enforcement of Buy American provisions through the FCA. And if the Justice Department, which is already understaffed and overstretched, does not rise to this occasion, the plaintiffs' bar will.

Most federal procurement contracts, including GSA Schedule contracts, contain certification provisions requiring affirmative representations of BAA compliance.

Any lack of diligence in ensuring compliance will be an easy target for allegations of "reckless disregard," which is a scienter standard under the FCA. Contractors should promptly ensure they are complying with the BAA certifications and further evaluate compliance within their supply chains.

Domestic steel to be protected

The executive order is particularly concerned with protecting domestic steel production. It affirms the requirement that for iron and steel products to be considered domestically produced the entire manufacturing process, including melting and pouring, must occur in the United States. This standard precludes the use of semifinished steel imports from other countries.

Assertions of dumping and unfair subsidies may prevent some waivers that are based upon price differences.

On top of this, the White House has asked the Commerce Department to investigate whether the steel industry should be protected on national security grounds under the (rarely used) Trade Expansion Act of 1962.² In combination, these protections could put a premium on domestic steel for government procurements.

TAKEAWAYS

Until further administrative guidance is developed as a result of this order, government contractors should be vigilant in complying with domestic preference laws, regulations, proposal representations and contract terms.

In particular, contractors should check their supply chains and determine whether products and materials comply with the BAA, the TAA, the Berry Amendment and other domestic-preference provisions.

In turn, this suggests there will be heightened scrutiny of — and indemnification from — the supply chain, and this attention will most assuredly be focused on first-tier subcontractors.

In the meantime, although it is easy to say but difficult to do, contractors should consider whether there are alternatives to their current foreign sources.

NOTES

¹ *Presidential Executive Order on Buy American and Hire American*, THE WHITE HOUSE (Apr. 18, 2017), <https://www.whitehouse.gov/the-press-office/2017/04/18/presidential-executive-order-buy-american-and-hire-american>.

² *Presidential Memorandum for the Secretary of Commerce*, THE WHITE HOUSE (Apr. 20, 2017), <https://www.whitehouse.gov/the-press-office/2017/04/20/presidential-memorandum-secretary-commerce>.

This article first appeared in the July 31, 2017, edition of Westlaw Journal Government Contract.

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