

Government Contracts & International Trade Update

February 2019

Make “Buy American” Great Again: Does Trump’s New Executive Order Hit the Mark?

Key Notes:

- President Trump’s recent executive order merely “encourages” use of goods, products and materials produced in the United States, rather than requires such use.
- Financial assistance programs are targeted.
- Each agency administering covered programs is required to respond to the president by May 31, 2019 on areas where Buy American principles can be maximized.
- Stakeholders should monitor developments.

On January 31, 2019, President Donald Trump issued Executive Order 13858, “Strengthening Buy-American Preferences for Infrastructure Projects.” In the opening policy statement, the order seeks to “maximize, consistent with law, the use of goods, products, and materials produced in the United States, in Federal procurements and through the terms and conditions of Federal financial assistance awards.” During a January 31 press conference, Trump stated, “We want American roads, bridges, and railways, and everything else to be built with American iron, American steel, American concrete, and American hands ... By signing this order today, we renew our commitment to an essential truth: It matters where something is made, and it matters very greatly.” This new order contains similar policy statements previously expressed in Executive Order 13788, “Buy American and Hire American,” issued on April 18, 2017. (See [Government Contracts Update dated July 13, 2017](#).)

The order directs each agency head administering a covered infrastructure program to “encourage recipients of new Federal financial assistance awards pursuant to a covered

program to use, to the greatest extent possible, iron and aluminum” as well as other manufactured products made in the United States. The “covered programs” include cybersecurity programs and various activities requiring federal financial assistance for “alteration, construction, conversion, demolition, extension, improvement, maintenance, reconstruction, rehabilitation or repair of an infrastructure project.” The order also defines “infrastructure projects” as projects “designed to provide services to the general public” in 13 different sectors ranging from aviation to electricity transmission. Each agency head is directed to prepare a report for the president outlining areas to maximize the use of the Buy American principles in procurement activities for that agency within 120 days.

The order only “encourages” each agency to maximize the use of domestic materials and does not require mandatory use of certain materials from the United States. Further, the order does not supersede or replace any of the existing “Buy America” or “Buy American” requirements that are found in a variety of other laws and regulations in place today. This is probably due to domestic sourcing laws already in place that require U.S. steel and U.S.-manufactured items for federally funded projects. For example, the following laws contain “Buy America” or “Buy American” requirements:

- The Buy American Act (41 U.S.C. § 8301-8305)
- The Buy America Act (49 U.S.C. § 5323(j) and 23 U.S.C. § 313)
- The Trade Agreements Act (19 U.S.C. §§ 2501-2581)
- The Berry Amendment (10 U.S.C. § 2533a)
- The Recovery Act (Pub. L. No. 111-5, § 1605)

Regulations published by various federal agencies already contain provisions implementing these statutes and often allow for the use of waivers under certain circumstances. For example, the Federal Railroad Administration may obligate funds for a project only if the steel, iron or other manufactured goods are produced in the United States. The Secretary of Transportation, however, may waive these requirements under certain circumstances, including if the use of domestic material will result in an increase in the overall project cost by more than 25 percent or if items required for the project are unavailable in sufficient quantities from a U.S. source.

The order creates multiple implications, especially for the construction industry, as well as other industries utilizing federal assistance programs. The federal Buy American Act (BAA) applies to manufactured articles, materials and supplies used in the construction of a federal building or in federal work. This means, by its terms, the BAA does not apply to state or local construction that receives federal funds. Other federal laws, however, which are often referred to as “Buy America” laws, provide for domestic preferences for certain types of construction projects receiving federal funding. The president’s new order not only implicates Buy America and Buy American requirements but also federal programs that provide financial assistance, such as grants, loans, cooperative agreements, etc., for infrastructure projects, to the extent that they do not already include domestic preference requirements.

This domestic preference emphasis is accomplished by requiring agencies that administer “covered programs” to encourage recipients of new federal financial assistance awards to use certain products that are “produced in the United States” to the greatest extent possible. These agencies are required to begin “encouraging” the use of these domestic products by May 1, 2019. Each agency’s report, however, must identify covered programs, within the agency’s jurisdiction, and include a “requirement” to use iron, aluminum, steel, cement or other manufactured items produced in the United States, whether in contracts, sub-contracts, purchase orders or sub-awards. This suggests that, while the order initially encourages compliance, the intended long-term effect is to generate new terms and conditions in grant and loan awards that would require the

purchase of domestically produced materials (i.e., aluminum, steel, cement and manufactured items).

Over time, the new order will likely result in increased inclusion and enforcement of these domestic sourcing requirements in government contracts, grants and other government agreements. The order does not, however, modify any existing laws or regulations currently in effect, nor does it require contractors working under existing contracts containing “Buy America” or “Buy American” provisions to change their procurement or supply chain plans. At this time, the order does not modify “existing rights or obligations under international agreements,” signaling that the order will not supersede or override the World Trade Organization Agreement on Government Procurement, or provisions in other free trade agreements in place today. The order does raise a number of significant questions that could affect the scope and nature of domestic preference requirements in future contracts and agreements. To minimize risk, stakeholders in industries using federal financial assistance programs would be well-advised to closely monitor the developments in this area in the coming months. Stay tuned for further updates from our team.

FOR MORE INFORMATION

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