

Government Contracts & International Trade Update

January 2021

Biden Administration Bolsters Buy American Requirements

Key Notes:

- Tighter requirements for domestic content under consideration.
- New Made in America Office to be established and a Made in America Director to be appointed.
- Waivers to domestic preference laws subject to heightened scrutiny.

As part of his “Build Back Better” initiative, President Biden issued an executive order (EO) yesterday that tightens Buy American requirements by enhancing enforcement efforts, increasing domestic content requirements for U.S. goods, and making it more difficult to obtain waivers. The EO, entitled, “Executive Order on Ensuring the Future is Made in All of America by All of America’s Workers,” also establishes a centralized Made in America office within the Office of Management and Budget (OMB) to track compliance with the policy.

Policy

The EO states that the government should “maximize the use of goods, products and materials produced in, and services offered in, the United States.” It further provides that the “United States Government should, whenever possible, procure goods, products, materials, and services from sources that will help American businesses compete in strategic industries and help America’s workers thrive.” The EO also requires the head of each agency to consider (a) suspending, revising, or rescinding agency actions that are inconsistent with the foregoing policy, and (b) proposing any additional agency actions necessary to enforce the policy. Finally, it sets forth concrete steps for increasing

domestic sourcing requirements and reviewing waivers with more scrutiny.

Tighter Requirements for Domestic Content

The EO requires the Federal Acquisition Regulatory Council (FAR Council) to consider proposing amendments to the Federal Acquisition Regulations (FAR) in three key areas within 180 days of the date of the order. The first is a possible amendment that would replace the “component test” used to identify domestic end product and domestic construction materials 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. This approach would apparently include other aspects of domestic content for end products and construction materials. According to some, this could help avoid situations where parts with a lesser value are sourced from domestic manufacturers and higher-value components are sourced from foreign manufacturers. Such a policy change could potentially have far reaching ramifications for what qualifies as domestic end products as the EO is not clear on what distinguishes “cost” from “value.”

The second consideration pertains to increasing the numerical threshold for domestic content requirements for end products and construction materials. It appears that the EO leaves the amount for any possible increase up to the FAR Council to consider as there are no suggested increases or parameters in the EO. However, one thing is clear: there may be an increase in the amount of domestic

content required to qualify a product as a domestic end item.

The third consideration is whether to increase the price preferences for domestic end products and domestic construction material. This change would impact the analysis as to whether a domestic item is available at a reasonable price compared to the price of a comparable foreign item. In other words, it is possible that the differential between the price for the domestic item and the foreign item would have to be greater in order for the agency to find that the domestic item is not available at a reasonable price.

It should be noted that on January 20, 2021, President Biden issued a “regulatory freeze” on last-minute rules issued by the Trump administration, directing agencies across the federal government to withdraw or delay action on potentially dozens of regulations. This may impact the FAR Council final rule issued on January 19 which changed several FAR clauses by (1) increasing the domestic content requirement (from 50% to 55% for most products, but to 95% for iron and steel) and for an end item to be considered as a “domestic end product,” and (2) increasing the percentages regarding price evaluation preferences for domestic end products (from 6% to 20% for low large business proposals, and from 12% to 30% for low small business proposals). These changes were to be effective on January 21, 2021 and were required to be included in all solicitations and contracts issued after February 21. The EO does not directly address whether the changes made by the FAR Council’s final rule should remain in place.

A New Buy America Office Must Approve Agency Waivers

Under the EO, the OMB Director is charged with establishing a new Made in America Office to be managed by a Made in America Director. The OMB Director will appoint the Made in America Director.

Moreover, before any agency grants a Buy American waiver, it must submit a description of the waiver and a detailed justification to the Made in America Director. Within 45 days after being appointed, the Made in America Director must publish a list of the information that agencies

must include in their waiver submissions and the deadline by which OMB will notify an agency on the results of OMB’s review. This deadline must not exceed 15 days.

Descriptions of the waiver submissions and their justifications must be posted for public review on a website that the EO also requires to be established (see below). After review, the Made in America Director shall notify the agency whether the proposed waiver is consistent with applicable law and the Biden Administration’s new policy. Where a proposed waiver is inconsistent with the law and policy, the waiver submission is returned to the agency for further consideration, including a written explanation for the determination. The EO also informs agencies how to resolve disagreements with OMB on such determinations, instructing them to resort to procedures set forth in another executive order addressing regulatory planning and review.

Unfair Trade Practices Must Be Considered When Granting Waivers

The EO also requires agencies to consider unfair trade practices when determining whether to grant a public interest waiver based on the high cost of domestic goods compared to foreign goods. The EO provides that agencies “shall assess whether a significant portion of the cost advantage of 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.” Thus, for the first time ever, agencies are required to factor in any cost advantages a foreign manufacturer may derive from goods that are dumped in the U.S. market at unfair prices or produced in reliance on unfair subsidies. These considerations must be included in any waiver determination made by the granting agency.

Increased Transparency Enables U.S. Manufacturers to Oppose Waivers

The EO also requires the General Services Administrator to establish a website setting forth information on all proposed waivers and whether those waivers were granted, together with contact information for each granting agency. At the same time, OMB must promptly report all proposed

waivers to the Administrator, as well as their descriptions and justifications, which must also be posted to the website to the extent permitted by law and consistent with national security and confidentiality requirements. Armed with this information, small and medium U.S. manufacturers will be able to reach out to granting agencies to inform them of the manufacturer's capabilities and whether a waiver is, in fact, appropriate.

Supplier Scouting

The EO asks agencies to work with NIST's existing Hollings Manufacturing Extension Partnership to identify American companies (including small and medium-sized companies) that can produce goods, products and materials in the United States.

Higher Scrutiny for the List of Domestically Nonavailable Articles

In addition, the EO requires the OMB, through the Office of Federal Procurement Policy (OFPP), to review any proposed amendment to the list of domestically nonavailable articles at Part 25 of the FAR. As part of its review, OFPP must consult with the Made in America Director and the Secretary of Commerce. It must also pay particular attention to economic analyses of relevant markets and available market research to determine whether there is a reasonable basis to conclude that the item is not mined, produced or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality. These findings must also be made available to the FAR Council for consideration.

Information Technology

The EO requests the FAR Council to review existing constraints on the extension of the requirements in Made in America Laws to information technology ("IT") when classified as a commercial item and develop recommendations for lifting these constraints. Such recommendations could potentially seek to curtail the current flexibility that agencies have in procuring IT products.

Agency Reports and Recommendations

The EO directs:

- The head of each agency to submit a report on the agency's implementation of, and compliance with, Made in America Laws – including a report on the agency's use of waivers, including waivers based on the Trade Agreements Act. The first report is to be provided to the Made in America Director within 180 days, and after that shall be submitted bi-annually.
- The FAR Council to review and report on various Buy American restraints on the classification of IT as a commercial item. While contractors and manufacturers will not be immediately impacted, it may lead to more IT products being classified as commercial items in the future, which could make them exempt from Buy American Act requirements.

Revoking Prior Actions

Lastly, the EO requires agencies to consider "suspending, revising, or rescinding" existing "agency actions," or undertaking additional agency actions, to carry out the Biden administration's Buy American policy. Although the term "agency action" is not defined, the EO appears to direct agencies to do more than just review and update existing rules and regulations.

Conclusion

This EO lays the groundwork for the eventual further tightening of restrictions regarding domestic preferences and "loopholes" that allow agencies to buy foreign-made end products. Practically, these proposed changes may be somewhat limited for contractors whose contracts are exempt from Buy American restrictions based on the Trade Agreement Act (TAA) and other international obligations as they are not specifically targeted in the EO. For government contractors and U.S. manufacturers that are subject to the BAA, these proposed changes could potentially have a significant impact on existing supply chains that were developed in reliance upon long-standing Buy American rules.

Thompson Hine will continue to monitor this issue and provide additional updates as the rulemaking process for the above proposed changes progresses.

FOR MORE INFORMATION

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