

Continuing Changes in “Buy American” Rules for Federal Contracts and Federally Funded Infrastructure Projects

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Despite the deep partisan divides that exist in Washington, there is one issue that both parties seem to agree on: strengthening “Buy American” preferences when using government funds. As we previously reported in client alerts, a series of Executive Orders (EOs) issued by both the Trump and Biden Administrations have resulted in significant changes to long-standing rules implementing the Buy American Act (BAA) preferences applicable to government procurements. Continuing this trend, the Bipartisan Infrastructure Law enacted by Congress in late 2021 mandates additional changes to the BAA rules affecting government contracts, as well as additional changes to the patchwork of “Buy America” rules that apply to federal infrastructure projects—including an expansion of Buy America preferences to a broad array of “construction materials” used in federal infrastructure projects.

These changes could have significant impacts on government contractors as well as suppliers on federally funded infrastructure projects, who may need to re-examine their supply chains to ensure compliance with these evolving rules and standards. To help make sense of these changes, this article provides a summary of the most recent changes in these long-standing rules, and also previews the potential changes that are likely to come as these Buy American EOs and legislation continue to be implemented.

Changes to Buy American Rules Applicable to Federal Procurements

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The BAA, which has been in effect since 1933, encourages the U.S. Government’s purchase of American-made products by setting a price preference for offers of domestic end products. In general, to be considered a “domestic end product” for purposes of the BAA, a manufactured end product needs to meet two conditions: (1) the article must be manufactured in the United States **and** (2) the cost of domestic components must exceed a certain threshold.

Since the 1950s, the domestic content threshold for the BAA was 50%. However, early in his administration, President Trump issued an EO to increase that threshold to 55%. Consistent with the Trump EO, in January 2021, the Federal Acquisition Regulatory (FAR) Council issued a final rule increasing the domestic content threshold to 55%, and that threshold remains in place today. The Trump EO and the implementing FAR rule also created a new domestic content requirement for iron or steel products, which allows no more than 5% of foreign iron or steel. This requirement applies to end products consisting “predominately” of iron or steel—*i.e.* iron or steel accounts for 50% of the total cost of the product. Commercial-off-the-shelf fasteners are exempted from the domestic content requirements.

President Trump’s EO also increased the price evaluation preference applied to offers of domestic end products. Although domestic offers previously received a 6% evaluation preference (or 12% if the offeror was a small business), the EO and subsequent final rule issued by the FAR Council increased the evaluation preference to 20% for other-than-small businesses and 30% for small businesses.

Following these changes to BAA rules, President Biden issued an EO that, among others, called for additional increases in the domestic content threshold. In March 2022, the FAR Council issued a final rule increasing the domestic content threshold from 55% to 60%, effective starting in October 2022. In addition, the final FAR rule calls for additional increases beginning in calendar year 2024, when the domestic content requirement will increase to 65%, ultimately increasing to 75% in calendar year 2029. Contractors will be required to comply with the threshold in effect in the year of delivery, although agencies can apply the threshold in effect at the time of contract award for the entire period of performance with approval by the senior procurement executive. The final rule also creates a fallback threshold to allow the use of the 55% threshold for products that are unavailable or are an unreasonable cost. This threshold is available only until calendar year 2030 and offerors must indicate that they are relying on the fallback threshold.

Building on these changes, the Bipartisan Infrastructure Law enacted in late 2021 codifies the increased domestic content thresholds mandated by the Trump and Biden EOs. In addition, the Bipartisan Legislation calls for additional changes to the BAA, including:

- An increase to the price preferences enjoyed by domestic end products and construction materials;
- New definitions of “end product manufactured in the United States” to ensure manufacturing processes occur in United States;
- Guidelines for issuing waivers based on non-availability, including consideration of anticipated project delays and lack of substitutable U.S. made articles;

- Guidelines for issuing waivers based on “public interest,” with direction to minimize waivers that “result in a decrease in employment in the United States” (not including employment related to management, research and development, or engineering and design);
- A requirement that agencies consider (in consultation with the International Trade Administration) whether any significant portion of the cost advantage enjoyed by a foreign end product results from “the use of dumped steel, iron, or manufactured goods or the use of injuriously subsidized steel, iron, or manufactured goods”; and
- A requirement to review existing trade agreements and reciprocal defense agreements, to determine whether U.S. entities “have equal and proportional access” to procurements by foreign governments (similar to the Trump EO’s direction to assess whether the United States is a “net loser” under existing trade agreements).

Changes to Buy America Rules Applicable to Federally-Funded Infrastructure Projects

In addition to the changes made to the BAA rules governing federal procurements, the Bipartisan Infrastructure Law calls for additional changes to be made in the separate set of “Buy America” rules that apply to federally funded infrastructure projects. While the federal procurements are governed by a single set of Buy American rules based on the BAA and its implementing FAR provisions, federally funded infrastructure projects are subject to a variety of different “Buy America” restrictions specific to each infrastructure program (e.g., Federal Highway Administration (FHWA), the Federal Transit Administration (FTA), etc.). In general, the Buy America rules require steel, iron, and manufactured products used in such projects to be produced in the United States.

However, Congress voiced concern that “common construction materials” are not adequately covered and that many infrastructure programs are not covered by existing Buy America preferences, or are subject to waivers that limit the application of those existing Buy America preferences. As a result, the “Build America, Buy America Act,” enacted as part of the Bipartisan Infrastructure Law, includes a number of provisions intended to strengthen application of Buy America laws to federally funded infrastructure projects. In particular, the Act includes the following:

- First, the Act’s expanded domestic preferences apply to any federally funded “infrastructure project,” unless the project is already covered by a domestic preference that meets all of the requirements of the Act. (As a practical matter, it is unlikely that any existing Buy America requirements meet all of the requirements of the Act, including the Act’s preference for domestic “construction material.”) For purposes of this requirement, “infrastructure projects” is broadly defined. “Infrastructure” means, at a minimum: roads, highways, and bridges; public transportation; dams, ports, harbors, and other maritime facilities; intercity passenger and freight railroads; freight and intermodal facilities; airports; water systems, including drinking water and wastewater systems; electrical transmission facilities and systems; utilities; broadband infrastructure; and buildings and real property. “Project” is also broadly defined to include “construction, alteration, maintenance, or repair of infrastructure.”

- Second, the Act extends the rules to require the use of U.S.-produced construction materials. Although specific regulations are yet to be promulgated, the Act includes Congressional findings that contemplate what materials would be considered “construction materials”: non-ferrous metals; plastic and polymer-based products (including polyvinylchloride, composite building materials, and polymers used in fiber optic cables); glass (including optic glass); lumber; and drywall. (“Construction material” does not, however, include “cement and cementitious materials, aggregates such as stone, sand, or gravel, or aggregate binding agents or additives.”)
- Third, the Act imposes new standards for determining whether items are “produced in the United States.” For manufactured products, the Act mirrors existing Buy American standards for federal procurements: “produced in the United States” means that (1) the product was “manufactured” in the United States and (2) the “cost of the components of the manufactured product that are mined, produced, or manufactured in the United States is greater than 55 percent of the total cost of all components of the manufactured product.” For construction materials, “produced in the United States” means that “all manufacturing processes for the construction material occurred in the United States.” The Act instructs the Office of Management and Budget (OMB) to issue standards to further define “all manufacturing processes” for construction materials.

Consistent with existing Buy America rules, the Build America, Buy America Act allows for waivers based on “public interest,” non-availability, and unreasonable cost. Before issuing a waiver, however, the Act directs that head of the Federal agency must publish a detailed written explanation for the proposed determination to issue the waiver, and provide a period of not less than 15 days for public comment on the proposed waiver.

These continued changes to the Buy American and Buy America rules could have significant impacts for federal contractors as well as suppliers on federally funded infrastructure projects. Wiley is continuing to track these changes, so look to this space for further updates as these changes continue to be implemented through the rulemaking process.