

ALERT

President Biden Directs More Changes to Buy American Rules

January 26, 2021

What: Three days into the new administration, President Biden has issued an additional Executive Order (EO or Order) impacting government contractors, U.S. manufacturers, and grantees and other recipients of federal financial assistance. This time, the EO is aimed at strengthening compliance with "Made In America Laws" such as the "Buy American" and "Buy America" Acts. The EO both adds to some changes to existing laws made by the Trump Administration and extinguishes other Trump EO's regarding Made In America Laws.

First, of particular importance for federal contractors, the Order requires the Federal Acquisition Regulatory (FAR) Council to consider several significant changes to existing Buy American Act rules applicable to federal procurements, including:

- Replacing the Buy American Act's longstanding "cost of component test" with ***a new test for determining country of origin*** that measures domestic content based on "the value that is added to the product through U.S.-based production or U.S. job-supporting economic activity" (though the EO does not explain how such value is to be measured);
- Increasing (i) the ***percentage of domestic content*** required to qualify as a domestic end product for Buy American Act purposes, as well as (ii) the ***price preference*** provided to domestic end products in procurement covered by the Buy American Act (both of which were recently increased in a final FAR rule issued in the last days of the Trump Administration, however the latest EO is silent as to whether those recent revisions to the FAR have been placed on hold, as well as the amount of any additional increase to be implemented in the

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Build America, Buy America
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FAR);

- Developing recommendations for *lifting the Buy American Act's exception for "commercial item IT"* (an exception that has been incorporated into the FAR since 2004, based on direction provided by Congress in annual appropriations acts); and
- Updating the FAR's current list of "*nonavailable articles*" that are exempt from the Buy American Act, to determine whether there is still a reasonable basis to conclude that the listed articles are not mined, produced, or manufactured in the United States in sufficient quality and quantities.

Second, in addition to these specific potential changes in procurement rules, the EO announces the Biden Administration's *overarching policy* to "maximize the use of goods, products, and materials produced in, and services offered in, the United States" in connection with federal contracts, as well as federal grants. Of particular note is the EO's reference to "services," which have not traditionally been subject to either Buy American or Buy America requirements.

Third, the EO requires agencies to consider "suspending, revising, or rescinding" existing "*agency actions*," or undertaking additional agency actions, to carry out the Administration's Buy American policy. Although the term "agency action" is not defined, the Order appears to contemplate more than just reviewing and updating existing rules and regulations—for example, the Order specifically calls for agencies to conduct "supplier scouting" using NIST's existing "Manufacturing Extension Partnership" (MEP) program, to identify American companies that are able to produce goods, products, and materials in the United States.

Fourth, the EO creates a centralized process for review and approval of *agency waivers* of Made in America Laws. Specifically, the EO directs the Office of Management and Budget (OMB) to create a new "Made in America Office," headed by a "Made in America Director," that will be responsible for reviewing all proposed waivers of Made In America Laws. This new process will likely make it more difficult to obtain waivers of the Made In America Laws. The EO also increases the transparency of waivers by directing the General Services Administration (GSA) to develop a public website that includes information on proposed waivers and whether those waivers were granted, to allow manufacturers and other interested parties to easily identify proposed waivers waiver information.

Fifth, the EO imposes a new requirement for agencies to consider the *source of any cost advantage* of any foreign-sourced product before granting a public interest waiver. Specifically, the EO requires agencies to consider whether any cost advantage of a foreign-sourced product results from the use of "dumped steel, iron, or manufactured goods," or the use of "injuriously subsidized steel, iron, or manufactured goods." To meet this new requirement, waiver granting agencies are encouraged to consult with the International Trade Administration at the Commerce Department in making this assessment.

Finally, 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.

When: President Biden signed the EO on January 25, 2021.

What does it mean for industry: President Biden's Executive Order, which comes on the heels of a final rule involving changes to Buy American Act policies, proposes further significant changes to those policies. The practical impact of these proposed changes may be somewhat limited for contractors whose contracts are exempt from Buy American restrictions based on the Trade Agreements Act (TAA) and international obligations such as the WTO's Agreement on Government Procurement (GPA), which are not specifically targeted in the EO. However, for those government contractors and U.S. manufacturers that are subject to the Buy American Act (which generally applies to contracts below certain dollar thresholds, or for certain categories of products that are not covered by the TAA), these proposed changes could have a significant impact on existing supply chains that were developed in reliance on long-standing Buy American rules.

The FAR Council is required to consider these proposed changes—including the proposed replacement of the longstanding cost of component test, as well as the potential lifting of the commercial item IT exception—and if appropriate, issue any proposed changes to the FAR within the next 180 days. Any proposed change to the FAR will be published for notice and comment, so contractors and other interested parties affected by these proposed changes should have an opportunity to make their voices heard. Wiley will continue to monitor this issue and will provide additional alerts as the rulemaking progresses.

The EO is available [here](#).