

ALERT

President Trump Signs Executive Order Maximizing Procurement of Domestic Goods

April 20, 2017

WHAT: President Trump signed an Executive Order outlining the Administration's plan to "Buy American and Hire American." The Executive Order seeks to "maximize" the procurement and use of U.S.-made products in federal procurement contracts and federal grants by mandating a number of specific actions relating to the enforcement of existing "Buy American Laws," including the following:

- First, the Order mandates that executive branch agencies "maximize, consistent with the law," the use of goods, products and materials produced in the United States;
- Second, the Order directs agencies to "scrupulously monitor, enforce, and comply" with existing Buy American Laws, to "minimize the use of waivers" of those Buy American Laws, and to develop policies to maximize the use of products made in the United States;
- Third, the Order requires the Secretary of Commerce and the U.S. Trade Representative (USTR) to assess the impact of free trade agreements (FTAs) on the operation of existing Buy American Laws, and to make recommendations to strengthen the implementation of those existing Buy American Laws; and
- Finally, the Order calls on agencies to make "judicious" use of public interest waivers in order to "maximize" utilization of goods produced in the United States, and to expressly consider whether a foreign product has benefited from the use of "dumped" or subsidized goods before granting a public interest waiver.

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In addition to these Buy American provisions, the Executive Order includes “Hire American” provisions that require the Secretary of State, the Attorney General, the Secretary of Labor, and the Secretary of Homeland Security to propose new rules to “protect the interests of United States workers in the administration of our immigration system,” and to suggest reforms to “ensure that H-1B visas are awarded to the most-skilled or highest-paid petition beneficiaries.”

WHEN: The Executive Order was signed on April 18, 2017. Federal agencies are to submit findings from their Buy American assessments, and to develop and propose related policies, by mid-September. In addition, the Secretary of Commerce and USTR are required to assess the impact of FTAs within 150 days, and to make recommendations for strengthening Buy American Laws within 220 days of the date of the Order. New immigration rules and guidance are to be proposed “as soon as practicable.”

WHAT DOES IT MEAN FOR INDUSTRY: In the short term, federal contractors and grant recipients can expect heightened scrutiny over compliance with existing Buy American Laws, which are broadly defined in the Executive Order to include not only the Buy American Act, but also the Buy America Act and similar laws that require or provide a preference for U.S.-made products. As an Administration official explained in introducing the Order, “[e]very agency and department of government will conduct top-to-bottom assessments aimed squarely at cracking down on weak monitoring, enforcement, and compliance efforts, and at rooting out every single Buy American loophole.” Therefore, contractors and grantees should carefully review their existing agreements to understand which Buy American restrictions (if any) currently apply, and ensure that they have adequate controls in place within their supply chains to comply with the applicable restrictions.

Longer term, contractors and grant recipients will have to wait for implementing policies and regulations to be issued in order to assess the full impact of the Executive Order. Perhaps the most significant potential change could come from the Order’s requirement for the Secretary of Commerce and the USTR to assess the impact of FTAs, and to make recommendations to strengthen the implementation of those existing Buy American Laws. According to an Administration briefing on the Executive Order, “if it turns out America is a net loser,” then the Buy American waivers in our FTAs may be “renegotiated or revoked.” To the extent that this means that products from countries covered by FTAs will no longer be eligible for reciprocal treatment in federal procurements, as currently provided for under the Trade Agreements Act (TAA) and implementing regulations, the impact on federal contractors and their supply chains could be particularly significant.