

Government Contractors May Face New Hurdles Under Trump's Executive Order Increasing Buy American Act Requirements

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President Donald Trump's most recent effort to maximize the use of goods, products, and materials produced in the United States through proposed changes to and enforcement of the regulations implementing the **Buy American Act** ("BAA") will likely result in considerable new challenges for government contractors across multiple industries. On July 15, 2019, President Trump issued an [Executive Order](#) titled "**Maximizing Use of American-Made Goods, Products, and Materials.**" This Executive Order follows on the heels of two other Orders issued by this Administration: [Executive Order 13788 – Buy American and Hire American](#), issued on April 18, 2017, and [Executive Order 13858 – Strengthening Buy-American Preferences for Infrastructure Projects](#), issued January 31, 2019. While the first two Executive Orders set the ground work for greater assessment and enforcement of domestic preferences under the Buy American requirements, the most recent Executive Order is the first to propose specific changes to the FAR which, if adopted, would increase substantially the domestic component percentage of qualifying end products under the BAA. These proposed changes, as described below, represent a substantial departure from the existing statutory and regulatory framework on which contractors have relied for more than sixty years for purposes of establishing compliant manufacturing and sourcing protocols.

Proposed Changes to the Buy American Act Requirements

As currently written, the Buy American Act establishes a preference for the Government to procure domestic materials. The current regulations dictate that a manufactured good qualifies as a domestic end product if (1) it is manufactured in the United States and (2) the cost of the components in the end product that are produced or manufactured in the U.S. exceed 50 percent of the cost of all components. 41 U.S.C. § 8301 *et seq.* The Executive Order directs the FAR Council to consider making the following regulatory changes to the provisions set forth at FAR Subpart 25.1:

(1) For iron and steel end products, materials will be considered of foreign origin if the cost of foreign iron and steel used in the iron and steel end products constitutes 5% or more of the cost of all the products used in the end product; and

(2) For all other end products, materials will be considered of foreign origin if the cost of foreign products used in the end products constitutes 45% or more of the cost of all the products used in the end product.

Stated otherwise, the Executive Order would change the regulatory scheme to require government contractors providing iron and steel end products to certify that the cost of the U.S. components used in the end product exceeds 95%, rather than 50%. For all other end products (i.e. not iron and steel), government contractors will have to certify the cost of the U.S. components used exceeds 55%. Even a 5% percent change can have substantial effects on contractors with an already-established manufacturing process and supply chain. Additionally, the potential burden of the proposed rule is significantly magnified for companies that supply iron and steel products to the Government.

The Executive Order also seeks to reinforce the established price preference for offers of domestic goods by increasing the price evaluation penalty percentages used in making a reasonableness determination. Under the current regulations, when a domestic offer is not the low offer, the procuring agency must add a certain percentage of the low offer's price to that offer before determining which offer is the lowest priced or "best value" for the Government. This percentage generally ranges from 6%, in cases where the lowest domestic offer is from a large business; to 12%, when the lowest domestic offer is from a small business. If the FAR Council makes the requested regulatory changes, these percentages would increase to 20% for large businesses and 30% for small businesses.

The Executive Order asks the FAR Council to consider these regulatory changes via notice and public comment within 180 days. The FAR Council is also tasked with submitting a report to President Trump on other changes the FAR Council should consider in order to better enforce the Buy American Act, including whether and when to require non-iron and steel goods to consist of 75% U.S. components to be considered domestic end products.

Implications of the Proposed Changes

The Executive Order signifies an important shift moving the domestic preference requirements under the BAA closer to the strict domestic sourcing requirements of the FTA under Buy America. While the full impact of the Executive Order will vary, the proposed changes, if adopted by the FAR Council, will likely have a substantial impact on manufacturing and supply chain, and ultimately the cost to the Government of procuring requisite end items. And while the Executive Order is silent on exceptions to the BAA, including the COTS and TAA exceptions, changes to or elimination of these exceptions will necessarily upend the controlling statutory and regulatory framework that has been in place for decades and will certainly result in a cascade of consequences to contractors and to the federal procurement process.

Because the FAR Council must publish changes to the FAR through formal rulemaking procedures, no changes will be in effect until the notice and comment period is completed. Government contractors and other interested industry players should participate in the comment period and express any concerns regarding the proposed rules. Moreover, as communicated through this and other related Executive Orders, the Administration likely intends to continue the trend of greater enforcement of the domestic sourcing requirements, possibly leading to additional audits, investigations, and False Claims Act prosecution. Contractors should assess their current sourcing and manufacturing compliance with the existing statutory, regulatory, and contractual requirements in an effort to minimize risk and to better understand steps necessary to comply with the proposed changes if adopted by the FAR Council.

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