

Executive Order Seeks to Bolster ‘Buy American’ Enforcement

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US President Donald Trump’s executive order aims to increase the use of US goods and materials in federal acquisitions.

On April 18, President Trump signed the [Presidential Executive Order on Buy American and Hire American](#). Although it imposes few immediate changes to federal procurement practices, the executive order (EO) establishes an express policy of maximum acquisition of US-produced goods and materials, extending the existing preferences for those articles already contained in federal “Buy American” laws. The EO further demands that agencies minimize the use of waivers for, and “scrupulously” monitor, enforce, and comply with, these Buy American laws.

Existing ‘Buy American’ Landscape

The EO defines “Buy American laws” to include all statutes, regulations, rules, and executive orders relating to federal procurement (or federal grants) that require, or establish a preference for, the purchase or acquisition of goods, products, or materials produced in the United States. This broad definition covers a number of domestic preference laws applicable to federal procurements or grants, including the following:

- The Buy American Act of 1933 (BAA), 41 U.S.C. §§ 8301-8303, which establishes a price-evaluation preference for “domestic end products” in US government supply orders exceeding the micro-purchase threshold (currently set at \$3,500 generally and \$5,000 for DoD purchases). For construction contracts, contractors must use only “domestic construction materials” in the construction, alteration, or repair of any public building or public work in the United States.
- The Berry Amendment, 10 U.S.C. § 2533a, which restricts DoD purchases of food, clothing, fabrics, tents, and hand or measuring tools to those that are grown, reprocessed, reused, or produced in the United States.

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- Five distinct Buy American laws applicable to Department of Transportation (DOT) agencies—the Federal Aviation Administration (FAA), Federal Highway Administration (FHWA), Federal Railroad Administration (FRA), National Railroad Passenger Corporation (AMTRAK), and Federal Transit Administration (FTA).^[1]

Importantly, for purchases above certain thresholds,^[2] the US Trade Representative (USTR) has waived the BAA's requirements, an action permitted by the Trade Agreements Act of 1979 (TAA), 19 U.S.C. §§ 2501-2581. In these cases, the TAA applies instead of the BAA and sets certain foreign articles from US trade-agreement partners on equal footing with American products.

Executive Order Requirements

The EO's chief requirement is to mandate that all agencies assess and maximize their monitoring, enforcement, and compliance with the various Buy American laws, including by minimizing their use of related waivers. The EO also requires agencies to develop and propose policies to ensure that federal financial assistance awards and procurements maximize the use of materials produced in the United States.^[3] The EO further requires that the US secretary of commerce, in consultation with the US secretary of state, the director of the Office of Management and Budget, and the USTR, submit to the president a report with specific recommendations on how to strengthen the implementation of Buy American laws.

Waivers

Under current Buy American laws, most domestic preference requirements may be waived for certain foreign end products if the procuring agency head makes a determination that complying with these requirements would be inconsistent with the public interest, or where domestic products are unavailable or only available at an unreasonable cost. Notably, the DoD has historically used a broad public interest waiver to allow it to purchase certain articles without applying a domestic preference.^[4]

Section 4 of the EO seeks to minimize the use of such waivers by requiring that they be construed to ensure the maximum utilization of US-produced goods and materials. In addition, before granting a public interest waiver, agencies must account for whether a significant portion of the cost advantage of a foreign product is the result of the dumping or subsidization of steel, iron, or manufactured goods.

Takeaways

The EO does not impose immediate changes to federal procurement practices, but instead merely calls for enhanced assessment and reporting by agencies on current Buy American practices. However, the EO signals increased enforcement attention to Buy American laws by the Trump administration. It also may lead to regulatory changes by agencies, in particular those that, like the DoD, have historically relied upon the broad use of public interest waivers.

The EO comes at the same time that President Trump's USTR nominee, Robert Lighthizer, navigates the confirmation process. Mr. Lighthizer is expected to go before the full US Senate in the next few weeks, following the Senate Finance Committee's unanimous approval on April 25 of his moving forward. Mr. Lighthizer has long asserted that the United States must embolden its response to abusive Chinese trade policies, and has also hinted at possibly renegotiating and strengthening

enforcement related to certain trade deals.

[1] The individual Buy American requirements applicable to each DOT agency mentioned above are found at the following: 49 U.S.C. § 50101 (FAA); 23 U.S.C. § 313 and 23 C.F.R. § 635.410 (FHWA); 49 U.S.C. § 24405 (FRA); 49 U.S.C. 24305 (AMTRAK); and 49 U.S.C. § 5323(j) and 49 C.F.R. Part 661

(FTA).

[2] These thresholds range from \$25,000 to \$191,000 for supply contracts, and from \$7,358,000 to \$10,079,365 for construction contracts.

[3] For iron and steel products, this is specifically defined to mean that all manufacturing processing, from the initial melting stage through the application of coatings, must have occurred in the United States.

[4] See DFARS 225.872-1.

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National Law Review, Volume VII, Number 116

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