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BIDEN LEAVES IN PLACE KEY PORTIONS OF BUY AMERICAN ACT CHANGES, TARGETS NEW DOMESTIC END PRODUCT TEST AND SERVICES

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President Joe Biden issued on January 25 an Executive Order on Ensuring the Future Is Made in All of America by All of America's Workers (EO). This EO leaves in place key portions of the prior administration's July 15, 2019 EO 13881 (Maximizing Use of American-Made Goods, Products, and Materials) and related implementing regulations, orders a sweeping review of multiple domestic preference rules, including proposing standards for domestic products, and establishes a central Office of Management and Budget (OMB) authority to approve federal agency waiver requests of Made in America requirements.

KEY POINTS

- Broadly defines "Made in America Laws" as those relating to financial assistance awards, including grants, and contracts requiring or providing a preference for goods, products or materials produced in the United States. This includes the US Department of Transportation's Buy America provisions and Buy American Act (BAA) requirements, but does not include Federal Trade Commission (FTC) Made in USA labeling issues.
- Seeks to maximize use not only of goods, products, and materials produced in the United States, but also services offered in the United States, but does not offer a clear path toward required purchases of US services.
- Requires each agency to vest waiver issuance authority in senior agency leadership.
- Establishes a Made in America Office within OMB headed by a Made in America director appointed by the director of OMB. This office will be responsible for implementing a centralized waiver review and approval process through OMB.
- Provides for development of a public website containing information regarding proposed and granted

- waivers.
- Requires that the Federal Acquisition Regulation (FAR) Council, within 180 days, to consider proposing changes to Buy American Act supply domestic end product and domestic construction material provisions of the FAR.
- Requires the FAR Council, in considering amendments to the list of domestically non-available articles, to seek review, before proposing any amendment, by the director of OMB, through the Administrator of the Office of Federal Procurement Policy (OFPP), in consultation with the Secretary of Commerce and the Made in America director, paying particular attention to economic analyses of relevant markets and available market research.
- Requires that heads of agencies submit reports to the Made in America director with respect to the agency's implementation of, and compliance with, Made in America Laws, including waivers, as well as the agency's analysis of spending as a result of waivers issued pursuant to the Trade Agreements Act of 1979, separated by country of origin.
- Requires that the Administrator of General Services submit to the Made in America director recommendations for ensuring that products offered to the general public on federal property are procured in accordance with the EO's Made in America policies. This, for example, implicates products sold by concessionaires on public land.
- Revokes Executive Order 13788 of April 18, 2017 (Buy American and Hire American), which included requirements to propose new rules to protect the interests of US workers in the administration of the immigration system, and reforms to ensure that H-1B visas were awarded to the most-skilled or highest–paid petition beneficiaries. Also revokes Section 5 of Executive Order 13858 of January 31, 2019 (Strengthening Buy-American Preferences for Infrastructure Projects), which amended EO 13788 to include all federal financial assistance instead of federal grants only.
- Revokes Executive Order 13975 of January 14, 2021 (Encouraging Buy American Policies for the United States Postal Service).
- As discussed below, retains the requirements of the prior administration's July 15, 2019 EO 13881, superseding only those portions inconsistent with the new EO.

WAIVER APPROVAL DETAILS

The EO defines "waiver" to mean "an exception from or waiver of Made in America Laws, or the process and conditions used by an agency in granting an exception from or waiver of Made in America Laws." Importantly, this definition presumably includes non-availability determinations routinely made when no offers of domestic end products are received in an ongoing procurement, as such determinations arise, for example, under FAR 25.103 – Exceptions, implementing the Buy American Act – Supplies.

Under the EO, before an agency grants a waiver, the agency now will be required to provide the OMB Made in America director with a description of its proposed waiver and a detailed justification for the use of goods, products, or materials that have not been mined, produced, or manufactured in the United States. Within 15 business days (or shorter period as determined by the director of OMB), the Made in America director will be required to inform the head of the agency in writing either that it has waived its review (presumably permitting the waiver to proceed) or of the result of the review. Interestingly, the EO states that, if the Made in America director finds that issuing the proposed waiver would not be consistent with applicable law or the policy set forth in the EO, and the head of the agency disagrees, the disagreement

"shall be resolved in accordance with procedures that parallel those set forth in section 7 of Executive Order 12866 of September 30, 1993 (Regulatory Planning and Review), with respect to the Director of the Office of Information and Regulatory Affairs ("OIRA") within OMB." That Section 7 provides "[t]o the extent permitted by law, disagreements or conflicts between or among agency heads or between OMB and any agency that cannot be resolved by the Administrator of OIRA shall be resolved by the President, or by the Vice President acting at the request of the President, with the relevant agency head (and, as appropriate, other interested government officials)."

Establishing this highly centralized waiver review process potentially will have very significant impacts on the procurement process, including the speed at which certain procurements can proceed. As indicated above, the definition of "waiver" includes "exceptions" and arguably encompasses routine non-availability determinations regularly performed, under the current system, at the level of the head of the contracting activity, well below the level of agency head. Specifically, under the current FAR implementation of the Buy American Act for supplies, the BAA requirements do not apply with respect to products that are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality. With respect to individual articles, non-availability determinations currently can be made by the head of the contracting activity. FAR 25.103(b)(2). Moreover, no formal written determination is required if the acquisition is conducted through full and open competition and is properly publicized and no offer for a domestic end product is received. FAR 25.103(b)(3).

Waivers also can be justified under the "public interest" exception. These waivers historically have been granted at the level of the agency head. *E.g.*, FAR 25.103(a). Most notably, the Department of Defense supplement to the FAR (DFARS) 225.103(a)(1)(A) includes a public interest waiver finding that it is inconsistent with the public interest to apply the BAA to end products produced in 26 "qualifying countries." The EO provides that "before granting a waiver in the public interest, the relevant granting agency shall assess whether a significant portion of the cost advantage of a foreign-sourced product is the result of the use of dumped steel, iron, or manufactured goods or the use of injuriously subsidized steel, iron, or manufactured goods. The granting agency may consult with the International Trade Administration in making this assessment …"

POTENTIAL FAR BUY AMERICAN ACT CHANGES

The EO requires that the FAR council consider issuing proposed rules within 180 days amending the FAR BAA supply and construction provisions to address the following:

i. replace the "component test" in Part 25 of the FAR that is used to identify domestic end products and domestic construction materials with a test under which domestic content is measured by the value that is added to the product through US-based production or US job-supporting economic activity;

ii. increase the numerical threshold for domestic content requirements for end products and construction materials; and

iii. increase the price preferences for domestic end products and domestic construction materials.

Currently the component test looks only at the cost of components. For example, the Buy American Act supply provisions consider the cost of US-manufactured components, irrespective of the cost and origin of the subcomponents used. The BAA itself does not specify a component

cost test and instead requires only that the product be manufactured in the United States "substantially all from articles, materials, or supplies mined, produced, or manufactured in the United States." This requirement has been implemented, through previous executive orders through the current component cost test. Although not specified in the EO, new value-based systems could potentially include systems that look at the value/level of the component manufacturing work performed in the United States (the current standard does not require that a component be wholly manufactured in the United States) or the value of the subcomponent manufacturing work performed in the United States. Even if the component test is not changed, but the cost percentage is increased, this may make US manufacturers unable to certify their products as domestic end products unless they are able to find additional and potentially more costly US component manufacturers. If the price preferences afforded domestic end products in competition with non-domestic offers is increased, this simply signals the willingness of taxpayers to pay significantly higher prices for domestic end products than for non-domestic end products.

CONSIDERATION OF INFORMATION TECHNOLOGY EXCEPTION

Currently, the preferences afforded domestic end products do not apply to the acquisition of information technology that is a commercial item. The EO requires that the FAR Council review existing constraints on the extension of the requirements in Made in America Laws to information technology that is a commercial item and develop recommendations for lifting these constraints.

THE EO IS INTERESTING FOR TWO THINGS IT DOES NOT DO

First, unlike the August 6, 2020 Essential Medicines EO 13944 issued by the previous administration, the EO does not propose to have the US Trade Representative remove products from trade agreements, including the World Trade Organization Government Procurement Agreement (WTO GPA). These trade agreements promise nondiscriminatory treatment of included foreign products. Removal of the products from the trade agreements would mean that offers of domestic end products again would be preferred under the BAA to the products of other trade agreement signatories. Because, no changes in the trade agreements are directed under the EO, procurements of products covered by the WTO GPA, for example – currently, procurements of supplies valued at more than $182,000 – will be unaffected by changes in implementation of the BAA.

Second, the EO does not appear to revoke those portions of EO 13881, issued in July 2019 by then-President Trump, as implemented by the FAR Council in a final rule issued on January 19, 2021 (the Final Rule), that increase both the BAA domestic content requirement and the BAA price preferences applied to domestic end products as well as domestic construction materials at the expense of products and construction materials deemed non-domestic, and significantly increases the US content requirement for products that are predominantly iron and steel except COTS fasteners. This appears to reflect bipartisan interest in support of US jobs through strengthened government procurement domestic preferences.

PURCHASES OF SUPPLIES UNDER THE FINAL RULE

Until January 19, 2021, under the BAA, as implemented by the FAR, a "domestic end product" was defined as,

"[a]n end product manufactured in the United States, if–(i) [t]he cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components . . . or (ii) [t]he end product is a [commercially available off-the-shelf ("COTS")] item." FAR 25.003. Under the BAA, domestic products competing with non-domestic products were afforded a 6% price preference if offered by a large business and a 12% price preference if offered by a small business. The January 19, 2021 Final Rule made modest changes in the component cost test by increasing the US component percentage to 55% (except for supplies that are predominantly iron or steel for which the percent was changed to 95%), and increased the price preferences to 20% and 30%, respectively.

Importantly, however, except for products made predominantly of iron or steel, the Final Rule did not change the COTS exception which treats supplies that are COTS items manufactured in the United States as domestic end products without regard to the component test. Purchases of these items therefore are unaffected by the increase in the component cost percentages and the benefit from the increased price preferences. These changes affect procurements to which the BAA applies – those above the micro purchases threshold, currently 10,000 (20,000 for purchases in support of the pandemic response), where the preferences are not waived under the TAA to permit adherence to commitments made in trade agreements.

PURCHASES OF CONSTRUCTION UNDER THE FINAL RULE

For construction, the BAA focuses on domestic construction materials – those brought to the construction site by a contractor or subcontractor for incorporation into the building or work and not the components. Prior to January 19, 2021, domestic construction materials were defined as those manufactured in the United States, if - (A) The cost of the components mined, produced, or manufactured in the United States exceeds 50% of the cost of all its components... or (B) The construction material is a COTS item. Under the final rule, except for construction material that consists wholly or predominantly of iron or steel or both, the component test percentage for non-COTS construction materials was increased to 55%.

However, for construction material that consists wholly or predominantly of iron or steel or a combination of both, the material is now considered domestic construction material only if the cost of foreign iron and steel constitutes less than 5% of the cost of all the components used in such construction material (at least 95% US iron and steel). The cost of foreign iron and steel includes the cost of foreign iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the construction material and a good faith estimate of the cost of all foreign iron or steel components excluding COTS fasteners.

Importantly, the Final Rule did not change the COTS exception for construction materials, not predominantly of iron or steel, that are manufactured in the United States. The Final Rule also does not change the COTS exception of fasteners that are predominantly iron or steel. However, the Final Rule removes the COTS exception to construction materials that are predominately iron or steel that are other than fasteners. This means that COTS construction materials predominately of iron or steel that are manufactured in the US only qualify as domestic construction materials if they also satisfy the new 95% iron/steel content test.

Together, these changes, implemented in the Final Rule and not expressly revoked by the Biden EO, potentially could operate to increase purchases of domestic end products. Alternatively, however, the

changes could reduce the number of domestic suppliers because current domestic end products will no longer be characterized as domestic, leading to purchases of non-domestic end products through the non-availability exceptions. Also, at least initially, the changes could increase the cost of government procurements subject to the Act, as efficient global supply chains for products manufactured in the United States are disfavored.

CONTACTS

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