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What Contractors Need to Know About the Biden Administration's "Buy American" Executive Order

By Kristen E. Ittig, Charles A. Blanchard, Lynn Fischer Fox, Howard Sklamberg, Amanda J. Sherwood, and Daniel Wilson*

This article summarizes the major provisions of President Biden's "Buy American" Executive Order, identifies its areas of likely impact, and notes certain open questions the order leaves unresolved.

President Biden signed an Executive Order on January 25, 2021 professing an intent to bolster "Buy American" requirements in federal government procurements (the "Order").[1] While the Order, entitled "Ensuring the Future is Made in All of America by All of America's Workers," makes sweeping policy declarations, its practical impact may be more limited than the title implies. Notably, the Order does not address domestic preference provisions for specific industries that have been of interest, such as pharmaceuticals, and does not impact existing U.S. trade agreement obligations. This article summarizes the major provisions of the Order, identifies its areas of likely impact, and notes certain open questions the Order leaves unresolved.

POLICY

This early administration action targets one of President Biden's campaign promises, to ensure a greater proportion of federal procurement dollars are spent on American-made products. In a speech accompanying his signing of the Order,[2] President Biden criticized agency "waiver" of "Buy American" requirements without "pushback," which has, in his words, allowed companies to

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[1] The Order also revokes or supersedes, in whole or in part, several of the previous administration's domestic preference executive orders, including E.O. 13788 (April 18, 2017, Buy American and Hire American), E.O. 13858 (January 31, 2019, Strengthening Buy-American Preferences for Infrastructure Projects, § 5), E.O. 13881 (July 15, 2019, Maximizing Use of American-Made Goods, Products, and Materials) and E.O. 13975 (January 14, 2021, Encouraging Buy American Policies for the United States Postal Service). E.O. 10582 (December 17, 1954, Prescribing Uniform Procedures for Certain Determinations Under the Buy-America Act) is also superseded.

[2] https://www.youtube.com/watch?v=1WVQiddQ_NA.

utilize "loopholes" to sell foreign-made goods to the U.S. government. The accompanying press release[3] likewise touts the Order's intent to "make Buy American real and close loopholes that allow companies to offshore production and jobs while still qualifying for domestic preferences." These broad pronouncements at first glance seem to herald a sea change in domestic preference law, but as always, the devil is in the details—both in terms of what the Order does and can accomplish under existing law.

WAIVERS

The largest and first substantive section (Section 4) of the Order focuses on "Updating and Centralizing the Made in America Waiver Process." The EO adds an additional level of review to a small subset of procurements and will have a more limited impact than the Administration's public pronouncements have implied.

Procurement rules allow agencies to waive preference for domestic products when certain criteria apply. The Order creates a centralized process for review of such waivers by a newly created "Made in America Director" at the White House Office of Management and Budget ("OMB"). Under the Order, before an agency "grants a waiver" to Made in America Laws, the agency must provide the new 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." The Director of OMB, upon recommendation of the Made in America Director, will either notify the agency that the proposed waiver is consistent with law and policy or not. This determination is not necessarily binding—the Order states that disagreements between the procuring agency and the OMB "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)."

The Order also provides for establishment of a public website "designed to enable manufacturers and other interested parties to easily identify proposed waivers and whether those waivers have been granted." Along with the negative incentives created by the website, the Order promotes further utilization of National Institute of Standards and Technology's Manufacturing Extension Partnership[4] and its tools for identifying American companies—particularly small and minority owned companies—to meet federal procurement needs.

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[3] https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/25/president-biden-to-sign-executive-order-strengthening-buy-american-provisions-ensuring-future-of-america-is-made-in-america-by-all-of-americas-workers/.

[4] https://www.nist.gov/mep.

The most obvious question coming out of this new procedure is what qualifies as a "waiver" invoking this procedure. The Order defines "waiver" as "an exception from or waiver of Made in America Laws, or the procedures and conditions used by an agency in granting an exception from or waiver of Made in America Laws." The Order rather broadly defines "Made in America Laws" to mean "all statutes, regulations, rules, and Executive Orders relating to Federal financial assistance awards or Federal procurement . . . that require, or provide a preference for, the purchase or acquisition of goods, products, or materials produced in the United States. . . ." While the Order does not specify, the three main such laws are typically thought of as the Buy American Act ("BAA"), the Department of Transportation's ("DOT") Buy America requirements, and the Trade Agreements Act ("TAA").[5]

In brief, the Buy American Act requires application of a "price preference" for "domestic end products," or end products "manufactured in the United States," whose cost of components that are mined, produced, or manufactured in the United States exceed 50 percent of the cost all of components.[6] Buy American is a condition placed on federal grants for transportation and certain other infrastructure projects to state and local governments, which generally requires all iron, steel and manufactured products used in the project come from and be processed in the United States.

The Trade Agreements Act "waives" the Buy American Act's domestic preference for procurements above a certain threshold—currently $182,000—and thereby permits procurement of supplies from a long list of countries on an equal basis as U.S. goods, in accordance with the U.S. commitments made in multiple international trade agreements.[7] It is not clear that the Order would contemplate inclusion of the standing TAA waivers in the new review process. Requiring this new procedure for all procurements subject to the TAA would grind the federal procurement process (in which agencies currently simply issue solicitations requiring compliance with the TAA, and offerors certify their products are in fact TAA compliant) to a halt. Furthermore, denying TAA waivers would have the effect of greatly upsetting the United States' many binding and reciprocal trade agreements with other nations.[8]

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[5] While the Order does not specify, it may be that the DFARS 252.225-7008, 7009 and 7012 provisions relating to textiles and specialty metals are also to be considered Made in America Laws.

[6] FAR 25.003.

[7] *See* FAR 25.403.

[8] Notably, a separate section of the Order (Section 12(c)) requires agencies issue biannual reports containing an "analysis of spending as a result of waivers issued pursuant to the Trade

So, when do these new procedures apply? The answer seems to be: to the limited set of circumstances in which either DOT's Buy America requirements apply and are waived, or the Buy American Act applies (i.e., is not waived by the Trade Agreements Act) and yet a procuring agency decides to pursue a foreign item acquisition nonetheless. The various DOT entities have issued a long-standing series of waivers for certain Buy America requirements, which generally apply when equivalent domestic goods are not available or are not cost-efficient. The situations in which an agency may waive the Buy American Act requirements are outlined in FAR 25.103, namely, when doing so is in the public interest, when domestic items are not available, when domestic items are only available at unreasonable cost, when the purchase is for commissary resale, and for information technology that is a commercial item. It is unclear that waivers are widely used by agencies; recent analysis[9] of Buy American waivers by the Government Accountability Office ("GAO") found that "foreign end products accounted for less than 5 percent . . . of federal obligations for products potentially subject to the Buy American Act."[10]

Besides the potentially limited application, it is unclear what impact the waiver review process will have. Notably, the Order does not say that the Made in America Director/OMB Director refusal is binding. What will be the practical result of a finding that a waiver is not proper for a particular procurement? The Order contemplates agencies being able to forego OMB review when time is of the essence or when OMB has waived application of the review, further potentially decreasing the number of procurements even subject to the process. More OMB guidance on these issues will likely be forthcoming once the Made in America Director is appointed.

Agreements Act of 1979, as amended, 19 U.S.C. 2511, separated by country of origin." This imposes a new reporting requirement on agencies—which may prove onerous, as agencies do not typically collect this information—but does not suggest that the USTR's waiver of the BAA under the TAA brings the bulk of government procurement under this new scheme. This reporting requirement is the Order's only reference to trade agreement obligations.

[9] https://www.gao.gov/assets/700/696086.pdf.

[10] The Department of Defense reported that in 2019, the restrictions of the Buy American Act were not applied to $6.7 billion in Department of Defense purchases (out of a total of $381.2 billion) due to inapplicability, waivers, and authorized exceptions. Of that amount, 43 percent was for contract actions for which the restrictions of the Buy American Act are not applicable because are for items manufactured and used outside the United States, 55 percent was for contract actions for which the TAA or other international agreements applied, and two percent was for authorized exceptions to the Buy American Act. *See* https://www.acq.osd.mil/dpap/cpic/ic/docs/Transmittal_Letters_and_FY_2019_RTC_signed_2_Jul_2020.pdf.

ACCOUNTING FOR SOURCES OF COST ADVANTAGE

Section 5 of the Order, which is similar to language from an April 21, 2017 Trump Administration EO,[11] could have interesting implications for companies involved in international trade disputes with the United States. This section provides that before an agency grants a waiver to Made in America Laws as "in the public interest" (the first BAA exception in FAR 25.103(a)), the agency must "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 Order states that the agency "may consult with the International Trade Administration ("ITA") in making this assessment" but does not require such consultation.[12]

This provision could have serious teeth or be largely symbolic, depending on how it is applied. Who determines whether the goods in question were "dumped" or unfairly subsidized? Does such a determination require a final determination from the ITA and the U.S. International Trade Commission under the antidumping and countervailing duty laws? Or, since ITA consultations are not mandatory under the Order, does this give procuring agencies the ability under U.S. law to, on their own, decide that foreign goods' prices are unfairly low or injuriously subsidized? Will GAO have the ability to determine whether procuring agency decisions that foreign items were "dumped" or injuriously subsidized were reasonable? If these determinations are to be made outside of the US trade remedy laws and World Trade Organization ("WTO")-sanctioned trade remedy framework, would the U.S. government be able to square its WTO obligations with Section 5 of the Order?

FAR REVISIONS

Significant government contracting impacts from this Order may result from the FAR revisions it outlines. Within 180 days of the date of the Order (or, by July 24, 2021), the Order requires the FAR Council to "consider" certain FAR amendments, including:

- Replacing the "component test" in FAR Part 25 that asks whether 55 percent of the value of components of an end item were mined, produced, or manufactured in the U.S. "with a test under which domestic content is measured by the value that is added to the product

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[11] https://www.federalregister.gov/documents/2017/04/21/2017-08311/buy-american-and-hire-american.

[12] The International Trade Administration is a subagency within the U.S. Department of Commerce.

through U.S.-based production or U.S. job-supporting economic activity." In his remarks accompanying the signing of the Order, President Biden gave an example of a vehicle to illustrate this new test, explaining that while 55 percent of the costs of non-complicated components may be made in the United States more American jobs would result if the engine were made in the United States. This regulatory change, if implemented, could get complicated fast, and would raise interesting questions of how to quantify the differing impacts on the U.S. workforce of the production of certain components in the United States.

- Increasing "the numerical threshold for domestic content requirements for end products and construction materials." Presumably, this would result in an increase of the aforementioned 55 percent content requirement.
- Increasing "the price preference for domestic end products and domestic construction materials." The price preference is currently 20 percent, 30 percent for small business, and 50 percent for Department of Defense.[13]

UPCOMING CHANGES FOR COMMERCIAL ITEM IT?

Current law currently exempts "information technology that is a commercial item" from the BAA.[14] Therefore, so long as the software meets the definition of a commercial item,[15] no domestic preference requirements will apply to procurements under the TAA threshold. Section 10 of the Order directs the FAR Council to "promptly review existing constraints on the extension of the requirements in Made in America Laws to information technology that is a commercial item" and to "develop recommendations for lifting these constraints." This could signal the end of this BAA exception.[16]

IMPACT ON PHARMACEUTICAL INDUSTRY

The need to expand domestic pharmaceutical production, which focuses on national security, product quality, the potential for shortages of critical

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[13] FAR 25.105(b); DFARS 225.105.

[14] FAR 25.103(e).

[15] *See* FAR 2.101.

[16] There is no explicit exception or provision addressing the country of origin of software under the TAA, as there is under the BAA. Customs and Border Protection ("CBP") decisions have found that the location of the software build is the country of origin for TAA purposes. *See, e.g.*, 84 Fed. Reg. 40427 (Aug. 14, 2019). It is unclear whether the FAR Council will also address this test.

products, and the loss of domestic manufacturing jobs, is an administration priority that remains largely unaddressed by this Executive Order.

As a candidate, President Biden issued a proposal to enhance domestic drug manufacturing, which included domestic manufacturing requirements for federal procurement contracts.[17] Interest in this issue is bipartisan, and members of the House and Senate have introduced legislation to use federal procurement authority to increase domestic pharmaceutical manufacturing. In August 2020, President Trump issued an Executive Order[18] requiring agencies to purchase certain essential medical products from U.S. sources.

President Biden's Executive Order did not repeal the Trump Executive Order or take any pharmaceutical-specific steps requiring that federal agencies purchase drugs from domestic sources. However, changes to foreign access to U.S. pharmaceutical and medical supply procurement could still be in the making. In November 2020, the Trump Administration filed documents with the WTO Committee on Government Procurement proposing modifications to U.S. federal government procurement commitments to signatories to the WTO Government Procurement Agreement. The details of the proposed modifications are confidential and it is unclear at this point if the Biden Administration intends to follow through any proposed changes. However, given President Biden's interest, and the bipartisan congressional interest supporting domestic drug manufacturing, we expect that the Administration will take further measures in the future.

REPORTING

The Order requires a good deal of reporting from agencies, including reports within 180 days to the Made in America Director on implementation of, and compliance with, Made in America Laws, use of waivers, and recommendations for further action. Thereafter, bi-annual agency reports on Made in America Laws are required, including an analysis of spending as a result of waivers issued pursuant to the Trade Agreements Act, separated by country of origin. To the extent that country of origin information is not collected for all current procurements, contractors should anticipate additional data calls from their contracting partners.

TAKEAWAY

If the Executive Order lacks practical impact for the vast majority of federal procurements, it is because any larger impact would require derogation or at

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[17] *See* The Biden Plan to Rebuild U.S. Supply Chains and Ensure the U.S. Does Not Face Future Shortages of Critical Equipment, https://joebiden.com/supplychains/.

[18] https://www.federalregister.gov/documents/2020/08/14/2020-18012/combating-public-health-emergencies-and-strengthening-national-security-by-ensuring-essential.

least amendment of the United States' many trade agreements. While keeping those agreements—and the TAA—in place, the Biden Administration's options for expanding domestic preference law are necessarily limited for the time being. This Order strengthens protections where it can—under the TAA threshold, and where the BAA applies for other reasons.[19] Contractors should pay close attention both to the announcement of the Made in America Director (and any accompanying guidance this individual may release) and to the FAR Council's proposed updates to the BAA's applicable tests.

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[19] *See* FAR 25.401 (acquisitions exempted from the TAA).