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New 'Buy American' Rules May Be On The Horizon

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Law360, New York (September 24, 2014, 9:39 AM ET) -- The existing web of domestic preference requirements in U.S. procurement law creates a complex compliance challenge for contractors and subcontractors who must comply with varying federal, state and international requirements. Congress and various state legislatures have become increasingly active in crafting additional proposed domestic preferences, or laws mandating the use of U.S.-made content for government contracts. Although some U.S. manufacturers support these efforts, others believe that protectionist policies could decrease international government procurement opportunities for U.S. companies and could hinder current international negotiations on free trade agreements that include public procurement provisions.

Companies that intend to submit bids for government procurement projects in the United States must keep in mind these constantly changing domestic preference provisions, particularly if any inputs or portions of the procurement will be sourced from outside the United States. Foreign companies that provide parts or components to companies bidding on government procurement projects in the United States should also be aware of any applicable Buy American provisions and the exceptions to those provisions — which may not be fully understood by primary bidders (or by the federal, state or local government agency conducting the procurement). In certain instances, incorrect assurances regarding country of origin may result in improper certifications of compliance with various domestic preference requirements, leading to, among other things, potential liability under the federal Civil False Claims Act, or under similar state or local fraud provisions.

Domestic Preferences in Current Law

The most well-known domestic preference legislation in the United States is the Buy American Act. Enacted in 1933, this law restricts, for government procurement projects, the use or acquisition of end products or construction materials that are not classified as “domestic.” Domestic goods receive a price preference in procurement decisions, effectively allowing qualified domestic goods to be 6-12 percent more expensive in civilian agency bid evaluations, or 50 percent more expensive in U.S. Department of Defense procurements.

Domestic preferences also exist in several other statutory schemes, including, for example, the American Recovery and Reinvestment Act of 2009.[1] That legislation, popularly known as the Recovery Act, provided that, with certain exceptions, none of its funds were to be used “for the construction, alteration, maintenance, or repair of a public building or work unless all iron, steel, and manufactured goods used were produced in the United States.”[2] Even though there are a dwindling number of stimulus-funded projects, this provision will continue to have an effect on those remaining procurements. Further, this provision continues to be enforced: In May 2014, a federal contractor was fined $500,000 for installing at a project supported with Recovery Act funds, a tank with steel components manufactured in France.[3]

Many domestic preferences are in effect waived for numerous countries because of the United States’ obligations under international trade agreements, most importantly the World Trade Organization’s

Agreement on Government Procurement (GPA). These international obligations barring discrimination against non-U.S. products generally bind much of the federal government but not all state or local ("subcentral") entities. Each U.S. state had the option to have some or all of its procurement activities covered by the GPA provisions. Not all joined the GPA, and, as is discussed below, it is not clear that even the limited state commitments are legally enforceable under federal law.

Separately, U.S. Department of Transportation agencies, including the Federal Highway Administration and Federal Aviation Administration, are subject to strict domestic content requirements, particularly relating to iron, steel and manufactured goods to be used in transportation-related projects (i.e., airports, highways, bridges, railroads, etc.). This framework creates a patchwork of government entities that in some instances are required to implement domestic preferences and in other instances are forbidden to do so under U.S. law.

Recent Federal Legislation Containing Domestic Preferences

Despite existing "national treatment" obligations under the GPA and other international trade agreements, legislation mandating the use of domestic preferences in government procurement is periodically introduced in Congress. The majority of the bills are never enacted, but this year is proving more interesting. At least one recently enacted bill requires imposition of domestic preferences, and several other pieces of legislation are receiving serious consideration.

The Water Resources Reform and Development Act became law on June 10, 2014.[4] It revises federal law dealing with environmental, navigational and other aspects of water resources. Two of its provisions impose new domestic preferences. First, for waste water projects authorized under the Federal Water Pollution Control Act, the new legislation limits the availability of subsidized loans to only those projects that use U.S.-produced iron and steel. Second, the legislation makes funding for its new pilot program for public-private partnership water infrastructure projects contingent on the use of U.S.-produced iron and steel.

These requirements are subject to three exceptions: They do not apply if applying the requirement is not in the public interest, if sufficient quantities of American-made steel and iron are not available, or if the requirement would raise the cost of the project by more than 25 percent. These programs contain an explicit provision that the domestic content requirement will be applied consistently with the United States' international agreements, but much of the procurement under these programs will be done by state and local governments that may not be bound by these agreements.

In a similar vein, the Grow America Act,[5] which was proposed in June 2014 in order to reauthorize federal transportation funding and programs, would change important domestic preference thresholds required for transportation-related projects. For example, it would increase the required American-made content in "rolling stock" such as rail cars, as well as train control, communication and traction power equipment, from 60 percent to 100 percent by 2019. It also contains a novel requirement that rolling stock procurement proposals include a plan to increase the domestic content of the rolling stock over the course of the contract.

Furthermore, several appropriations bills for 2015 contain one or more domestic preference provisions that, if enacted, would add yet more layers of requirements on public procurements. Significantly, the Commerce, Justice and Science-Related Agencies Appropriations Bill as passed by the House of Representatives provides that "None of the funds made available by this Act may be used to negotiate

an agreement that includes a waiver of the 'Buy American Act.'"[6] This provision, if included in the final version of the bill as enacted, could undermine ongoing international trade negotiations because of international pressure on the U.S. to further open its procurement markets as part of the agreements.

Recent State Legislation Containing Domestic Preferences

Many states have their own "Buy American" legislation that governs state level procurements, and, similar to the national trend, recent months have seen an uptick in proposals imposing even more restrictive domestic preferences. In May 2014, Minnesota passed a $1 billion capital investment act that requires the use of U.S.-made steel for any facility receiving an appropriation under the act.[7] Some states have narrower proposals. For example, in Illinois, an act that would require state agencies to purchase only cars assembled in the United States passed the state house of representatives in April.[8]

Both New Jersey and New York have sweeping new domestic preference legislation pending. The New Jersey bill would require all state contractors to use exclusively products manufactured in the United States unless such products are not available in sufficient quantities or are available only at unreasonable cost, a change from the current law that imposes this requirement on only some public contracts.[9] The New York State Buy American Act, if enacted, would require the use of U.S.-made iron, steel and manufactured goods in a wide range of procurement activities, subject to certain exceptions and so long as doing so is consistent with the U.S.'s international obligations, insofar as they are applicable.[10]

Many of the states that have recently proposed domestic preference legislation are also covered by the GPA, and so have pledged not to discriminate against vendors from other member countries.[11] However, this fact does not provide foreign companies blocked from state procurement any recourse in U.S. courts, because under U.S. law, only the federal government may bring states to court for failure to comply with an Uruguay Round agreement, such as the GPA.[12] Given the proliferation of domestic preferences in federal and state legislation, aggrieved parties may fairly question whether the federal government would ever bring such an enforcement action.

International Developments

The international regulation of domestic preferences is also in flux. The revised GPA, adopted in March 2012, entered into force on April 16, 2014.[13] It modernized the agreement, last updated in 1994, to take into account electronic procurement and expanded its scope by adding new government agencies and types of services to its coverage. The United States obligated more than ten additional federal entities to the GPA, including the Social Security Administration, the Millennium Challenge Corporation, the Federal Energy Regulatory Commission, and the Transportation Security Administration (except for purchases of textiles and apparel). While other GPA members expanded the coverage of subfederal entities and of new types of procurement activity, the U.S. maintained its prior level of coverage in these areas.

The Transatlantic Trade and Investment Partnership and Trans-Pacific Partnership negotiations are still ongoing, but further progress on both could be severely hindered by recent U.S. legislation. The E.U. has indicated that opening subfederal U.S. markets is one of its priorities in any TTIP agreement, something the U.S. has thus far been hesitant to do.[14]

Further, opening international procurement markets generally is one of the U.S.'s stated objectives in the TPP negotiations. The recent upsurge of legislation imposing domestic preferences could therefore be seen as a popular backlash against these possibilities, a development that should concern anyone anticipating the conclusion of these agreements in the near future.

Notably, should the Commerce, Justice and Science-Related Agencies Appropriations Bill pass the Senate unchanged, as described above, the United States might be unable to negotiate waivers of the Buy American Act, which could frustrate hopes for significant progress in both TTIP and TPP. However, many find the prospect of an appropriations bill being passed before the November 2014 elections unlikely.

Conclusion

Recent developments on both the federal and state levels, combined with the potential for future TTIP and TPP agreements, show that the landscape of U.S. domestic preferences may be undergoing a significant change. Moreover, given that many of the proposed "Buy American" bills would continue to shift more burdens to prime government contractors to verify where their materials are sourced, contractors and their suppliers should carefully monitor the growing complexities in this already confusing area of law to ensure compliance with federal and state rules.[15]

[1] Public Law No. 111-5. See also Lawrence Schneider and Kristen Ittig, "Addressing the 'Buy American' Provisions in the Recovery Act," Arnold & Porter Advisory (March 2009), available here. While this advisory focuses on "buy American" requirements, another example of Congress using legislation to restrict foreign involvement in U.S. government acquisitions is the anti-Chinese IT language passed as part of the FY 2013 Continuing Appropriations Act. For more information, see Lawrence Schneider and Paul Howard, "Procurement and International Law Uncertainties Abound in Anti-Chinese IT Legislation," Arnold & Porter Advisory (May 2013), available here.

[2] See Conference Report to Accompany H.R. 1, H. Rep. No. 111-16, at 190, 111th Cong., 1st Sess. (Feb. 12, 2009).

[3] See "Jett Industries Pays $500,000 to Settle Civil Fraud Allegations," Department of Justice Press Release (May 28, 2014), available here.

[4] H.R. 3080, 113th Cong. (2014) (enacted).

[5] H.R. 4834, 113th Cong. (2014).

[6] H.R. 4660, 113th Cong. § 551 (2014).

[7] H.F. 2490, 88th Leg. (Minn. 2014).

[8] H.B. 3861, 98th Gen. Assemb., Reg. Sess. (Ill. 2014).

[9] S. 1811, 216th Leg., Reg. Sess. (N.J. 2014).

[10] S. 7206, 2013-2014 Leg., Reg. Sess. (N.Y. 2014).

[11] For a list of states covered by the GPA, see Schneider and Ittig, "Addressing the 'Buy American' Provisions in the Recovery Act," supra note 1, at 4, available here.

[12] 19 U.S.C. § 3512(b)(2)(A) (Supp. V 2011).

[13] Available here.

[14] See generally Christopher R. Yukins & Hans-Joachim Priess, "Breaking the Impasse in the Transatlantic Trade and Investment Partnership (TTIP) Negotiations: Rethinking Priorities in Procurement," The Government Contractor, Vol. 56, No. 27 (July 23, 2014).

[15] For another area of law that also demonstrates this trend, see Craig Holman, Evelina Norwinski, and Dana Peterson, "DOD Anti-Counterfeit Rule Requires Immediate Action," Law360 (May 19, 2014), available here.

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