

Trump's 'Buy American' Order Already Packs A Punch

By **Howard Roth**

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On Dec. 29, 2016, President Donald Trump tweeted: “My administration will have two simple rules BUY AMERICAN HIRE AMERICAN.” These rules were repeated in both his inaugural address and his address to Congress. On April 17, 2017, the president’s “Buy American and Hire American” executive order was issued and the final EO report by the secretary of commerce was due at the White House by Nov. 24, 2017. It is not known at this time when the report will be made public but it is expected to include “specific recommendations to strengthen implementation of Buy American Laws, including domestic procurement preference policies and programs” with input from Secretary of State Rex Tillerson, Office of Budget and Management Director Mick Mulvaney and U.S. Trade Representative Robert Lighthizer.



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The EO report is already in the foreground of the debate on legislative and regulatory actions, as well as changes in trade agreements. It is changing the landscape of domestic content rules or “Buy American Laws” for many organizations with increased scrutiny over compliance, increased enforcement, and fewer exceptions/waivers.

Yet, when a company is asked to certify to its customers that its products comply with domestic content law, the answer is rarely straightforward. Companies should therefore be proactive and review the Buy America and the Buy American Acts, the Buy American Laws and rules as well as the Trump administration’s coming actions under the EO. The penalties for noncompliance are serious and include civil or criminal False Claims Act violations, suspension or debarment, contract terminations and other claims against a contractor by the government.

Buy America Act

The Buy America Act is the popular name for a group of domestic content restrictions that attach to specific funds administered by the U.S. Department of Transportation. The “Buy America” provision of the Surface Transportation Assistance Act of 1982, 23 U.S.C. § 313, states that the secretary of transportation “shall not obligate any funds authorized to be appropriated to carry out the Surface Transportation Assistance Act ... unless steel, iron, and manufactured products used in such project are produced in the United States.” These funds are used to make grants to states and other nonfederal government entities for various transportation purposes.

There are Buy America Act regulations with different standards for the Federal Highway Administration, Federal Transit Authority and other DOT agencies. Simply because a product is manufactured in the United States or meets the requirements of one domestic content rule does not mean it meets the requirements of another agency's Buy America Act provisions.

Nationwide waivers of the Buy America Act exist for narrow areas (e.g., ferryboat construction). Waivers for specific contracts are also available, such as under the FHWA's Buy America regulations, but are rarely granted due to the high standards required for a waiver.

Buy American Act

Separate and distinct from the Buy America Act is the Buy American Act, passed by Congress in 1933 (and implemented by Federal Acquisition Regulation part 25). Unlike the Buy America Act, the Buy American Act only applies to "federal" procurement. It does not apply to DOT funded state/local projects because, while the source of the money for those projects is federal, such purchases are not made directly by the federal government. The Buy American Act prohibits the government from acquiring an article, material or supply for public use within the United States that is not a domestic end product, and allows only domestic construction materials to be used for public use subject to certain exceptions. The U.S. Department of Defense has created exceptions to the act by negotiating memorandum of understandings with foreign governments.

Importantly, the Buy American Act does not apply to products covered by the Trade Agreements Act, the North American Free Trade Agreement, or other free trade agreements. The Buy America Act, in contrast, has no waivers for countries that have a trade agreement with the United States.

As a part of the EO assessment process of addressing "Buy American Laws," a June 30, 2017, Department of Commerce/Office of Management and Budget memo titled "Assessment and Enforcement of Domestic Preferences in Accordance with Buy American Laws" stated that there are an "estimated 2,000 different Federal assistance authorizing statutes that require careful analysis to determine whether domestic sourcing requirements may be imposed." For instance, the Berry Amendment requires the DOD to give preference in procurement to domestically produced, manufactured, or home grown products, notably food, clothing, fabrics, and specialty metals

Supply Chain EO and Assessment of Trade Agreements

On July 17, 2017, President Trump issued another EO, "Assessing and Strengthening the Manufacturing and Defense Industrial Base and Supply Chain Resiliency of the United States." This EO goes to improving the American industrial base, a necessary requirement when foreign supplies are taken out of the supply chain. This executive order has importance to the "Buy American" EO and the EO sets forth that "manufacturing capacity and defense industrial base have been weakened by the loss of factories and manufacturing jobs." The Buy American Act in 1933 never envisioned the kinds of supply chains we have in place today. It was like a piece of solid cheese then, and now it's like Swiss cheese with a lot of holes in it.

Under the "Buy American" EO the secretary of commerce and U.S. Trade Representative also assessed the impact of free trade agreements and WTO Agreement of Government Procurement on Buy American Laws and requested comments from industry. Comments were received by Sept. 18, 2017. A total of 47 comments were received, such as "Buy American Hemp, not Chinese or Canadian."

States and Contractors Impacted by EO

Based on the "Buy American" EO, the heightened scrutiny of "Buy American Laws" is having a measurable impact on both businesses and state governments.

In Alaska, the Department of Transportation is seeking to replace the more than 50-year-old ocean-going vessel, the M/V TUSTUMENA. The Juneau Empire reported in August 2017 that according to the Alaska Department of Transportation Commissioner Marc Luiken "Right now, based on the current administration's stance ... they have not given one Buy American Act waiver. That's the challenge in front of us." The Federal Highway Administration has long had a blanket waiver of the Buy America Act for certain ferry construction components, but determining whether an item falls on the list is no easy task.

The Alaska Marine Highway System was set to replace that ferry with a reported grant from the U.S. government paying 90 percent of the cost, thus making the replacement of that vessel subject to Buy America requirements. The AMHS can only overcome the law by requesting a waiver from the administrator of the Federal Highway Administration. According to press reports in the Juneau Empire, "building the new TUSTUMENA is estimated right now to require 75 waivers — and that figure is down tremendously from the 1,250 waivers that were originally planned." Yet, due to the heightened scrutiny and enforcement brought about by the EO, the AMHS is having no luck getting any waivers. The M/V TUSTUMENA replacement project is therefore dead in the water. ...for now.

DOD Highlights Buy American Law Fraud and Noncompliance

Since the EO was issued, the DOD has also highlighted enforcement of Buy American Laws. On June 20, 2017, the DOD director of defense procurement and acquisition policy wrote concerning improving compliance with Buy American Laws that "recent fraud convictions highlight the need for the defense acquisition workforce to be vigilant in its oversight and enforcement strategies. Then on July 7, 2017, the DOD inspector general issued a report that the Defense Logistics Agency did "not consistently comply with" both the Berry Amendment and the Buy America Act. The report set forth that 19 out of 34 contracts assessed did not comply with the Berry amendment and 12 of 56 contracts did not comply with the Buy American Act. By Sept. 15 the DOD submitted its assessment and findings on Buy American law enforcement to Commerce for the required November EO report to the president.

Legislative Impact

This fall Senate Democrats have also looked to strengthen Buy American Laws since the EO was issued by the president. In an Oct. 20 letter, 16 Democrats reiterated efforts to delete Section 863 from the 2018 National Defense Authorization Act, which remained when the act was subsequently passed by the Senate. That provision would eliminate protections for selected materials in the DOD procurements. On Nov. 1, 2017, Rep. Mark Pocan, D-Wis., led a bipartisan group of 35 members of the House of Representatives in writing conferees of the fiscal year 2018 NDAA to protect "Buy American Laws." Specifically, the letter called for rejection of Section 863 of the Senate NDAA counterpart. The congressional letter quoted the Trump statement of administrative policy that also objects to Section 863 of the Senate NDAA.

In sum, the "Buy American, Hire American" final report to the White House can be expected to result in action by President Trump in the new year on this signature issue of his presidency. Businesses,

especially contractors would do well to pay close attention to any compliance with American product preferences in their contracts. Contractors would be wise to be up to date on Buy American Law requirements on existing contracts and recognize the significance of these requirements going forward based on the results of the EO. Exceptions and waivers will be harder to obtain. In order to not run afoul of civil and criminal penalties, the best advice to contractors is to do a review of their compliance programs now.

Howard Roth is of counsel in the Seattle office of Oles Morrison Rinker & Baker LLP.

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