

Client Alert

International Trade & Litigation Practice Group

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President Trump Issues “Buy American and Hire American” Executive Order With Significant Federal Procurement Implications

On April 18, 2017, President Donald Trump signed another executive order with potentially significant implications for international trade and U.S. manufacturers. Building on his previous executive orders addressing infrastructure, trade enforcement, and trade deficits, President Trump’s new Executive Order addresses the Administration’s Buy American and Hire American policy (the “Buy American and Hire American Executive Order”).

President Trump discussed and signed the Executive Order at Snap-On Tools in Kenosha, Wisconsin. In his remarks, President Trump announced that “[w]ith this action, we are sending a powerful signal to the world: We’re going to defend our workers, protect our jobs, and finally put America first.” This Client Alert focuses on the Federal procurement-related aspects of the Buy American and Hire American Executive Order.

The Buy American and Hire American Executive Order is designed “to promote economic and national security and to help stimulate economic growth, create good jobs at decent wages, strengthen our middle class, and support the American manufacturing and defense industrial bases” through an executive branch policy “to maximize, consistent with law, through terms and conditions of Federal financial assistance awards and Federal procurements, the use of goods, products, and materials produced in the United States.” The Executive Order further defines “produced in the United States” with respect to “iron and steel products” to require that “all manufacturing processes, from the initial melting stage through the application of coatings, occurred in the United States.”

The Executive Order defines “Buy American Laws” as “all statutes, regulations, rules, and Executive Orders relating to Federal procurement or Federal grants including those that refer to “Buy America” or “Buy American” that require, or provide a preference for, the purchase or acquisition of goods, products or materials produced in the United States, including iron, steel, and manufactured goods.”

This broad language, therefore, encapsulates a number of Federal government procurement laws, including the Buy American Act of 1933 (41 U.S.C. § 8301 *et seq.*), the Trade Agreements Act of 1979 (19 U.S.C. §

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2501 *et seq.*), the Buy America Act (49 U.S.C. § 5323j), numerous U.S. Department of Transportation-specific Buy America Act provisions, and the U.S. Environmental Protection Agency American Iron & Steel Requirement for Clean Water State Revolving Fund projects (33 U.S.C. § 1338), Drinking Water State Revolving Fund projects (42 U.S.C. 300j-12(a)), and financing under the Water Infrastructure Finance and Innovation Act of 2014 (33 U.S.C. § 3914). The Executive Order also would appear to extend to Department of Defense-related domestic preference laws, such as the Berry Amendment (10 U.S.C. § 2533a). By specifically including Buy America (without the “n”) provisions, the Executive Order clearly requires that iron and steel melt requirements also be evaluated and enforced as part of the actions arising from this new Administration policy.

AGENCY-BY-AGENCY ASSESSMENTS OF DOMESTIC PREFERENCES ACCORDING TO BUY AMERICAN LAWS

The Buy American and Hire American Executive Order requires comprehensive action by a variety of executive departments and Federal agencies in the coming months. The Executive Order instructs “the heads of all agencies” to submit findings to the Secretary of Commerce and the Director of the Office of Management and Budget (“OMB”). Although the agencies will be provided with further guidance by the Secretary of Commerce and the OMB Director regarding this process within the next 60 days, the Executive Order instructs generally that the required agency findings must:

- assess the monitoring of, enforcement of, implementation of, and compliance with Buy American laws within their agencies;
- assess the use of waivers of Buy American requirements by the agency (presumptively with an eye to minimizing the use of such waivers) and assess the impact of waivers on domestic jobs and manufacturing; and
- develop and propose policies to ensure that “Federal financial assistance awards and Federal procurements maximize the use of materials produced in the United States, including manufactured products; components of manufactured products; and materials such as steel, iron, aluminum, and cement.”

The agency reports must be submitted to the Secretary of Commerce and the OMB Director within 150 days (or by September 15, 2017). Going forward, similar reports must be filed by agencies on November 15 of each year during 2018-2020, and in subsequent years, as directed. The Secretary of Commerce and the OMB Director will use those submissions to prepare an annual report for the President, starting January 15, 2019.

COMMERCE/OMB RECOMMENDATIONS TO STRENGTHEN IMPLEMENTATION OF BUY AMERICAN LAWS

The Buy American and Hire American Executive Order requires the Secretary of Commerce and the OMB Director to prepare a report for the President with “specific recommendations to strengthen implementation of Buy American Laws, including domestic procurement preference policies and programs.” The report must be submitted within 220 days (or by November 24, 2017).

This report will provide the President with information regarding the findings from the agency-by-agency assessments. Although the Executive Order itself does not affect “existing rights or obligations under international agreements”, the Secretary of Commerce and the OMB Director’s report also must “assess the impacts of all United States free trade agreements and the World Trade Organization Agreement on Government Procurement on the operation of Buy American Laws, including their impacts on the implementation of domestic procurement

preferences.” As President Trump explained in Wisconsin, “[e]veryone in my administration will be expected to enforce every last Buy American provision on behalf of the American worker, and we are going to investigate every single trade deal that undermines these provisions.”

ADDITIONAL INSTRUCTIONS TO AGENCIES REGARDING “JUDICIOUS USE OF WAIVERS”

The Buy American and Hire American Executive Order also instructs that “public interest waivers from Buy American Laws should be construed to ensure the maximum utilization of goods, products, and materials produced in the United States.” Generally speaking, public interest waivers of Buy America Laws are distinct from waivers that may be provided for under applicable Federal law in cases where the products at issue are not produced in the United States in sufficient or reasonably available quantities, or where inclusion of domestically produced goods would increase the cost of the overall project by more than 25 percent. It is possible (and perhaps likely), however, that proposed modifications to availability and cost waivers could be included in the recommendations that the Secretary of Commerce and the OMB Director will make to the President this November, as discussed above.

Finally, the Executive Order instructs that public interest waiver determinations should “be made by the head of the agency with the authority over the Federal financial assistance award of Federal procurement under consideration.” This instruction appears to be designed to end the practice of waiver determinations being made by agency personnel instead of the agency head. The Executive Order also modifies the public interest waiver process by requiring that “before granting a public interest waiver, the relevant agency shall take appropriate account of 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, and it shall integrate any findings into its waiver determination as appropriate.” This is consistent with President Trump’s statement that “for the first time ever, we are going to crack down on foreign bidders that used dumped steel and other subsidized goods to take contracts from” American manufacturers.

In sum, yesterday’s Buy American and Hire American Executive Order emphasizes enhanced monitoring, enforcement, and compliance with existing Buy American Laws. While details concerning implementation still must be finalized in the reports required under the Executive Order, the Administration intends to place additional focus on Federal procurement obligations, which has the possibility of creating opportunities for U.S. manufacturers in the years to come.

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