

Client Alert

International Trade & Litigation Practice Group

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“Buy American And Hire American” Update *Comments solicited for consideration in report to President Trump*

On August 21, 2017, the U.S. Department of Commerce (“Commerce”) and the Office of the United States Trade Representative (“USTR”) published a Federal Register notice requesting comments on the costs and benefits to U.S. industry of U.S. international government procurement obligations. This information gathering process is being conducted pursuant to Section 3(e) of the Presidential Executive Order on Buy American and Hire American (“Buy American and Hire American Executive Order”). Our prior analysis of the Executive Order is available here.

Written comments must be filed by 11:59 p.m. on Monday, September 18, 2017. This deadline overlaps with, and extends beyond, the September 15 due date for an initial assessment by Commerce and USTR of “the impacts of all United States free trade agreements and the World Trade Organization (“WTO”) Agreement on Government Procurement (“GPA”) on the operation of Buy American Laws, including their impacts on the implementation of domestic procurement preferences.” Thus, comments that are filed before September 15 are more likely to have an impact on the initial assessment. Comments filed by the September 18 deadline will be considered by the agencies in advance of the transmission of a final report to President Trump by November 24, 2017. Any submissions containing business confidential information may be exempted from public disclosure.

As we reported previously, 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.”

Focus On U.S. And Foreign Government Procurement Markets

Commerce and USTR “are conducting industry outreach in order to better understand how the U.S. government procurement obligations under all U.S. free trade agreements and the GPA affect U.S. manufacturers’ and suppliers’ access to and participation in the domestic government procurement process.”

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Commerce and USTR also recognize that “reciprocal access to trading partners’ markets is an important motivation for including government procurement obligations in U.S. free trade agreements and for the United States’ membership in the GPA.” As a result, the agencies seek comments and information on both domestic and foreign government procurement markets to inform the analysis that will be contained in the final report to President Trump later this year.

List Of Countries For Which “Reciprocal Access” Information Is Being Sought

The Federal Register notice seeks “information about the costs and benefits of” government procurement obligations imposed on “U.S. manufacturers and suppliers in U.S. trading partners’ government procurement markets.” The countries with which the United States has international government procurement obligations include: Armenia, Aruba, Australia, Bahrain, Canada, Chile, Chinese Taipei (Taiwan), Colombia, Costa Rica, Dominican Republic, El Salvador, the European Union (which includes Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxemburg, Malta, the Netherlands, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden, and the United Kingdom), Guatemala, Honduras, Hong Kong, Iceland, Israel, Japan, the Republic of Korea, Liechtenstein, Mexico, the Republic of Moldova, Montenegro, Morocco, New Zealand, Nicaragua, Norway, Oman, Panama, Peru, Singapore, Switzerland, and Ukraine.

Specific Questions Posed By Commerce And USTR

In order to facilitate the information gathering process, Commerce and USTR pose nine questions to be addressed by commenting parties as appropriate in connection with participation in U.S. federal and/or foreign government procurement markets:

1. What is your company’s experience with respect to U.S. federal and/or foreign government procurement, either as a prime contractor or a subcontractor (with an emphasis on the past 5 years)?
2. How have your company’s decisions to bid on or supply U.S. federal contracts been affected by U.S. free trade agreements and the WTO GPA which allow equal participation by companies from U.S. trading partners?
3. Please describe in a few sentences your company’s experience as a prime or subcontractor in bidding on national government procurements in countries with which the U.S. has a trade agreement with government procurement obligations (*see* the list of countries identified above)? How does this differ from your experience for competing for bids in markets in countries with which the U.S. does not have a trade agreement with government procurement obligations?
4. What is the average U.S. content of goods that your company supplies to the U.S. federal government?
5. What is the average U.S. content of goods that your company supplies to foreign governments?
6. What are the three principal barriers to having 100% domestic content in the goods that you produce for U.S. federal or foreign governments?
7. How do trade agreements with government procurement obligations affect strategic decisions your company makes about production and supply chains for government as well as commercial (private sector) customers?

8. What are your company's experiences with conflict between Buy American or similar foreign requirements and U.S. free trade agreement or WTO GPA requirements, including whether and how the conflict was resolved?
9. How have Buy American or similar foreign requirements affected positively or negatively your company's ability to bid and/or win contracts for U.S. or foreign government procurement?

Additional Guidance Regarding Comments

Commerce and USTR ask commenters to address, as appropriate, several topics relating to the impact of U.S. federal and/or foreign government procurement markets, including:

- Business opportunities that are made available;
- Economic incentives that trade agreements and Buy American Laws provide;
- How trade agreements impact business competitiveness, or increase or decrease competition, in government procurement opportunities;
- How trade agreements affect companies' (prime contractors') supply chain and sourcing decisions for goods;
- How Buy American or similar foreign requirements increase or decrease companies' (prime contractors') competitiveness in government procurement opportunities;
- Administrative compliance costs tied to Buy American and similar government procurement policies; and
- Additional costs relating to providing or otherwise proving the country of origin of goods provided.

In sum, the Buy American and Hire American Executive Order requires the Secretary of Commerce to submit a report to President Trump by November 24, 2017, which includes "specific recommendations to strengthen implementation of Buy American Laws, including domestic procurement preference policies and programs." Commerce's and USTR's request for comment on the costs and benefits to U.S. industry of U.S. international government procurement obligations presents an important opportunity for interested parties to ensure that their positions are fully considered in the report.

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