

# Biden issues wide-ranging Buy American executive order – FAR rulemaking to come

27 January 2021

On 25 January 2021, President Biden issued his first Buy American executive order (EO), titled *Ensuring the Future Is Made in All of America by All of America's Workers*, which is meant to implement the “Made in All of America” plan that was central to his campaign. With the stated intent of the EO being to strengthen American industry through changes to federal contract law to more strongly favor domestic products, the EO directs rulemaking and other action to increase domestic content requirements, limit waivers of domestic purchase restrictions, and encourage accountability and transparency.

**Impact on Trump Buy American initiatives:** Not surprisingly, given the change in administrations, the EO rolls back a number of Buy American executive orders that were issued by the Trump administration. It does not, however, specifically address the Trump administration’s *final rule* issued on January 19, 2021, which imposed certain changes to domestic content requirements (increasing domestic content requirements from 50 percent to 55 percent for end products, excluding iron and steel products, which would require 95 percent U.S. content). However, given that the Biden administration has applied a temporary freeze on all regulations of the outgoing administration that have not yet gone into effect, it is not clear whether or when the Trump final rule will go into effect.

**Federal Acquisition Regulation (FAR) rulemaking:** Importantly, the EO directs the FAR Council to engage in rulemaking to revise the FAR to effectuate administration policy, *which should provide industry an opportunity to comment and help shape the new Buy American approach.*

## **Key initiatives laid out in the EO:**

- **Directs the FAR Council to revise the Buy American rules setting forth domestic content requirements and price preferences.** The EO provides that within 180 days of the order, the FAR Council shall consider proposing amendments to the FAR that would: (1) replace the “component test” currently used to identify domestic end products and construction materials with a test under which domestic content is measured by the value that is added to the product through U.S.-based production or U.S. job-supporting economic activity; (2) increase the numerical threshold for domestic content requirements for end products and construction materials; and (3) increase the price preferences for domestic end products and construction materials. *See Sec. 8(a).*

Importantly, the order does not specify how to calculate such value, nor does it propose a specific target for the domestic content threshold or price preference; presumably, this is one area where industry input will be critical. *See* Sec. 8(b).

- **Instructs the FAR Council to reconsider the Buy American exception applicable to information technology (IT) commercial items.** The EO instructs the FAR Council to review and develop recommendations regarding revision or potentially revocation of the current FAR exception to Buy American rules for commercial IT. *See* Sec. 10. Currently, purchases of commercial IT in the open market and other purchases under the applicable Trade Agreements Act (TAA) (19 U.S.C. 2511) dollar thresholds are exempt from the Buy American rules. A revision or revocation of the current exception would be especially problematic for IT manufacturers – as well as systems integrators and suppliers – that sell commercial IT that would be subject to the Buy American rules but for the current exception. These companies will have an extra incentive to monitor and potentially engage in the rulemaking process to help shape the narrative.
- **Calls for a review and update of the list of nonavailable articles.** The FAR currently provides an exception to the Buy American rules that applies where domestic end items and components do not exist in sufficient and reasonably available commercial quantities and of a satisfactory quality. The EO instructs the Office of Federal Procurement Policy (OFPP) to review the list of nonavailable articles to assess whether there are bases to revoke the waiver for any such items. *See* Sec. 9.
- **Establishes a Made in America Office within the Office of Management and Budget (OMB) to lead the government’s Buy American policy approach.** This office will be headed by the Made in America Director who will oversee implementation of the EO. *See* Sec. 4(a). The Made in America Director will also oversee the waiver process (detailed below).
- **Increased scrutiny of Buy American waivers.** The order requires that potential waivers of Buy American requirements undergo a centralized review. *See* Sec. 4. With respect to waivers that are granted going forward, the EO requires:
  - Before granting a waiver in the public interest, the granting agency must assess whether a “significant portion” of the cost advantage of a foreign-source product is the result of “dumped” or “injuriously subsidized” steel, iron, or manufactured goods. *See* Sec. 5. This could well have a significant impact on procurement of goods containing imported iron or steel because a large share of imported steel is currently subject to antidumping and/or countervailing duty measures. The provision also may be vulnerable to challenge as inconsistent with U.S. obligations under the World Trade Organization (WTO) Antidumping Agreement.
  - The General Services Administration (GSA) must publish waivers on a public website so businesses can find potential contracting opportunities. *See* Sec. 6.
- **Requires agency reports, review, and accountability.** The EO requires agencies to report on their implementation of domestic preference laws and provide recommendations for achieving domestic procurement goals. *See* Sec. 11. The review must include an analysis of the agency’s spending as a result of waivers issued pursuant to the TAA. *See* Sec. 12(c). It is not entirely clear how this spending will be identifiable under

current country-of-origin reporting requirements, which often do not separately record nondomestic offerings from TAA designated countries.

- **Directs use of the Manufacturing Extension Partnership (MEP).** The order directs federal agencies to utilize this national network to conduct supplier scouting and connect with new domestic suppliers who can make the products they need while employing America's workers. See Sec. 7. The MEP network supports small- and medium-sized manufacturers who might otherwise lose out on contracting opportunities to foreign manufacturers.

One key issue that the EO does not address is the application of waivers of Buy American rules for products of countries that are members of trade agreements with the United States – referred to as TAA “designated countries.” Currently, in many sectors including aerospace and defense, information/telecommunications technology, pharmaceutical, and medical device/life sciences, Buy American requirements are automatically waived once TAA thresholds (US\$200,000 per procurement or less) are met. Although the EO requests data pertaining to products procured under TAA waivers in order to get a sense of the magnitude of such purchasing, it does not propose to change the current framework that allows for these waivers.

In all, this EO casts a wide net covering current Buy American regulations and agency processes. One key issue to watch is how the domestic content requirement shifting from component manufacture to a U.S. “value-add” framework (as contemplated by the order) will take shape. Once it does, we would anticipate that questions will be raised as to whether the new standard will be impactful to country-of-origin analysis in other contexts, such as the TAA. Companies that sell to the federal government will do well to stay advised and involved on the regulatory implementation that is to come.

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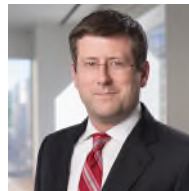
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