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4 Takeaways From The 'Buy American' Executive Order

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Law360, New York (April 19, 2017, 8:25 PM EDT) -- President Donald Trump took a significant step this week toward implementing his often touted objective of protecting U.S. manufacturers and workers by signing the "Presidential Executive Order on Buy American and Hire American" on April 18, 2017. In addition to addressing reforms to the H1-B visa program to protect U.S. workers, the EO sets forth a policy and action plan intended to "support the American manufacturing and defense industrial bases" by "maximiz[ing]" the federal government's procurement of "goods, products, and materials produced in the United States," and mandates strict compliance with the statutory and regulatory regimes for domestic sourcing preferences and restrictions (jointly referred to as "Buy American laws"), such as the Buy American Act (41 U.S.C. §§ 8301–8305) and other buy America legislation, and implementing regulations.

In short, and as to procurement, the EO:

Requires all agencies to assess their monitoring, enforcement, implementation and compliance with Buy American laws and the use of waivers to those laws, and to propose policies designed to ensure that the use of domestic sources is maximized, consistent with existing law.

Requires an assessment of the impact on domestic procurement preferences of all free trade agreements and the World Trade Organization Agreement on Government Procurement.

Elevates to the head of the agency the granting of any public interest waivers to Buy American laws requirements and requires such determinations to consider whether the cost advantage of the foreign product is due to dumping or the use of an injuriously subsidized product.

Requires the secretary of commerce to submit a report to President Trump within 220 days of the date of the EO which shall include "specific recommendations to strengthen implementation of Buy American laws, including domestic procurement preference policies and programs."

Requires agencies to submit annual reports to the secretary of commerce and the director of the Office of Management and Budget on agency efforts to maximize the procurement of domestic products, and requires the secretary of commerce to submit an annual report to the president based on the agency submissions.

Although this EO establishes the administration's policy to strictly enforce Buy American laws to maximize the use of domestic manufacturers and labor, it does not change existing law or regulation.[1]

Here are our key takeaways:

Expect More Scrutiny and Fewer Public Interest Waivers

Contractors should expect agencies to significantly increase their efforts to monitor contractor compliance with Buy American laws and to enforce contractor noncompliance — possibly through civil or criminal False Claims Act violations, contract terminations, and suspension or debarment. We also expect that this EO will pique the interest of potential whistleblowers and relator's bar — which could well result in more qui tam complaints being filed and related government investigations.

Thus, it is imperative now more than ever for contractors to take steps to ensure that contracting and purchasing personnel understand these domestic preference rules and restrictions, and ensure that the necessary processes and procedures are in place to avoid a compliance failure. A decision to "wait and see" how agencies will respond to the EO simply is not advisable, especially given the statements made in the administration's April 17 background briefing about the EO — describing the current enforcement regime as "lax," and noting that agencies will need to "crack[] down on weak monitoring, enforcement, and compliance efforts, and at rooting out every single Buy American loophole."

It is already difficult under the current regulatory regime for contractors to determine compliance with the domestic preference statutes and regulations, including what constitutes a "domestic end product," a "domestic construction material" or a "component" that is "manufactured in the United States" — especially in light of the ever-increasing reliance on global supply chains and the difficulty of tracing components. Government representatives fare little better in their understanding of this difficult area. As a result, the government likely will err heavily on the side of rejecting contractor claims that products meet the domestic preference rules because they either are domestic or they qualify for a waiver. And even where the contractor can establish the basis for such a waiver, we should anticipate that agencies will be unwilling to approve such requests absent a compelling need.

Changes to Free Trade Agreements May Be on the Horizon

Consistent with President Trump's promise to revisit free trade agreements with the United States' trading partners, Section 3(e) of the EO mandates a review of the impact of those agreements on domestic sourcing. A portion of many of those agreements provides for the reciprocal lifting of domestic

preferences for government procurement, allowing those countries to sell into the U.S. government and even state and local government markets in return for equivalent access to the foreign market. Any decision to renegotiate or rescind those agreements will limit the procurement of foreign end products and replace them, if available, with domestic products. Currently, the Trade Agreements Act (19 U.S.C. §§ 2501–2581) implements these reciprocal arrangements and, where applicable, acts as an exception to the Buy American Act. As a result of the EO, we may later see changes in the countries allowed to sell product to government markets in the U.S. free of domestic preferences.

The administration's April 17 Background Briefing provides more context to this assessment. That briefing cited a February 2017 Government Accountability Office report as providing "compelling evidence" that "strongly suggests the U.S. may not be getting its fair share of the global government procurement through its free trade agreement concessions." The briefing also stated, point blank, that "[i]f the analysis mandated by this report indicates any agreement is failing to meet the Trump standard of fairness and reciprocity so that the U.S. is a net loser, these findings will inform the President's decision to rescind or renegotiate these deals."

Is the Buy American Act Cost of Components Test Going Away?

Currently, an end item manufactured in the United States is domestic if its foreign components make-up less than 50 percent of the cost of all components, or if it is a commercial-of-the-shelf item regardless of its component makeup. Does the EO's direction in Section 3(b)(iii) to "maximize" the use of domestic components presage a change in the 50 percent standard, a standard that was put into place in 1954 by President Eisenhower through Executive Order 10582 and subsequently implemented through acquisition regulations? Will the COTS exception for the cost of components test remain?

Assessments May Signal Legislative Reform

Section 3(f) of the EO directs the secretary of commerce, in consultation with the secretary of state, the director of the Office of Management and Budget, and the United States Trade Representative to submit an annual report to President Trump that includes "specific recommendations to strengthen implementation of Buy American laws, including domestic procurement preference policies and programs." Annual reports also must be submitted. It is possible that these reports may serve as a prelude to legislative reform.

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[1] An executive order cannot create new law or regulation.