

6 Takeaways From 'Buy American' Memo On Agency Reports

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Law360, New York (July 12, 2017, 11:49 AM EDT) -- On June 30, 2017, Secretary of Commerce Wilbur Ross and Office of Management and Budget Director Mick Mulvaney issued a memorandum to federal agencies regarding the “assessment and enforcement of domestic preferences in accordance with Buy American Laws,” which includes the Buy American Act (41 U.S.C. §§ 8301–8305). Although the memorandum purports to provide guidance to help agencies implement the vision expressed in President Donald Trump’s April 2017 “Presidential Executive Order on Buy American and Hire American” (E.O. 13788), which we previously analyzed, the memorandum focuses mostly on what agencies must include in the reports that they are required, under Section 3 of the executive order, to submit to the U.S. Department of Commerce and the OMB by Sept. 15. It also offers some clues for contractors about how the Trump administration plans to implement its “buy American” vision.

Forthcoming Agency Reports

The memorandum directs agencies to address three primary topics with respect to their procurement activities:

1. “Oversight of Buy American Laws”

Agencies must “evaluate and report on their oversight of the Buy American Act (BAA) and other Buy American Laws.” In doing so, agencies must, among other things, (1) provide current procedures and guidance employed to satisfy the “requirements of Buy American Laws and the application of the TAA [Trade Agreements Act (19 U.S.C. §§ 2501–2581)]” and (2) describe any internal reviews conducted in the last two fiscal years regarding compliance with such laws.

2. “Enforcement of Buy American Laws and Waiver Usage”

Agencies are directed to review their “enforcement of the Buy American Laws” and to report about their “use of exemptions and waivers.” This includes a review of the “level of spending conducted under each exception, the most prevalent products that were subject to BAA exceptions and waivers, and, government-wide, the largest contracts subject to BAA exceptions and waivers, for each of the last three fiscal years.” This assessment will be



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based, in part, on information in the Federal Procurement Data System and will be used to “evaluat[e] the impact of agency spending for foreign items on domestic jobs and manufacturing.”

3. “Steps to Strengthen Implementation of Buy American Laws”

Agencies must “develop and propose policies for their agencies to ensure that Federal procurements maximize the use of materials produced in the United States, consistent with law.” Among other things, agencies must (1) identify plans to update internal guidance regarding “buy American” Laws; (2) assess whether certain reporting requirements would “benefit from government-wide clarification”; and (3) provide ideas for “strengthening Buy American Laws” and “ensuring compliance with the TAA.”

Agencies also are required to report on similar topics related to the oversight of domestic preferences applicable to federal grants.

Takeaways for Contractors

Although the memorandum is mostly administrative in nature — setting expectations for what each agency must submit in their required report — the memorandum contains lessons for contractors and at least some indication of what they might see from the administration in the coming months.

1. Continue to Prepare for Increased Scrutiny Over BAA Exceptions and Waivers

The memorandum states that agencies “must ... carefully monitor[]” their use of BAA exceptions and waivers, reasoning that such exceptions and waivers “annually result in billions of Federal taxpayer dollars being spent for foreign made products.” This statement reaffirms that agencies are expected to closely scrutinize and limit their use of BAA exceptions and waivers. We expect that agencies will focus in particular on nonavailability determinations, as the memorandum specifically asks agencies to report on mechanisms for ensuring that the domestic non-availability waiver is “not being used to support the procurement of a desired foreign product at the direction of a program office when a suitable domestic product would fulfill program requirements.” Increased scrutiny on BAA exceptions and waivers may present challenges for some contractors, particularly those with global manufacturing operations or supply chains.

2. Large-Dollar Contracts With an Exemption or Waiver are in the Crosshairs

The memorandum notes that “OMB has identified the 25 largest contracts under each [BAA] exception, as well as spending subject to waivers in accordance with (i) the TAA and (ii) for use outside the United States.” The memorandum then directs the pertinent agencies to review the contract files concerning these 25 largest contracts. The focus on large contracts strongly suggests that the administration may be inclined to focus public attention on these large-dollar contracts from foreign sources.

3. Expect Sustained Attention on TAA Compliance

The memorandum also focuses squarely on TAA compliance. Agencies are asked to “[i]dentify any instructions or workforce support” used to “ensure that country of origin as required under the TAA is reported accurately,” and to provide “ideas for ensuring compliance with the TAA to make certain that the benefits of the TAA go to designated countries, particularly countries that have provided appropriate reciprocal competitive government procurement opportunities to United States products and suppliers of such products.” This memorandum also comes on the heels of a June 16, 2017, letter from nine

senators explaining that “NAFTA creates loopholes in Buy American requirements” and urging President Trump to “close this loophole by removing the government procurement chapter from NAFTA.”

4. Expect More of an Emphasis on Procuring Domestic End Products

The memorandum asks each agency to “improve[] marketing and outreach” by “[i]dentify[ing] steps that your agency intends to take, and recommendations to category managers, on how they might improve the visibility of domestic-end products in the marketplace.” It is unclear how each agency will respond to the administration’s call to “improve the visibility of domestic-end products in the marketplace,” but any change is likely to impact the contractor community. This also may signal a reform to current evaluation preference regimes.

5. More to Come in November 2017, and Perhaps Sooner

As noted, each agency must submit a report to the Commerce Department and the OMB no later than Sept. 15. Commerce Secretary Ross and OMB Director Mulvaney must then provide “specific recommendations” to President Trump by November 2017 for strengthening the implementation of “buy American” laws. We expect that this report will be highly critical of the status quo, and may include recommendations for legislative or regulatory reform. It may also draw attention to some large-dollar contracts that were subject to an exemption or waiver that the administration believes was not proper.

6. Expect Oversight to Increase

Finally, we expect that the guidance to be issued by the Commerce Department and the OMB will trigger an increased focus on oversight of “buy American” laws. It appears that some agencies have already renewed their efforts in this area. For example, on June 20, 2017, the Office of the Secretary of Defense issued a memorandum noting how “recent fraud convictions related to compliance with Buy American Laws highlight the need for the defense acquisition workforce to be vigilant in its oversight and enforcement strategies.” As the administration works to implement the president’s “buy American” vision over the coming months, it will be prudent for contractors to take a fresh look at their processes and procedures for ensuring compliance with the BAA and other sourcing obligations.

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