



Congress Pushes Stronger 'Buy American' Rules

■ Back in November, this column reported on several developments related to President Donald Trump's "Buy American" executive order, which set forth a policy to "maximize ... use of goods, products and materials produced in the United States" through federal procurements.

Among other things, we discussed how Senate Democrats sought to "strengthen" the government's Buy American policies by proposing certain amendments to the 2018 National Defense Authorization Act. Although the majority of these amendments ultimately were left out of the bill, lawmakers from both sides of the aisle have continued to push for action.

On Dec. 6, Sen. Chris Murphy, D-Conn., reintroduced the 21st Century Buy American Act (S.2196), which aimed to "strengthen" existing Buy American standards.

The legislation focused on five change areas.

First, the cost of components test for non-commercial-off-the-shelf items would be modified to require that an item's U.S. component costs exceed 60 percent of the item's total costs for the item to be deemed "domestic." The current threshold is 50 percent.

Second, the so-called "overseas exemption" regarding items procured for use outside the United States would be limited significantly.

Third, agencies would not be permitted to apply a public interest exception unless it considers the short-term and long-term effects of applying such exception on employment within the United States.

Fourth, a program to make or guarantee loans would be created for contractors seeking to manufacture certain items that are not currently manufactured in the United States.

Fifth, actions would be taken to increase transparency related to the use of exceptions.

The bill includes more detailed and robust requirements geared towards increasing transparency and providing more accountability for the use of exceptions. For example, the General Services Administration would be required to establish a public website (BuyAmerican.gov) that would provide information about exceptions "that have been requested, are under consideration, or have been granted," and certain information would need to be provided and made publicly available for comment before an exception could be granted.

On Jan. 9, Murphy — along with Sens. Rob Portman, R-Ohio, Lindsey Graham, R-S.C. and Sherrod Brown, D-Ohio — proposed the BuyAmerican.gov Act of 2018 (S.2284) to "strengthen" Buy American requirements.

Among other things, this bipartisan bill would recognize key components of the president's Buy American executive order — namely, that "every executive agency should maximize . . . the use of goods, products and materials produced in the United States" under federal procurements; that "every executive agency should scrupulously monitor, enforce and comply with Buy American Laws, to the extent they apply, and minimize the use of waivers"; and that there will be a "judicious use" of "public interest waivers."

The bill also would require the secretary of commerce to report to Congress and the president over the next few years about certain Buy American compliance matters, including matters expected to be discussed in the Commerce Department's now overdue Buy American report. The report was required by executive order and, among other things, must provide specific recommendations to strengthen implementation of Buy American Laws.

Notably, the bill would implement the same requirements found in the 21st Century Buy American Act to increase transparency and provide more accountability regarding exceptions — albeit under different timeframes.

Either bill would have significant ramifications for contractors. For example, increasing the U.S. component cost threshold to 60 percent would have major consequences for those contractors currently relying on global supply chains. The proposed new requirements and policy regarding exceptions would result in increased scrutiny and complications at a time when Congress and the Trump administration are seeking to streamline the procurement system. On the other hand, new opportunities for U.S. manufacturers likely would arise.

In addition to these legislative efforts, Democrats recently wrote two letters urging Trump to ensure that Buy American action remains a top priority.

On Dec. 13, Sen. Tammy Baldwin, D-Wis., sent Trump a letter calling for bipartisan action and inquiring about the status of the Commerce Department's report.

Baldwin extended the president an olive branch "to work together to ensure Congress strengthens our government's commitment to buying American-made goods."

A few days later, on Dec. 18, House Democrats on the Committee on Transportation and Infrastructure sent Commerce Secretary Wilbur Ross and Office of Management and Budget Director Mick Mulvaney a letter asking about the status of the Commerce Department's Buy American report, and expressing "support for this administration's stated intent to bolster U.S. manufacturing."

They also "welcome[d] the opportunity to explore provisions to strengthen Buy America and Buy American laws" as "Congress prepares to work with the administration on an infrastructure package."

These efforts by Democrats to reach across the aisle are remarkable, especially when paired with the proposed bipartisan BuyAmerican.gov Act. It also will be interesting to see how much support this bill receives before the Commerce Department issues its report, or whether the legislation will push the administration to issue that report sooner rather than later.

In any event, action on the Buy American issue certainly is on the horizon, and contractors should closely monitor these developments as any changes could have substantial downstream consequences. **ND**

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