AN A.S. PRATT PUBLICATION
APRIL 2019
VOL. 5 • NO. 4

PRATT'S GOVERNMENT CONTRACTING LAW REPORT

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VOLUME 5 NUMBER 4 APRIL 2019

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Library of Congress Card Number:

ISBN: 978-1-6328-2705-0 (print)

Cite this publication as:

[author name], [article title], [vol. no.] PRATT'S GOVERNMENT CONTRACTING LAW REPORT [page number] (LexisNexis A.S. Pratt);
Michelle E. Litteken, GAO Holds NASA Exceeded Its Discretion in Protest of FSS Task Order, 1 PRATT'S GOVERNMENT CONTRACTING LAW REPORT 30 (LexisNexis A.S. Pratt)

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MATTHEW BENDER

(2019–Pub.4938)

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Trump's New Executive Order Requires Additional Buy American Preferences for Infrastructure Projects

By E. Sanderson Hoe, Michael Wagner, and Peter Terenzio*

This article explains a new executive order, entitled "Strengthening Buy-American Preferences for Infrastructure Projects," which continues to emphasize the importance of "the use of goods, products, and materials produced in the United States," but is specifically directed towards infrastructure projects that are recipients of federal financial assistance awards.

President Trump issued a new executive order, entitled "Strengthening Buy-American Preferences for Infrastructure Projects."[1] This order serves as an extension of the President's earlier April 2017 "Buy American and Hire American"[2] executive order. The April 2017 order stated that "it shall be the policy of the executive branch to buy American and hire American," and, among other things, directed agencies to "scrupulously, monitor, enforce, and comply with" domestic preference laws (referred to by the executive order as "Buy American Laws") and to minimize use of waivers that would permit the purchase of foreign end products.

The president's new order continues to emphasize the importance of "the use of goods, products, and materials produced in the United States," but is specifically directed towards infrastructure projects that are recipients of federal financial assistance awards. Federally-financed infrastructure has also been a stated area of focus for the Trump administration, although the Administra-

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1 https://www.whitehouse.gov/presidential-actions/executive-order-strengthening-buy-american-preferences-infrastructure-projects/.

2 https://www.whitehouse.gov/presidential-actions/presidential-executive-order-buy-american-hire-american/.

tion's "Legislative Outline for Rebuilding Infrastructure in America"[3] released last year curiously lacked any domestic preference requirements.

The new executive order makes up for this previous omission and then some: it has the potential to affect a vast number of programs and projects, and may in fact impose domestic sourcing requirements in areas—such as internet infrastructure—that are not typically targets for domestic preferences.

STATUTORY BACKGROUND

The president's new executive order plays out against a background of two different regulatory regimes for construction. First, the federal Buy American Act (or "BAA") applies to manufactured articles, materials, and supplies that are used in the construction of a federal building or federal work. By its terms, the BAA does *not* apply to state or local construction that receives federal funds.

However, other federal laws (frequently referred to by the confusingly similar name of "Buy America" laws) provide for domestic preferences for certain types of construction projects that receive federal funding. For example, the Surface Transportation Assistance Act of 1982, which governs the financing of highway and mass transit projects, includes several "Buy America" provisions that generally require the use of "steel, iron, and manufactured products . . . produced in the United States," subject to certain waiver authorities.[4]

FORMAT OF THE EXECUTIVE ORDER

The Trump Administration's new executive order is targeted at a third category: federal programs that provide financial assistance (*e.g.*, grants, loans, cooperative agreements, etc.) to infrastructure projects, but do *not* currently include domestic preference requirements. More specifically, the order applies to "covered programs," which are defined as "any program for which a focus of the statutory authorities under which it is administered is the award of Federal financial assistance for the alteration, construction, conversion, demolition, extension, improvement, maintenance, reconstruction, rehabilitation, or repair of an infrastructure project in the United States," but *not* including:

- programs for which providing a domestic preference is inconsistent with law; *or*
- programs providing Federal financial assistance that are subject to comparable domestic preferences.

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[3] https://www.whitehouse.gov/wp-content/uploads/2018/02/INFRASTRUCTURE-211.pdf.

[4] *See* 23 U.S.C. § 313(a) (highway projects); 49 U.S.C. § 5323(j) (mass transit projects).

The emphasis on domestic preference is accomplished by requiring the agencies that administer "covered programs" to "*encourage* recipients of new Federal financial assistance awards" to use certain products that are "produced in the United States" to the greatest extent possible.[5]

Agencies are required to begin "encouraging" the use of these products within 90 days of the date of the order (*i.e.*, by May 1, 2019). In addition, those agencies are required to identify, beyond encouragement, their strategy for maximizing the use of iron and aluminum as well as steel, cement, and other manufactured products produced in the United States in a report to be delivered to the president within 120 days of the issuance of the order (*i.e.*, by May 31, 2019). Importantly, the agency's report must identify "whether [the] covered programs within the agency['s] jurisdiction would support" the imposition of a "requirement" to use "iron and aluminum as well as steel, cement, and other manufactured products produced in the United States" through the use of terms and conditions on new financial assistance awards. Thus, while the first effect of the order is to "encourage" the use of domestically-produced construction materials, the intended long-term effect is to generate new terms and conditions of grant and loan awards *requiring* the use of these materials.

QUESTIONS FOR CONTRACTORS

This new executive order raises several potentially thorny questions for members of the contracting community and other stakeholders.

What Projects Are Covered?

The order is aimed at federal assistance programs supporting "infrastructure projects" that currently are not subject to "comparable" domestic preferences, a category that could encompass a vast array of projects. The term "infrastructure projects" is broadly defined in the order to include any project to provide or support services to the general public in the following sectors:

- surface transportation, including roadways, bridges, railroads, and transit;
- aviation;
- ports, including navigational channels;
- water resources projects;
- energy production, generation, and storage, including from fossil-fuels, renewable, nuclear, and hydroelectric sources;

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[5] Emphasis added.

- electricity transmission;
- gas, oil, and propane storage and transmission;
- electric, oil, natural gas, and propane distribution systems;
- broadband internet;
- pipelines;
- stormwater and sewer infrastructure;
- drinking water infrastructure;
- cybersecurity; and
- any other sector designated through a notice published in the Federal Register by the Federal Permitting Improvement Steering Council.

From this list, it appears that any number of federal programs could be affected by the order's domestic preference requirements. To take just one example, several federal programs allow financial support for the provision of broadband internet to underserved or rural areas—these programs may soon be subject to domestic preference requirements.

What Does It Mean to Be "Produced in the United States"?

In addition to applying to a wide variety of projects, the executive order also applies to a potentially broad array of products that must be "produced in the United States." The order applies to iron and aluminum, steel, cement, and other "manufactured products." And the order defines "manufactured products" to include "items and construction materials composed in whole or in part of non-ferrous metals such as aluminum; plastics and polymer-based products such as polyvinyl chloride pipe; aggregates such as concrete; glass, including optical fiber; and lumber."

But despite the broad array of products within the scope of its coverage, the order defines the term "produced in the United States" *only* with respect to iron and steel. Left unaddressed is how the government will determine whether the remaining covered products are "produced in the United States." For instance, the order does not attempt to explain what is required for, say, fiber-optic cable or polymer-based products, to be considered to be "produced in the United States." Absent some clarification, this ambiguity may result in considerable uncertainty at the implementation stage.

How Will New Domestic Preferences Be Imposed?

The order clearly contemplates that future financial assistance awards for "covered programs" will incorporate domestic preferences for "iron and aluminum as well as steel, cement, and other manufactured products." The order is unclear, however, how the Administration believes it can impose such preferences. The order is directed at Executive Branch agencies with no mention of Congress, but it is Congress that has created current domestic preferences for assistance programs in construction, such as the Surface Transportation Assistance Act. This could set up another battle over the power of the Executive Branch to "legislate."

Alternatively, it is possible that the Administration intends for the executive order to be implemented on a purely contractual basis "through terms and conditions on new federal financial assistance awards." Yet in that case, the metes and bounds of any domestic preference requirements would be determined entirely by the negotiations of the parties to any financial assistance agreement. Of course, absent some underlying statutory or regulatory authority, that approach could engender substantial inconsistency and uncertainty.

CONCLUSION

The new Executive Order could lead to considerable constraints on all types of contractors. On its face, it applies to a wide variety of projects and a potentially even wider variety of products—some of which will be new to the imposition of domestic preferences. However, the order also raises a number of significant questions that undoubtedly will affect the scope and nature of any new domestic preference requirements. Stakeholders in industries that utilize federal financial assistance would be well-advised to closely monitor developments in this area as the government begins to implement this latest order in the coming months.