

## The Latest Executive Order On Buying American Has Teeth

By **Mike Wagner, Scott Freling and Nooree Lee**

(July 18, 2019, 2:59 PM EDT)

On July 15, 2019, President Donald Trump issued the Executive Order on Maximizing Use of American-Made Goods, Products, and Materials.[1] The EO directs the Federal Acquisition Regulation Council to “consider” amending the Federal Acquisition Regulation’s provisions governing the implementation of the Buy American Act. This EO is the Trump administration’s latest — and most concrete — step toward enhancing domestic sourcing preferences and restricting foreign sources of supply for federal customers. And if implemented, the change promises to have dramatic implications for government contractors and their supply chains.

### Overview of the Executive Order

This week’s announcement is the Trump administration’s third executive order seeking to strengthen enforcement under the Buy American Act. An April 2017 executive order directed agencies to “scrupulously, monitor, enforce and comply with” domestic preference laws,[2] and a January 2019 executive order emphasized the importance of domestic sourcing in infrastructure projects.[3] Yet neither of the first two orders set forth specific requirements or prohibitions; rather, they essentially amounted to position statements detailing the administration’s views regarding the significance of the Buy American Act and other domestic preference laws.

This latest executive order is different. Not only does it direct the FAR Council to take imminent action toward a change in settled regulation, but it identifies concrete changes to the substantive standards established by President Dwight Eisenhower in 1954.

Under the current regulations, which are contained in Subpart 25.1 of the Federal Acquisition Regulation, the general rule is that a product is a “domestic end



Mike Wagner



Scott Freling



Nooree Lee

product” if (1) the article is manufactured in the United States and (2) the cost of domestic components in the end product exceeds 50% of the cost of all components. The Buy American Act does not prohibit the acquisition of a foreign end product but applies an upward cost adjustment during the evaluation process.

The adjustment is 6% if the lowest domestic offer is from a large business and 12% if the lowest domestic offer is from a small business.

The new EO would retain the current structure for determining a product’s domestic status and imposing price evaluation preferences, but alter the applicable percentages for each aspect of this analysis:

	<b>Existing Framework</b>	<b>New Framework Contemplated by EO</b>
<i>Percentage of cost of U.S. components necessary to be U.S. end product</i>	Must exceed 50%	Must exceed 55% generally  Must exceed 95% for cost of iron and steel used in iron and steel end products
<i>Evaluation penalty for foreign end product (compared to U.S. large business)</i>	6%	20%
<i>Evaluation penalty for foreign end product (compared to U.S. small business)</i>	12%	30%

The EO directs the FAR Council to consider proposing this rule change for notice and comment within 180 days and then to finalize such changes if they are “appropriate and consistent with applicable law and the national security interests of the United States.”

Moreover, the order requires the U.S. Secretary of Commerce and the director of the Office of Management and Budget to submit a report to the White House on any other changes to the Federal Acquisition Regulation that should be considered to better enforce the Buy American Act, including the possibility of further increasing the U.S. cost of component requirement to 75%.

#### **Four Key Takeaways for Government Contractors**

##### ***Dramatic Consequences for Contractors and their Supply Chains***

The EO’s proposed change to the FAR is conceptually straightforward, as it retains the existing regulatory structure and simply adjusts the thresholds and domestic pricing preference percentages. However, what may be a straightforward change to the text of the FAR would have wide-ranging and potentially disruptive effects on government contractors and their supply chains.

The 50% cost-of-components threshold has been in place for decades and many contractors have built their supply chains around that requirement, engaging in costly analyses of bills of materials and shifting sources of supply around the world to maintain compliance. Even a seemingly modest increase to a 55% cost-of-components test — to say nothing of the 95% requirement for steel and iron products — would require many contractors to engage in renewed analyses of their supply chain. And the pressure to qualify products as “domestic” would be greater than ever in light of the roughly threefold increase in the evaluation penalty for foreign end products.

Given these stakes, the contemplated proposed rule from the FAR Council undoubtedly will attract significant scrutiny from industry, and government contractors and their suppliers would be well-advised to make their voices heard during the comment period.

### ***Implications for Increased Enforcement Activity***

It is no coincidence that the announcement of new Buy American Act standards coincides with a marked increase in enforcement activity in this area. Recent years have seen a steady stream of enforcement actions — and costly settlements — based on alleged noncompliance with domestic sourcing requirements like the Buy American Act.

We need not dwell on the importance of ensuring accuracy of compliance certifications, as contractors are well-familiar with the litany of consequences that can flow from a miscertification — not least of which are treble damages and cumulative statutory penalties under the False Claims Act. But contractors should pause to consider how these contemplated changes would affect their internal processes for making required certifications and obtaining the same from their suppliers.

At a minimum, contractors likely would have to demand that suppliers execute updated Buy American Act certifications. Failing to do so conceivably could expose contractors to significant risks based entirely on a compliance issue lower down in the supply chain.

### ***Tension with Trend Toward Streamlined Commercial Acquisitions***

Notably, the Trump administration’s policy focus on enhancing domestic sourcing preferences appears to conflict with the dual goals of reducing regulatory burdens on contractors and commercializing federal procurements. In recent years, both Congress and the executive branch have advanced a number of policy proposals aimed at streamlining the federal procurement system to more closely approximate conditions in the commercial marketplace.

For example, Congress has attempted to cabin the definition of “subcontract” in order to reduce flowdown obligations, the U.S. Department of Defense has expanded its use of Other Transactional Authorities, or OTAs,<sup>[4]</sup> and the General Services Administration has moved to develop a commercial online buying portal.

The existing Buy American regulations contain limited regulatory exceptions for commercial items, or COTS, and commercial item information technology products, but now the announcement of new and more stringent domestic preference standards appears to be at odds with the broader movement to reduce regulatory burdens on contractors and make federal agencies more nimble market actors.

Going forward, the contracting community will remain keenly interested to see how the administration and procuring agencies seek to strike a balance between advancing key policy initiatives and promoting a more streamlined acquisition model.

### ***Open Questions and Issues to Watch***

While the contemplated changes to Buy American Act standards undoubtedly would have significant consequences for the contracting community, the precise contours of those changes remain to be seen — and are certain to be the subject of intense scrutiny as the rulemaking process proceeds. The EO lays out revised percentage thresholds under the Buy American Act, but the FAR Council still will need to navigate a thicket of issues related to the timing and scope of implementing these changes.

For instance, the FAR Council will need to determine how implementation of the new rule will be timed and whether there will be a transition or “grace” period, questions that will be particularly salient for contractors with established supply chains. It also will be left to the FAR Council to operationalize key terms that are undefined in the EO.

To take just one example, the EO contemplates a 95% cost-of-components threshold for “iron and steel products,” but it does not define the phrase “iron and steel end products” or otherwise address how such products will be identified. The EO also does not address certain key exceptions to applicability of the Buy American Act’s domestic preference provision, such as (a) class or individual product determinations, (b) blanket exceptions by agreements with a foreign government, (c) commercial item IT products and (d) contracts covered by the Trade Agreements Act as set forth in FAR Subpart 25.4.

Presumably, the EO’s silence suggests that these exceptions will remain unchanged but given the general policy directive from the White House to strictly enforce domestic sourcing preferences, the handling of these exceptions by the FAR Council and procuring agencies warrants close monitoring.

In sum, this EO is the latest and most concrete step taken by the Trump administration to enhance domestic sourcing preferences. For contractors, the revised standards are likely to have a slew of knock-on effects that will require close attention to procurement practices and supply chain management. And while the full effect of these changes will not become clear until implementing FAR regulations have been issued, there is little question that the effects of this order will continue to reverberate in the months and years ahead.

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*Mike Wagner and Scott A. Freling are partners at Covington & Burling LLP. Nooree Lee is an associate at the firm.*

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[1] <https://www.whitehouse.gov/presidential-actions/executive-order-maximizing-use-american-made-goods-products-materials/>

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

[3] <https://www.whitehouse.gov/presidential-actions/executive-order-strengthening-buy-american-preferences-infrastructure-projects/>

[4] <https://fas.org/sgp/crs/natsec/R45521.pdf>