

## 4 Key Questions On Biden's Buy American Order

By **Daniel Wilson**

*Law360 (January 29, 2021, 10:41 PM EST)* -- President Joe Biden's directive to prioritize domestic sources in federal procurements could lead to the biggest makeover to Buy American requirements in decades, but vague language in the order has left contractors with important unanswered questions regarding its implementation.

The Jan. 25 executive order directs federal agencies to maximize their use of domestically sourced products and services, and mandates changes to "Made in America" rules, while seeking to clamp down on the use of waivers to get around those rules.

But broad language in the order means contractors have no clear answer on pressing questions, such as how sweeping the rule changes will be and how the order overlaps with another recent change to Buy American requirements.

### How Will Deciding Domestic Origin Change?

In the order's potentially most impactful change, the Federal Acquisition Regulatory Council has been tasked with developing a way to replace the current "component test," which looks at the value of domestic-sourced components in a product to determine Buy American compliance — upending the process that federal contractors have long used for determining whether a product is considered domestic.

"Replacing the component test would be an alteration of the fundamental structure of the Buy American Act analysis that's been around for decades, and would be a potentially significant change," Covington & Burling LLP partner Mike Wagner said.

In its place would be a test based on "the value that is added to the product through U.S.-based production or U.S. job-supporting economic activity," fitting in with Biden's call for procurement policy that "will help American businesses compete in strategic industries and help America's workers thrive."

But those terms are not defined in the order and are so broad and so vague that they are open to multiple interpretations, with both the nature and impact of the changes to how domestic content is assessed hinging almost entirely on how the FAR Council interprets those terms, attorneys said.

"There's zero detail in this order as to what that's actually going to mean," McCarter & English

LLP associate Cara Wulf said. "But it is such a dramatic shift from what companies have been doing for decades that it's something that we'll want to watch very carefully."

It is already difficult for many contractors to determine whether their products comply with Buy American requirements, and using a value-added determination is likely "going to create a little bit of a mess," making clear guidance crucial, Jackson Kelly PLLC of counsel Lindsay Simmons said.

### **Does a Recent Buy American Rule Still Apply?**

Complicating the executive order's rollout is that it arrived less than a week after the FAR Council finalized a rule that increases the percentage of domestic material that must be in a product for it to be considered of U.S. origin under the current component test.

The current test requires at least 50% domestic content, which the new rule will increase to 55%, and 95% for steel or iron.

Agencies can purchase foreign products if domestic products aren't available at reasonable prices, but the new rule raises the price preference for domestic products from 6% to 20% for large businesses and from 12% to 30% for small businesses, while retaining the 50% price preference for U.S. Department of Defense procurements.

Those requirements seem broadly in line with the goals of the Biden administration, with beefing up Buy American rules being one of its few areas of substantial agreement with the Trump administration, which suggests the rule could stay in place while the FAR Council develops new requirements.

"I think that the Trump final rule, if you will, is a step in the right direction from the Biden administration's perspective," Wulf said.

But that is only an educated guess, as the executive order does not directly address the rule. It instead only hints that it will stay in place in the meantime, stating that the Trump-era executive order under which the rule was implemented is "superseded to the extent that [it is] inconsistent with this order," unlike other Trump Buy American orders that were fully repealed.

It's also not clear whether the recent White House regulatory freeze will apply to the rule. The freeze, which was issued on Jan. 20 — the day after the final rule was formally published, instructed agencies to consider a 60-day pause for rules published in the Federal Register that have not yet taken effect in order to review "any questions of fact, law, and policy the rules may raise."

Although the rule states that it should be considered effective immediately, as of Jan. 19, it also won't apply to new procurements until 30 days after publication.

### **How Will the Waiver Clampdown Apply?**

In another key component, the order creates a Made In America Office within the White House Office of Management and Budget, and its director is tasked with reviewing every agency request for a Buy America waiver and making all waivers and requests public.

"That czar, for lack of a better term ... takes away some of the discretion that the agencies had, and puts it at a much higher policymaking [level]," Venable LLP partner Dismas Locaria said.

That higher-level review — when removed from the pressure of meeting contracting needs that agencies also have to consider, and especially when combined with Biden's allegations that the Trump administration "did not take [compliance] seriously enough" — means there is likely to be "a lot less of those contract-specific waivers," Locaria said.

But as with the proposed change to determining domestic content, the scope of the new czar's authority to grant a waiver is both broad and vague, and there is little indication of what the actual review process will involve.

Agencies should make sure when seeking to grant a waiver on cost grounds that they assess whether that cost advantage is due to "dumped" or "injuriously subsidized" components — a new way of "[leveraging] trade remedies ... in service of procurement policy," Covington's Wagner said, noting that compliance with the directive will likely be considered in waiver reviews.

The order also says that agencies should receive a decision within 15 days, but otherwise says only that determinations should be made "consistent with applicable law and the policy," pointing specifically to the broad overarching policy statement about maximizing the use of domestically sourced products and services.

Even with tough rhetoric about cutting down on waivers, there might be practical barriers to following through, Jackson Kelly's Simmons said. She cited recent bans imposed on the use of certain Chinese technology products by agencies and contractors, where waivers were supposed to be "virtually impossible" to secure.

Now that the bans have been in effect for a while, those waivers haven't been as difficult to get as initially suggested, because the products and services that the government needs to function properly are "filled with this stuff," according to Simmons.

"And I think we're probably going to see a similar tension, if you will, between the desire to narrow loopholes that have appeared by way of these waivers and the reality in the marketplace," she said.

### **How Does the Trade Agreements Act Fit In?**

Another key part of the Buy American framework is the Trade Agreements Act. The TAA allows federal agencies to purchase products from countries that the U.S. has a free trade agreement with as if they were domestic products.

The executive order's only specific reference to the TAA is to direct agencies to conduct biannual analyses of their spending on products using TAA waivers, which is a strong indication the new administration is going to examine the use of TAA waivers, although it is less clear what the White House intends to do with that information, said Wulf of McCarter & English.

The Biden administration risks violating the underlying trade agreements if it makes changes to the TAA, so it may approach the issue with caution — although protectionism is one of the more bipartisan issues "where the most change is actually being affected," Alston & Bird LLP partner Jeffrey Belkin said.

In the meantime, the way the FAR Council and courts have interpreted the interplay between the TAA and Buy American Act — that products considered exempt under the TAA aren't subject to potential

changes to the BAA — means any changes made to Buy American rules under the executive order shouldn't carry through to TAA items, Belkin said.

Another open question from the order is whether TAA waivers, which are required for every TAA-compliant purchase, will be subject to review by the new Made in America Office.

On the one hand, the TAA waivers are statutorily required and function more like an exemption, and it would be both "highly bureaucratic" and would likely overwhelm the capacity of the new review office if TAA waivers are included in the waiver review requirement, Covington's special counsel Samantha Clark said.

But they are nonetheless classified as waivers, and that is something that will need to be addressed in any guidance or rulemaking, according to Clark.

"It is unclear from the EO whether they were trying to capture that within," she said.

--Additional reporting by Asher Stockler. Editing by Nicole Bleier and Michael Watanabe.