

Latest Executive Order Proposes Major Changes to Buy American Rules

July 17, 2019

WHAT: For the third time since he entered the White House, President Trump has issued an Executive Order aimed at maximizing the Government's procurement of American-made products. While the two previous "Buy American" Orders were primarily aimed at enforcing existing Buy American rules, the latest Executive Order proposes significant changes to the Federal Acquisition Regulation (FAR) rules on Buy American preferences—rules that have been in place for more than 60 years, and have guided how contractors manufacture products and source components to comply with the Buy American Act. As a result, the impacts of this latest Order on government contractors subject to the Buy American Act and their existing supply chains could be significant.

The latest Executive Order on "Maximizing Use of American-Made Goods, Products, and Materials" comes on the heels of two prior Executive Orders aimed at enforcing the "Buy American" policy: EO 13788, "Buy American and Hire American" issued in January 2017, which directed federal agencies to strengthen enforcement of existing Buy American laws and close "loopholes" to maximize the procurement of American-made products in Federal procurements; and EO 13858, "Strengthening Buy-American Preferences for Infrastructure Projects," issued in January 2019, which called for maximizing the procurement of American-made products in federally-funded infrastructure projects. The President's newest Order—billed by White House Director of Trade and Industrial Policy Peter Navarro as the President's "third pillar to his Buy American platform"—goes further than merely enforcing existing rules, and instead calls for significant changes in two key aspects of the FAR rules on Buy American preferences.

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Practice Areas

Buy American and Trade Agreements Acts
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First, the latest Executive Order proposes to change the decades-old standard for determining whether a product is “domestic” or “foreign” for purposes of the Buy American Act. For more than 60 years, a product was considered “domestic” (i.e., American-made) if more than 50% of the components (by cost) were of U.S. origin. This most recent Executive Order proposes that the FAR be amended to increase the percentage of required U.S. content to 55%, and also asks the FAR Council to consider whether this threshold should be increased over time to eventually require that an end product contain at least 75% U.S. components to qualify as domestic. The Order also proposes a new, separate standard for iron and steel end products, which would require that iron and steel end products contain 95% U.S. content (and no more than 5% foreign iron and steel) in order to qualify as domestic end products. If fully implemented, these proposed changes would make it substantially harder for a product containing foreign components to qualify as “domestic.”

Second, the Order also instructs the FAR Council to consider increasing the price evaluation preference that domestic end products enjoy under the Buy American Act. Under longstanding FAR rules implementing the Buy American Act, the price of foreign end products is increased by 6% (12% if the domestic offeror is a small business) to provide an evaluation preference for domestic end products. Under the latest Order, the FAR Council has been directed to consider amending the FAR to more than double the evaluation adjustment that is added to foreign end products, from 6% to 20% (for other than small businesses) and from 12% to 30% (for small businesses). If implemented, this enhanced price evaluation preference will create a meaningful competitive advantage for contractors that offer domestic end products in procurements that are covered by the Buy American Act.

WHEN: President Trump signed the executive order on July 15, 2019.

WHAT DOES IT MEAN FOR INDUSTRY: If fully implemented, the proposed changes outlined in President Trump’s latest Order could have far-reaching implications for government contractors that are subject to the Buy American Act, which generally applies to contracts over the micro-purchase thresholds (currently \$3,500), but under the Trade Agreements Act threshold (currently \$180,000 for supply contracts, or \$6,932,000 for construction contracts). Revising the decades-old standards for deciding whether a product qualifies as “domestic” or “foreign” could force some contractors to re-source materials and components, and/or change manufacturing processes or locations in order to comply with the Buy American Act and remain competitive in procurements covered by the Buy American preference. On the other hand, contractors whose products are manufactured in the U.S. and contain limited foreign content may find it easier to comply, and could stand to significantly benefit from the enhanced evaluation preference called for under the Order.

The FAR Council is required to consider these proposed changes, and any other changes necessary to “most effectively carry out the goals of the Buy American Act,” and if appropriate, issue a proposed rule to implement these proposed changes in the FAR within the next six months. Any proposed change to the FAR will be published for notice and comment, so contractors and other interested parties affected by these proposed changes should have an opportunity to make their voices heard. Wiley Rein will continue to monitor this issue and will provide additional alerts as the rulemaking progresses.

The order is available [here](#).