



FEBRUARY 2021

Changes To Buy American Policies

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Strengthening Buy American statutes have been a rare area of bipartisan agreement in the current fractured political climate. In the final days of the Trump Administration, the Department of Defense (“DOD”), General Services Administration, and National Aeronautics and Space Administration jointly issued new regulations, amending the Federal Acquisition Regulations (FAR) to implement Executive Order 13881, “Maximizing Use of American-Made Goods, Products, and Materials.” On January 25, 2021, President Biden signed Executive Order 14005, “Ensuring the Future Is Made in All of America by All of America’s Workers,” which will limit waivers of Buy American requirements, adopt a “value-added” approach to defining what constitutes “American-made” products in the Component test in FAR Part 25, and raise domestic-content requirements and price preferences. This alert discusses both the new regulations and President Biden’s Executive Order 14005.

New Regulations

Of most impact to the construction industry, the regulations introduce a new standard for products made “wholly or predominately” of iron or steel or a combination of both. They require that the cost of foreign iron or steel must be less than five percent of the cost of all components. Importantly, the new regulations eliminate the exception for Commercial Off-the-Shelf Items (“COTS”) for all items other than fasteners.

The regulations also increase the percentage of domestic content in order to qualify as a domestic product from 50 percent to 55 percent. Finally, they increase the price evaluation penalty for non-compliant products from six to 20 percent for large business and from 12 to 30 percent for small businesses. There is no change to the evaluation penalty for DOD procurements.

The new regulations apply to solicitations issued on or after February 22, 2021 and resultant contracts. The changes do not impact application of the Trade Agreements Act, which apply to projects of more than approximately \$7 million in value.

Executive Order 14005

The most significant change for federal procurement in President Biden’s Executive Order is that it directs the Office of Management and Budget (“OMB”) and the Federal Acquisition Regulatory (“FAR”) Council to adopt a “value-added” approach what constitutes “American-made” products in the component test in FAR 25.

The Order is expected to reduce waivers of domestic preference laws. It requires the head of each agency to rescind agency actions that are inconsistent with the policy of maximizing the use of domestic goods and materials. It directs the OMB to establish a “Made in America Office,” headed by a Director tasked with reviewing all proposed waivers. All waivers have to be made public, and the Order contains multiple reporting requirements.

The Order also applies to the [Jones Act](#), which requires goods shipped between U.S. ports to be transported on ships that are built, owned and operated by U.S. citizens or permanent residents.

While the domestic preference policies may provide short-term benefits, they could also be detrimental in the long term. The focus on price preferences and increased domestic content, in both the new regulations and the Executive Order, may result in higher costs for projects, or lesser number of projects (and jobs) for the same budgeted amount. Price preferences, while helping firms using domestic content in the short term, will make them increasingly reliant on government projects, as the products will not be competitive in the commercial market where such artificial preferences do not exist. The long-term result may be a further bifurcation of the supplier base, where some firms increasingly rely entirely on government projects, while others focus on commercial projects.

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