

## Federal Contractors Bear Brunt Of 'Buy American' Crackdown

By **Daniel Wilson**

*Law360, Nashville (April 18, 2017, 7:55 PM EDT)* -- President Donald Trump's Tuesday executive order ramping up enforcement of "Buy American" laws is likely to create significant headaches for federal contractors, increasing their compliance costs, potentially restricting their supplier pools and likely leading to increased bid protests and False Claims Act disputes.

After months of campaign rhetoric, followed by further references in a number of high-profile speeches since his inauguration, the president followed through on his promise to push "Buy American" and "Hire American" policies in a long-expected executive order on Tuesday.

"It puts speculation into actual tangible, or apparently tangible, action," Dentons partner Steve Masiello said.

The "Hire American" side of the order is focused on the H-1B guest-worker visa program, with a promised crackdown on allegedly rampant abuses, while the "Buy American" side is aimed squarely at compliance with federal domestic procurement requirements, which the administration argues have been routinely skirted for many years.

Under the order, federal agencies will be directed to implement what one senior administration official on Monday called a "more muscular" Buy American policy based on maximizing the use of U.S.-made content in federal procurements and minimizing exemptions, with agencies directed to undertake "top to bottom" reviews to improve compliance and eliminate loopholes.

"In short, this order declares that American projects should be made with American goods," Trump said before signing the order during an appearance at toolmaker Snap-on's Kenosha, Wisconsin, headquarters Tuesday. "No longer are we going to allow foreign countries to cheat our producers and our workers out of federal contracts."



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Alongside narrower Buy American preference statutes and regulations, such as the Berry Amendment — requiring the U.S. Department of Defense, and by extension Department of Homeland Security, to give preference to domestic food, textile and specialty metal sources — the two main applicable laws are the 1933 Buy American Act, which requires the government to give preference to U.S.-made products in federal procurements whenever practicable, and the 1979 Trade Agreements Act.

The TAA effectively supersedes the BAA for the approximately 60 “designated countries” with whom the U.S. has a relevant trade agreement by allowing for items made in those countries — or “substantially transformed” in those countries when compared with base components — to be treated on equal footing with U.S. goods for nearly all federal procurements.

And given that much of the practical application of these two statutes comes from implementing regulations or other policy choices within the control of the executive branch, the new order could mark a major change for federal contractors, attorneys said.

“A lot can be done in a regulatory manner ... this is one of those areas where you can do a lot without actually having to actually amend the Buy American Act, because of how it’s implemented in the [Federal Acquisition Regulation],” Crowell & Moring LLP partner Gail Zirkelbach said.

For example, under the current FAR interpretation used to fulfill the BAA’s “substantially all” requirement, the cost of U.S.-sourced components must make up more than 50 percent of the total cost of an end product for that product to be considered U.S.-made, while a commercial off-the-shelf, or COTS, item need only to be manufactured in the U.S., regardless of where its components come from.

While there has already been some congressional support to raise the sourcing requirement — such as the Buy American Improvement Act, introduced in February — these thresholds are currently set by regulation and the administration could, for example, look to increase the percentage of required U.S.-sourced components, place sourcing restrictions on COTS items or even eliminate the COTS exception altogether, without needing to go to Congress at all.

On the TAA side, the administration has also signaled it will examine and potentially rescind trade deals it deems unfair to the U.S. if the trade counterparty won’t make acceptable concessions, potentially limiting the pool of nations that contractors can purchase from — although the renegotiation or rescission of trade treaties can be difficult in practice, according to Zirkelbach.

“[The administration] might be able to accomplish that ... but renegotiating trade deals is going to be more cumbersome [than] the increased focused on compliance,” she said.

But even for countries where the administration decides to keep current trade treaties in place, it could nonetheless introduce regulatory changes to alter the “substantially transformed” standard away from the current “totality of the circumstances” test and toward a more rigid and potentially stricter standard, attorneys noted.

Another provision highlighted by the White House will allow federal contracting officers to take into account, for the first time, the impact of unfair trade practices like “dumping” — the selling of items below cost to drive out competition — or other “injurious subsidization” from foreign governments related to imported items intended for use on federal contracts.

While it remains to be seen how this assessment process will be implemented, at least one likely

outcome is that federal contractors and prospective contractors will have to increase the scrutiny they give to their supply chains, adding to already heightened attention from a number of federal agencies, attorneys noted.

Attorneys also pointed to the increased prospect of bid protests from unsuccessful bidders who believe the requirement has been unfairly applied, particularly if those determinations are left solely in the hands of contracting officers, whose roles do not typically involve expertise in unfair trade practices.

And for federal suppliers who make particularly significant use of items or components from overseas — for example, electronics and device makers or construction companies — many of these potential changes portend particularly difficult and expensive supply-chain adjustments, particularly as the administration signals it will subject waiver requests to greater scrutiny and will overall be less inclined to grant waivers, they claimed.

“If they change the Buy American Act to flow those requirements all the way back down again so it’s not just components, but any subcomponents, that would wreak havoc on industry, I think — we’d have part shortages and we’d have price increases,” Fred Levy, co-chair of Covington & Burling LLP’s government contracts practice group, said.

Further, the increased emphasis on enforcement in the order may result in an uptick in the number of alleged BAA and TAA noncompliance claims in False Claims Act suits filed by the federal government, as well as attracting related qui tam lawsuits as the issue lands on whistleblowers’ radar.

“What I think might change is that with increased scrutiny, particularly within the whistleblower community, we might see an increase in investigations and actions,” Levy said. “If you take a look at the False Claims Act statistics, the whistleblowers — qui tam relators — really drive the False Claims Act agenda.”

Masiello expressed hope, however, that the administration’s approach will be measured, noting that the White House had not rushed to action in the same way it had done for some of the president’s other campaign priorities, with the order also calling for agencies to develop plans of action ahead of making broad change.

“What stood out to me is that rhetoric from the campaign appears to be being put into action, albeit in this case in an apparently thoughtful and methodical manner that will hopefully lead to rational and appropriate standards that our clients and other contractors can address reasonably in their compliance programs,” he said.

--Editing by Philip Shea and Aaron Pelc.