THE GOVERNMENT CONTRACTOR®

THOMSON REUTERS

Information and Analysis on Legal Aspects of Procurement

Vol. 60, No. 22 **June 13, 2018**

Focus

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FEATURE COMMENT: Real Steps Towards 'Buy American' Compliance—Part IV: What Comes Next?

Introduction—The final installment in our four-part series on "Buy American" compliance follows the June 12th opening night of *Hamilton* in Washington, D.C. Some of our readers may appreciate the reference in our title to a solo from King George following the British surrender at Yorktown, in which he asks the American colonists, "What comes next?"

Is it a stretch to compare our four-part series to the American Revolution? Well . . . yes (though the term "trade war" has certainly been bandied about lately); in any case, the end query remains the same. Over the last four months, we have led our readers through the maze of Buy American requirements, and we hope we have fulfilled our promise to provide real steps and practical guidance towards understanding and complying with domestic sourcing requirements.

And so, what comes next? In this final part to our series, we explore what changes may be on the horizon for Buy American policy reform. First, we explore various proposals and actions currently underway from the executive and legislative branches to strengthen domestic sourcing requirements. Next, we assess what actions may be taken in the future, based on the current Buy American framework.

Executive Actions—The president has made no secret of his agenda to strengthen domestic sourcing requirements in public procurement. What began as a campaign promise has evolved into a key component of the president's national security strategy, which highlights multiple "priority actions" related to domestic sourcing requirements. Notably, the plan promises that the U.S. will "pursue bilateral trade and investment agreements with countries that commit to fair and reciprocal trade and will modernize existing agreements to ensure they are consistent with those principles," "counter all unfair trade practices that distort markets using all appropriate means," "emphasize fair trade enforcement actions when necessary," and "promote policies and incentives that return key national security industries to American shores." Donald J. Trump, National Security Strategy, at 20, 30 (Dec. 18, 2017). In this section, we examine many of these policies that the executive branch has already begun to enact.

Buy American and Hire American Report: Back in April 2017, President Trump signed an executive order on Buy American and Hire American, which instituted a governmental policy to "maximize, consistent with law, through terms and conditions of Federal financial assistance awards and Federal procurements, the use of goods, products, and materials produced in the United States." EO 13788, "Buy American and Hire American" (April 18, 2017). More specifically, the order required executive branch agencies to "scrupulously monitor, enforce, and comply with Buy American Laws, to the extent they apply, and minimize the use of waivers, consistent with applicable law." Consistent with this policy, the EO mandated that the Department of Commerce, along with several other agencies, submit a report to the White House assessing agencies' implementation and enforcement of the Buy American Act (BAA), usage and impact of waivers, and policies to maximize the procurement of U.S.-origin manufactured products, components and materials.

President Trump ordered the secretary of commerce to submit the report by Nov. 24, 2017. A few days after the deadline passed, a Commerce spokesperson indicated that the report was under review at the White House. However, this report has yet to be released to the public.

On May 9, 2018, Sen. Debbie Stabenow (D-Mich.) authored a letter to President Trump explaining that she had been told that the report was recently completed, but still unavailable to the public. In addition to praising President Trump's commitment to the Buy American laws and procurement of U.S.-origin goods and materials, she expressed hope that President Trump will release the report "so the public can better understand how Buy American laws are being implemented and what actions Congress can take to uphold Buy American laws that support American manufacturing and workers."

The White House previously indicated that the mandated report was an "internal report that will be used to inform the White House's policymaking process on this issue." Accordingly, it could be that the administration hopes to alter BAA requirements, likely to limit procurement of foreign goods further, or perhaps to require additional compliance measures, based on the policy statement accompanying the EO. Even if the administration decides not to increase BAA requirements, it could discourage agencies' use of waivers. If President Trump releases the report, it would likely contain more specific information on how agencies plan to implement and enforce the Buy American laws in the future, and if they plan to change their approach to issuing BAA waivers.

Revisions to Trade Agreements: On February 28, in accordance with the 1974 Trade Act, the U.S. trade representative (USTR) sent President Trump's 2018 trade policy agenda to Congress. The trade agenda outlines five major initiatives: (1) supporting national security, (2) strengthening the U.S. economy, (3) negotiating better trade deals, (4) aggressively enforcing U.S. trade laws and (5) reforming the World Trade Organization.

Part of the implementation of these goals will be effectuated through waivers of discriminatory purchasing requirements in U.S. Government procurements that require the purchase of U.S. goods and materials. The Trade Agreements Act of 1979 (TAA) grants the president the ability to waive these discriminatory purchasing requirements. Signed in 1980, EO 11846 delegated this waiver authority to the USTR.

Despite rather broad authority to issue waivers, the USTR has typically limited application to the BAA and the Department of Defense's Balance of Payments Program in conjunction with the WTO Government Procurement Agreement (GPA) and free trade agreements. In 2018, the WTO GPA Committee is focusing on advancing the GPA accessions for six countries: Australia, China, the Kyrgyz Republic, Russia, Tajikistan and former Yugoslav Republic of Macedonia. As such, the TAA waivers could potentially apply to these countries once they complete GPA accession.

In addition to potential changes to parties of the WTO GPA, re-negotiations of the North American Free Trade Agreement are also underway. According to the USTR report, the focus of re-negotiations has been to strengthen rules of origin for products from Canada and Mexico that significantly contribute to trade imbalance between the countries, and to remove any incentives for outsourcing work from the U.S. to Canada and Mexico.

President Trump has also indicated that he would consider withdrawing from NAFTA entirely if these demands are not met. If the U.S. were to withdraw from NAFTA, Canada and Mexico would not be under any obligation to provide reciprocal trade benefits to U.S. goods. At that point, the USTR would likely reverse its issuance of the waiver for Canada and Mexico, and agencies would then need to modify corresponding regulations that authorize the BAA waivers for the two countries.

On the other hand, if the U.S. enters into a "skinny" NAFTA, whether Canada and Mexico retain any procurement privileges would depend on the specific language in the agreement. Notably, any changes to NAFTA would likely significantly affect Mexico more than Canada because Canada is also part of the WTO GPA. NAFTA provides similar benefits, but at a lower dollar threshold than the WTO GPA (the NAFTA threshold is $25,000, whereas the WTO GPA threshold is $180,000). Accordingly, the only procurements of Canadian products that would be affected by the removal of the reciprocal trade benefits would be those between $25,000 and $180,000.

Exception for E-Commerce Portal Purchases under $25,000: This last March, the General Services Administration, in consultation with the Office of Management and Budget, finalized the implementation plan for § 846 of the National Defense Authorization Act for Fiscal Year 2018, entitled "Procurement Through Commercial E-Commerce Portals." Part of this program increases the micropurchase threshold from $10,000 to $25,000 for e-commerce portal purchases. Correspondingly, this relaxes BAA requirements for such purchases, as the BAA only applies to procurements above the micropurchase threshold.

Section 232 Investigations: The U.S. Department of Commerce's Bureau of Industry and Security conducted investigations under § 232 of the Trade Expansion Act of 1962 regarding the effect of global imports of steel and aluminum on U.S. national security. In January 2018, BIS concluded that steel and aluminum imports threatened to impair U.S. national security. As a result, President Trump ordered a 25-percent global tariff on steel and a 10-percent global tariff on aluminum, effective March 23.

Various countries are seeking exemptions, some of which have been temporarily granted. Notably, South Korea reached a long-term agreement for steel, and is subject to an annual quota. At the time of the writing of this article, the White House had just issued notices of implementation of tariffs on Canada, Mexico and the European Union. Canada responded by implementing retaliatory tariffs on $12.8 billion worth of U.S. imports beginning July 1, 2018. Canada also indicated that it will file an objection to the steel and aluminum tariffs at the WTO. Mexico stated that it will react similarly, primarily focusing on 10 U.S. products. The EU also plans to challenge the application of tariffs at the WTO.

Although the § 232 investigations do not directly implicate the BAA or TAA, the focus is the same: protect and benefit U.S. industries. Here, BIS concluded that excessive imports of steel and aluminum caused closures of domestic production capacity. The tariffs are designed to protect that production capacity and encourage consumption of U.S. steel and aluminum. Despite nearly 10,000 exclusion requests for steel and 1,500 for aluminum, none have been granted.

Legislative Actions—The president's trade agenda has largely been mirrored by Congress on a bipartisan level. Not only is Congress also interested in encouraging the consumption of U.S.-origin goods and materials, but it has keenly focused on the use of waivers and the expansion of Buy American-like preferences throughout Government procurements.

BuyAmerican.gov Act of 2018 (S. 2284): Introduced in the Senate in January, the bipartisan BuyAmerican.gov Act of 2018 focuses on several issues identified in this article. It requires the secretary of commerce to issue a report, similar to the one that President Trump required in his Buy American and Hire American EO, within 180 days after the enactment of the legislation and every two years thereafter. In addition, it requires the secretary of commerce to review and analyze the impact of free trade agreements and the WTO GPA on Buy American laws.

Aside from the compilation of required reports, the Act also requires GSA to establish a website at—you guessed it—*BuyAmerican.gov*. GSA must make the website publicly available and free to access. *BuyAmerican.gov* will list all waivers of BAA requirements that have been requested, are under consideration or have been otherwise granted. In addition, the Act requires agencies to provide a detailed justification for each waiver, including the specific statutory basis for the waiver and a certification that the procurement official made a good faith effort to solicit bids for domestic products. While this certainly indicates Congress' focus on cracking down on exemptions to the Buy American laws, it also presents a significant record keeping burden on GSA.

Buy America 2.0 Act (H.R. 5137): Rep. Brendan Boyle (D-Pa.) introduced the Buy America 2.0 Act in the House on March 1. It would prohibit the obligation of federal funds to transportation or infrastructure projects unless the steel, iron and manufactured goods used for the projects are produced in the U.S. There are limited exceptions, i.e., if the requirements would be inconsistent with public interest; the steel, iron or manufactured goods are not sufficiently and reasonably available; or the inclusion of the products would increase the cost of the project by more than 25 percent. Finally, the bill would provide for waivers to the requirements if the agency permits public input.

American Food for American Schools Act of 2018 (S. 2641): Most recently, Buy American reform cropped up in a bill to formalize the waiver process of procuring foreign commodities or products for use in school lunches. On April 10, Sens. Dan Sullivan (R-Alaska) and Maria Cantwell (D-Wash.) introduced the American Food for American Schools Act of 2018 to "amend the Richard B. Russell National School Lunch Act to improve the requirement to purchase domestic commodities or products, and for other purposes." The bill has not made it out of committee to date, and if passed likely would have little effect on the majority of our readership. Regardless, the bill signals continued focus on strengthening Buy American policies in all realms of Government procurement, and further demonstrates that increased waiver restrictions appear to be the Buy American reform du jour.

Changes on the Horizon—As discussed above, many Buy American reforms and enhancements are already in the works, but the current focus on Buy American requirements and the domestic sourcing regime in general suggest that more legislative and

executive action is yet to come. In this section, we predict where Congress and the White House might be headed in terms of further Buy American reform.

Percentage Requirements for Domestic Components: As we discussed in some detail in parts I and II of this series, manufactured products meet a two-part test to be considered "domestic end products" for purposes of BAA compliance: (1) manufacturing must occur in the U.S., and (2) the end product must consist of more than 50-percent U.S. component parts. Federal Acquisition Regulation 25.003. The FAR defines "component" as "an article, material, or supply incorporated directly into an end product or construction material." Id. Agencies calculate the percentage of U.S. components by cost.

The language of the BAA itself, however, does not specify this 50-percent domestic component requirement. Instead, the statute passed in 1933 employs a "substantially all" standard: "[O]nly manufactured articles, materials, and supplies that have been manufactured in the United States *substantially all* from articles, materials, or supplies mined, produced, or manufactured in the United States, shall be acquired for public use." 41 USCA § 8302(a) (emphasis added). In 1954, President Eisenhower issued an EO declaring that "substantially all" should be interpreted as 50 percent or greater: "For the purposes of this order materials shall be considered to be of foreign origin if the cost of the foreign products used in such materials constitutes fifty per centum or more of the cost of all the products used in such materials." See EO 10582 (Dec. 17, 1954) at § 2(a). In response, the FAR Council implemented the 50-percent rule in the FAR at § 25.003.

Various tribunals have upheld the 50-percent rule as a valid application of BAA requirements. See, e.g., *U.S. ex rel. Made in the USA Found. v. Billington*, 985 F. Supp. 604 (D. Md. 1997); *Allis-Chalmers Mfg. Co.*, Comp. Gen. Dec. B-147210, 1961 CPD ¶ 69. Nevertheless, the 50-percent rule's implementation via an executive order leaves it susceptible to modification.

Executive orders typically enjoy the force and effect of law. See generally, Chu, Cong. Research Serv., RS20846, "Executive Orders: Issuance, Modification, and Revocation" (April 14, 2014). However, executive orders do not benefit from the same permanence as statutes, as "[t]he President is free to revoke, modify, or supersede his own orders or those issued by a predecessor." Id. at 7. Congress also maintains the power to revoke or modify executive orders by passing legislation that repeals the order. Id. at 9. Other Buy American requirements, in contrast, do not suffer from the same vulnerability. For instance, the commercially available off-the-shelf exception to the 50-percent domestic content requirement was the result of legislation rather than an executive order. See 74 Fed. Reg. 2713 (Jan. 15, 2009) (FAR amendment to "implement Section 4203 of the Clinger-Cohen Act of 1996 (41 U.S.C. 431) (the Act) with respect to the inapplicability of certain laws to contracts and subcontracts for the acquisition of commercially available off-the-shelf (COTS) items"). The 50-percent rule is therefore prone to future modification, most likely in the form of increased percentage of domestic components necessary to be considered "substantially all" domestic materials.

Price Differential for "Unreasonable Cost" Exception: Another aspect of the BAA susceptible to reform is the price penalty currently applied to foreign offerors. The BAA mandates use of domestic materials "unless the head of the department or independent establishment concerned determines their acquisition to be inconsistent with the public interest or their cost to be unreasonable." 41 USCA § 8302(a). As we have discussed in previous parts to this series, the FAR implements this mandate by requiring agencies to apply a price preference for certain supplies and construction materials if the lowest offer in a procurement is not for the domestic articles, materials or supplies described above. See FAR 25.104 (supplies), 25.204 (construction materials).

Civilian agencies apply a six-percent "price penalty" to foreign offers (12 percent if the next-in-line offeror is a U.S. small business), and DOD agencies provide a more outcome-determinant 50-percent penalty to foreign offers (regardless of small business competition). If, after the application of the pricing preference, the lowest offer is for the designated foreign materials, then the agency may select the foreign offer for award.

The six-, 12-, and 50-percent price penalties may be reasonable interpretations of the BAA requirement, but they are just that—interpretations. The language of the BAA states only that a department head should determine whether a cost is unreasonable. As with the quantification of "substantially all" domestic content, the quantification of the unreasonable cost prohibition also stems from EO 10582. Section (b) of the order provides,

> [T]he bid or offered price of materials of domestic origin shall be deemed to be unreasonable, or the purchase of such materials shall be deemed to be

> inconsistent with the public interest, if the bid or offered price thereof exceeds the sum of the bid or offered price of like materials of foreign origin and a differential computed as provided in subsection (c) of this section.

Section (c)(1) provides the six-percent price penalty implemented in the FAR: "The sum determined by computing six per centum of the bid or offered price of materials of foreign origin."

For the reasons already stated above, the definition of what constitutes an unreasonable cost could be modified without revising the text of the statute itself. In fact, agencies have already demonstrated such an ability by revising the percentage calculation for foreign offerors competing against small businesses (12-percent price penalty) and DOD agency procurements (50-percent price penalty). Increasing the price differential necessary to deem a foreign offeror's price "unreasonable" could therefore provide another avenue to strengthen Buy American policies.

Increased § 232 Investigations and Tariffs: The president's March announcement regarding new tariffs on foreign steel, discussed above, demonstrates yet another avenue for additional Buy American reform. See "Presidential Proclamation on Adjusting Imports of Steel into the United States" (March 8, 2018). Section 232 of the Trade Expansion Act of 1962 authorizes the executive branch (through the Commerce Department) to conduct investigations to "determine the effects on the national security of imports." 19 USCA § 1862.

Within 270 days of initiating an investigation, the Commerce Department must report on findings, including whether certain imports threaten to impair U.S. national security. As demonstrated by the recent use of § 232 (the first in 16 years), the president may then use his statutory authority under § 232 "to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security." 19 USCA § 1862(c)(1)(a)(ii). Some sources suggest that other § 232 investigations may already be in the works to consider imports of uranium and of critical minerals. See Grier, Perspectives on Trade, "Trump's 232 Choice: Tariffs or Quotas?" (May 8, 2018). As noted above, although § 232 investigations do not directly implicate the BAA or TAA, the focus remains the same: protect and benefit American industries. Accordingly, § 232 represents another opportunity for the president to strengthen domestic sourcing policies.

Conclusion—Congratulations! You have successfully completed our four-part series on "Real Steps Towards Buy American Compliance." You reviewed the overall U.S. domestic sourcing regime in Part I, 60 GC ¶ 52, sifted through the nuts and bolts of BAA and TAA requirements in Part II, 60 GC ¶ 97, scared yourself into compliance through a survey of enforcement mechanisms in Part III, 60 GC ¶ 131, and finally, here in Part IV, found at least a few answers and predictions to King George's query, "What comes next?" The material may not have been as easy (or enjoyable) to digest as *Hamilton*, but it will no doubt prove to be more helpful to your companies and clients. And when *Hamilton* creator Lin Manuel Miranda is ready to move on from the American Revolution and start his screenplay for the (Buy) American Revolution, our series will give him everything he needs.

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