

IS AGENCY “BUY AMERICAN” INSIGHT IN SIGHT?

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In April of 2017, President Trump directed the Secretary of Commerce to submit a report recommending ways to strengthen the implementation of U.S. "Buy American" laws. The White House has stated that the report is an "internal report that will be used to inform the White House's policymaking process on this issue." However, several Democratic Senators are attempting to make the report public. The *Keep Buying American Act of 2018* (S. 3006), if signed into law, will provide insight into agencies' Buy American waiver processes, enforcement of and compliance with Buy American laws, and proposed policies to ensure that federal procurements maximize domestic sources of supplies. This insight will in turn help government contractors predict what policies may be in the pipeline to strengthen the current Buy American regime.

EXECUTIVE ORDER 13788'S REQUIREMENT FOR BUY AMERICAN REPORTS FROM AGENCIES

As we explained in an April 2017 Public Policy and Law Alert, President Trump signed a Presidential 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." [1] The E.O. directed the heads of all federal agencies to "assess" the monitoring, enforcement, and compliance with Buy American laws within their agencies, as well as the use of "waivers" by type and impact on domestic jobs and manufacturing. The Order further directed agency heads to "develop and propose" policies for their agencies to ensure that federal procurements and federal grants maximize the use of materials, products, and components produced in the United States, including materials such as steel, iron, aluminum, and cement. The E.O. provided agency heads 150 days (i.e., until September 15, 2017) to complete these tasks and submit their findings to the Commerce Secretary and the Office of Management and Budget Director. The E.O. then provided the Commerce Secretary 220 days (i.e., until November 24, 2017) to submit a report to the White House assessing agencies' implementation and enforcement of Buy American laws, usage and impact of waivers, and policies designed to maximize the procurement of U.S.-origin manufactured products, components, and materials.

A few days after the deadline passed, a Department of Commerce spokesperson indicated that the report was under review at the White House. [2] Since then, multiple members of Congress have urged the Trump Administration to make the Buy American report public. In a December 2017 letter to President Trump, Senator Tammy Baldwin (D-WI) encouraged the administration "to expedite the publication of this now late report." [3] On May 9, 2018, Senator Debbie Stabenow (D-MI) wrote to President Trump expressing hope that he would 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." [4] Despite these requests, the Buy American report has yet to be released to the public.

THE KEEP BUYING AMERICAN ACT OF 2018

Most recently, certain Congressional members have attempted a more roundabout way of accessing the reports. On June 6, 2018, a group of Democratic Senators led by Senator Stabenow introduced the *Keep Buying American Act of 2018* (S. 3006). The bill requires federal agencies to publicly release the reports mandated by Executive Order 13788. Of course, the President would have to sign it into law, in contradiction of his administration's rebuffs. However, should the bill succeed (or inspire the administration to release the report), interested parties could gain key insight into how agencies plan to further implement and enforce the Buy American laws, and if they plan to change their approach to issuing waivers. In turn, these agency actions will affect how federal contractors comply with Buy American requirements.

We can help. The K&L Gates International Trade and Government Contracts & Procurement Policy teams are well positioned to assist interested parties with assessing the impact on business interests at home and abroad, provide input to and engage with government officials, and assist government contractors with respect to Buy American laws and other regulatory and transactional matters.

[1] Executive Order 13788, "Buy American and Hire American," (April 18, 2017).

[2] *Stabenow demands release of 'Buy American and Hire American' report*, Inside Trade.com (May 9, 2018).

[3] *Id.*

[4] *Id.*

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