

Five Things You Must Know About Biden's Buy American Act Executive Order

Litigation Alert

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The Biden administration this week issued an [executive order \(EO\)](#) aimed at maximizing the purchase of American-made supplies under federally-funded procurement contracts and financial assistance awards (the Biden Buy American EO). The new EO comes just days after the Federal Acquisition Regulation (FAR) Council [finalized a rule](#) to increase the domestic content requirements and pricing preferences under the [Buy American Act, 41 U.S.C. §§ 8301-8305 \(BAA\)](#). This client alert discusses five features of the Biden Buy American EO that every government contractor must know.

1. Potentially Big Changes to FAR Part 25 May Be on the Horizon

The BAA promotes the use of American-made supplies by imposing a price preference for "domestic end products" and "construction materials" in federal procurements via FAR Part 25. To qualify as a domestic end product or domestic construction material, the FAR has long stated that a manufactured end product or construction material (1) must be manufactured in the U.S. and (2) the cost of its components mined, produced, or manufactured in the U.S. must exceed 50 percent of the cost of all of its components. The second prong of this domestic content requirement is commonly referred to as the "component test." Historically, the FAR also required large businesses offering domestic end products or domestic construction materials in civilian procurements to receive a price preference of 6 percent compared to competitors offering foreign end products or construction materials. The preference was 12 percent for small businesses offerors.

Just before last week's presidential inauguration, however, the FAR Council published a [final rule](#) that (1) increased the component test threshold from 50 percent to 55 percent for most end products and construction materials, (2) set a separate component test threshold of 95 percent for products made "wholly or predominantly" of iron and steel, and (3) increased the pricing preferences for large businesses from 6 percent to 20 percent and from 12 percent to 30 percent for small businesses. This final rule was promulgated pursuant to EO 13881 (Maximizing Use of America-Made Goods, Products, and Materials), which the previous administration issued in July 2019. The final rule was published in the Federal Register on January 19, 2021 (with an effective date of January 21, 2021) and is set to apply to solicitations issued on or after February 22, 2021 and resultant contracts.

But the Biden Buy American EO may soon fundamentally change all of that. Within 180 days of the EO— *i.e.*, on or before July 25, 2021—the FAR Council must "consider proposing for notice and public comment" a rule to further amend the BAA provisions of the FAR. Most significantly, the new EO requires the FAR Council to consider eliminating the component test entirely and replacing it with "a test under which domestic content is measured by the value that is added to the product through U.S.-based production or U.S. job-supporting economic activity." The new EO is silent, however, on how "U.S.-based production or U.S. job-supporting economic activity" would be measured. It also does not explain how this determination relates to the first prong of the BAA test, which already requires that domestic end products and construction materials be "manufactured" in the U.S. Adding to the confusion, the order also directs the FAR Council to consider "increas[ing] the numerical threshold for domestic content requirements for end products and construction materials," a measure that presently focuses on component cost. But the new EO does not explain how this will be accomplished. One possibility is that, under the new "value added" test, the domestic content of U.S.-manufactured end products or construction materials will be measured by the extent to which their individual components are also physically produced or manufactured in the U.S. or with American labor. Given these unknowns, it is apparent that the FAR Council has its work cut out for it in implementing the new EO, and contractors will want to closely monitor the regulatory process to ensure their voices are heard on these potentially material changes to FAR Part 25.

2. The Fate of the Recent BAA Final Rule Remains to Be Seen

Notwithstanding the Biden Buy American EO of January 25, 2021, last week's BAA [final rule](#) remains in effect and contractors should prepare to see its requirements in solicitations issued on or after February 22, 2021. The new EO did not purport to amend or invalidate the final rule—which became effective January 21, 2021—and merely called on the FAR Council to "consider proposing" further amendments to the then-applicable regulations. Notably, the final rule was published in the Federal Register on January 19, 2021, the day before the Biden administration issued a [memorandum](#) instituting a "freeze" on certain regulatory actions. Under the administration's January 20, 2021 memorandum, agencies were authorized to "consider" postponing for 60 days the effective date of any rules previously published in the Federal Register, but which had "not taken effect." Here, the BAA final rule went into effect the following day with no reports of any agencies looking to delay its effective date. Therefore, for the time being, contractors should treat the recent BAA final rule as controlling.

Still, the shelf life of the current final rule is likely to be limited given the substantive changes contemplated in the Biden Buy American EO. For example, as discussed above, the new EO and the final rule differ on how domestic content should be calculated, with the new EO calling for the introduction of a "value added" test and the final rule relying on the existing component test. Similarly, it remains to be seen if the new EO will prompt the FAR Council to (1) impose domestic content and pricing preference thresholds that differ, either qualitatively or quantitatively, from the increased thresholds just adopted in the BAA final rule, or (2) take a different approach towards predominantly iron and steel products in the absence of express executive direction to treat such items differently from other products.

3. It May Be Tougher to Rely on Existing BAA Exceptions

Under the current FAR Part 25 regulations, certain categories of products are exempt from the BAA because they have been deemed "nonavailable" in the U.S. in sufficient quantities. Products also are exempt if agency officials determine that applying the BAA would be inconsistent with "the public interest" or result in unreasonably high costs to the government. And the BAA does not currently apply to acquisitions of information technology (IT) that is a commercial item. The Biden Buy American EO seeks to limit these exceptions, termed "waivers" in the order, in several ways:

- **First**, the new EO directs the Office of Management and Budget (OMB) to establish the "Made in America Office," to be headed by the "Made in America Director." Before an agency grants a BAA waiver, it will be required to submit a description of the "proposed waiver and a detailed justification" to the Made in America Director, which may either grant permission to issue the waiver or provide a written explanation for denying the request. Agencies may formally disagree with a denied request and initiate an administrative process to resolve any outstanding disagreements or conflicts.
- **Second**, the new EO would require agencies to assess, prior to issuing a waiver, "whether a significant portion of the cost advantage of a foreign-sourced product is the result of the use of dumped [or injuriously subsidized] steel, iron, or manufactured goods." An agency must integrate its findings in any waiver request to the Made in America Director and may consult with the International Trade Administration (ITA) in making this assessment.
- **Third**, prior to proposing any amendment to the list of domestically nonavailable articles at FAR 25.104(a), OMB must review the amendment with the Secretary of Commerce and the Made in America Director to evaluate the economic basis of the underlying nonavailability determination.
- **Fourth**, the new EO directs the FAR Council to review the existing justifications for maintaining the BAA's commercial item IT exception and "develop recommendations for lifting" the exception. Eliminating or weakening of the BAA's commercial item IT exception could have potentially significant ramifications for the entire U.S. procurement system, including by limiting the government's access to critical IT hardware and products, and could be the object of significant pushback by industry during the rulemaking process.

Moreover, by restricting the availability of BAA exceptions, the U.S. runs the risk that significant trading partners—such as the European Union (EU) and Canada—will take steps to enhance domestic preference measures under their own procurement systems, ultimately making it harder for American firms to compete for procurement contracts in those markets. Whether or not

this risk ultimately materializes, it should be seriously considered by the FAR Council in adopting any changes to FAR Part 25 pursuant to the Biden Buy American EO.

4. Agencies' BAA Decisions May Be Subjected to Greater Scrutiny

The new EO also includes several provisions aimed at promoting transparency into the way federal agencies comply with the BAA. For example, the EO would require the Administrator of General Services to develop a public website that includes a description of all BAA waiver requests and justifications submitted to the Made in America Director. The website also would provide publicly available contact information for each agency that has granted a waiver request. Additionally, the EO proposes to impose new reporting requirements on federal agencies, including with respect to (1) proposed waivers, approved waivers, and longstanding or nationwide waivers under the BAA, and (2) agency spending analyses, by country of origin, resulting from waivers issued pursuant to the Trade Agreements Act (TAA). Agencies also would have to report on their respective efforts to implement the BAA and other "Made in America Laws," such as Federal Transit Administration's (FTA) "Buy America" requirements and the Jones Act (Pub. L. 66-261).

5. Agencies May Help Contractors Find American Suppliers to Meet BAA Requirements

Finally, to support a transition towards increased use of American suppliers, the new EO directs federal agencies to "partner" with the [Hollings Manufacturing Extension Partnership \(MEP\)](#) and conduct "supplier scouting" of American companies "that are able to produce goods, products, and materials in the United States that meet Federal procurement needs." MEP is a public-private partnership that, among other services, helps identify qualified domestic sources that can manufacture products to meet supply chain needs. Information about qualified sources is disseminated through MEP Centers located in all 50 states and Puerto Rico. Though not expressly stated in the EO, contractors presumably would have access to information gathered pursuant to this supplier scouting, as that information will be critical to ensuring they can deliver products and materials that satisfy any heightened BAA requirements.

Conclusion

At bottom, the changes set in motion by the Biden Buy American EO will be highly consequential for the vast majority of companies that contract with or supply the U.S. government. Many companies will have to modify their procurement and supply chain processes to ensure compliance. Effecting these internal changes can be complex and resource-intensive, and any adjustments must be implemented thoughtfully to avoid the very real prospect of a [BAA enforcement action](#) under the civil False Claims Act (FCA). If you have questions about this significant EO or how it will impact your company, please contact the Miller & Chevalier attorneys listed below.

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