“BUY AMERICAN” – PRESIDENT TRUMP ORDERS FEDERAL AGENCIES TO ENFORCE GOVERNMENT PROCUREMENT RULES

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Public Policy and Law Alert

President Trump's "Buy American" agenda continues to pick up steam. Following up on earlier executive action prioritizing use of American-made steel in new pipeline construction,[1] President Trump has ordered federal agencies to enforce and assess compliance with Buy American laws. The President's call for compliance with Buy American laws includes a crackdown on waiving domestic content requirements for U.S. trading partners. The crackdown also extends to public interest waivers, and federal agencies have been instructed to assess whether the cost advantage of foreign-sourced products is the result of unfair trade practices before granting such waivers.

U.S. federal agency actions to prioritize procurement of domestically-produced goods could result in significant barriers to U.S. and foreign businesses engaged in government contracting at home and overseas. Foreign firms could soon face new obstacles to securing U.S. government contracts, while U.S. firms could face heightened scrutiny of their overseas supply chains. U.S. firms could also face new procurement barriers abroad[2] if our trading partners impose similar constraints on domestic preference procurement waivers.

Companies interested in existing waivers and the prospects for future waivers need to pay close attention to agency actions and consider engaging directly with agency officials as they develop new policies to ensure federal procurements maximize use of domestic materials and products. In the interim, U.S. contractors should ensure that their sourcing practices comply with domestic preference requirements as they currently stand.

We can help. The K&L Gates International Trade and Government Contracts & Procurement Policy teams are well positioned to assist interested parties to assess 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.

The executive order on Buy American is discussed in greater detail below.

EXECUTIVE ORDER ON BUY AMERICAN

On April 18, 2017, President Trump ordered federal agencies to prioritize procurement of domestically produced goods, specifically referencing American iron and steel products.[3] The order could have far-reaching implications for U.S. policies on government procurement and could end up disadvantaging U.S. businesses engaged in government contracting overseas.

Various laws, regulations, and executive orders related to federal procurement or federal grants require, or provide a preference for, purchase or acquisition of items produced or manufactured in the United States (defined collectively in the April 18 order as "Buy American laws"). Such laws include the Buy American Act, the Buy

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America Act, the Trade Agreements Act, and the Berry Amendment. Each law applies to different entities and supplies and imposes somewhat different domestic content restrictions at the federal as well as the state and local levels. As discussed below, there are exceptions or "waivers" to the various restrictions.

President Trump recently remarked that Buy American standards have been gutted by "reckless" exemptions.[4] He then directed all federal agencies to reprioritize procurement of domestically produced goods. Curbing use of waivers is one action item prescribed by the Buy American executive order.

Crackdown on Public Interests Waivers and Waiver of Domestic Content Requirements for U.S. Trading Partners

Effective immediately, the April 18 executive order directs every federal agency to "scrupulously" monitor, enforce, and comply with Buy American laws. The order also directs the agencies to "minimize" the use of waivers. To ensure maximum use of products and materials produced in the United States, the President has directed agencies to review the use of both public interest waivers and waivers of domestic content requirements for certain U.S. trading partners.

Federal agencies may waive domestic procurement requirements if it is in the "public interest," including where there is lack of availability of domestically produced items or if use of domestic materials would increase the costs of projects by 25 percent or more. The President's order directs agencies to assess and consider whether the cost advantage of a foreign-sourced product is the result of the use of predatorily priced (dumped) or subsidized steel, iron, or manufactured goods before granting a public interest waiver. Whether government contractors themselves will be required to provide pricing and subsidy information or federal agencies will need to obtain such information elsewhere remains to be determined.

Another exception to the various Buy American domestic content restrictions includes waiver of the domestic preference content requirements for "designated" U.S. trading partners. Designated countries are those that are parties to U.S. free trade agreements or the World Trade Organization ("WTO") Government Procurement Agreement, or that are otherwise determined to be eligible (e.g., Caribbean Basin countries or Least Developed Countries).[5] Products manufactured in designated countries, or products "substantially transformed" into new articles within designated countries from materials from other countries, generally are treated the same as domestically produced goods for purposes of federal procurement rules.

The President's order directs the Commerce Secretary and U.S. Trade Representative ("USTR") to assess the impact of U.S. free trade agreements and the WTO Government Procurement Agreement on the operation of Buy American laws, including their impact on the implementation of domestic procurement preferences. Commerce and USTR have 150 days to complete their assessment. U.S. trading partners likely are closely monitoring this process. Whether countries act to impose new procurement barriers on U.S. firms may depend on the Administration's actions in response to the Commerce Secretary and USTR recommendations.

Assessing Agency Compliance with Buy American Laws

President Trump's executive order also directs 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 directs agency heads to "develop and

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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.

Under the order, agency heads have 150 days to complete these tasks and submit their findings to the Commerce Secretary and the OMB Director, and thereafter must submit annual reports on their implementation of Buy American laws. Agencies may struggle to meet this deadline. The order does not provide guidance on how agency heads should make their assessments or develop policies to maximize use of domestic goods and materials. Instead the order directs the Commerce Secretary and Office of Management and Budget ("OMB") Director to issue such guidance within 60 days — i.e., by mid-June — leaving agencies three months to develop and submit their findings regarding Buy American compliance and boosting domestic procurement.

Report to the President

Under the April 18 executive order, the Commerce Secretary has 220 days (late November) to submit to the President a final report on Buy American. The report will contain agency findings regarding Buy American compliance, boosting domestic procurement, and the impact of waiver of domestic content requirements for U.S. trading partners on domestic procurement preferences. The report also will include specific recommendations to strengthen implementation of Buy American laws, including domestic procurement preference programs and policies. The recommendations could become the basis for new, government-wide procurement rules or new Buy American legislation.

Implications

Review of Buy American laws is on an expedited schedule — with policy changes possible before the end of 2017. A crackdown on the use of waivers could undermine opportunities for U.S. firms to participate in procurement at home and abroad. Foreign firms also could face new obstacles to securing U.S. government procurement contracts. Interested parties should assess the impact on business interests both at home and abroad and consider engaging directly with government officials.

Moreover, the increased enforcement of domestic preference laws could trigger heightened review of contractors' compliance programs, potentially resulting in False Claims Act liability. Contractors may want to take this opportunity to review their compliance with the Buy American laws as they currently stand, including internal controls and employee training. Contractors should ensure that they are aware of which domestic preference laws apply to each contract, as applicability varies by contract type, dollar amount, and procuring agency (civil versus defense). Contractors should also consider reaching down the supply chain to enforce domestic sourcing preferences at the subcontractor and supplier levels.

Notes:

[1] Presidential Memorandum Regarding Construction of American Pipelines, https://www.whitehouse.gov/the-press-office/2017/01/24/presidential-memorandum-regarding-construction-american-pipelines.

[2] The 2017 National Trade Estimate Report on Foreign Trade Barriers highlights a wide range of foreign domestic preference practices that already disadvantage U.S. firms competing for foreign procurement contracts, https://ustr.gov/about-us/policy-offices/press-office/reports-and-publications/2017/2017-national-trade-estimate.

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[3] Presidential Executive Order on Buy American and Hire American, https://www.whitehouse.gov/the-press-office/2017/04/18/presidential-executive-order-buy-american-and-hire-american. The executive order also directs federal agencies to review the employment immigration laws, including the high-skilled H-1B visa program, to promote "Hire American" policies.

[4] Remarks by President Trump on Buy American, Hire American Executive Order (18 April 2017), https://www.whitehouse.gov/the-press-office/2017/04/18/remarks-president-trump-buy-american-hire-american-executive-order.

[5] 48 C.F.R. § 25.003.

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