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Client Advisory

Buying American: Gauging the Potential Impact of the “Buy American and Hire American” Executive Order on Federal Contracts

The Buy American Act (BAA), as implemented by Federal Acquisition Regulation (FAR) Part 25, imposes an evaluation preference for offerors proposing domestic products under a federal contract. This preference is generally applied by a contracting officer adding a price “penalty” to a non-domestic low-priced offer for evaluation purposes if the second lowest offer proposes domestic items. Six percent is added to the lowest-priced offer if the domestic offeror is a large business, and 12% is added if the domestic offeror is a small business.

However, the BAA permits the use of waivers and exceptions to the requirements. Notably, the Trade Agreements Act exempts procurements over a certain threshold from the application of the BAA if the goods and services offered are from a Trade Agreement partner nation. There are also BAA waiver provisions that can apply to individual procurements under FAR Part 25.103 (for goods and services) and 25.202 (for construction).

The use of these waivers has come under scrutiny, as the President seeks to determine whether current rules strike a proper balance between preferring domestic suppliers, ensuring an efficient and cost-effective federal procurement system, and a host of other stakeholder interests.

Executive Order 13788, “Buy American and Hire American,” signed by President Trump on April 18, 2017, requires heads of agencies to (1) “assess the monitoring of, enforcement of, implementation of, and compliance with” domestic purchasing preference requirements within their agencies, (2) assess how waivers are used within their agencies and their effect on domestic jobs and manufacturing, and (3) “develop and propose policies . . . [to] maximize the use of materials produced in the United States”

The agency heads’ assessments are due 150 days from the date of EO 13788. However, this 150 day period is effectively reduced pending guidance from the Commerce Secretary and the Director of the Office of Management and Budget, “in consultation with” the Secretaries of State and Labor, the U.S. Trade Representative, and importantly, the Federal Acquisition Regulation Council. This guidance is due 60 days from the date of the EO, which essentially leaves mid-June to mid-September for the agency heads to perform these assessments.

It is unclear what immediate effect EO 13788 will have on day-to-day FAR compliance requirements, but government contractors should actively anticipate a change in the status quo. Government contractors should review their supply chains and the sourcing of the goods and services they provide to the federal government in order to prepare for the possible future restricting of previously-granted waivers and even potential new domestic sourcing requirements resulting from the assessments required by EO 13788.

If you have any questions about state or federal contracts, please contact [David Weinstein, Esq.](#) or [Greg Vogel, Esq.](#) at (856) 795-2121.

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