

What Biden Buy American Order Means For Gov't Contracting

By **Amy Hoang, Stacy Ettinger and Erica Bakies** (February 9, 2021)

On Jan. 25, President Joe Biden issued a new executive order directing federal agencies to strengthen current Buy American policies.[1] While the order is largely in line with the policy changes introduced in multiple Trump-era executive orders, it contains a number of alterations and enhancements to the current Buy American policy regime.

This article provides a refresher on what statutes, regulations and policies governed domestic sourcing requirements prior to issuance of the order, summarizes the directives included in Biden's order and suggests what additional revisions might be in the future.

Where We Were: Domestic Sourcing Requirements Under the Trump Administration

Most federal procurements, with some exceptions, are subject to one of two domestic sourcing regimes: (1) requirements under the Buy American Act, or BAA,[2] or (2) the Trade Agreements Act, or TAA.[3]

The federal government also imposes several domestic sourcing requirements specific to certain industries, such as Jones Act requirements for the maritime industry.

Although often conflated, the BAA and the TAA provide two separate and distinct sets of domestic content requirements. The BAA generally applies to supply and construction contracts over the micro-purchase threshold and under the thresholds for TAA applicability.[4]

The BAA also applies to certain categories of acquisition regardless of whether the contract exceeds the TAA threshold: (1) small business set-asides; (2) acquisitions of arms, ammunition, or war materials, or purchases indispensable for national security or for national defense purposes; (3) acquisitions from Federal Prison Industries Inc. or nonprofit agencies employing people who are blind or severely disabled; and (4) sole-source awards.[5]

Under procurements governed by the BAA, agencies may only acquire domestic end products, which the Federal Acquisition Regulation defines as a product (1) manufactured in the U.S.; and (2) consisting of more than 50% U.S. component parts — calculated by cost.[6]

Products that do not meet the definition of a domestic end product are subject to a price penalty, although there are certain waivers and exceptions.[7]

The TAA acts as an exception to the BAA for procurements over certain thresholds, and allows the U.S. to comply with its obligations under various trade agreements. The TAA waives application of the BAA restrictions for products from certain trading partners, known as designated countries.



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The TAA does not use the BAA's two-part test to determine a product's country of origin. The TAA determines country of origin by identifying the country in which the product was substantially transformed into the final product, regardless of the origin of component parts.

Nor does the TAA use the BAA's price penalty for foreign products; instead, the TAA prohibits the procurement of any non-U.S. or nondesignated country product.

	Applicability	Requirements	Country of Origin Test	Treatment of Non-Compliant Products
Buy American Act	Supply and construction contracts over \$10,000 and under Trade Agreements Act threshold (generally \$182,000)	Acquire only domestic end products unless cost is unreasonable	(1) Manufactured in the United States (2) At least 50% U.S. component parts	Subject to price penalty during evaluation
Trade Agreements Act	Supply, construction, and service contracts over Trade Agreements Act threshold (generally \$182,000)	Acquire only U.S. or "designated country" products	"Substantially transformed" in the U.S. or a designated country (origin of component parts irrelevant)	Agency prohibited from procuring

During the past four years, the Trump administration issued a number of executive actions aimed at enhancing domestic preferences.[8] These actions included directives to federal agencies to review and limit the use of waivers to domestic sourcing requirements, and to acquire only domestic products to the extent permitted by law.

Additionally, the Trump administration directed the Federal Acquisition Regulatory Council to promulgate a rule to increase the domestic content requirement from 50% to 55% for BAA procurements and to increase the BAA price penalty from 6% to 20%.[9]

The FAR Council published a final rule implementing these changes, which became effective on Jan. 21, 2020.[10]

Where We Are: Impacts of the Executive Order

The Biden administration's order includes directives similar to those issued by former President Donald Trump. It promotes a policy of using "terms and conditions of Federal financial assistance awards and Federal procurements to maximize the use of goods, products, and materials produced in, and services offered in, the U.S."

It anticipates broad coverage of Made-in-America laws, defined as all federal procurement-related statutes and regulations providing a preference for domestic products, including

laws requiring domestic preference for maritime transport, including the Jones Act.

The order includes the following directives and policies.

Crackdown on Buy American Waivers

The order creates a new, more rigorous process for agencies that seek waivers to Buy American requirements. Specifically, Biden's order creates the Made in America Office within the Office of Management and Budget, and directs agencies to submit all proposed Buy American waivers to the Made in America Office for review and approval.

The order also calls for the creation of a public website to publish information on proposed waivers and whether such waivers have been granted.

New Assessment of the Unreasonable Cost Exception

Current regulations allow an agency to waive Buy American requirements if the cost of domestic products is unreasonable — after application of the BAA price penalty discussed in the prior section.

Under the new order, before an agency can make an unreasonable cost determination, it must first assess whether a significant portion of the cost advantage of a foreign product is the result of the use of dumped steel, iron, or manufactured goods, or the result of "injuriously subsidized" steel, iron or manufactured goods.[11]

Supplier Scouting

The order directs agencies to partner with the Hollings Manufacturing Extension Partnership to conduct supplier scouting to identify American companies that are able to produce goods, products and materials in the U.S. that meet federal procurement needs.

Revisions to Current Buy American Regulations

Within 180 days, the FAR Council must consider proposing a rule that would make the following revisions to current regulations implementing the BAA:

Increase the domestic content requirements for domestic products.

The new order does not articulate a specific percentage for domestic content, but generally directs the FAR Council to "increase the numerical threshold for domestic content requirements for end products and construction materials."

Replace the component test.

Currently, the FAR measures domestic content by the total cost of domestic components. Biden's order recommends replacing this test with one that measures domestic content by the "value that is added to the product through U.S.-based production or U.S. job-supporting economic activity."

Increase the price preference for domestic products.

The order does not direct a specific percentage increase, but generally directs the FAR Council to "increase the price preferences for domestic end products and domestic

construction materials."

Interaction with Recent FAR Revisions to Buy American Requirements

It is unclear how Biden's order will impact the recent final rule revising current Buy American regulations. As noted above, that rule implemented certain increases to domestic content requirements and domestic price preferences directed by Executive Order No. 13881 on maximizing the use of American-made goods, products and materials.

Biden's order did not revoke Executive Order No. 13881, but noted that it was superseded to the extent it was inconsistent with the new order. The new rule, while effective as of Jan. 21, 2020, is still subject to the regulatory freeze implemented by Biden on Jan. 20.[12]

It therefore remains to be seen if and how agencies implement the final rule, or if implementation will be postponed until enactment of the order's policies.

Where We're Headed: Potential Future Impacts of the Executive Order

The summary above describes the actions and policies that Biden intends to enact in the near term to enhance domestic sourcing requirements. In addition to these items, the order contains a number of actions that do not explicitly direct changes to current policies but suggest that additional changes may be on the horizon:

Limitations on the Use of Domestic Unavailability to Justify the Procurement of Foreign Products

Agencies may waive BAA requirements for products that are not produced domestically in sufficient quantities. Agencies may waive TAA requirements for the same reason, except that when determining whether an item is unavailable for TAA purposes, an agency must determine that it not available in either the U.S. or in any designated country.

The FAR publishes a list of products predetermined to be unavailable in sufficient domestic quantities. The order establishes new procedures for updating the list, suggesting that it may become more difficult to designate an item as nonavailable and therefore eligible for purchase from otherwise prohibited sources.

Potential Removal of the Commercial Item Information Technology Exception

Agencies may waive Buy American requirements for information technology products that qualify as commercial items under the FAR.

The order does not make immediate changes to this exception, but directs the FAR Council to "promptly review constraints" on extending Buy American requirements to commercial item IT products and to develop recommendations for lifting the exception.

Potential Long-Term Plans to Renegotiate Trade Agreement Coverage

The order is largely silent as to what impact, if any, the new policies will have on a contractor's ability to provide products and services from designated countries under the TAA.

While Made-in-America laws broadly encompass both BAA and TAA requirements, the specific directives focus on BAA requirements and note that any policy changes must be

consistent with applicable law, which would include the TAA's requirements for nondiscrimination of trading partner products.

The order does, however, direct the head of each agency to submit a biannual report addressing, among other things, "the agency's analysis of spending as a result of waivers issued pursuant to the Trade Agreements Act ... separated by country of origin," which may form the basis for future actions.

Key Takeaways and Industry Impacts

From a practical perspective, the order will have the largest impact on those contracts subject to the BAA — supply contracts under \$182,000 and construction contracts under \$7.008 million, along with specific categories of contracts like small business set-asides and sole source awards.

Certain contractors and industries may be particularly impacted:

- Contractors that rely on waivers to Buy American requirements will see those waivers come under closer, and more public, scrutiny.
- Contractors that supply foreign-made IT products under the commercial IT exception to the BAA could see limitations on the scope of the exception, which could prompt the contractors to conduct a supply chain review to determine compliance.
- Contractors that rely on the domestic nonavailability exception to provide foreign products may see changes to the list of items pre-determined to be unavailable, and agencies may be less willing to make individual determinations given the mandate to maximize domestic sources.
- Contractors in the iron and steel industry will want to closely monitor implementation — or lack thereof — of the Jan. 21, 2020 final rule revising domestic content requirements for iron and steel products. As explained above, the final rule increased current content requirements from 51% to 95% for iron and steel products. Contractors that would have been subject to this domestic content increase — scheduled to be added to new solicitations in February — may see a temporary reprieve if implementation is put on hold because of the regulatory freeze coupled with new policy changes contemplated by the order.
- Subcontractors and suppliers doing business with federal prime contractors could see downstream effects of the order policy changes. While the FAR provisions implementing Made-in-America laws do not contain mandatory flow-down language, a prime contractor must necessarily flow down certain domestic content

requirements to subcontractors furnishing components, materials or end products for ultimate use by federal agencies.

Companies in the above categories will want to closely monitor future policy and regulatory changes, identify opportunities to provide input and, if needed or able, make changes to ensure that future procurement opportunities are not jeopardized.

Companies with contracts subject to the TAA rather than the BAA may have fewer immediate impacts; however, TAA obligations may come under review in future actions.

Particularly, the directive for agencies to report on acquisitions of products from TAA countries suggests that the Biden administration will be further assessing the impact of designated-country reciprocity on agencies' abilities to maximize the procurement of domestic goods and services.

Additionally, the establishment of the Made in America Office within the OMB signals continued and enhanced focus not only on BAA issues, but on a broader range of domestic sourcing and domestic content requirements, and enforcement of the same.

Biden's order is likely to be just one in a series of executive actions geared toward enhancing the defense industrial base. While it has few immediate impacts on contractors, particularly those whose contracts apply the TAA rather than the BAA, the order nevertheless suggests a continued push to strengthen Buy American policies generally and decrease dependence on foreign sources.

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[1] <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/25/executive-order-on-ensuring-the-future-is-made-in-all-of-america-by-all-of-americas-workers/>.

[2] 41 U.S.C.A. §§ 8301–8305.

[3] 19 U.S.C.A. §§ 2501–2581.

[4] See FAR 25.100(b), 25.402(b). The current thresholds for TAA applicability are \$182,000 for supply contracts and \$7,008,000 for construction contracts.

[5] FAR 25.401(a).

[6] Items that qualify as commercially available off-the-shelf items need not meet the domestic component test. See FAR 25.003.

[7] An agency may waive Buy American requirements if: (1) Domestic preference would be inconsistent with the public interest; (2) Domestic products are not available in sufficient quantities; (3) The cost of domestic products is unreasonable; (4) The products are specifically for commissary resale; or (5) The products qualify as information technology that is a commercial item. FAR 25.103.

[8] Notably, Trump issued Executive Order No. 13788 on April 18, 2017 (Buy American and Hire American); Executive Order No. 13858 on Jan. 31, 2019 (Strengthening Buy-American Preferences for Infrastructure Projects); Executive Order No. 13881 on July 15, 2019 (Maximizing Use of American-Made Goods, Products, and Materials); and Executive Order No. 13975 on Jan. 14 (Encouraging Buy American Policies for the U.S. Postal Service).

[9] When a foreign offer is evaluated against a domestic small business, the prior price penalty was 12% and increased to 30%.

[10] Federal Acquisition Regulation: Maximizing Use of American-Made Goods, Products, and Materials, 86 Fed. Reg. 6180–94 (Jan. 19, 2021).

[11] The reference to dumped and subsidized goods likely means unfairly priced (dumped) imports or imports subsidized by a foreign government found to have caused economic harm (injury) to a domestic industry producing a like product. It is unclear whether the relevant finding for purposes of the EO is limited to decisions by U.S. investigating authorities.

[12] <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/regulatory-freeze-pending-review/>.