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Buy America and Buy American: What's the difference and why it matters

- *The penalties for non-compliance can include serious civil or criminal actions.*

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In this first year of Donald Trump's administration, American sourcing requirements are receiving heightened focus that impacts business by providing opportunities and threats.

For instance, President Trump's "Buy American Hire American" executive order restates the policy of the government to buy American. Federal agencies are required to make an assessment of what the executive order calls the "Buy American Laws" aimed at maximum use of United States materials. The executive order is now on the road to changing the landscape of preferences for American products by the end of the year.



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When a company is asked to certify to its customer that its products comply with domestic content law, the answer is rarely straightforward. Considering the new executive order, contractors must be proactive and understand the Buy America Act and the Buy American Act.

The penalties for non-compliance are serious and include civil or criminal False Claims Act violations, suspension or debarment from contracting, contract terminations and other claims against a contracting business by the government. In recent years, the Department of Justice has increased efforts to prosecute False Claims Act violations in concert with Buy American violations. In 2016 alone the Department of Justice obtained more than \$4.7 billion in settlements and judgments from civil cases under the False Claims Act.

So what is the Buy America Act?

Buy America Act

The Buy America Act is the popular name for a group of domestic content restrictions that attach to specific funds administered by the Department of Transportation.

The Buy America provision of the Surface Transportation Assistance Act states the Secretary of Transportation "shall not obligate any funds authorized to be appropriated to carry out the Surface Transportation Assistance Act ... unless steel, iron and manufactured products used in such project are produced in the United States." These funds are used to make grants to states and other non-federal government entities for various transportation projects.

There are Buy America Act regulations with different standards for the Federal Highway Administration, Federal Transit Authority and other DOT agencies. Simply because a product is manufactured in the U.S. or meets the requirements of one domestic content rule does not mean it meets the requirements of another agency's Buy America Act provisions.

Nationwide waivers of the Buy America Act exist for narrow areas (e.g., ferryboat construction) but determining whether an item falls on the list is no easy task. Waivers for specific contracts are also available, but are rarely granted due to the high

Federal government contracting seminar

standards required for a waiver.

The Buy America Act has no waivers for countries that have a trade agreement with the U.S.

How is the Buy American Act different?

Buy American Act

Separate and distinct from the Buy America Act is the Buy American Act, passed by Congress during the Great Depression.

Unlike the Buy America Act, the Buy American Act only applies to “federal” procurement. It does not apply to DOT-funded state/local projects because while the source of the money for those projects is the federal government, such DOT projects are not awarded by the federal government.

The Buy American Act prohibits the government from acquiring an article, material or supply for public use within the U.S. that is not a domestic end product, and allows only domestic construction materials to be used for public use, subject to certain exceptions.

The Department of Defense has created exceptions to the Buy American Act by negotiating memorandum of understandings with foreign governments. The act also does not apply to products covered by the Trade Agreements Act, NAFTA, or other free trade agreements. The act in 1933 never envisioned the kinds of international supply chains we have in place today. In the act's inception, supply chains were like a piece of solid cheese, and now it's like Swiss cheese — there are all these holes in it.

Executive order

President Trump's “Buy American Hire American” executive order is the means to change the landscape of preferences for American products. The executive order restates the policy of the government to buy American and then provides an action timeline.

The executive order requires the Secretary of Commerce and the Office of the U.S. Trade Representative “to assess the impacts of all United States free trade agreements and the World Trade Organization Agreement on Government Procurement on the operation of Buy American Laws.”

These reviews are designed to ensure that American companies are treated equitably by assessing the impact of these agreements on the Buy American Laws.

The executive order reaffirms that in order for iron and steel products to be considered “produced in the United States,” all manufacturing processes must take place in the U.S.

The reaffirmation of Buy American laws will undoubtedly assist U.S. manufacturing, especially if the review of trade agreements results in curtailment of foreign manufactures' ability to be exempt from the Buy American Act. The executive order also has the potential to limit companies who previously benefited from U.S. government procurements and grants through waivers and exemptions to Buy American requirements.

Federal agency chiefs had 150 days from last April to perform the executive order's review, and the Secretary of Commerce must submit a report to the president with recommendations by November.

The executive order also seeks to limit the use of waivers of Buy American requirements, and requires agency heads to make the decision on whether a waiver is in the public interest. Before issuing a waiver, the agency head must consider whether a significant portion of the cost advantage of a non-U.S. product is the result of dumped steel, iron or manufactured goods.

Bottom line

It is reasonable to anticipate that this executive order will result in the strengthening of Buy American law requirements through stricter enforcement of existing law. The stakes are too high not to pay close attention to any certification of compliance with American product preferences.

Washington PTAC, the AGC of Washington and Oles Morrison Rinker & Baker are holding a federal government contracts seminar Nov. 16 at the AGC Building in Seattle. It will cover the “Buy American Hire American” executive order and how to do business with the new federal administration. More information is at <http://www.washingtonptac.org/seminar>.

Additionally, review of the impact of trade agreements will likely result in an increase in U.S. manufacturer's access to federal procurements, as well as federal grants used to fund transportation projects. Staying up to date and following the developments of the executive order's November results is critical for companies to take advantage of new opportunities to supply American products to the U.S. government and federally funded projects.

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