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Biden Moves to Bolster Buy America

On Monday, January 25, 2021, President Biden signed an executive order (EO) entitled, “Ensuring the Future Is Made in All of America by All of America’s Workers,” which is aimed at strengthening existing Buy America policies.[1] The EO summary[2] lists six separate policies:

- 1) Directs agencies to close loopholes in measuring domestic content and to increase domestic content requirements.** The Federal Acquisition Regulatory Council (FAR Council) must release proposed adjustments to Buy America calculations within 180 days (July 24, 2021). The proposal will seek to replace the current “component test” with a new test that determines the domestic content using the value added by “U.S.-based production or U.S. job-supporting economic activity.” The FAR is also directed to increase by an unspecified amount the threshold for domestic content in end-products and construction materials, as well as price preferences for domestic end-products and construction materials. Finally, the FAR must update its list of products not domestically available and examine the intersection of Buy America and information technology.
- 2) Creates a Made in America Office within the Office of Management and Budget (OMB).** This office will be headed by a Made in America Director, who is tasked with reviewing any agency requesting a waiver of its Buy America requirements. This office does not appear to have explicit authority to block waivers. However, disapproval will carry significant weight, requiring agency heads to provide further justification and paperwork on the decision.
- 3) Increases oversight of waivers to domestic preference laws.** In addition to the aforementioned Made in American Office within OMB, the General Services Administration will be required to publish Buy American waivers on its website.
- 4) Requires agencies to actively use supplier scouting.** Agencies will be required, to the greatest extent possible, to partner with the Commerce Department’s Manufacturing Extension Partnership (MEP). This will allow agencies to

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locate domestic small- and medium- businesses that can produce the item in question.

5) Reiterates support of the Jones Act. The President generally promises to uphold and advocate for the Jones Act, which mandates only U.S.-flagged vessels may carry cargo between U.S. ports.

6) Directs a cross-agency review of all domestic preferences. Every federal agency will be required to deliver a report to the Made in America Director within 180 days (July 24, 2021). The report must include implementation and compliance with Buy America laws, any Buy America waivers currently in force, and recommendations to further Buy America goals. Agencies will further be required to submit biannual reports thereafter on those same topics.

In addition to those six policies, the EO revoked five previous EOs in part or whole, four of which were from the Trump Administration. Those five are: 1) Executive Order 13788 of April 18, 2017 (Buy American and Hire American); 2) Section 5 of Executive Order 13858 of Jan. 31, 2019 (Strengthening Buy-American Preferences for Infrastructure Projects); 3) Executive Order 13975 of Jan. 14, 2021 (Encouraging Buy American Policies for the United States Postal Service); 4) any portions of Executive Order 10582 of Dec. 17, 1954 (Prescribing Uniform Procedures for Certain Determinations Under the Buy-America Act) that are inconsistent with Biden's EO; any portions of Executive Order 13881 of July 15, 2019 (Maximizing Use of American-Made Goods, Products, and Materials) that are inconsistent with Biden's EO.

The EO was, predictably, received warmly by unions like the AFL-CIO,[3] who cheered the provisions closing loopholes, and not-so-warmly by the U.S. Chamber of Commerce,[4] who pointed to figures it had prepared last year that showed 97% of federal procurement contracts already go to U.S. firms.

Nevertheless, it is no surprise that the Biden Administration is putting an early emphasis on Buy America. It fits easily under the Build Back Better mantle, while giving a win to an important constituency in organized labor. The reporting required by the EO provides mostly window dressing for more substantive changes, including overhauling the "component test," increasing domestic content thresholds (which were increased already in the waning days of the Trump Administration),[5] and establishing a new office to put a microscope on any deviations from existing Buy America laws.

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