

ISSUE BRIEF

No. 4989 | AUGUST 7, 2019

THOMAS A. ROE INSTITUTE FOR ECONOMIC POLICY STUDIES

New Buy American Executive Order Bad for Taxpayers

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KEY TAKEAWAYS

The government has a responsibility to use the tax dollars of hard-working Americans wisely during federal procurement.

The President's latest Buy American executive order would reduce competition in government procurement, increase costs for taxpayers, and the move could conflict with statute.

The Trump Administration should halt its efforts to increase domestic content regulations, and instead focus on expanding competition in federal procurement.

On July 15, 2019, President Donald Trump signed an executive order instructing the Federal Acquisition Regulatory (FAR) Council to consider changing the rules for what is considered “manufactured in the United States” in government procurement.¹ Currently, these rules are set out by the Buy American Act of 1933 (BAA)² and the Trade Agreements Act of 1979 (TAA).³

Existing rules actively limit the use of imported products in federal government procurement, reduce competition in procurement, and increase costs for American taxpayers. Further narrowing the definition for “manufactured in the United States” would exclude several American companies that currently bid on government contracts. This decrease in competition could result in even higher procurement costs. The proposed rule change could also come into conflict with the Trade Agreements Act, adding confusion to an already complex regulatory system.

This paper, in its entirety, can be found at <http://report.heritage.org/ib4989>

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The FAR Council should refrain from changing the “manufactured in the United States” rules as suggested in the President’s executive order. The Trump Administration should halt its efforts to increase domestic content regulations and focus instead on expanding competition in federal procurement. Doing so would allow taxpayers’ dollars to be spent more wisely.

Proposed Rule Changes

The President’s executive order instructs the FAR Council to, within 180 days, consider decreasing the foreign iron and steel content permitted in government procurement contracts from 50 percent to only 5 percent. The order also suggests adopting a rule permitting no more than 45 percent of the cost of a product procured by the government to be of foreign origin for “all other end products.”⁴

This move follows two previous executive orders by the Trump Administration aimed at restricting competition in government procurement. In April 2017, the President issued the Buy American and Hire American executive order, which established White House policy “to maximize...the use of goods, products, and materials produced in the United States” and for “every agency [to] scrupulously monitor, enforce, and comply with Buy American laws, to the extent they apply, and minimize the use of waivers.”⁵ The executive order on Strengthening Buy-American Preferences for Infrastructure Projects, issued by the President in January 2019, again instructed federal agencies to “use to the greatest extent practicable, iron and aluminum as well as steel, cement, and other manufactured products produced in the United States in every contract, subcontract, purchase order, or sub-award that is chargeable against such Federal financial assistance award.”⁶

Standards in the Buy American Act

The Buy American Act of 1933 regulates the levels of foreign content permitted in products procured by the federal government.⁷ The Federal Acquisition Regulation implements the standards established in the BAA. The FAR Council provides further regulatory guidance and administers the rules, while U.S. Customs and Border Protection (CBP) issues rulings on country-of-origin under the BAA.⁸

When federal agencies acquire supplies for use within the U.S., they must use domestic end products if the purchase exceeds \$3,500. To be considered a domestic end product under the BAA, the product must fulfill the following requirements:

Unmanufactured end products must be mined or produced in the United States in order to qualify as “domestic” for purposes of the Buy American Act. Manufactured end products, in contrast, qualify as domestic if they are manufactured in the United States, and either (1) the cost of the components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all components, or (2) the end product is a commercially available off-the-shelf item.⁹

Substantially Transformed in Trade Agreements Act

The Trade Agreements Act of 1979 defines “manufactured in the United States” as a product “that is mined, produced, or manufactured in the United States or that is substantially transformed in the United States into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed.”¹⁰ In most cases regarding the Buy American Act requirements, this standard is used to determine if a product is eligible for procurement by the federal government.

In a practical sense, this means that a product acquired by the government qualifies as being manufactured in the U.S. if it is made into a new product in the U.S. using imported components. This is so as long as the new product is different than the components. The requirement to meet this substantially transformed threshold is somewhat vague and CBP is charged with issuing rulings on country-of-origin in relation to substantial transformation under the TAA.

Potential Rules in Conflict

In general, domestic content requirements, such as those found in the BAA, are already extremely onerous and create complicated barriers with which companies must comply.¹¹ Drastically changing the rules would mean that many companies currently providing products to the government would no longer meet the requirements to do so. Supply chains currently in place to meet restrictive Buy American requirements would need to be reconfigured at great expense—or these American companies would simply lose the ability to bid on contracts.

In reference to tariffs on steel imports, Bob Miller, president of Novolipetsk Steel (NLMK) USA in Pennsylvania, explained that NLMK “[is] concerned with any provisions that limit competition. What is that going to do? Raise prices for the consumer...and the government will be overpaying

with limited competition.”¹² Similar to tariffs, changing procurement rules limits competition and increases prices. In the end, American taxpayers end up funding government projects—and those bills will become more expensive if this rule change is made.

The President’s proposed rule changes could also be in conflict with the TAA, which defines “manufactured in the United States” as substantially transformed. While the executive order does not mention the Trade Agreements Act or “substantially transformed” directly, it is unclear how the proposed FAR Council changes would relate to the “substantially transformed” standard. At the very least, it would cause confusion for businesses attempting to comply with the different rules; at worst, unelected government bureaucrats would be writing new rules that could supersede statute.

Conclusion

Existing domestic content laws, including the Buy American Act, impose costly regulations on U.S. businesses providing goods to the federal government. Ultimately, these regulations reduce competition in government procurement, make the supplied products more expensive, and cost American taxpayers more than they would otherwise pay for government projects.

President Trump’s executive order recommends higher regulations on procurement than those that already exist. Not only could these changes further decrease competition for procurement and increase costs for taxpayers, they could conflict with standards found in the Trade Agreements Act. Rather than increasing these rules, the Trump Administration should work with Congress to expand competition in federal procurement by eliminating costly domestic content rules.

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Endnotes

1. News release, “Executive Order on Maximizing Use of American-Made Goods, Products, and Materials,” The White House, July 15, 2019, <https://www.whitehouse.gov/presidential-actions/executive-order-maximizing-use-american-made-goods-products-materials/> (accessed July 25, 2019).
2. Buy American Act of 1933, Public Law 72-428.
3. Trade Agreements Act of 1979, Public Law 96-39.
4. White House, “Executive Order on Maximizing Use of American-Made Goods, Products, and Materials.”
5. News release, “Presidential Executive Order on Buy American and Hire American,” The White House, April 18, 2017, <https://www.whitehouse.gov/presidential-actions/presidential-executive-order-buy-american-hire-american/> (accessed July 25, 2019).
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7. 41 U.S. Code §§ 8301-8305.
8. 41 U.S. Code § 106 and 19 Code of Federal Regulations § 174.
9. Kate M. Manuel et al., “Domestic Content Restrictions: The Buy American Act and Complementary Provisions of Federal Law,” Congressional Research Service Report for Congress, September 12, 2016, <https://fas.org/sgp/crs/misc/R43354.pdf> (accessed July 25, 2019).
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11. Tori K. Whiting, “Buy American’ Laws: A Costly Policy Mistake That Hurts Americans,” Heritage Foundation *Backgrounder* No. 3218, May 18, 2017, <https://www.heritage.org/trade/report/buy-american-laws-costly-policy-mistake-hurts-americans>.
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