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Biden Administration’s Approach to “Buy American” Will Harm Taxpayers

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KEY TAKEAWAYS

America's dozens of domestic content requirements create burdens for businesses, decrease competition for government contracts, and increase costs for taxpayers.

The new Biden Administration wants to strengthen these “Buy American” laws and regulations.

The Administration should instead work with Congress to increase competition in federal contracting—a better tool for creating jobs and supporting economic growth.

On January 25, 2021, President Joe Biden signed an executive order laying out the new Administration’s vision for “Buy American” policies,¹ which Heritage Foundation analysts have broadly called “domestic content requirements.”² According to the White House, strengthening these laws and consolidating their application will “help create well-paid, union jobs, and build our economy back better so that everybody has a fair shot at the middle class.”³

America’s dozens of domestic content requirements are incredibly complex and create additional, costly regulatory burdens for producers, ultimately resulting in less competition for government contracts and increased costs for taxpayers. Many previous Administrations have put their own spin on how these laws are enforced, as well as how waivers to the requirements are administered. Time and again,

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those tweaks have cut down on competition in procurement and have not yielded job growth in target industries, such as the steel industry.

The Biden Administration’s Buy American plans are unlikely to yield different results than those of its predecessors. The Administration should halt its efforts to increase domestic content requirements and focus instead on working with Congress to expand competition in federal procurement by eliminating Buy American rules. Such a move would increase private-sector jobs by more than 300,000 and contribute \$22 billion to U.S. gross domestic product (GDP).⁴

Buy American Basics

U.S. law is filled with a myriad of highly complex and confusing domestic content requirements, and the situation is further complicated by varied interpretations of the regulations by different government agencies. The various laws and provisions are separated into two categories: (1) those that regulate direct federal government spending, and (2) those that regulate indirect federal government spending, such as federal grant funds to state and local governments. The former, commonly called “Buy American” rules include: The Buy American Act of 1933, the Trade Agreements Act, and the Berry Amendment. The latter are commonly referred to as “Buy America,” and include a host of laws and provisions related to the Department of Transportation and other agencies. The Biden Administration estimates that the federal government spends roughly \$600 billion annually on procurement contracts.⁵

In 2019, roughly \$220 billion of federal spending on procurement was subject to Buy American Act regulations, and only 3.5 percent of this spending was for products that did not meet those regulations.⁶ Under the Buy American Act, most manufactured goods must contain at least 50 percent domestic content. Waivers can be issued under certain circumstances, such as if the products are not sufficiently available from a domestic source.⁷ The Department of Defense is subject to this act, and is further regulated through the Berry Amendment, which requires that certain goods be 100 percent of U.S. origin.⁸ The Trade Agreements Act allows the President to waive certain domestic content requirements through international agreements.⁹

Buy America laws are housed within dozens of statutes, and the Surface Transportation Assistance Act of 1982 is the largest such law, containing domestic content requirements for federal grant funds for transportation infrastructure. The act requires state and local governments to use steel,

cement, and manufactured products that are “produced in the United States” when using federal funds for transportation infrastructure projects.¹⁰ These requirements primarily affect Amtrak and four administrations within the U.S. Department of Transportation,¹¹ but due to the vague definition of “produced in the United States,” each administration interprets the law differently. These variations are incredibly complex, and it is difficult for potential contractors to have multiple sets of rules in addition to the existing requirements for direct federal procurement under the Buy American Act of 1933.¹²

President Biden’s Take on Buy American

President Biden’s new executive order attempts to strengthen these laws and regulations. The White House claims that the order makes “Buy American real and close[s] loopholes that allow companies to offshore production and jobs while still qualifying for domestic preferences.”¹³ Additionally, the Administration is emphasizing the positive effect that its Buy American policies will allegedly have on job creation, specifically union jobs.

While President Biden’s general approach to Buy American policies is very similar to the approaches of previous Administrations, his executive order does include major changes to the institutional bureaucracy within the government. A new office within the Office of Management and Budget called the Made in America Office will be created to centralize the evaluation and approval of waivers to domestic content regulations. Subsequently, there will be a Director of Made in America. Agency heads, who previously determined waiver requests for their relevant regulations, will need to instead submit requests to this new office for approval. The Made in America Office will also establish guidelines for what must be included in waiver requests, publish all waivers online for public access, and be responsible for certain reporting requirements.

In addition, President Biden’s executive order includes a new requirement for all relevant agencies to “assess whether a significant portion of the cost advantage of a foreign-sourced product is the result of the use of dumped steel, iron, or manufactured goods or the use of injuriously subsidized steel, iron, or manufactured goods.” U.S. antidumping and countervailing duty laws already allow American businesses to petition for relief from these kinds of imports, making this policy redundant and just another barrier to competition in government contracting.

Future Regulatory Changes. The executive order cannot directly implement all the changes that the Biden Administration would like to make

to domestic content rules. The Federal Acquisition Regulatory Council is instructed to consider three major changes to the regulations that enforce the Buy American Act: (1) replacing the component test, (2) increasing content thresholds, and (3) increasing price preferences. The executive order suggests that the council “consider proposing” these rule changes within 180 days. In general, such changes would increase the regulatory burden for businesses attempting to secure government contracts and could result in excluding existing U.S.-based suppliers and further reducing the very limited amount of foreign-sourcing that takes place.

A Better Approach to Government Procurement

The cumbersome rules for domestic content requirements translate into higher costs for taxpayers. The reason is that existing regulations limit the number of companies that can qualify to bid on government contracts. Additionally, even if a company is not outright unable to bid, the regulatory burden associated with intensive supply-chain tracking to ensure domestic content can be too costly for smaller companies. Further action by the government to increase these burdens will continue to decrease the number of businesses willing and able to fulfill the contracts. Without competition, the companies that are able to meet these onerous requirements can charge higher prices, ultimately making taxpayer dollars not stretch as far as they could.

For example, Congress may consider new infrastructure legislation this year.¹⁴ Any appropriated funds would be subject to various domestic content requirements, mainly Department of Transportation rules. The funding provided in such a bill would not stretch as far as it could under current regulations, and the rules could cause project delays. In fact, a Government Accountability Office study published in 2010 found that five of 27 federal agencies reported that Buy American requirements tied to the America Recovery and Reinvestment Act of 2009 caused delays in implementing new projects.¹⁵ Strengthening domestic content rules (or including new ones in an infrastructure package) and a more stringent waiver process would cause greater inefficiency and waste of taxpayer dollars.

The proof that Buy American policies provide a net economic win for Americans is also lacking. The U.S. steel-producing industry has been a primary target sector for domestic content requirements for decades. In 1980, more than 500,000 Americans were directly employed in the domestic steel industry.¹⁶ Since then, employment has consistently decreased despite the government’s efforts to protect the industry from foreign competition.

Approximately 144,000 Americans were directly employed in the steel industry in 2019.¹⁷ The decades of regulations (not just Buy American laws) meant to support job growth in this industry have not achieved their goals.¹⁸

Gary Hufbauer, a trade economist at the Peterson Institute for International Economics, estimates that each job saved through Buy American policies costs taxpayers \$250,000 annually.¹⁹ On the other hand, a 2017 report found that eliminating all Buy American policies would help to increase jobs and increase the size of the economy. It estimates that deregulating procurement would increase U.S. GDP by \$22 billion and add an estimated 363,000 jobs. While approximately 57,000 jobs would be lost around the country, 50 of 51 states (including the District of Columbia) and 430 of 436 congressional districts would experience job increases as a result of this policy change.²⁰

Conclusion

The Biden Administration, like many Administrations before it, is actively increasing the regulatory burden for government contracting, and claims that doing so will help to create new jobs and strengthen the middle class. These laws have proven over time to be costly regulatory burdens for businesses, reducing competition for government contracts and increasing costs for taxpayers. At the same time, the industries that Buy American laws attempt to benefit are not experiencing job growth. The changes put forth by the Biden Administration will not lead to better results. The Administration and Congress should increase competition in contracting by eliminating all Buy American policies. Doing so would boost jobs and support the economy.

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