

INTERNATIONAL BUSINESS ALERT

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Reevaluating your supply chain: How the new American-made product qualifications rule may impact your business

Two recent actions aimed at maximizing domestically-produced goods, products, materials and services may have significant impact on contractors and supply chains. In January 2021, the Federal Acquisition Regulation (FAR) Council published a final rule "[Maximizing Use of American-Made Goods, Products, and Materials](#)" that amended the requirements for products to be classified as American-made under the [Buy American Act](#) (BAA). Less than a week later, President Joe Biden signed [Executive Order 14005](#), titled "Ensuring the Future Is Made in All of America by All of America's Workers" (EO 14005), to further strengthen the BAA requirements and close loopholes that allowed companies to engage in offshore production and manufacturing. Both contemplate significant changes to domestic end product requirements under the BAA. Federal government contractors of all sizes and contractors that fulfill federal government contracts should carefully monitor developments in this area and reassess their supply chains to ensure compliance and to preserve their ability to continue to procure federal government contracts.

While EO 14005 may appear to resemble [Executive Order 13788](#), entitled "Buy American Hire American," or the "BAHA EO," implemented under the Trump Administration, there are a few differences between the two. Most importantly, the BAHA EO addressed not only the BAA requirements, but also U.S. immigration policies. On the other hand, President Biden's executive order has a strong focus on government procurement, and does not address immigration policies. In regards to government procurement, EO 14005 calls for the closing of all loopholes that permitted companies

to utilize offshore manufacturing, while benefiting from domestic policies. According to President Biden's [press release](#), EO 14005 aims to direct over \$600 billion of the annual federal procurement budget to American companies. Although there are waivers available if a product does not meet the BAA requirements, the Biden Administration expects the newly created "Made in America Office" to increase the scrutiny of waiver requests.

What is the Buy American Requirement?

"Buy American" generally refers to the BAA, the most significant domestic preference statute on government contracting. While the BAA does not restrict government agencies from purchasing foreign goods, it provides a price preference for domestically produced goods (domestic end products) under federal government contracts, with certain exceptions. In order for a product to be classified as American-made under the old rule, the product must be manufactured in the U.S., and the cost of its components mined, produced or manufactured in the U.S. must exceed 50% of the cost of all of its components. The BAA generally restricts the purchase of items that are not domestic end products through a price evaluation penalty applied to competing offers of foreign end products, but waivers are available based upon the public interest, unavailability or costliness. For procurements covered under the BAA, government contractors must file certificates of compliance with the procuring agency.

Final Rule – the Current Buy American Requirement

The final rule includes a few significant changes to the domestic end products rule discussed above, including:

1. Raising the domestic content requirement from 50 percent to 55 percent;
2. Creating a separate domestic content requirement for items wholly or predominantly made of iron or steel; and
3. Raising pricing preferences from 6 percent to 20 percent for large business and from 12 percent to 30 percent for small businesses. Accordingly, in order to qualify as an American producer under the BAA, government contractors must produce items in which the final item is made up of at least 55 percent of American-made materials. The final rule went into effect on Feb. 22, 2021. However, although this final rule should be considered as the controlling rule for the time being, it too may change soon, particularly given the mandate of EO 14005, discussed in more detail below.

EO 14005 – the Additional Buy American Requirements and Proposals

In addition to the final rule, EO 14005 contemplates numerous changes aimed at strengthening the domestic end products requirements under the BAA, such as:

- Directing agencies to propose further amendments to the BAA regulations to close current loopholes in how domestic content is measured and increase domestic content requirements;
- Appointing a new senior leader in the Executive Office of the President dedicated to the BAA compliance;
- Increasing oversight of potential waivers to domestic preference laws;
- Requiring federal agencies to participate in the Hollings Manufacturing Extension Partnership to conduct “supplier scouting” in order to identify U.S. companies that are able to produce products and materials in the U.S.;
- Connecting new businesses to contracting opportunities by requiring active use of supplier scouting by agencies; and
- Directing a cross-agency review of all domestic preferences.

Moreover, EO 14005 requires the FAR Council to propose a new rule that would further amend the domestic end product rule. Specifically, EO 14005 calls upon the FAR Council to replace the domestic content test with a test that measures domestic content by the value it adds to the U.S. production of the product or the U.S. job sector. Yet, the Biden Administration did not describe how regulators could calculate a new test based on value. EO 14005 mandates the FAR Council to make determinations as to whether to propose such amendments within 180 days from the issuance of EO 14005, so more changes are expected.

Additionally, while waivers based upon public interest, unavailability, or costliness remain available under the BAA, EO 14005 will impact waivers in the following ways:

1. Agencies will be required to submit descriptions and justifications of all proposed waivers to the Made in America Director before a waiver will be granted;
2. Agencies will be required to assess, and may call upon the International Trade Administration in the U.S. Department of Commerce for assistance, whether the cost advantage of a foreign product is due to dumping materials such as steel, iron or manufactured items; and
3. The Office of Management and Budget, Secretary of the Department of Commerce, and the Made in America Director must collectively assess the economic implications of a proposed amendment to the list of domestically nonavailable products.

While these changes inevitably make it harder for companies to satisfy the BAA requirements, EO 14005 presents new and significant opportunities for small and mid-sized businesses to produce goods, products and materials in the U.S. that meet federal procurement needs. Particularly, as a result of EO 14005, the [National Strategy for the COVID-19 Response and Pandemic Preparedness](#), and [Executive Order 14001](#) (addressing a Sustainable Public Health Supply Chain), significant opportunities will exist

for U.S. manufacturers of personal protective equipment (PPE) and other essential products and supplies.

Take Away

Overall, government contractors or businesses that provide products or services for federal government contracts can expect heightened scrutiny under the BAA qualifications and waiver process. As an additional transparency measure, the new order proposes a public website where all waiver requests would be available. Moreover, EO 14005 implements additional reporting requirements for federal agencies, which would require agencies to detail their compliance efforts.

Nevertheless, EO 14005 could turn out to be beneficial for small and mid-sized companies. These businesses should look for contracting opportunities with the full spectrum of federal agencies, especially agencies tasked with maintaining national stockpiles, agencies in charge of procuring PPE and other items needed to combat COVID-19, and others such as the U.S. Department of Health and Human Services and the U.S. Department of Veterans Affairs.

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