

AN A.S. PRATT PUBLICATION

JUNE 2017

VOL. 3 • NO. 6



PRATT'S  
**GOVERNMENT  
CONTRACTING  
LAW**  
REPORT



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Library of Congress Card Number:

ISBN: 978-1-6328-2705-0 (print)

Cite this publication as:

[author name], [article title], [vol. no.] PRATT’S GOVERNMENT CONTRACTING LAW REPORT [page number] (LexisNexis A.S. Pratt);

Michelle E. Litteken, GAO Holds NASA Exceeded Its Discretion in Protest of FSS Task Order, 1 PRATT’S GOVERNMENT CONTRACTING LAW REPORT 30 (LexisNexis A.S. Pratt)

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*An A.S. Pratt® Publication*

Editorial Office  
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862  
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# How Is Your Domestic Preference Compliance? President Trump Signals More Scrutiny of “Buy American, Hire American” Practices

*By Justin A. Chiarodo, Stephanie M. Harden, and Philip E. Beshara\**

*This article discusses the Buy American portion of President Trump’s Executive Order, which is of particular importance to federal contractors.*

President Trump has signed an Executive Order that marked another step forward in his promotion of “Buy American” and “Hire American” policies. The Executive Order focuses on two areas: cracking down on abuse of the H-1B guest worker program, and promoting the purchase of American products in federal procurements.

This article tackles the Buy American portion of the Executive Order, which is of particular importance to federal contractors.

## **THE EXECUTIVE ORDER**

According to an April 17 White House press briefing, the Executive Order “ushers in a new, more muscular Buy American policy based on the twin pillars of maximizing Made in America content and minimizing waivers and exceptions to Buy American laws.” In furtherance of these pillars, the Executive Order features four main Buy American components:

- 1) It directs agencies to strictly enforce Buy American laws (including the Buy American Act and the Berry Amendment). Each agency will be required to conduct a Buy American performance review assessing, among other things, its use of waivers and exceptions and to provide recommendations for strengthening the United States’ Buy American policies.
- 2) It also directs agencies to use public-interest waivers narrowly and to obtain approval from the heads of agencies before using them. Agencies will also be permitted for the first time to consider the effect

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of unfair trade practices, such as dumping and subsidization, in their evaluation of proposals. According to a senior administration official, “it is simply unfair for government contracts to be awarded to low bidders that use dumped or injuriously subsidized foreign-source content to push out domestic producers.”

- 3) It also directs the Secretary of Commerce and the United States Trade Representative to assess the effects of the numerous trade agreements to which the United States is a party, with the goal of determining whether the agreements are “fair and reciprocal.” The administration has signaled that agreements that do not meet this standard may be rescinded or renegotiated by President Trump.
- 4) Finally, it reaffirms the “melted and poured” standard for U.S. steel production in an effort to ensure that steel slabs are not imported from countries such as China and Russia, where lesser standards are used.

The stated goal of all of these policies is to ensure that the United States is not a “net loser” to other countries in the spending of federal dollars. Interestingly, the policies align the Trump administration with lawmakers and government officials on different ends of the political spectrum. For example, Democratic Senator Chris Murphy (CT) takes credit for some of the initiatives in the Executive Order. Senator Murphy, a Buy American-proponent, urged the administration to appoint a Buy American watchdog, among other actions, shortly after President Trump assumed office.

Likewise, President Trump’s Transportation Secretary, Elaine Chao, has been a longtime opponent of Buy American policies. In January, then Secretary-designate Chao’s past characterization of Buy America as a “dig a moat around America policy” was brought up during her confirmation hearing. As the head of the Department of Transportation, Secretary Chao presides over an agency that is particularly impacted by the Buy America provisions—for example, through infrastructure projects across the country—and will have considerable authority in the potential reigning in of Buy American waivers.

Whether via the Department of Transportation or the Department of Defense, the White House describes the inter-governmental reviews initiated by the Executive Order as “top-to-bottom assessments aimed squarely at cracking down on weak monitoring, enforcement, and compliance efforts” at every federal agency and department. To this end, Commerce Secretary Wilbur Ross is required to report back to the president within 220 days with recommendations on how to strengthen the Buy American policies of the federal procurement system. We can expect a significant push to strengthen these policies at that time, including the possible renegotiation of trade agreements deemed to be unfair by the administration.

In the immediate term, the Executive Order does not change existing law, but rather, encourages agencies to more strictly enforce existing Buy American restrictions. Given the prospect of enhanced enforcement in these areas, contractors with domestic preference issues impacting their business should take advantage of this opportunity to review their compliance with the Buy American Act, Trade Agreements Act, Berry Amendment, and other trade-related laws and regulations.

### **WHAT SHOULD CONTRACTORS DO?**

There are several basic steps and processes worth considering for impacted contractors, all of which should be geared toward ensuring compliance with all applicable trade-related restrictions and accurately representing the country of origin for offered products:

- Identify an individual within the company responsible for domestic preference compliance, and ensure that they have adequate time and support from the company to accomplish their job.
- Review solicitations carefully to identify any clauses that relate to the country of origin of products or services to be supplied, including Buy American Act or Trade Agreements clauses. And, understand how these clauses relate (many apply only at certain thresholds or waive the requirements of other clauses, creating complex and sometimes overlapping restrictions).
- Remember that the end products under the solicitation to which the rules of origin will be applied are not necessarily the same as individual Contract Line Items (“CLINs”). Ask contracting officers for guidance if there is any doubt regarding the “end product” being acquired.
- Research offered products carefully to ensure that they are fully trade compliant. Determine if an exception under the Buy American Act or Trade Agreements Act applies (such as commercially available information technology under the Buy American Act).
- Ensure that suppliers are aware of, and accurately disclose, the country of origin and component cost breakdown for their offered products.
- Establish a mechanism to update all country of origin information prior to the submission of final proposal revisions. Awards may be subject to protest if non-compliant products, part of a contractor’s solution, or a previously compliant product becomes non-compliant as a result of a change in its components or production process between the time the proposals are submitted and the time of the award.
- Establish a system to ensure full compliance with Buy American Act

## HOW IS YOUR DOMESTIC PREFERENCE COMPLIANCE?

and Trade Agreements Act certifications throughout the course of contract performance.

With the above and other practices in mind, contractors with significant foreign components in their supply chain should also pay close attention to this issue as it unfolds over the coming weeks and months.