

CLIENT ALERT

One-Two Punch: President Biden Issues Made in America Executive Order Mere Days After FAR Council Issues Final Rule Tightening Federal "Buy American" Requirements

January 29, 2021

Contractors barely had time to digest the prior administration's changes designed to tighten the Buy American Act restrictions when, on January 25, 2021, President Biden issued [Executive Order 14005](#) on "Ensuring Future of America is Made in America by all of America's Workers" directing further tightening and perhaps even a new approach to determining what will constitute a "domestic end product" under the implementing regulations ([previously discussed here](#)).

Buy American Act Final Rule

On January 19, 2021, the FAR Council belatedly finalized a rule to implement President Trump's [EO 13881](#), "Maximizing Use of American-Made Goods, Products, and Materials" (July 15, 2019) (discussed [here](#)). The most significant changes adopted in the [final rule](#) include:

- Increasing the amount of domestic component cost generally needed (to 55%) for a non-COTS end product to qualify as "domestic;"
- Establishing, for the first time outside of federal grant programs, special and complex rules for end products consisting "wholly or predominately of iron or steel or a combination of both"; and
- Increasing the price evaluation penalty assessed on non-domestic end products in civilian agency procurements to 20% generally and 30% for domestic end product offers from small business.

Biden Made in America EO

EO 14005 is largely prescriptive, laying out the general policy of maximizing the use of goods, products, and materials produced in, and services offered in, the U.S. In addition to requiring agencies to review and report on implementation of and compliance with the various domestic preference regimes, the EO includes the following key provisions:

1. **Centralized process for waiver review and publication.** The EO creates a new Made in America Office within the Office of Management and Budget (OMB) to be headed by a Made in America Director, who will have authority to review proposed agency waivers of any domestic preferences, with ultimate resolution by the President for any disagreements that cannot be resolved between OMB and the agency with respect to the appropriateness of the waiver. The EO also requires the General Services Administration (GSA) to develop a website where it will publish proposed and granted waivers along with the justification.
2. **Potential (additional) changes to the BAA.** The EO also directs the FAR Council, within 180 days of the order, to *consider* proposing several amendments to the BAA, including (a) potentially a further increase in the domestic component requirements and applicable price evaluation preferences; and (b) replacement of the long-standing "component test"

with a test “under which domestic content is measured by the value that is added to the product through US-based production or job-supporting economic activity.”

The EO also directs the FAR Council specially to review the current special rules for commercial item IT, as well as more generally to report within 180 days recommendations on how to further effectuate the policy announced in the EO.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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