

Buy American FAR Provisions in a State of Flux as Biden Administration Finds Its Footing

The law firm of Tucker Arensberg contributes this quarterly column focused on the legal issues that may impact our readers. Tucker Arensberg is a full-service law firm headquartered in Pittsburgh, Pa., USA. Servicing the legal needs of the iron and steel industry, Tucker Arensberg has also provided legal counsel to the Association for Iron & Steel Technology.



Author

Mark Hamilton
Shareholder, Tucker Arensberg
Attorneys, Pittsburgh, Pa., USA

TUCKER ARENSBERG
Attorneys

If you have any questions about this topic or any other legal topics, contact attorney Thomas P. Peterson at +1.412.594.3914 or tpeterson@tuckerlaw.com. Please include your full name, company name, mailing address and email address in all correspondence.

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A flurry of executive orders and changes to the “Buy American” provisions of the Federal Acquisition Regulations (FAR) over the past few years has left many in the iron and steelmaking industry wondering what’s coming next. Former President Donald Trump issued a series of executive orders designed to strengthen existing Buy American regulations in government contracting, with a particular emphasis on iron and steel products.

At the end of Trump’s term, the Federal Acquisition Regulatory Council issued a final rule that announced significant changes to the Buy American FAR provisions of Part 25. Shortly after taking the oath of office, President Biden showed his desire to do the same by issuing a far-reaching executive order of his own and by requesting that the Federal Acquisition Regulatory Council hold up on implementation of its recent final rule for the time being.

To hazard a guess at where things are headed, it is helpful to consider where things presently stand.

The Trump Administration’s Buy American Regulatory Moves

President Trump issued the “Buy American and Hire American” Executive Order No. 13788 on 21 April 2017. It required the heads of government agencies to assess compliance of Buy American regulations and to develop policies to maximize the use of American-made materials in federal procurement efforts. This executive order also required agencies to scrutinize public interest waivers to reduce the use of foreign-sourced and subsidized

iron, steel and other manufactured goods.

Then on 31 January 2019, President Trump issued Executive Order No. 13858 to increase Buy American preferences for government infrastructure projects. This executive order reflected the Trump administration’s emphasis on iron and steel products by establishing that all aspects of the iron and steel manufacturing process must occur inside the country for such products to be considered to have been “produced in the United States.”

Executive Order No. 13858 also instructed government departments and agencies to encourage recipients of financial assistance awards to use American-made iron, steel, aluminum, and other manufactured products in all contracts, subcontracts and purchase orders that are chargeable against a federal financial assistance award. Agency heads were also required to issue a report on any tools and methods that could be used to maximize the use of iron, steel, aluminum and similar manufactured metals that are produced in the United States.

Next came Executive Order No. 13881 on 15 July 2019, which served to strengthen the domestic versus foreign content provisions of a long-standing executive order dating to the Eisenhower administration. This executive order required the Federal Acquisition Regulatory Council to consider an amendment to the FAR provisions for iron and steel end products, which would designate them to be of foreign origin if more than 5% of their cost can be attributed to foreign iron and steel material. Non-iron and steel end products would only receive a foreign origin designation if more than 45% of their costs is from foreign

material. The heightened emphasis given to iron and steel over other products is significant.

The Federal Acquisition Regulatory Council published its final rule (86 FR 6180) amending the FAR pursuant to Executive Order No. 13881 on 19 January 2021, which was the final day of the Trump administration. The final rule closely mirrored the executive order and in doing so requires significant changes to the regulations implementing the Buy American Act (41 U.S.C. §§ 8301-8305).

First, the final rule increases the domestic content requirement to more than 95% for products consisting “wholly or predominately” of iron and steel and more than 55% for other products. Failure to meet these thresholds would mean a foreign origin designation. Iron and steel components of unknown origin are treated as foreign. Second, the final rule also removed the commercially available-off-the-shelf (COTS) exception for iron and steel products, although a partial COTS exception was left in place for fasteners made predominately from iron or steel. Third, the final rule increased price preferences for domestic products by 14% (6% to 20%) for large businesses and by 18% (12% to 30%) for small business. These measures were taken with the express purpose of decreasing the amount of foreign-sourced iron and steel content utilized in American-manufactured products. The amended FAR were to be required in new solicitations as of 22 February 2021.

These executive orders — and the final rule instituted pursuant to Executive Order No. 13881 in particular — are of major importance to iron and steel manufacturers. In essence, the Trump administration singled out iron and steel for special treatment and codified a heightened 95% domestic content requirement, while virtually eliminating the COTS exception for iron and steel products.

The Biden Administration’s Buy American Actions to Date

On his first day in office, President Biden issued a regulatory freeze that requested all agencies postpone the effective dates of new rules for at least 60 days. On 25 January 2021, President Biden issued Executive Order No. 14005, entitled “Ensuring the Future is Made in All of America by All of America’s Workers.” This executive order creates a “Made in America Director” position within the Office of Management and Budget to administer the issuance of waivers for Buy American FAR provisions. Decisions on waivers must now consider whether a significant portion of the cost advantage for utilizing a foreign-sourced product stems from the use of subsidized or dumped steel or iron.

This executive order also instructs the Federal Acquisition Regulatory Council to propose amendments to FAR to:

- Replace the “component test” that is used to identify domestic end products and construction materials with a test through which domestic content is measured by the value that is added through American-based production or job supporting economic activity.
- Increase the numerical threshold for domestic content requirements for end products and construction materials.
- Increase the price preferences for domestic end products and construction materials.

Section 11 requires agency heads to submit a report concerning compliance with and implementation of Made in America laws to the Made in America Director within 180 days and to also issue biannual reports concerning the same. Notably, Section 14 revokes some provisions of former President Trump’s executive orders yet the rest of the Trump administration’s Buy American regulatory actions remain on the books. It remains to be seen whether the major changes to the heightened iron and steel domestic content requirement and virtual elimination of the COTS exception for iron and steel products will continue as the Federal Acquisition Regulatory Council takes into account the directives in President Biden’s Executive Order No. 14005.

Buy American Regulations Are in a State of Flux

Despite the revocation of Executive Order No. 13788, the Biden administration’s stated policy goal of maximizing the use of products and materials produced in the United States is consistent with many of the Trump administration’s Buy American regulatory initiatives. The Biden administration also placed emphasis on services offered in the U.S. in its Executive Order No. 14005. The provision of services is not traditionally subject to Buy American FAR requirements and it will be interesting to see how this issue develops as the Biden administration’s policy takes shape in the coming years.

The Federal Acquisition Regulatory Council has until late July to issue notice and public comment amendments to the Buy American FAR provisions along the lines set forth in Executive Order No. 14005. Until then, the Buy American FAR provisions are in a state of flux and it is impossible to predict with any certainty what will emerge from the rule-making process. The best advice is to keep one eye on the Part 25 FAR clauses and the other one on Washington. ♦