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Will "Making America Great Again" Mean Increased Enforcement of the Buy American Act? What Government Contractors Can Do Right Now

By Alex Hontos and Jocelyn Knoll*

The Trump Administration may use the considerable enforcement resources at its disposal to make it a high priority to enforce domestic-preference laws. Thus, new opportunities may exist for contractors, particularly those in the infrastructure and defense sectors. This article discusses domestic preference laws and offers contractors suggestion on how to develop a robust compliance system.

Over the course of the presidential campaign, President Trump indicated a willingness to punish companies that source labor or manufacture products abroad, particularly from China and Mexico. With promises of a $1-trillion dollar infrastructure plan and a cabinet in place, Trump continues to use the bully pulpit to put government contractors, particularly those in the construction and defense sectors, on notice. While it remains to be seen whether rhetorical broadsides will become policy or campaign promises of infrastructure spending will pass the Congress, the new Administration may breathe new life into an old set of rules that are already on the books: domestic-preference laws.

BUY AMERICAN, BUY AMERICA, AND THE BERRY AMENDMENT

Federal law is rife with provisions that, to a greater or lesser extent, require the domestic sourcing of goods provided to the United States government or are paid for with federal funds. Enacted in 1933, the Buy American Act is the best-known of these laws. The Buy American Act applies to direct U.S. procurements, and requires contractors to source "unmanufactured" goods from domestic sources and ensure that "manufactured" goods are obtained with "substantially all" U.S. components. Other provisions, known colloquially as the "Little Buy America Acts," govern the use of federal funds for specific agencies or projects, mostly those managed by the Department of Transportation. An example of these provisions is the Federal Highway Administration's Buy America provision, which requires that items like steel and iron incorpo-

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rated into infrastructure projects be obtained domestically. The Department of Defense ("DOD"), under the so-called "Berry Amendment," has a similar set of requirements that apply to DOD procurements. Contractors with direct government contracts must certify to the government the domestic origin of their products; and, in turn, it is commonplace for contractors to require their subcontractors to make parallel certifications, further extending the reach of domestic-preference laws into the marketplace.

WHAT MAKES THIS DIFFICULT?

The requirement to domestically source goods, while a logistical challenge and a cause for increased performance costs, is simple enough to understand. However, the core requirement is quickly overshadowed by a host of other practical problems, ranging from potential competitive disadvantage at the bid stage to compliance and record-keeping obligations, to ruinous agency-imposed penalties and significant regulatory scrutiny. Application of these laws requires understanding U.S. trade agreements and the Trade Agreements Act, which authorizes President Trump to treat goods made abroad in certain countries as if they were made in the United States. Some of the laws are enforced as strict prohibitions, while others are enforced as a price-premium added to an offeror's bid. Each set of laws has its own exceptions, which permit foreign-sourced goods in some limited circumstances. And the laws have separate, time-consuming "waiver" procedures, either for a class of goods or a particular project. Quantification of the content of domestically produced goods can be a difficult and time-consuming exercise.

The laws are sometimes enforced directly by agencies through contractual remedies, and sometimes enforced through other provisions of the law, like the False Claims Act, which provides for triple damages and civil penalties, and allows whistleblowers to collect a bounty for successfully prosecuting claims against contractors.

WHAT CAN CONTRACTORS DO NOW?

Taking the new Administration's statements at face value, it is likely the Trump Administration may use the considerable enforcement resources at its disposal to make it a high priority to enforce domestic-preference laws. And even if enforcement remains the same in the new Administration, there are steps contractors can take now to reduce the pain (and costs) of regulatory scrutiny or perhaps avoid it altogether. A robust compliance system includes:

- retention of documentation of product origin, including invoices, bills of lading, and classification notes;
- investment in file-management and IT systems that facilitate efficient collection and review of product-origin documents, ideally on a

project-by-project (or contract-by-contract) basis;

- regular training of contract administrators, estimating/purchasing employees, and quality-control personnel;
- a corporate culture that encourages project managers, engineers, and other employees to elevate concerns about sourcing through appropriate channels;
- segregation of government work from work for commercial projects, which may not be (and may not need to be) BAA-compliant;
- review of subcontracts and supply agreements for proper flow-downs, including for indemnification provisions from suppliers for harm resulting from their non-compliance; and
- uniform communications to subcontractors and suppliers directly that the end-user (or funder) is the United States government and that goods must be domestically sourced.

CONCLUSION

The new Administration should bring these concerns to the forefront. New opportunities likely exist for contractors, particularly those in the infrastructure and defense sectors, who want to help "make America great again." The time is ripe for those contractors to revisit their sourcing and procurement policies and compliance program.