Government Contracts
& Disputes

February 8, 2017

"Buy American, Hire American"—From Rhetoric to Regulation

By Glenn Sweatt, Nancy A. Fischer, Stephan E. Becker and Matthew R. Rabinowitz

"We will follow two simple rules: buy American and hire American." While world leaders are pondering what these words from President Trump's Inaugural Address mean for international trade, a different question looms for U.S. Government contractors—what is on the horizon as far as the Buy American Act and similar protectionist regulations?

- Any new infrastructure spending bill that provides funding for state and local public works projects likely will incorporate domestic preference requirements similar to those incorporated in 2009's American Recovery and Reinvestment Act.
- The process for issuing new waivers when a particular item is not available in commercial quantities from U.S. producers may be further restricted, and some existing waivers could be cancelled.
- Even if no new rules are implemented, contractors should be prepared for increased enforcement.

The Buy American Act, Balance of Payments Program, Cargo Preference Act, Berry Amendment and similar regulations all require U.S. Government contractors to exclusively use, or give a preference to, U.S. suppliers. Further, the Trade Agreements Act prohibits U.S. Government purchases of products from many foreign countries.

Other laws impose requirements for state and local governments to purchase domestically-made products when using funds provided by the U.S. Government under certain programs, such as the Federal Highway Administration's grants for highway construction and the Federal Transit Administration's subsidies for rolling stock and related equipment.

Over the last year and half of the Presidential campaign, the American public has heard extensive promises to reinvigorate the U.S. manufacturing and business base and to "Buy American." Also during the campaign, President Trump discussed a massive infrastructure spending bill that would result in a significant increase (reported figures have varied widely, between one trillion dollars and a more recent estimate of $137 billion dollars) in government spending for domestic construction, utility and related procurement. Moreover, on January 24, 2016, President Trump issued the "Presidential Memorandum

Regarding Construction of American Pipelines" that asked the Department of Commerce to develop a plan under which new, repaired or expanded pipelines would be required to use materials and equipment produced in the United States "to the maximum extent possible and to the extent permitted by law."

While government contracts are already subject to numerous regulations concerning domestic content preference, it would be prudent for the government contracting community to be thinking ahead to the next level of regulation and enforcement.

There are many laws that currently require or impact sourcing or preferences to domestic suppliers, including:

- The Buy American Act of 1933, FAR 25, DFAR 225
- The Balance of Payments Program, DFAR 225.75
- The Trade Agreements Act, FAR 25.4, DFAR 225.4
- Cargo Preference Act of 1904; U.S. flag vessel shipping requirements at FAR 47.5 et seq.
- Berry Amendment, Specialty Metals clauses, 10 U.S.C. 2533 (a) and (b), and subsequent related NDAA restrictions and Class Deviations

Despite some of these rules being over a century old, they have withstood the pressures of time and an evolving global economy. The Buy American Act of 1933, a law born directly from the Great Depression, has only been substantively changed four times in over 80 years, a time frame which encompasses significant post-war globalization and a fundamental shift in the U.S. economic base.

So what can government contractors expect? First, it would not be surprising for a new infrastructure spending bill that provides funding for state and local public works projects to incorporate domestic preference requirements similar to those incorporated in 2009's American Recovery and Reinvestment Act, which required iron, steel and manufactured goods used in funded projects to be produced or manufactured in the United States. Note that currently, relatively few countries are exempt from Buy American restrictions in U.S. Government procurement—only countries that are members of the WTO Government Procurement Agreement or a free trade agreement with the United States that imposes reciprocal obligations not to discriminate in procurement. (Importantly, the U.S. Government is prohibited from purchasing products made in China.) Imposing new discriminatory measures on federal procurement would require cancelling or amending trade agreements, which would be complicated and time-consuming, and have implications beyond government procurement. On the other hand, most procurements by state and local governments are outside the scope of international trade agreements, so there may be more focus on federal conditions attached to federal subsidies for state and local projects.

Second, various domestic preference laws and regulations incorporate procedures for seeking waivers when a particular item is not available in commercial quantities from U.S. producers. Although those waiver provisions typically have been applied strictly, it is possible that the standards for issuing new waivers would be further restricted and that some existing waivers could be cancelled. For example, the Administration could take steps to reduce the current list of items designated as "non-available" from domestic sources in the Federal Acquisition Regulation (FAR).

Lastly, contractors should prepare for changes in enforcement. Even if no new rules are advanced, the President's statements and resulting media attention on this issue will certainly bring a renewed focus onto these rules, resulting in increased scrutiny from contracting officers and other government personnel.

Moving forward, compliance with domestic preference clauses will be increasingly important. Even prior to the presidential election, the General Services Administration (GSA) sent letters to thousands of schedule contract holders requiring country of origin verifications for all products on their schedule contracts. Country of origin determinations can be quite difficult, especially if examining whether a foreign-made item has been substantially transformed into a new and different article of commerce in the United States or, depending on the particular governing provision, an eligible country. This analysis often involves a comprehensive review of the contractor's supply chain and manufacturing operations, and may even require an agency determination. The Administration may look for examples and success stories for its policies. Overall, contractors may expect fewer waivers, fewer favorable determinations, and for any violations to be met with a less favorable reaction than may have occurred previously.

Contractor's Immediate Action Items

Contractors should review their contracts and subcontracts for any domestic-content-related clauses and proactively ensure that they are currently in compliance. Many contracts and subcontracts include multiple domestic preference clauses, and further diligence should be conducted to confirm the applicable provision. Contractors should further invest in training and documentation, throughout the supply chain, to ensure both compliance and the documentation of compliance. Quality control programs should ensure that the requirements are well known to all employees, not just those in the procurement chain. Additional training, auditing and communication now will pay dividends in terms of problem avoidance down the line, as violations of these laws can lead to contractual remedies such as price adjustments, disallowances, or rejected work, in addition to potential False Claims Act charges being levied against non-compliant contractors.

If you have any questions about the content of this Alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

Glenn Sweatt (bio)
Silicon Valley
+1.650.233.4031
glenn.sweatt@pillsburylaw.com

Stephan E. Becker (bio)
Washington, DC
+1.202.663.8277
stephan.becker@pillsburylaw.com

Nancy A. Fischer (bio)
Washington, DC
+1.202.663.8965
nancy.fischer@pillsburylaw.com

Matthew R. Rabinowitz (bio)
Washington, DC
+1.202.663.8623
matthew.rabinowitz@pillsburylaw.com