



President Encourages Agencies to Buy American-Produced Goods & Materials

February 8, 2019

On January 31, 2019, the President signed the Strengthening Buy-American Preferences for Infrastructure Projects, Executive Order 13858 ([EO 13858](#)), which is designed to encourage federal agencies to use, to the maximum extent permissible under law, American-produced goods, materials, and products in procurement contracts and in setting terms for [federal assistance programs](#) (e.g., grant programs) involving infrastructure projects. Although Congress has enacted generally applicable domestic preference laws in the procurement context, comparable buy American standards **do not** generally apply to federal grant and other assistance programs, which are covered in EO 13858.

EO 13858 builds on an April 2017 “Buy American and Hire American” executive order ([EO 13788](#)), which focused on encouraging federal agencies to scrutinize compliance with and minimize the use of waivers of domestic preference standards under existing law.

The President took these actions after several inspector general (IG) [audit reports](#) noted numerous instances of federal agencies failing to comply fully with domestic preference laws or to justify the use of exceptions or waivers in these laws. Although the stated [purpose](#) of the EOs is to bolster the American economy and foster job growth, [some](#) have expressed concerns that the EOs might discourage agencies from utilizing exceptions and waivers Congress built into these laws to promote legitimate public policy goals, such as judiciously using government resources and maintaining a consistent playing field with U.S. international trading partners.

Background on Domestic Content Restrictions in Procurement

Congress has erected a number of [domestic preference laws](#) designed to encourage executive agencies to procure goods that are produced or manufactured in the United States. These laws vary as to the goods to which they apply, domestic content standards they impose, and the exceptions and waivers they authorize. The [Buy American Act](#) establishes various price preferences for certain “domestic end products” and “domestic construction materials” (together, “domestic products” or “domestic goods”) when the lowest offer on a procurement solicitation is from a foreign-sourced good. The [Berry Amendment](#) imposes similar price preferences for American goods, but, among other distinctions, it applies exclusively to certain Department of Defense (DOD) acquisitions and imposes a [more stringent domestic content standard](#) than that of the Buy American Act. Both laws provide for a number of exceptions and waivers

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that federal agencies may utilize to purchase foreign-sourced products without applying preferences for domestic competitors. For example, [neither law](#) applies to the acquisition of goods that are not commercially available domestically in sufficient quality or quantity. The Buy American Act also [does not apply](#) to the acquisition of goods when it would be “inconsistent with the public interest” or “unreasonb[ly]” costly, and it may be [waived](#) if inconsistent with international trade agreements, such as the World Trade Organization (WTO) Government Procurement Agreement.

Compliance Issues with Domestic Content Restrictions

This complex domestic preference legal regime makes compliance challenging for federal contracting personnel. The DOD [spends](#) more annually on procurement contracts than all other federal agencies combined, and its IG has issued [multiple](#) audit reports in recent years identifying Buy American Act and Berry Amendment compliance issues. In an audit [report](#) published in August 2015, the DOD IG found that Navy personnel failed to “consistently comply with the Berry Amendment for 11 of 23 [audited] contracts” and that “Navy and Marine Corps contracting personnel did not ensure compliance with the Buy American Act for 12 of 32 [audited] contracts.” The DOD IG found, among other compliance issues, that relevant Navy and Marine Corps contract personnel failed to include mandatory domestic preference terms in contracts and lacked sufficient knowledge of the Buy American Act and Berry Amendment. The DOD IG noted similar compliance issues and rates in a February 2016 [report](#) on audits of 54 Air Force contracts.

EO 13788, the Buy American and Hire American, and Guidance

In part to address these domestic preference law compliance issues, the President signed EO 13788 [mandating](#) federal agencies to “scrupulously monitor, enforce, and comply with [domestic preference laws], to the extent they apply, and minimize the use of waivers, consistent with applicable law.” EO 13788 [requires](#) agency heads to evaluate and issue annual reports to the Commerce Secretary and OMB Director on their agency’s compliance with and enforcement of domestic preference laws, including how waivers and exceptions in those laws are utilized. EO 13788 [stresses](#) that, “public interest waivers from [domestic preference] laws should be construed to ensure the maximum utilization of goods, products, and materials produced in the United States.” Additionally, EO 13788 [requires](#) agency heads, prior to utilizing a waiver to a domestic preference law, to evaluate whether “a significant portion of the cost advantage of foreign-sourced products” derives from “[injurious\[\]](#)” trade pricing policies, such as “[dumping](#)” or [governmental subsidization](#). Finally, EO 13788 [directed](#) the Commerce Secretary and Director of OMB to issue guidance (the Guidance) to agency heads on how to implement EO 13788 and required the Commerce Secretary to issue a report recommending ways to improve compliance with domestic preference laws.

[The Guidance](#), which was issued on June 30, 2017, provides that the reports mandated by EO 13788 should include:

- [Descriptions](#) of agencies’ procedures for evaluating waivers and exceptions and steps agencies intend to take to improve those procedures;
- [Recommendations](#) on statutory and regulatory changes that could improve federal domestic preference policies; and
- Steps that agencies intend to take to (1) [improve](#) compliance with and enforcement of domestic preference laws; (2) [enhance](#) internal domestic preference compliance reviews; (3) [improve](#) domestic preference compliance training for personnel; and (4) [enhance](#) outreach to domestic producers.

EO 13858, Strengthening Buy-American Preferences for Infrastructure Projects

EO 13858 reiterates the policy established by EO 13788 by encouraging federal agencies “to use, to the greatest extent practicable, iron and aluminum as well as steel, cement, and other manufactured products produced in the United States in every contract, subcontract, purchase order, or sub-award that is chargeable against” a relevant procurement or federal assistance program. Additionally, EO 13858 requires federal agency heads to issue reports specifying ways, consistent with existing law, to utilize domestically produced goods in federal assistance programs despite the fact that, unlike in the procurement context, federal law does not generally impose domestic preference standards in federal assistance programs. Specifically, EO 13858 requires federal agencies to “identify . . . any tools, techniques, terms, or conditions that have been used or could be used, consistent with law . . . to maximize the use of iron and aluminum as well as steel, cement, and other manufactured products produced in the United States in contracts, sub-contracts, purchase orders, or sub-awards that are chargeable against Federal financial assistance awards for infrastructure projects.” The executive order mandates federal agencies to “encourage recipients of new Federal financial assistance awards” to use American made products “in every contract, subcontract, purchase order, or sub-award that is chargeable against such Federal financial assistance award.” EO 13858 makes clear, however, that any steps taken to further these domestic preference policies must be in accordance with the law, including existing international trade agreements.

Potential Impact of the Buy American Executive Orders

While the general policy goals of EO 13788 and EO 13858 are to foster domestic jobs and domestic economic growth, some have raised concerns that the way in which they will be implemented could have unintended consequences. For instance, concerns have been raised that the executive orders could make contracting personnel reticent to utilize valid exceptions or waivers, which could lead to acquisitions of domestic goods at costs that outweigh any direct or indirect benefits to the country. Some commentators have also argued that many U.S. companies might have difficulty complying with stringent domestic preference standards because they produce goods comprised of multiple components, some of which are sourced from different countries. As a result, these commentators argue that the executive orders could inadvertently harm the very companies they are intended to help. Additionally, some have expressed the concern that placing too much emphasis on favoring domestic goods could lead other countries to retaliate against the United States by purchasing non-American products, which could have significant domestic economic ramifications given the estimated \$4.4 trillion annual global government procurement market. That being said, because the executive orders must be implemented in compliance with applicable federal law and international agreements, EO 13788 and EO 13858 might not result in a significant alteration of existing procurement and federal assistance programs.

Congress may evaluate how the implementation of EO 13788 and EO 13858 ultimately impacts appropriations, domestic economic and job growth, and international trade. Such steps could include, for example, mandating compliance reports by inspectors general or the Government Accountability Office (GAO) and conducting oversight hearings. Congress might also contemplate passing legislation to reinforce, build upon, or override aspects of the executive orders.

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