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President Biden's Buy American Executive Order Signals Possible Heightened False Claims Act Risk for Government Contractors

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On January 25th, 2021, President Biden signed Executive Order 14005, entitled "Ensuring the Future Is Made in All of America by All of America's Workers," ("EO"), aimed at increasing the federal government's procurement of American-made supplies. This EO has potentially significant implications for all businesses that sell and supply products to the federal government, ranging from life sciences and health care companies to IT and software providers, defense contractors, and any other company doing business with the federal government. The order has little immediate effect, but directs agencies to seek to increase the domestically produced content of the American-made goods they purchase and limit exceptions and loopholes to made-in-America requirements, and creates a Made in America Office to oversee waivers. The overall impact of the EO will depend on the finalization of its implementing rules, but the order signals an emphasis by the Biden Administration on the certification of American-made products and a probable increase in enforcement of these requirements, likely through the False Claims Act ("FCA").

Current Landscape and Proposed Changes

The Buy American Act ("BAA") requires federal agencies to procure domestic materials and products. The Federal Acquisition Regulation ("FAR") Council has implemented the statutory requirements of the BAA by requiring any "domestic end product" to meet a two-part test to qualify as an American-made product for purposes of the Act: first, the end product must be manufactured in the United States, and second, the cost of the domestic component parts must exceed 55% of the total cost of all component parts in the product, with a higher threshold for iron and steel products. The second part of this "component test" had historically been set at 50%, but a rule finalized in January 2021, in response to a Trump Administration 2019 Executive Order, increased the component parts requirement to 55% for non-iron or steel products.

The Biden EO calls for a further increase in the domestically produced content of products, but also directs the FAR Council to promulgate a new rule to replace the component test with a value-based test, in "which domestic content is measured by the value that is added to the product through U.S.-based production or U.S. job-supporting economic activity."

The BAA and FAR presently allow for many exceptions, often through waivers, to certain types of procurement contracts. The Biden EO aims to close or limit the use of waivers through new regulations, procedures, and increased transparency. For example:

- The BAA currently allows a waiver if the head of the procuring agency determines application of the Act to be "inconsistent with the public interest." The EO directs the Office of Management and Budget ("OMB") to establish a "Made in America Office," to be headed by the "Made in America Director." As contemplated by the EO, agencies will be required to submit any proposed waiver, and a detailed justification for it, to the Made in America Director for approval or denial. The EO also calls for a public website to include information on all proposed waivers and the justifications for them, and to report whether the waivers are approved or denied.

- Under FAR Part 25, certain products are exempt from the BAA because they have been considered "nonavailable" in the U.S. in sufficient quantities. The EO requires new amendments to the nonavailable list be reviewed by the Made in America Director and the Secretary of Commerce.

- The BAA currently does not apply to commercially available information technology, but the EO asks the FAR Council to develop recommendations for lifting that exception.

Certification Requirements

Without a waiver, bids to the government with an estimated contractual value exceeding the micro-purchase threshold, which is currently set at $10,000, must include a certificate of compliance under either the BAA or the Trade Agreements Act ("TAA"). Presently, suppliers with contracts valued between $10,000 and $182,000 must submit a certification under the BAA. That certification requires the supplier to (i) attest that any domestic end product meets the component test and (ii) list all foreign end products. Suppliers with contracts exceeding $182,000, with certain exceptions such as small business set-aside contracts, must submit a TAA certification, which similarly requires the contractor to certify that its product is American made, allowing for some exceptions for products sourced from "designated countries" named in trade agreements.

Limiting waivers and increasing the threshold for domestically produced content will require more suppliers to certify more often as to more products, thus exposing them more frequently to the possibility of FCA liability.

Greater Enforcement Risk?

To be actionable under the FCA, "[a] misrepresentation about compliance with a statutory, regulatory, or contractual requirement must be *material* to the Government's payment decision…" *Universal Health Servs. Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 1994 (2016). In *Escobar*, the United States Supreme Court adopted a multifaceted test for evaluating the materiality of any allegedly false claim, and emphasized that materiality is a "rigorous" and "demanding" standard. *Id*. at 2001-03. The *Escobar* Court rejected the theory that "[a] misrepresentation [is] material merely because the government designates compliance with a particular statutory, regulatory, or contractual requirement as a condition of payment." *Id*. at 2001. Instead, the Court held that the government's actual knowledge of a violation of requirements, coupled with its payment of a particular claim in full, or regular payment of a particular type of claim in full without indicating an objection, "is strong evidence that the requirements [violated] are not material." *Id*. at 2003.

In the post-*Escobar* era, enforcement actions in this space have met with mixed success. In *United States v. Sanford-Brown, Ltd.*, 840 F.3d 445, 447 (7th Cir. 2016), the Seventh Circuit concluded that because the government had reviewed fraud allegations against an entity several times, but did not terminate the contract or apply administrative penalties, the alleged fraud could not have been material. By contrast, the United States District Court for the Central District of California recently denied a motion to dismiss in a similar case made on materiality grounds, *see United States ex rel. Mei Ling v. City of Los Angeles*, 389 F. Supp. 3d 744 (C.D. Cal. 2019), and the United States District Court for the District of Columbia denied a defendant's motion for summary judgment based on a lack of materiality because it would be more "appropriate for a jury to decide." *United States ex rel. Scutellaro v. Capitol Supply, Inc.*, Civil Action No. 10-1094 (BAH), 2017 U.S. Dist. LEXIS 59531 (D.D.C. Apr. 19, 2017). The court found that the government had sent the supplier mixed signals – both extending contracts and signing new ones, while at the same time citing the contractor for violations of the TAA. The case subsequently settled. Likewise, the Department of Justice has settled cases with medical supplier Ambu, Inc. for $3.3 million and, most recently, with defense giant Raytheon for $515,000.

While much remains to be seen, the EO has the possibility of effecting significant changes. The establishment of a Made in America Director, reporting directly to the Director of the Office of Management and Budget, is itself a significant change effected by the EO. The Made in America Director is tasked with overseeing BAA compliance and monitoring requests for BAA waivers. This new leadership position, coupled with the greater transparency occasioned by public

reporting requirements, seems to signal a shift in the current administration's attitude towards more rigorous and consistent enforcement of the BAA and TAA. The loopholes that formerly allowed some suppliers significant leeway may be closed, and the materiality defense bolstered by *Escobar* may not have nearly as much sway as it has had recently. At the very least, lawyers representing and recruiting FCA whistleblowers have taken note of the changes proposed by the EO and publicly predicted a wave of actions to enforce the BAA and TAA certification requirements.

Key Takeaways

A great deal will hinge on how the EO's directives are implemented in changes to the FAR and how strictly and consistently the certification requirements are monitored and enforced in the future. Ropes & Gray will continue to closely track developments in this area as they happen. In the meantime, entities who frequently sell and supply products to federal government entities might consider taking some proactive steps to prepare themselves for the anticipated changes:

- **Enhanced Certifications**: To address any heightened compliance risk that might come, companies doing business with the federal government might wish, if they have not already done so, to obtain certifications from their own suppliers as to origin and content of the component parts that they are purchasing. Obtaining such certifications could help to ensure the BAA's increased numerical requirements for domestic content are met and a contractor can make a good faith showing of compliance if ever called on to do so.

- **Documentation**: Contractors and their suppliers could also begin taking proactive steps to ensure accurate and robust documentation relating to the country of origin of component parts. Again, this documentation will bolster a contractor's argument that they have made a good faith effort to comply with the BAA's new mandates.

- **Compliance Framework**: In addition, contractors should consider assessing the maturity, effectiveness and alignment with the BAA of their current policies and procedures for collecting, assessing and storing supplier data to ensure the contractor can demonstrate good faith compliance with the BAA. As part of assessing the effectiveness of its compliance framework, the contractor also should consider assessing the data integrity of the information received from suppliers.

If you have any questions or would like more information about the Buy American Executive Order and its impact on your business, please reach out to your Ropes & Gray attorney contact or any of our attorneys in our False Claims Act practice.