



Doing The Tighten Up

President Trump's "Buy American/Hire American" executive order sounds patriotic, but it could be on a collision course with U.S. trade commitments.

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American and Wisconsin manufacturing employees are in an enviable position, one that soccer moms and security dads once enjoyed. Given the swing-vote impact they had on the 2016 presidential election, blue-collar workers have the undivided attention of candidates in both major political parties who are fawning over them with the adoration of Scarlett O'Hara's plantation beaux.

Exhibit A in this two-party courtship is President Trump's recent "Buy American/Hire American" executive order, which directed various cabinet members to make recommendations on how to more strictly enforce various America-first provisions of federal procurement law.

Not to be outdone, U.S. Senator Tammy Baldwin and her fellow Senate Democrats have countered with legislation requiring the U.S. government to buy 100% American-made iron and steel for domestic water infrastructure projects.

For U.S. companies bidding on federal procurement contracts, the potential ramifications of strengthened "Buy American" policies are potentially enormous.

“Overall, the purpose of the executive order is to take the current Buy America/Buy American structure and in effect enhance its enforcement,” states business attorney David Ralston, a partner with the law firm Foley & Lardner. “It’s about working with the existing structure, saying what more can we do with it as it exists now, and asking various government agencies to look at areas where it could be, for lack of a better term, tightened up in terms of its application and enforcement.”

The problem is that any attempt to tighten up enforcement could run smack into the opposite requirements of foreign trade agreements. In this look at the Buy American debate, we spoke to local and national attorneys and advocates for Wisconsin manufacturing.

Buying America

The term used in the executive order, Buy American, is a broad, generic concept that covers a host of laws that are often referred to as Buy America. Much of the focus is on the Buy American Act of 1933, a Depression-era law designed to give a preference to American-made goods in federal procurement. In procurement, when the government purchases goods from a domestic or foreign business, the government puts specifications out for bid and the bid can go either to the lowest bidder or lowest and best-qualified bidder.

As Ralston explains, there are several distinctions to be made between various laws. The Buy American Act is the law that applies to direct federal procurement and contains a two-part test under which a product is considered a “domestic end-product” if it is manufactured in the U.S. and 50% of the cost of all components is manufactured in the U.S. For example, if a car engine was made in the U.S., but more than 50% of the components were not made here, it would not be considered a domestic-end product.

A separate, similarly named statute contains the Buy America provisions, which principally cover transportation grants to states and localities and has a separate set of rules. A third statute that’s lumped in this same group is called the Berry Amendment, which applies only the Department of Defense and covers only a certain category of products.

Finally, there are Made in America provisions administered by the Federal Trade Commission, but they have nothing to do with federal procurement

or grants. These are advertising related requirements, and the executive order doesn't apply to them.

According to Ralston, federal agencies comply with these requirements to various degrees. For example, under Buy America, the U.S. Department of Transportation has in some cases very good enforcement programs; the Federal Transit Administration, with its pre- and post-procurement audits, is one example. In contrast, the Federal Aviation Administration has almost no enforcement. "I would think, using DOT as an example, that this [executive order] could have a significant impact at the FAA," Ralston states, "forcing the agency to finally take up the issue of the Buy America requirements, which heretofore they have not shown a great deal of interest in, and which frankly would apply to every airport in the country that gets federal grant dollars."

Government procurement attorney Mark Stempler notes there are a number of exceptions under the Buy American Act. It does not apply where materials are required for use outside of the U.S., such as when materials are going to be used in a foreign country or territory. "It also doesn't apply to materials not produced in the U.S. of a satisfactory quality, or when the use of domestic materials would be inconsistent with the public interest," Stempler notes. "That is a broad category and that determination can usually be made by the procuring officer for the government, and the interpretation of what is inconsistent varies."

Another main exception is when the cost of domestic materials is unreasonable or impractical versus foreign materials. "If what's available in the U.S. is so much more expensive than what's available from an international provider, then the Buy American Act may not apply," Stempler adds.

In some cases, President Trump could make recommended changes by executive order, but any proposed change in the law would require further legislation. For example, the Buy American Act has a set of procured regulations that enforce it, and there are changes the Trump administration could make to those regulations to bring about more rigorous enforcement. Perhaps the biggest obstacle to favoring American products is that the World Trade Organization has an international procurement agreement with a carve-out for transportation projects, and it was specifically

negotiated with an eye toward the Buy America provisions that apply to transportation, Ralston says.

“That very issue came up in 2009 when Congress passed the American Relief and Recovery Act [the stimulus bill],” Ralston recounts. “That was the device that was used to fund a host of what were supposed to be shovel-ready projects. The initial legislation had this very broad application [favoring domestic bids], and you had a host of foreign embassies come to Congress and say, ‘Whoa, wait a minute. We all have an international agreement, the WTO government procurement agreement, that prohibits you from doing this as broadly as you want.’ So they put language in there that specifically said that the grants had to comply with international law, and they acknowledged the application of the WTO’s government procurement agreement.”

The issue arises in every significant trade deal concerning government procurement, especially by the Canadian government, which means it could be wrapped into any renegotiation of the North American Free Trade Agreement. Ralston notes the Canadians complain about these U.S. laws, and American trade negotiators complain about similar restrictions by Canadian provinces.

Similarly, the Europeans claim that they don’t have similar kinds of domestic restrictions, but Ralston finds that a tad disingenuous. Even though the Europeans don’t have a formal Buy France, Buy Germany, or Buy Denmark rule, “I would bet procurement is about 98% local, and so they accomplish informally that which we do by statute and regulation.” Baldwin says U.S. Trade Representative Robert Lighthizer has told her that foreign companies have the right to compete in government procurement as though they are an American corporation. Using paper, a Wisconsin industrial strength, as an example, Baldwin notes that NAFTA allows Canadian or Mexican paper makers to be treated as though they were Wisconsin or other American paper makers for purposes of government procurement. “That’s true of most of our trade deals, and it’s true with regard to WTO participants, and that just weakens Buy American and Buy America quite a bit,” Baldwin states.

What’s more, there appears to be a lack of reciprocity. A 2016 report by the Government Accountability Office asserts that when you have procurement policies in trade deals, that tends to open up much more business opportunity for foreign countries than it does for American companies because of the size of the governments and the size of the economies of U.S. trading partners.

The GAO report found that the U.S. opens a greater percentage of its government procurement to foreign firms than its five largest trade-agreement partners combined “and so we’re big losers when we include those provisions in trade deals,” Baldwin states.

Stempler says one of the objectives of the executive order is to re-evaluate whether foreign countries are getting the better of this deal. Are those countries buying American products like America is buying their products in federal procurement?

“We should be clear that the executive order does not change the law just yet, but what it does is require these government agencies to re-examine the Buy American Act and to identify whether it’s being implemented enough,” he states. “Are the laws on the books now actually being followed because there are some government studies that suggest that’s not the case, that it’s not being implemented as it should be? I think that’s ultimately what the White House wants, and what it says in the executive order is that we will get reports from these agencies about how it’s being implemented and what changes could be made to help strengthen the law to determine if we’re getting the benefit of the bargain in these kinds of agreements with other countries.”

If necessary, getting out of agreements like NAFTA isn’t easy or simple, but “I think that’s one of the things the Trump administration will look at,” Stempler says.

Bid protests

One result of future changes could be an increase in bid protests over contract awards. In a bid protest, when the government makes a reward to a bidder in procurement, one of the contractors that did not get the award challenges that determination, leading to an administrative review and possibly a hearing process. It’s an area where there is a well-developed body of law, and one justification for a protest is that the government did not follow the bid specifications.

“There is the potential for an increase in bid protesting because the requirements of the Buy American Act are complicated,” Stempler notes. “As the government starts to potentially implement this rule more strictly, there may be ways to challenge awards. What we’re going to see is vendors fighting over more and more contracts where they can use the Buy American Act to claim they should be getting a preference over someone

who might have either a foreign product or one that doesn't fit one of the exemptions in the Buy American Act.”

Some would view the resulting increased procurement time as a downside, but Stempler isn't one of them. “If you're not awarding them properly, then they should be subject to that sort of a challenge,” he states.

Stempler also believes there could be an impact on the practice known as dumping, which involves flooding a market with underpriced products to eliminate competition. “The White House specifically said it's going to look at dumping as an issue,” Stempler says, “and dumping is essentially when a foreign manufacturer might flood the market with a good and drives down the price of that good, which might put the American equivalent of that good at a significant disadvantage because they can't compete on price. Then the foreign-made good becomes the best option or the only game in town for that particular good. The executive order will consider the effects of dumping on procurement and if the administration finds there's an issue, I think that's one of the things that will be directly addressed.”

Even if a law does not change, federal agencies might be more cognizant of enforcement and those agencies that do not have experience implementing it will have to pay greater attention to it, Stempler adds. “Any efforts that might be made in the evaluation of the contracting process are more likely to be open to challenges in the form of bid protests. Many months down the road, after the White House gets this report back from the agencies about the implementation, or corporate loopholes, and about stricter enforcement, we may see changes to the law. What those will be are hard to predict at this point.”

Businesses involved in government procurement will pay careful attention to federal announcements and rule making over the next 30-60 days because they could provide some insights into the direction the administration is taking. Due to the complexity of the existing law and the likely complexity of forthcoming changes, a compliance review to ensure they meet these requirements is advisable.

Arrows pointing up

Buckley Brinkman, executive director and CEO of the Wisconsin Center for Manufacturing and Productivity, says administration officials appear to have given little thought to the complexity of related laws. “It gets really sideways really fast,” he states. “I think one of the things that is missing here is a real clear description of what our intent is with this activity. Are we really clear about what we want to accomplish, both stated and unstated? There are goals that are not being stated in black and white.

“I just think it’s a really complex situation and sometimes we come up with really simplistic solutions to it, and we don’t take time to understand the complexity.”

According to Brinkman, the existing trendlines already favor U.S. manufacturing. One trend, already several years old, is to bring more operations closer to the United States. “That’s been happening and the real escalator of the trend was the 2011 tsunami in Japan,” Brinkman notes. “That really got people thinking about whether a 12,000-mile supply chain really is the best thing for their company.

“The second thing is that the United States, according to Deloitte, is the number two most competitive manufacturing platform in the world, second only to China, and if the present trend continues, the U.S. over the next five years will pass China.”

American productivity and labor has offset some of the higher wage rates. For advanced manufacturing of any kind, U.S. labor costs are competitive with anyone in the world “and we’re sitting in the middle of the world’s largest market,” Brinkman notes.

“The third piece of that, and few would’ve thought we’d be saying this even 10 years ago, is that we have large, plentiful, and cheap sources of energy. Those three elements are really the drivers behind it.”

Iron and steely resolve to buy American, 100%
Tammy Baldwin described it as just a little meet and greet, but she wanted to convey a message to President Donald Trump when he held a reception at the White House for members of the U.S. Senate.

Baldwin wanted to see if she and Trump were really on the same page when it comes to protecting American manufacturing jobs. Other than hearing him utter the word “great” more than once, what Baldwin remembers most is introducing herself and telling him that she’s a big proponent of “Buy American” policies and she believes this is something they can work together on.

Trump agreed and while Baldwin anticipates the potential changes that could result from his “Buy American/Hire American” executive order, he also praised a bill she has sponsored that requires that 100% American-made iron and steel be used on domestic water infrastructure projects. In

July, she called on Trump to press for Congressional action on the legislation.

“I worry about all the hits that manufacturing has taken over the years and frankly over decades due to barriers and challenges and threats,” Baldwin states. “I don’t think we have an economy built to last if part of it, a robust part of it, doesn’t involve making things.”

While Trump and Baldwin appear to be aligned on “Buy American” concepts, Baldwin is not as sure about Congressional Republicans. She voiced her disappointment that House Speaker Paul Ryan pulled her measure from a separate bill on water infrastructure late last year, reportedly after getting pressure from lobbyists representing foreign-owned steel makers. It had passed in the Senate by a vote of 95–3, so it had strong bipartisan support, and Baldwin found it particularly odd that it was pulled the day after Trump, during one of his “Thank You” tour visits, told a crowd in Cincinnati, Ohio that two rules would guide his infrastructure plan, “Buy American, Hire American.”

Ryan and other Republicans believe the Buy American provisions would increase costs and pick winners and losers by directing federal funding to some domestic companies and not others.

While it has been reintroduced as a stand-alone bill, S880, Baldwin would support its insertion into whatever infrastructure bill is advanced later this year. In the meantime, she is part of a group of senators who have called on Trump to keep his Buy American pledge by removing the government procurement chapter, which basically negates preferences for American-made goods in government procurement, from the North American Free Trade Agreement.

“I was sent to Washington, D.C. by the people of Wisconsin to fight for workers,” she states, “and to get them a fair shake and a level playing field.”

A visa to hire American

Perhaps the most overlooked aspect of President Trump’s recent executive order is the Hire American component, which could bring dramatic change to the H-1B visa program.

The section directed at the H-1B program reads as follows: “Sec. 5. (b) In order to promote the proper functioning of the H-1B visa program, the Secretary of State, the Attorney General, the Secretary of Labor, and the Secretary of Homeland Security shall, as soon as practicable, suggest

reforms to help ensure that H-1B visas are awarded to the most-skilled or highest-paid petition beneficiaries.”

Basically, the order tasks the aforementioned cabinet secretaries to review employment-based foreign worker programs and to recommend changes. It's likely that new rules and guidance will be issued, reportedly with a preference to those who have attained Master's degrees in the U.S. For Glorily Lopez, an immigration lawyer with Murphy Desmond, there is a lot to unpack there, and she fears that some of it is based on misunderstanding the law. Under H-1B, 85,000 applicants are selected annually, at random, out of a pool of thousands, for the right to work in the United States for up to six years, but Lopez notes the program does not allow American companies to hire low-wage foreign labor at the expense of Americans.

“One thing that his supporters, and I don't even think the president himself understands, is that in order for a company to hire someone through H-1B, they are going through an application process with the U.S. Department of Labor, and they actually need to pay the higher of either the prevailing wage, as determined by the Department of Labor, or the actual wage,” Lopez explains. “Let's say the prevailing wage is \$85,000, and that position pays \$100,000. Then they have to pay the H-1B worker the higher wage — the \$100,000, not the \$85,000.” Companies that apply not only pay attorney's fees, but also application fees that, taken together, can run into the thousands of dollars — just to make a hire. Would they go through that time and expense to hire a foreign worker if they can find an American worker with the skills they need? Probably not, but there is another misconception about the H-1B program — that in effect, it works like a lottery.

Not really. Tens of thousands of applications are reviewed to determine whether they meet the qualifications, but the government can only approve the number authorized by Congress, and there already are mechanisms in place to prevent and identify fraud. “I'm sure there are some bad apples,” notes Lopez, “but that doesn't necessarily mean that the system in place is bad.”