

Commerce and OMB Issue 'Buy American' Guidance to Federal Agencies

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July 17, 2017

On Friday June 30, Secretary of Commerce, Wilbur Ross, and Director of OMB, Mick Mulvaney, released a [memorandum](#) providing guidance to executive departments and agencies that must, pursuant to the directives of President Trump's April 18th [Executive Order](#) entitled "Buy American and Hire American," undertake an analysis of their administration of applicable Buy American laws.

The memo directs agency chiefs to submit to the Commerce Department and OMB a report that details their assessment of the implementation of Buy American Laws within their agencies by September 15th in compliance with the executive order's section 3.

Direct Federal Procurement and Federal Assistance

The OMB and DOC memorandum direct agency assessments of both (1) compliance with Buy American laws applicable to an agency's *direct procurement* and (2) compliance with any Buy American laws applicable to *federal financial assistance awarded by an agency*.

Direct Federal Procurement

The OMB and DOC memorandum directs the elements of the analyses executive departments and agencies must undertake and the content they must include in their report. The categories of information sought by DOC and OMB include:

1. Oversight of Buy American laws;
2. Enforcement of Buy American laws and waiver usage; and
3. Steps to strengthen implementation of Buy American laws.

Relative to agencies' oversight of Buy American laws, OMB and DOC are directing agencies to report on department level guidance and procedures concerning Buy American laws and, specifically, the manner in which the BAA is waived to implement the Trade Agreements Act (TAA).

The OMB and DOC memorandum also directs agencies to review the level of spending conducted under exceptions to the Buy American laws, the most prevalent products that were subject to BAA exceptions and waivers, and the largest contracts subject to BAA waivers and exceptions during the last three fiscal years.

The memo further directs agencies to develop and propose policies to ensure procurements maximize the use of materials produced in the United States.

The OMB and DOC memorandum devotes considerable attention to the TAA, suggesting the Administration's intent to adhere to the TAA and to abide by U.S. obligations under international trade agreements applicable to government procurement.

Federal Assistance

Notably, the OMB and DOC memorandum also directs agencies to evaluate and report on their oversight of Buy American laws applicable to federal financial assistance awards, for which there is no primary law that imposes a "Buy American" procurement preference. The memorandum directs agencies to:

1. Provide an inventory of their existing Federal financial assistance authorities and information on the extent Buy American laws apply to awards made under these authorities
2. Describe guidance the agency has issued to assist assistance recipients in complying with applicable Buy American laws; and
3. Describe reviews the agency has conducted in the last two fiscal years. . . to evaluate recipients' compliance with Buy American laws.

Review of Waivers of Buy American Laws

Trump's executive order requires agencies to "assess the use of waivers ...by type and impact on domestic jobs and manufacturing." The OMB and DOC memorandum directs agencies to, at a minimum, "describe their current waiver and exception process and actions they are taking to review and improve upon that process."

Agencies Must Make Policy Recommendations

Finally, the OMB and DOC memorandum requires agencies to "develop and propose policies for their agencies to ensure that" federal procurements and assistance awards maximize the use of materials produced in the United States...." The OMB and DOC memorandum therefore directs each federal agency to:

1. Identify actions the agency intends to take to review and update the relevant agency guidance to recipients;
2. Identify actions the agency intends to take to review and update relevant agency internal procedures to implement relevant Buy American laws; and
3. Offer ideas for strengthening and applying Buy American laws that may require statutory, executive, regulatory, or administrative action across the government.

Next Steps

The OMB and DOC memorandum poses no immediate changes for federal procurements and procurements made with federal assistance. The information submitted by federal agencies may, however, prove to be critical to the ultimate success of President Trump's executive order.

After the agencies submit their reports, the order directs Commerce and the USTR to assess, within 150 days of the date of the order, the impacts of all U.S. free trade agreements, including the World Trade Organization's Government Procurement Agreement on the operation of Buy American laws.

The order also requires the Director of the OMB, the Secretaries of Commerce and State and the

USTR to submit within 220 days of the order a report to the President on the findings of the required agency reviews, which is to include specific recommendations to strengthen implementation of Buy American laws.