

# They Really Mean It This Time... Three Things to Know About Trump's Second "Buy American" Executive Order

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If your company receives money from the federal government, take note: President Trump signed another "[Buy American, Hire American](#)" Executive Order on January 31, 2019, that instructs agencies to prioritize purchasing United States goods and services in any infrastructure project—including cybersecurity projects.

The January 31 Order underscores the Trump Administration's policy of encouraging compliance with existing domestic preference requirements, including by instructing federal agencies to:

- maximize the use of "iron and aluminum, as well as steel, cement, and other manufactured products," produced in the United States in contracts, subcontracts, purchase orders, or sub-awards
- extend the policy to any infrastructure project receiving "federal financial assistance" directly, or indirectly through state and local programs. (Trump's first Buy American EO only applied to "federal grants.")
- report to the President on "any tools, techniques, terms, or conditions that have been used or could be used" to effectuate this policy.

The Order builds on [Trump's first "Buy American and Hire American" EO](#) released in April 2017.

Large federally funded infrastructure projects (rail and transit, airports, highways) are already subject to the most stringent "Buy American" obligations (including the confusingly named *Buy America Act* that applies to Federal Transit Authority projects) so it is not clear what additional "encouragement"

federal agencies are expected to provide to prime contractors and lower-tier suppliers. But even though the Order does not change existing laws, compliance with domestic preference schemes is more important than ever.

Below are three steps that private companies selling products or providing services in connection with federally funded projects should take in 2019.

## **1. SPOT-CHECK YOUR “BUY AMERICAN” COMPLIANCE**

Does your company supply elevator parts that will be used in an airport renovation? Do you provide products on a Veterans Administration schedule? Do you include foreign-made electronic components in your end products? Do you provide software or cybersecurity solutions to prime contractors or government entities? If yes, it is time to audit your “Buy American” compliance, particularly if you signed a “Buy American” certification form in the past.

Prime contractors ask subcontractors and suppliers to certify compliance with Buy American preferences, often via email or buried within purchase orders. Salespeople sometimes make Buy American certification decisions on their own. But informal certification requests may be wrong about the law that applies (“Buy American” vs. “Buy America” vs. ARRA), or provide no details about the federal award itself.

Contractors must make independent determinations about whether to sign a certification, or risk a False Claims Act violation. With your legal team, first investigate *which* domestic preference regime applies to a project, and whether a certification can even be made in a particular case. Just because a product qualifies under one Buy American system does not necessarily mean the same product will always qualify.

## **2. HOLD A BUY AMERICAN TRAINING EVENT**

Compliance in this field is challenging, and many suppliers do not understand there are actually several “Buy American” regimes—and some have very confusing names. It is critical to understand what domestic preference regime applies to *each* of your federally funded projects.

Training employees and creating internal processes now will help avoid running afoul of Buy American rules. Employees involved in bidding on or managing projects that involve federal funding (even indirectly, which is frequently the case in state-level construction projects) must be trained in Buy American requirements. This is particularly important for companies in countries *outside* the United States that sell goods to prime contractors working on federal projects. Invite your government contracts counsel to present to your legal, sales, and project management teams.

### 3. REVIEW YOUR SUPPLY CHAIN

If your product includes components from countries not on the “designated countries” list like China or India, an investigation should be conducted to ensure Buy American compliance. Make sure subcontractors and vendors certify their compliance and indemnify you if not; collect and maintain compliance certifications.

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President Trump’s latest EO is the second on this somewhat obscure topic in just the past two years. In the months and years to come, contractors should expect, and prepare for, changes in the law, an uptick in enforcement, and an increase in False Claims Act claims. Contact your Carlton Fields lawyer to stay abreast of the latest changes.

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