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New Executive Order Aims to Extend Buy American Requirements

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In order to further implement the Administration's Buy American strategy, President Trump signed Executive Order 13858, *Strengthening Buy-American Preferences for Infrastructure Projects*, on January 31, 2019. The Order instructs federal agencies to encourage recipients of federal financial assistance awards pursuant to "covered programs" to use steel, cement and other manufactured products produced in the United States in every contract, subcontract, purchase order, or subaward that is chargeable against such federal financial assistance award to the extent practicable. A "covered program" is broadly defined in the Order as "any program for which a focus of the statutory authorities under which it is administered is the award of federal financial assistance for the alteration, construction, conversion, demolition, extension, improvement, maintenance, reconstruction, rehabilitation, or repair of an infrastructure project in the United States."

This Order expands upon the President's April 2017 "Buy American and Hire American" Executive Order, which broadly directed federal agencies to maximize the use of goods, products and materials produced in the United States. It also defines terms that were previously undefined. For example, "manufactured products," is defined in the Order to include "materials composed in whole or in part of nonferrous metals such as aluminum; plastics and polymer-based products such as polyvinyl chloride pipe; aggregates such as concrete; glass, including optical fiber; and lumber."

Under the Executive Order, by May 31, 2019, all agencies administering a covered program are required to report any tools, techniques, or conditions that may be used to further the Order's goals. In preparing these reports, agencies have been asked to analyze whether their covered programs would support, through terms and conditions on new federal financial assistance awards under such covered programs, the imposition of a requirement to use iron and aluminum as well as steel, cement, and other manufactured products produced in the United States in contracts, subcontracts, purchase orders, or subawards that are chargeable against such federal financial assistance awards.

The Executive Order has potentially profound implications for contractors supporting infrastructure projects that receive federal financial assistance, particularly those who may find themselves subject to the Buy American domestic preference requirements for the first time. Companies likely will need to establish additional procedures to ensure compliance with the broad expansion of requirements for manufactured products and of programs subject to domestic preference restrictions. Due diligence efforts when preparing bids, completing certifications, or seeking waivers is critical.

The full impact of this latest addition to the President's Buy American strategy remains to be seen until federal agencies complete their 120-day reports. Nevertheless, contractors performing or bidding on relevant infrastructure projects should closely monitor these developments for any new requirements.

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