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How Trump’s “Buy American and Hire American” Could Alter Procurements

The President’s “Buy American and Hire American” Executive Order (EO), issued April 18, 2017, reflects Executive Branch policy and orders several agencies to submit reports due in 60 and 150 days. But it does not change the statutes and regulations that currently govern Federal procurement and Buy American requirements. **As such, the EO will have no immediate effect on existing Federal contracts and solicitations. But it could result in recommendations to affect future procurements.**

Section 2(b) of the EO states that it is the policy of the Executive Branch to buy American and hire American by maximizing the use of goods, products and materials produced in the United States consistent with existing law. Section 2(b) states that it is the policy of the Executive Branch to promote higher wages and higher employment rates for workers in the United States by rigorously enforcing and administering the laws governing entry into the United States by workers from abroad.

Section 3, “Immediate Enforcement and Assessment of Domestic Preferences According to Buy American Laws,” directs agencies to “scrupulously monitor, enforce and comply with” Buy American laws and to minimize the use of waivers. To that end, the EO directs agencies to report within 150 days regarding their enforcement of Buy American laws, their use of waivers and to propose policies to ensure that federal procurements maximize the use of materials produced in the United States. It directs that within 60 days the U.S. Trade Representative and the Departments of Commerce, State and Labor must issue guidance to implement the policies of this EO and to assess the use of free trade agreements within 150 days. Within 220 days, the Office of Management and Budget and the U.S. Trade Representative must submit a report to the President that includes the findings from the above reports with recommendations to strengthen implementation of Buy American laws.

The EO’s requirements for these reports provides domestic manufacturers with an opportunity to lobby agencies to recommend changes in statutes and regulations to promote increased use of domestic products. But it is a good idea to be mindful of the current “Buy American” Federal procurement policy. The Federal Acquisition Regulation (FAR) Part 25 implements statutes that govern the Federal Government’s preference for domestic products.

The Buy American Act (BAA), 41 U.S.C. §§8301 – 8305, requires federal agencies to procure domestic end products and construction materials. To qualify under the BAA, a product must meet a two-part test: it must be manufactured in the United States and the cost of domestic components must exceed 50 percent of the cost of all the components. FAR 25.101(a). Commercial-off-the-shelf (COTS) items need not meet the latter “component test,” as a statute makes the BAA and a number of Federal statutes inapplicable to procurement of such COTS products. 41 U.S.C. 1907. The waiver of the component test particularly affects domestic manufacturers of computer products, because many components are manufactured abroad. In addition, the FAR currently includes a waiver of BAA requirements for a list of materials and products that are not available in the United States. FAR 25.104.

In the Trade Agreements Act of 1979, 19 U.S.C. §2511 provides that for Federal procurement, the President may waive treatment less favorable than that accorded the United States for the products of certain “designated countries”. This is implemented by FAR 25.4, Trade Agreements, which lists the trade agreements and designated countries to which this waiver applies. The list is extensive.

Domestic manufacturers and their trade associations should monitor this process and the reports it generates. This process ultimately may affect the eligibility of their products for future Federal procurements.

The Executive Order is available at the White House internet site, at <https://www.whitehouse.gov/the-press-office/2017/04/18/presidential-executive-order-buy-american-and-hire-american>.

Federal Claims Decision: Good News, Bad News for Qualified Health Plans

A recent U.S. Court of Federal Claims decision spells good news and bad news for a Qualified Health Plan (QHP).

First, the good news: the Court has jurisdiction of a claim for the Department of Health and Human Services’ failure under the

Affordable Care Act’s (ACA’s) Risk Corridors Program to pay the amount required by the statute and regulations. The bad news is that the QHP must wait until completion of HHS’s audit and other procedures before it can sue. **Whether the Court’s interpretation is right or wrong, it is difficult to understand how this Risk Corridor Program will provide temporary relief to a QHP if it must wait three years before receiving payment.**

The April 18, 2017 decision held that the Court has jurisdiction over a suit by a QHP seeking a monetary judgment against the HHS for alleged failure to properly pay the QHP amounts due under the ACA’s Risk Corridors Program under ACA Section 1342, 42 U.S.C. § 18062. *Blue Cross and Blue Shield of North Carolina v. United States, US COFC*, No. 16-651C, (April 18, 2017, Griggsby, J.) The Court held that it had jurisdiction over the QHP’s claims based on violation of a “money-mandating” statute and implementing regulations, but dismissed the claim because payment was not yet due.

This article focuses on the Court’s decision that ACA Section 1342’s provisions that HHS “shall pay” prescribed percentage amounts to a QHP makes that provision a “money-mandating” statute and that the Court has jurisdiction over a QHP’s money claim based on alleged violation of that statute.

Blue Cross and Blue Shield of North Carolina (BCBS NC) is a QHP that provided health insurance coverage under the Affordable Care Act (ACA). BCBS NC brought a suit for damages in the U.S. Court of Federal Claims alleging that HHS failed to properly pay BCBS NC amounts required by the ACA’s Risk Corridors Program under ACA Section 1342, 42 U.S.C. § 18062.

The Court’s decision includes an excellent summary of the ACA’s objectives and its provisions to protect a QHP from unanticipated financial risk in insuring previously-uninsured individuals whose medical conditions are unknown. The Court explains that the Risk Corridor Program, applicable in 2014 – 2016, was one of several means employed under the ACA to mitigate a QHP’s financial risk from insuring such previously-uninsured individuals.

ACA Section 1342 states that the Risk Corridor Program is “a payment adjustment system based on the ratio of the allowable costs of the plan to the plan’s aggregate premiums.” Under the statute and its implementing regulations, 45 C.F.R. § 153.510(a)-



(b), HHS “shall pay” prescribed amounts to a QHP in the event that the Plan’s allowable costs exceed its target amount anticipated when premiums were established.

The Court explained that the Court has jurisdiction of a claim for money damages based on a “money-mandating source of law.” “A source is money-mandating when it “can fairly be interpreted as mandating compensation by the [government].” The Court held that ACA section 1342 and its implementing regulations were “money-mandating,” because they provide that HHS “shall pay” prescribed amounts to the QHP, and that the word “shall” typically states a mandatory requirement. Thus, the Court of Federal Claims had jurisdiction over BCBS NC’s claim that HHS violated the statute.

But the Court then dismissed the claim for failure to state a claim upon which relief could be granted. BCBS NC contended that the statute and regulations impliedly required HHS to pay the proper amount to a QHP within one year (in this case, by December 31, 2015). But the Government argued that HHS’s policy is to interpret the statute and regulation such that it does not state a time period for payment. The Court stated, “The [HHS’s] policy affords HHS the full three years of this temporary program to make up any shortfall in the Risk Corridors Program Payments as funds become available. Given the absence of a statutory deadline for making the Risk Corridors Program Payments to issuers—and the temporary nature of the Risk Corridors Program—HHS’s policy is sound and consistent with Section 1342.” Since payment was not yet due BCBS NC, the Court dismissed the claim for failure to state a claim upon which relief could be granted.



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For More Information

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