

Managing the Supply Chain

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Agenda

- Buy American Developments
- COVID-19 Government Contractor Mandates
- SECURE Technology Act and Other Supply Chain Developments
- Practical Advice on Managing Supply Chain Disruptions
- Questions



Buy American Developments

Infrastructure Investment and Jobs Act of 2021 (IIJA)

- Covers a variety of potential construction projects:
 - Transportation Infrastructure repair, replacement, new starts, research & development
 - Intermodal, including surface, highway, rail
 - Rural, city, tribal, federal agencies and entities (DOT, USACOE, Amtrak, etc.)
 - Energy infrastructure and investments, includes R&D, production and distribution facilities for utilities (electric, gas, hydrogen, nuclear, hydro, renewables, etc.), residential, commercial, educational facilities
 - Security and Cybersecurity infrastructure and resilience
 - Natural resources infrastructure and restoration (minerals, water, forest, recycling, bioproducts)
 - Communications infrastructure and deployment
- Addresses through financing, loans, contracts, grants, cost-share

IIJA - Build America, Buy America

- Buy America Sourcing Requirements
 - Sec. 70914 Application of Buy America Preference
 - Calls for use of “commonsense procurement preference” for materials and products produced in the US using “federal financial assistance”
 - Domestic content procurement preference – “a requirement that no amounts made available through a program for Federal financial assistance may be obligated for a project unless-- (A) all iron and steel used in the project are produced in the United States; (B) the manufactured products used in the project are produced in the United States; or (C) the construction materials used in the project are produced in the United States.”

IIJA – Build America, Buy America

- Buy America Sourcing Requirements
 - Within 60 days of enactment, each federal agency to report on each federal assistance program for infrastructure that it administers, including compliance, waivers, “deficient programs”
 - Per Section 70914, within 180 days of enactment, none of funds made available for Federal financial assistance for **infrastructure** may be obligated for project unless “**all** of the iron, steel, manufactured products, and construction materials used in the **project** are **produced in the United States**”

IIJA – Build America, Buy America

- Waiver of Buy America Sourcing requirements only where head of agency finds:
 - Inconsistent with public interest
 - Types of iron, steel, manufactured products, or construction materials are not produced in the US in sufficient and reasonably available quantities or of a satisfactory quality
 - Inclusion of domestic iron, steel, will increase the cost of the overall project by more than 25%
 - Must issue written justification and send to OMB /agency and provide 15 days for public comment on proposed waiver
 - General Applicability Waiver to be reviewed every 5 years and must be published for comment at least 30 days before waiver [exempts general product specific waiver issued more than 180 days before IIJA enacted]
- Special rules for Department of Transportation federal assistance programs

IIJA – Build America, Buy America

- Make It in America (continued) - Develop FAR regulation to implement IIJA:
 - Minimize waivers
 - “Should” amend to increase domestic content requirement to 75%, or where no qualifying offers to 60%
 - Revise FAR definition of “domestic end product manufactured in US” to include “manufacturing processes in production of the end product occur domestically”
 - “Iron or steel manufactured in US” to mean “all manufacturing processes involved in the production of iron and steel from initial melting stage through application of coatings occurs in US”
 - FAR COTS exception does not apply to iron or steel articles, materials, supplies

IIJA – Build America, Buy America

- Make It in America (continued) - Develop FAR regulation to implement IIJA:
 - Establish a **Made In America Office** to
 - Enforce domestic preference statutes
 - Address waiver requests
 - Support efforts to develop and sustain a domestic supply base to meet Federal procurement requirements
 - Each entity enrolled in Hollings Manufacturing Extension Partnership Activities will be enrolled in GSA Advantage!



<https://www.madeinamerica.gov/>

IIJA (continued)

- Section 7093 “BuyAmerican.gov Act of 2021”
 - Buy American Law includes any law, regulation, Executive order, or rule relating to Federal contracts, grants, or financial assistance that requires or provides a preference for the purchase or use of goods, products, or materials mined, produced, or manufactured in the United States
 - 150 days after IIJA enactment, report on assessment of impact of all US FTAs, WTO GPA, and impacts on domestic preferences
 - Establish BuyAmerican.gov website to track and report all waivers, including public interest waivers
 - Only can grant a BAA waiver if the Agency submits detailed waiver request to GSA for notice and public comment period of at least 15 days
 - Except urgent contracting need in “unforeseen and exigent circumstance”

Other Buy American Act Developments

- EO 14005 Ensuring the Future is Made in All of America by All of America's Workers
 - Consistent with law, use Federal financial assistance awards and procurements to maximize use of good, products, and materials produced in, and services offered in, the US, and to help US business and workers
 - Appoint Made in America Director and establish centralized and transparent website and waiver process through OMB
 - Consider impact of steel, iron, manufactured goods “dumping” on waiver process
 - Partner with Hollings Manufacturing Extension Partnership to scout US suppliers

Other Buy American Act Developments

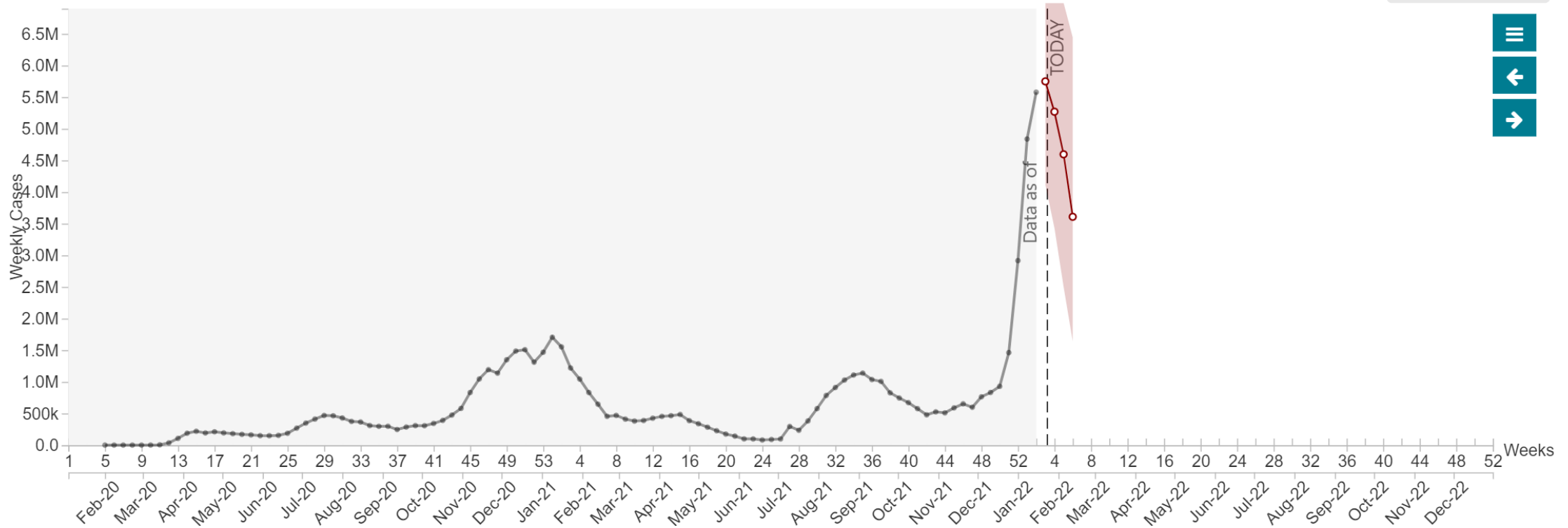
- EO 14005 (continued)
 - Buy American Act and other Buy America, Made in America laws to be enforced and bolstered
 - “Replace” FAR Part 25 component cost test with content test measuring value and increasing threshold for domestic content and price preferences for domestic end products and construction materials
 - Update DNAD list and consider extending Made in America laws to IT that is commercial item
- FAR Case 2021-008 Amendments to FAR Buy American Act Requirements
- What will this mean for contracts covered by the Trade Agreements Act?

COVID-19

Government Contractor Mandates

COVID-19 Government Contractor Mandates

Observed and forecasted weekly COVID-19 cases in the United States



Click below to open legend or see past models



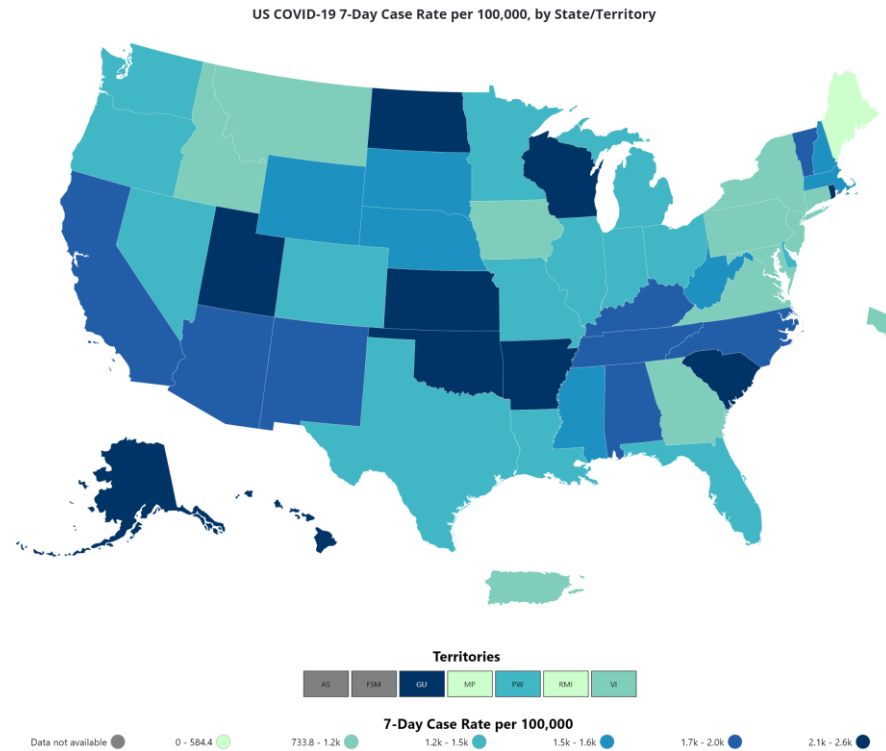
https://covid.cdc.gov/covid-data-tracker/#forecasting_weeklycases

COVID-19 Government Contractor Mandates

- US at a glance:
 - Daily Admissions of Patients with Confirmed COVID-19
 - As of 2022-01-16 -- 18,236
 - As of 2022-01-17 – 17,845
 - As of 2022-01-18 -- 21,251
 - As of 2022-01-19 – 21,576
 - As of 2022-01-20 -- 20,990
- US at a glance:
 - 7-Day moving average
 - As of 2022-01-16 – 21,477
 - As of 2022-01-17 -- 21,233
 - As of 2022-01-18 -- 21,077
 - As of 2022-01-19 – 20,867
 - As of 2022-01-20 – 20,691

<https://covid.cdc.gov/covid-data-tracker/#new-hospital-admissions>

COVID-19 Government Contractor Mandates



https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days

On January 13 the U.S. Supreme Court Issued Two Opinions on Similar Mandates

- ***National Federation of Independent Business, et al v. DOL, etc. and Ohio et al v. DOL, etc.*** - Granted a stay of enforcement of OSHA Emergency Temporary Standard (ETS) that would have required employers with 100 or more employees to develop and implement policies mandating vaccination or weekly testing and mask wearing for unvaccinated employees
- ***Biden v. Missouri*** - Allows a Centers for Medicare and Medicaid Service (CMS) regulation to go into effect, which requires health care facilities that receive federal funds through these programs to implement a vaccine mandate with exceptions for medical and religious objections

How can these two rulings be reconciled?

- OSHA does not have broad authority to regulate public health through vaccine mandates because OSHA's statutory duty is to regulate workplace safety
- COVID-related OSHA regulations may be permissible for specific types of work places, but this vaccine mandate went beyond that
- CMS, on the other hand, is authorized by federal statute to impose requirements that protect the health and safety of patients

Where do things stand now?

- State and local authorities have the power to regulate public health, including by mandating vaccines
- State and local officials have broad discretion to determine how to do this
- A highly politicized patchwork of regulations that varies greatly across the country poses challenges for large, national employers

What about the Federal Contractor Mandate under Executive Order (EO) 14042?

- EO 14042 imposed vaccination, masking and social distancing requirements for federal contractors at any tier
- U.S. District Court in Georgia issued a nationwide stay of enforcement of EO 14042
- Supreme Court decision does not directly impact EO 14042 or the stay of enforcement pending that litigation, but it provides some clues

So what's a federal contractor supposed to do?

- Figure out your requirements and what is best for your company, create a sound policy, and implement it fairly
- Don't push the envelope one way or the other without close consultation with legal counsel and a willingness to spend money on litigation



Principles to consider (should have been done already, but it's never too late)

- Designate people to track and ensure compliance with federal, state and local requirements
- Assess the work that employees do and tailor your policies to match risks and practices
- Create standard operating procedures and provide training to employees on compliance
- Encourage vaccination and masking but allow for sincere and appropriate medical and religious exceptions
- Consider implementation of health insurance surcharges to account for increased medical expenses resulting from failure to vaccinate

SECURE Technology Act

and Other Supply Chain
Developments

SECURE Technology Act

- Strengthening and Enhancing Cyber-Capabilities by Utilizing Risk Exposure (SECURE) Technology Act
 - Establish policy for encouraging reporting and information sharing of cyber vulnerabilities, including Bug Bounty Pilot Program
 - Establish the Federal Acquisition Security Council (FASC) to assess and develop a plan to mitigate threats and vulnerabilities relating to the supply chain, particularly in Information and Communications Technology acquisition
 - Recommend NIST development of standards
 - Recommend exclusion of sources and covered articles from procurement; COTS not exempt
 - DHS, DoD, or DNI to issue exclusion and removal orders resulting in government-wide exclusion
 - DC Circuit exclusive jurisdiction over exclusion/removal order claims, subject to SCOTUS review

Other Supply Chain Issues

- Cybersecurity is foundational for contracts ***at all tiers***
- Implementation is changing
 - Still no rule on confidential unclassified information (CUI)
 - But Basic Assessment and Reporting in SPRS is in place
 - CMMC 1.0 has been reissued as CMMC 2.0 and comes with changes that require you to pay attention
 - POAMs, Flowdowns, Self Certification, Third Party Certification, and even Government Certification
- There is increased risk of False Claims Act issues in this area now

Other Supply Chain Issues

- Monaco Memoranda and Procurement Collusion Strike Force
 - DOJ enforcement actions (Antitrust, Cyber, Criminal) increasing
- Increasing Cyber incidents and hacking
 - E.g., Russian Brute Force hacking campaigns
- Supply pandemonium
 - Shortages and Inflation
 - Flowdown “must-haves” increasing
 - Counterfeits
- White House Supply Chain Task Force

Practical Advice

on Managing Supply Chain
Disruptions

The Concept of Force Majeure

- Something that is outside of the contractor's reasonable control
- Contract spells out what constitutes force majeure
- Typically includes
 - Acts of God
 - Acts of Government
 - Fires and floods
 - Epidemics and quarantines
 - Strikes
 - Unusually severe weather
- Usually excuses performance or allows for additional time to perform, but does not grant additional compensation.

The case of Pernix Serka JV v. Dept. of State

- Fixed Price Water Storage project for U.S. Embassy in Sierra Leone
- Ebola outbreak occurred
- Contractor sought direction, but contracting officer refused to provide any
- Contractor shut down project temporarily to protect safety of workers but returned to finish later
- Contractor's two Requests for Equitable Adjustment (REAs) were denied.
 - Board of Contract Appeals awarded additional time but no additional compensation

Implications for COVID-19 Claims

- Additional time for confirmed impacts should be granted
- Absent directives from government to stop or materially alter work, additional compensation is not likely
- But if additional time is denied by contracting officer, then additional compensation may be awarded for constructive acceleration

Other supply chain interruptions

- Shipping delays
- Product unavailability
- Substantial price increases
- Labor shortages
- ...

Mitigation strategies

- Pay attention to contract terms and address specific supply chain concerns through contract negotiations.
 - Consider using allowances for particularly price sensitive items
 - Consider shared risk or equitable adjustment provisions
 - Maintain consistent terms upstream and downstream in the chain of contract to the extent possible

Mitigation strategies continued

- Develop contingency plans for each component of your work
- Diversify your supply chain
- Strengthen subcontractor and supplier relationships
- Use payment and performance bonds to protect against defaults by subcontractors and suppliers
- Analyze insurance that may be available to cover business interruption losses

Mitigation strategies continued

- Give notice of impacts early and as often as needed
- Work collaboratively with all parties as much as possible
- Do not wait before engaging subcontractors and placing orders
- Be prepared to pivot quickly to minimize impacts

Takeaways

Takeaways

- Lots of new statutes to implement into regulation so keep checking for new clauses in your solicitations and contracts
- Update your subcontracts and compliance programs to address existing and new clauses to protect against supply chain disruption
- Be sure to have contract administration procedures and trained personnel to identify issues early and escalate appropriately for proper disposition
- Secure your systems and infrastructure against internal and external threats

Any Questions?

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