

THE GOVERNMENT CONTRACTOR®

Information and Analysis on Legal Aspects of Procurement



THOMSON
REUTERS®

Vol. 64, No. 33

August 31, 2022

Focus

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FEATURE COMMENT: The Inflation Reduction Act: A New Role For Green Procurement?

The 2022 Inflation Reduction Act of 2022 (IRA) (H.R. 5376, now P.L. 117-169) marks one of the most significant steps forward in U.S. environmental policy in decades. The IRA provides for hundreds of billions of dollars in energy and climate spending, consisting in part of tax provisions designed to encourage development in low-carbon energy systems, electric vehicles, nuclear power, and hydrogen cell technology. While federal procurement provisions do not play a central role in the IRA, the legislation does include significant provisions related to federal spending, for example regarding federal purchases of environmentally sound building products. Even more importantly, taken in context, the IRA follows a number of other steps taken to advance “green” procurement by the Biden administration. The legislation thus helps define an upward trajectory in environmental initiatives, several of which have been accompanied by corresponding developments in federal procurement regulations. See, e.g., Christopher Yukins, “Understanding Biden’s ‘Green’ Federal Procurement Order,” *Bloomberg Law*, Jan. 7, 2022.

In the legislation’s provisions affecting General Services Administration contracting, we see a shift towards an environmental procurement strategy based on directed spending rather than indirect preferences for “green” products or vendors. Sec-

tion 60502 and 60503 of the IRA provides GSA with \$2.15 billion for low-embodied carbon materials in building projects, along with \$250 million to be invested in green materials for federal properties. This is an important development—an aggressive move by Congress to drive the purchase of environmentally favorable products, and a more direct effort than merely encouraging “green” preferences in procurement. See Steven L. Schooner, “No Time to Waste: Embracing Sustainable Procurement to Mitigate the Accelerating Climate Crisis,” 61 *Contract Management*, Issue 12, page 24 (Dec. 2021), available at ssrn.com/abstract=3980915; Kate M. Manuel & L. Elaine Hanchin, Congressional Research Service, *Environmental Considerations in Federal Procurement: An Overview of the Legal Authorities and Their Implementation* (Jan. 2013), available at www.fas.org/sgp/crs/misc/R41297.pdf.

While there are relatively few specific green procurement measures in the IRA, the legislation builds on a pattern of measures taken by the Biden administration to advance environmentally sound procurement. See, e.g., 64 GC ¶ 60(b); 63 GC ¶ 30 (discussing Executive Order 14008, Tackling the Climate Crisis at Home and Abroad); 63 GC ¶ 309.

In June 2022, for example, the Biden administration announced several measures under which long-awaited shifts in environmental policy were firmly paired with developments in federal procurement. On June 6, 2022, President Biden issued Proclamation 10414 under § 303 of the Defense Production Act of 1950 (DPA), providing the secretary of commerce with the authority to extend duty-free treatment of solar cells and modules from parts of Southeast Asia until June 6, 2024. See Proclamation 10414, 87 Fed. Reg. 35067 (June 9, 2022). In the past year, the U.S. solar industry reportedly has been hobbled by an ongoing Commerce Department

investigation into whether Chinese manufacturers have avoided anti-dumping and countervailing duties by selling through Thailand, Vietnam, Malaysia, and Cambodia (these four countries currently account for some 80 percent of solar imports to the U.S.). See Iulia Gheorghiu, “Biden to Pause Solar Tariffs for Two Years Amid Supply Chain Disruption from Commerce Investigation,” *UtilityDive* (June 6, 2022). While they waited to learn if they would need to pay billions in new import tariffs, solar producers had to put hundreds of new projects on hold, essentially placing the industry in lockdown. See Emily A. Beagle, “Biden Throws Solar Installers a Lifeline with Tariff Relief, But Can Incentives Bring Manufacturing Back?,” *The Conversation* (June 7, 2022). President Biden’s DPA declaration has therefore freed the solar industry to re-start a range of major projects. *Id.*

Concurrently, the Biden administration issued a series of presidential actions designed to balance the effects of new solar measures on U.S. domestic solar manufacturing. See Presidential Determination 2022-17, 87 Fed. Reg. 35075 (June 9, 2022); Presidential Determination 2022-15, 87 Fed. Reg. 35071 (June 9, 2022). Drawing again on the authority of the DPA, these measures aim to encourage the domestic production of five critical technologies, and to further cultivate domestic supply chains in solar installation materials—building insulation, heat pumps, equipment for producing electrically-generated fuels, and critical energy infrastructure such as transformers. Through these executive actions, the Biden administration helped lay the groundwork for a range of provisions in Subtitle D of the IRA which appropriate funds designed to incentivize the development of energy-related technologies and supply chains already granted national security priority status under the DPA.

One key aspect of these measures, it is important to note, is the leveraging of the Federal Government’s purchasing power. On June 6, 2022, the Biden administration also issued a determination calling for the development of Master Supply Agreements, “for domestically manufactured solar systems to increase the speed and efficiency with which domestic clean energy manufacturers can sell their products to the US government.” See Presidential Determination 2022-17, 87 Fed. Reg. 35075 (June 9, 2022). The White House further called for the creation of “so-called ‘super preferences’ to apply do-

mestic content standards for federal procurement of solar systems, including domestically manufactured solar photovoltaic components, consistent with the Buy American Act” (www.whitehouse.gov/briefing-room/statements-releases/2022/06/06/fact-sheet-president-biden-takes-bold-executive-action-to-spur-domestic-clean-energy-manufacturing/).

Very little information was released by the White House regarding these potential procurement preferences. If these preferences are framed under the Buy American Act, however, their impact may be limited by trade agreements which can supersede the Buy American Act for larger purchases, and leave procurement markets open to U.S. trading partners from abroad. See, e.g., Congressional Research Service, *The Buy American Act and Other Federal Procurement Domestic Content Restrictions* (updated July 18, 2022), crsreports.congress.gov/product/pdf/R/R46748; Christopher R. Yukins and Allen Green, *International Trade Agreements and U.S. Procurement Law*, in *The Contractor’s Guide to International Procurement* (American Bar Association 2018) (Erin Loraine Felix & Marques Peterson, eds.), available at ssrn.com/abstract=3443244. In this regard, as standing trade agreements steer “green” procurement towards trading partners geopolitically aligned with the United States through trade agreements, the procurement driven by IRA funding may prove an example of “friend-sourcing,” i.e., supply chains strengthened and diversified by including the United States’ friends and allies, a popular policy approach in the Biden administration. See, e.g., Christopher Condon, Heejin Kim, and Sam Kim, *Yellen Touts ‘Friend-Shoring’ as Global Supply Chain Fix*, *Bloomberg*, July 18, 2022; Halit Harput, *What Policy Initiatives Advance Friend-Shoring?*, *Global Trade Alert - Zeitgeist Briefing #2*, at 1–2 (Aug. 24, 2022) (discussing IRA’s preferences and the use of the DPA as examples of “friend-shoring”), available at www.globaltradealert.org/reports.

The recent moves by the Biden administration built on developments to advance domestic preferences in procurement announced earlier this year. In March 2022, the Federal Acquisition Regulatory councils promulgated a final rule intended to increase Federal Government preferences for domestically manufactured materials, and to increase the required domestic content threshold for

purchases governed by the Buy American Act. 87 Fed. Reg. 12780 (Mar. 7, 2022). This rule was based on EO 14005, Ensuring the Future is Made in All of America by All of America's Workers, which in turn was followed by EO 14017, America's Supply Chains, 86 Fed. Reg. 11849 (Mar. 1, 2021). The Biden administration, through these executive orders, launched an initiative under which agencies were required to review existing supply chains and to evaluate options for the use of domestic production in responding to potential shortages in critical goods. *Id.* These measures were part of a procurement policy strategy which, looking towards the IRA, can provide for the prioritization of domestic energy systems in federal purchasing, built in part on an understanding that green energy supply chains advance national security interests and U.S. domestic industry.

It is not new to see a role for Federal Government procurement policy in greening supply chains. In fact, the use of executive action to leverage the buying power of the U.S. Government in the service of sustainable growth goes back at least to the Obama administration, in particular EO 13514, Federal Leadership in Environmental, Energy and Economic Performance,⁷⁴ Fed. Reg. 52117 (Oct. 8, 2009). That executive order from President Obama directed federal agencies to promote procurement of sustainably produced electronics, and called for agencies to assess the possibility of using the federal procurement process to minimize greenhouse gas emissions. Although President Obama's executive order launched a 2010 GSA report that in many ways anticipated today's federal strategies for "green" procurement, see GSA, *Executive Order 13514 Section 13: Recommendations for Vendor and Contractor Emissions* (Apr. 2010), the order itself was superseded during the Trump administration.

In retrospect, green procurement policy under the Obama administration, while largely without teeth, helped to point the way towards a nested ap-

proach linking procurement with low-carbon and sustainable technology appropriations that we see in the 2022 IRA. The key seems to be the Biden administration's decision to identify low-carbon, low-emission technologies and their associated supply chains as an intrinsic part of national security, and thus under the mantle of the DPA. That link between environmental policies and national security may make it more difficult for foreign nations to challenge the procurement preferences (such as those under the IRA), because trade agreements which open procurement markets typically exempt measures taken for national security reasons, or to address environmental concerns. See, e.g., World Trade Organization, Government Procurement Agreement Art. III; Christopher Yukins, 2021 Gov't Contracts Year in Review Briefs 4; Sue Arrowsmith, "Social and Environmental Policies under the GPA: Some General Reflections and Emerging Issues," www.wto.org/english/tratop_e/gproc_e/symp_feb10_e/arrowsmith_6_e.pdf. With the passage of the IRA and other, related measures by the Biden administration, a wide range of economic incentives, including procurement preferences, are now available for unprecedented growth in these industries, with federal procurement potentially poised to make an important contribution to the development of domestic supply chains.



This Feature Comment was written for THE GOVERNMENT CONTRACTOR by Nathaniel Green and Christopher Yukins. Mr. Green is an attorney with experience in U.S. agency law and associated research into energy and environmental policy. He also specializes in U.S. federal procurement and is an LLM candidate at the George Washington University Law School in Washington, D.C. Professor Yukins serves as the Lynn David Research Professor in Government Procurement Law at the George Washington University Law School.