

Client Alert: New Buy American Proposed Rule Increases Domestic Content Thresholds and Foretells Future Change

Publications

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As required by President Biden's Executive Order 14005, *Ensuring the Future is Made in America by All of America's Workers*, the FAR Council published on July 30, 2021 a proposed rule to amend the Buy American Act (BAA).¹ While not fundamentally shifting the landscape, the proposed rule makes it more difficult to qualify as selling American-made goods and foretells of potential future changes in key questions for comment. However, for companies who do qualify, the proposed rule provides competitive benefits.

The BAA requires the federal government to procure articles, materials, and supplies that were mined, produced, or manufactured in the United States, substantially all from domestic components, subject to certain exceptions. This is implemented through an evaluation price preference for American-made products. Under the existing regulations, large businesses offering domestic supplies receive a 20 percent price preference, and small businesses receive a 30 percent price preference.

Currently, the determination of whether a manufactured end product or construction material qualifies as domestic is made using a two-part test. **First**, the end product or construction material must be manufactured in the United States. **Second**, a certain percentage of all component parts (determined by cost of the components) must also be mined, produced, or manufactured in the United States. The second prong of the test, historically known as the "component test," was recently was redesignated the "domestic content test." Under this prong, for an end product that does not consist wholly or predominantly of iron or steel or a combination of both, the cost of domestic components must exceed 55 percent of the cost of all components (with certain exceptions).

At a high level, there are three areas of changes in the proposed rule. **First**, the proposed rule includes an increase to the domestic content threshold, a schedule for future increases, and a fallback threshold that would allow for products meeting a specific lower domestic content threshold to qualify as domestic products under certain circumstances. **Next**, the proposed rule

creates a new framework for application of an enhanced price preference for a domestic product that is considered a critical product or made up of critical components. **Finally**, the proposed rule establishes a post-award domestic content reporting requirement for contractors.

Significantly, the proposed rule does *not* replace the existing BAA “component test” in favor of a test under which domestic content is measured by the value that is added to the product through US-based production or US job-supporting economic activity. This still may change in the future, as the FAR Council seeks additional information regarding the “component test” as currently structured, as well as input on a better calculation for domestic content to achieve the policy aims of the BAA.

Enhanced Price Preference for Critical Products and Critical Components

In an effort to bolster American production of critical products, the rule provides for a framework through which higher price preferences will be applied for end products and construction material deemed to be critical or made up of critical components. In other words, companies offering American-made products will have an even greater preference over foreign products in these areas. The proposed rule places the onus on offerors to identify in their offer domestic end products that contain a critical component, so that contracting officers can apply the higher price preferences when appropriate.

The process for identifying critical items and critical components to receive the price preference would use the quadrennial critical supply chain review instituted in E.O. 14017, *America’s Supply Chains*, as well as the National COVID Strategy. Separate rulemaking will identify and add critical products and components to the FAR and to establish the associated preferences.

Post-award Reporting Requirement for Contractors

Under the proposed rule, contractors would be required to disclose to the government the specific domestic content of critical items, domestic end products containing a critical component, and domestic construction material containing a critical component, that were awarded under a contract. This reporting requirement does not apply to COTS items. The intent with this change is to provide the government with insight into the actual domestic content of products sold to the government, since currently this information is not readily available.

Applicability

The proposed rule would modify existing clauses, which will continue to apply, or not apply, to acquisitions at or below the simplified acquisition threshold (SAT) and to acquisitions for commercial and COTS items as they did prior to the proposed rule.

The FAR Council has also proposed to add two clauses at FAR 52.225–XX, Domestic Content Reporting Requirement—Supplies, and FAR 52.225–YY, Domestic Content Reporting Requirement—Construction Materials. These clauses would apply to acquisitions at or below the SAT and to acquisitions for commercial items, excluding COTS items.

COTS Waiver

Since 2009, COTS items (with limited exceptions) have been subject to a waiver from the component test of the Buy American statute. Whether the component test will be restored to COTS items is under review by the Made in America Office in collaboration with the FAR Council and other interested parties.

Public Meeting and Comments

Domestic preference programs, such as the BAA, present an evolving landscape as the government tries to promote American-made products to benefit the American economy and American workers, as well as to protect the supply chain. This proposed rule is likely the first in a series of changes that will affect government contractors. To ensure your voice is heard throughout the rulemaking process, the FAR Council will hold a virtual public meeting on August 26, and will accept written comments on or before September 28, 2021. We stand ready to assist you in understanding the full import of this important rulemaking and in drafting comments on your behalf should that be of interest.

Footnotes

[1] 86 Fed. Reg. 40980.

Related Capabilities

Government Contractor Litigation and Compliance

Related Locations

Washington, DC

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