

Biden Administration Issues Notice of Public Rulemaking on Buy American Regulations

On July 28, 2021, President Biden announced that, pursuant to Executive Order (“EO”) 14005 “Ensuring the Future Is Made in All of America by All of America’s Workers,” the Department of Defense (“DoD”), the General Services Administration (“GSA”), and the National Aeronautics and Space Administration (“NASA”) issued a Notice of Proposed Rulemaking (the “NPRM”) requesting comments about potential changes to the Federal Acquisition Regulatory Council (“FAR”) regulations that implement the Buy American Act (“BAA”). The NPRM has not yet been published in the Federal Register, but a pre-publication version of the NPRM is available [here](#).

A White House fact sheet about the NPRM is available [here](#) and a transcript of President Biden’s remarks about the NPRM is available [here](#). In his remarks, President Biden stated that “[i]n recent years, ‘Buy American’ has become a hollow promise. But [] my administration is going to make ‘Buy American’ a reality.”

Below, we provide a brief overview of the NPRM.

- **Deadline:** Comments in response to the NPRM are due within 60 days after the NPRM is published in the Federal Register. DoD, GSA, and NASA will hold a virtual public meeting about the NPRM on August 26, 2021 from 9:00 AM to 3:00 PM EST.
- Subject to certain exceptions, the BAA “requires public agencies to procure domestic products, meaning articles, materials, and supplies that were mined, produced, or manufactured in the United States, substantially all from domestic components.” See NPRM, page 7.
- Under FAR regulations, subject to certain exceptions, a product is generally considered a domestic product (meaning “mined, produced, or manufactured in the United States, substantially all from domestic components”) when it meets the “component test,” which requires:
 1. The end product or construction material is manufactured in the United States; and
 2. The cost of domestic components exceeds 55 percent of the cost of all components (for end products that do not consist wholly or predominately of iron or steel or a combination of both). See NPRM, page 8. (Note: The current rule imposes a stricter standard for an end product that consists wholly or predominantly of iron or steel or a combination of both. In that case, the cost of foreign iron and steel must constitute less than 5 percent of the cost of all the components). See *id.*
- Domestic products are given preference in federal procurement and can receive between a 20 and 30 percent price preference, depending on the size of the business. See NPRM, page 9.
- As drafted, the NPRM would:
 1. Increase the required content of non-iron/steel domestic components “initially from 55 percent to 60 percent, [] increase the threshold to 65 percent in two years, and [] increase the threshold to 75 percent five years after the second increase.” The increases will include a fallback threshold permitting “the acceptance of the former domestic content threshold in instances where end products or construction materials

that meet the new domestic content threshold are not available or are of unacceptable cost.” See NPRM, pages 11-12.

2. Provide increased price preferences for domestic products considered “critical products” or made up of “critical components.”
 - a) A list of “critical products” and “critical components” will be issued in a separate Federal Register notice. See NPRM, pages 13-14.
 3. Implement a requirement for government contractors awarded a government contract to report the specific domestic content of critical items, domestic end products containing a critical component, and domestic construction material containing a critical component. See NPRM, page 15.
- The NPRM does not seek to replace the two-part test for determining whether a product is a domestic product, but it does seek comments on the strengths and shortcomings of the test. See NPRM, page 11.