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Biden Administration Issues Proposed Buy American Regulations

Requests Comments From Industry On A Number Of Key Aspects Of The Proposal

On July 30, 2021, pursuant to Executive Order (“E.O.”) 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” or “Proposed Rule”) requesting comments about proposed modifications to the Federal Acquisition Regulation (“FAR”) provisions that implement the Buy American Act (“BAA”). A White House fact sheet about the Proposed Rule is available here and a transcript of President Biden’s remarks about the Proposed Rule is available here.

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 – subject to exceptions for nonavailability of domestic products, unreasonable cost of domestic products, or in situations when the purchase of domestic products would not be in the public interest. Additional exceptions include acquisitions subject to certain international trade agreements and purchases below certain dollar-thresholds (*i.e.*, micro-purchases).

The Proposed Rule would amend the FAR provisions that implement the BAA in three ways:

- Increase the level of domestic content required for a product to be considered a domestic product and receive preferences under the BAA;
- Provide enhanced price preferences for domestic products considered “critical products” or made up of “critical components”; and



- Require government contractors to report the specific domestic content of critical items, domestic end products containing a critical component, and domestic construction material containing a critical component.

REQUEST FOR COMMENTS

DoD, GSA, and NASA are requesting comments from interested parties on a number of substantive topics that will impact the agencies' implementation of any final rule. A virtual public meeting about the Proposed Rule also will be held on August 26, 2021. Affected companies and other stakeholders should take steps now to begin preparing submissions. Comments must be filed by September 28, 2021. **Importantly, submissions that contain business confidential/proprietary information may be withheld from public disclosure, but several procedural steps must be followed in order to obtain this protection.**

CURRENT DOMESTIC CONTENT TEST

Under current law, the determination of whether a manufactured end product or construction material qualifies as domestic is performed using a two-part test. First, the end product or construction material must be manufactured in the United States. Second, a minimum percentage of all component parts (determined by cost) must also be mined, produced, or manufactured in the United States. This is known as the "domestic content test," and different thresholds apply depending on whether the end product consists wholly or predominantly of iron or steel (or a combination of both). For an end product that does not consist wholly or predominantly of iron and/or steel, the cost of domestic components must exceed 55 percent of the cost of all components. For an end product that consists wholly or predominantly of iron and/or steel, the cost of foreign iron and steel must constitute less than 5 percent of the cost of all the components. That iron and steel threshold is not waived for commercially available off-the-shelf ("COTS") items, except for COTS fasteners.

INCREASED DOMESTIC CONTENT AND FALLBACK THRESHOLDS

The Proposed Rule proposes to increase the domestic content threshold for non-iron/non-steel products initially from 55 percent to 60 percent. Two years later, the threshold would increase to 65 percent. Finally, the threshold would increase to 75 percent five years after the second increase. As a fallback (to help with implementation of the new standards), the Proposed Rule intends to allow, until one year after the increase of the domestic content threshold to 75 percent, for the acceptance of the former domestic content threshold in instances where end products that meet the new domestic content threshold are not available or are of unacceptable cost. To implement this fallback threshold, the NPRM proposes to require offerors to indicate which of their foreign end products exceed 55 percent domestic content. The fallback threshold only applies to construction material and end products that do not consist wholly or predominantly of iron or steel or a combination of both.

ENHANCED PRICE PREFERENCE FOR "CRITICAL PRODUCTS" AND "CRITICAL COMPONENTS"

The Proposed Rule would establish a framework to apply higher price preferences¹ for domestic end products and construction material deemed to be "critical products" or made up of "critical components." For products made up of "critical components," the Proposed Rule would introduce a requirement that contractors identify their domestic products that contain a "critical component" when making offers to the federal government so that contracting officers know when a domestic product contains a "critical component." To establish the enhanced price preferences, the Proposed Rule would provide a process for identifying "critical products" and "critical components" using the quadrennial critical supply chain review instituted in E.O. [14017](#), "America's Supply Chains" and the pandemic supply chain strategy called for under E.O. 14001 ("National COVID Strategy"). We have previously discussed Biden Administration actions taken under E.O. 14017.²



The specific products that will be deemed “critical” for purposes of receiving a price preference is unknown – the list of critical products will be determined in a separate rulemaking that will be subject to a notice and comment period. Companies with supply chains that may be impacted by a “critical” product or component designation will need to carefully assess the potential impacts of this ongoing process.

POSTAWARD REPORTING REQUIREMENT

Another proposed change to the FAR is a requirement for contractors to provide the specific domestic content of critical items, domestic end products containing a critical component, and domestic construction material containing a critical component, that were procured under a contract.³ This new postaward reporting requirement appears to be aimed at supporting the Biden Administration’s broader supply chain security initiatives. Ultimately, if the Proposed Rule becomes final, then contracting parties will be required to provide actual domestic content for critical items – as opposed to certifying that a threshold has been exceeded. That is, the Proposed Rule requires that contractors report within 15 days of the award: (1) the contract number; (2) the amount of domestic content in each critical item; and (3) the amount of domestic content in each domestic end product (or domestic construction material) containing a critical component.⁴ This new reporting requirement would not become operational until a separate rulemaking that identifies and adds specific critical items or critical components to the FAR becomes finalized.

EXPECTED IMPACT

Although the specific details depend upon the implementation of any final rule, the Proposed Rule will impact companies (and their downstream suppliers) that do business with the federal government. First, a scheduled increase to the domestic content threshold almost certainly will impact contractors that do not take steps to comply with the stricter domestic content requirements.

Second, the Proposed Rule only creates a framework for an enhanced price preference for critical items and components, and a separate rulemaking will be undertaken to identify critical products and components, and to establish the associated preference. Accordingly, contractors will have a better sense of the impact of this modification following a subsequent rulemaking. Companies will need to assess whether to participate in government contracting opportunities for “critical” items when accounting for the larger price preference received for such items.

Third – and with regard to the postaward reporting requirement for contractors – the data on the amount of actual domestic content provided in the contractors’ reports is expected to provide valuable insight on the domestic content of the manufactured products that are integral to U.S. national and economic security. A subsequent rulemaking will provide greater detail on requirements for postaward reporting for critical items and components.

SPECIFIC QUESTIONS IN PROPOSED RULE

The Federal Register notice includes the following specific questions:

- **Increased Domestic Content Thresholds:** Do products you make or sell to the Federal Government currently meet the proposed increased domestic content thresholds of 60 percent, 65 percent, or 75 percent?
 - Would you be willing and able to adjust your supply chain to meet the proposed new thresholds given the scheduled phase-in? Why or why not? Please discuss any obstacles that might interfere with, or opportunities—including actions by the Federal Government—that might support your ability to meet the proposed increases in domestic content thresholds.
 - If you are willing to make supply chain adjustments, please provide an overview of associated costs and benefits to making these changes. Explain to what extent any costs may be offset by increased Federal



Government sales or price preferences. If relevant, provide an overview of expected increased economic activity through the increased use of domestic suppliers and domestic labor.

- **Fallback Threshold:** Please address the utility of the proposed fallback threshold, including whether it would give your company time to adjust to a higher domestic content threshold; whether the fallback threshold should increase as the domestic content threshold increases; whether the existence of the fallback threshold would delay the ability to increase Made in America content in Federal procurement; the process by which the fallback threshold should be eliminated in order to maximize the use of Made in America content; and any challenges posed by the complexity of employing a fallback threshold.
- **Price Preferences:** Please comment on the effectiveness of current price preference levels at promoting domestic economic activity and employment and strengthening domestic supply chains for critical items; address whether increased price preferences would be more, less, or equally as effective, and, if more effective, at what level.
- **Enhanced Price Preferences:** Please comment on the anticipated effectiveness of providing enhanced price preferences to strengthen the domestic supply chains for items and components deemed “critical”. In particular—
 - Which specific items or components or combination thereof, if any, should receive an enhanced price preference and why?
 - What process should the Office of Management and Budget use to determine which of the critical items identified through the critical supply chain review under E.O. 14017 and the National COVID Strategy are likely to make a meaningful difference toward strengthening domestic supply chains such that an enhanced preference is merited? In addition to national and economic security, should the process identify items and components that are critical to other factors such as national public health and sustainability? Should the process consider the impact on the creation of well-paying jobs in identifying critical items or components?
 - Is four years a reasonable interval for updating the critical components or item list? Why or why not?
 - How should enhanced price preferences be applied? For example, if a finished product includes multiple critical components, what is the most effective way to apply an enhanced price preference (e.g., a single time, once per component)?
 - Please address whether and how enhanced price preferences should be considered for commercial items that have been identified as critical and currently are subject to either a full statutory Buy American waiver (in the case of information technology) or a partial regulatory Buy American waiver (in the case of COTS items) and the reasons for your response.
 - If particular vendors can supply products that exceed the minimum domestic content threshold by significant margins, should the Federal Government consider whether and how to incentivize such practices to maximize the use of taxpayer dollars on domestic content?
- **Content Calculation:** Section 8(i) of E.O. 14005 directed the FAR Council to consider replacing the “component test” in FAR Part 25 with a test under which domestic content is measured by a “value added” calculation. Please comment on (a) how such “value” could be calculated in order to promote U.S.- based production or U.S. job-supporting economic activity; (b) whether a “value added” calculation would be superior to the current approach and why or why not; and (c) whether approaches other than a “value added” calculation should be employed to achieve the goals of E.O. 14005 (for example, should the definition of “cost of components” in FAR 25.003 be changed).



- **Content Reporting:** Will the proposed requirement to report on the actual level of domestic content included in designated critical products sold to the Federal Government provide greater compliance with Made in America Laws? Why or why not?
 - Will the requirement negatively impact small or disadvantaged businesses, such as those who are resellers or distributors? How can these impacts be mitigated?
 - What other procedures can the Federal Government employ to better monitor compliance with Made in America Laws?
- **Contracting with Small and Disadvantaged Businesses:** What specific steps should the Federal Government consider to maximize opportunities for small and disadvantaged businesses and avoid unintended barriers to entry as it works to strengthen the impact of Made in America Laws, diversify domestic supplier bases, and create new opportunities for U.S. firms and workers?

The Federal Register notice includes the following additional questions:

- **Commercial Information Technology:** Whether the exemption for commercial information technology (“IT”) from the BAA remains relevant and under what situations, if any, do current marketplace conditions support narrowing or lifting the statutory waiver?
- **Commercially Available Off-the-Shelf Items:** The extent to which the original purpose for the waiver of the “component test” for COTS remains relevant, including questions about whether the waiver has benefited domestic firms and whether the narrow or the lift the waiver.
- **Services:** How can the Federal Government promote the use of Made in America services? What standards or methodologies might be considered that could be easily adapted by commercial sellers? Are there critical services that should be accorded price preferences, and if so, why?
- **Trade Agreements:** The impact of products made of foreign components being eligible for Buy American preferences under the Trade Agreements Act (“TAA”), including whether the “substantial transformation” test under the TAA is a useful tool to promote domestic jobs and manufacturing and potential trade-compliant actions the Federal Government could take to acquire useful information about the content of goods procured pursuant to trade obligations.
 - Do you have any recommendations or ideas for strengthening content standards under the BAA, including recommendations for how content is calculated and whether and why certain products or categories of products should have more stringent content standards than others?
 - Do you have any recommendations or ideas for the use of waivers and exceptions to the BAA, including proposals to narrow or expand the scope of existing waivers; ensure appropriate interpretation of existing waivers; and policies or practices to ensure that unnecessary waivers are not granted?
 - Do you have any recommendations or ideas for improving the Federal Government’s ability to enforce the content standards in the BAA, including by verifying domestic content levels?

KEY TAKEAWAYS

The Proposed Rule indicates that the Biden Administration will continue to emphasize support for domestic manufacturing capabilities, including through the implementation of stricter BAA requirements. Companies should begin to assess their supply chains in light of the proposed new requirements and in order to assess whether to actively participate in the rulemaking process. Several aspects of the proposals are yet to be announced (e.g., domestic content



requirements or price preferences for “critical products” and “critical components”), but it is clear that these ongoing policy developments will continue to impact affected industries for the foreseeable future.

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¹ The price preference provisions provide that, when a domestic offer is not the low offer, the procuring agency must add a certain percentage of the low offer’s prices to that offer before determining which offer is the lowest priced or “best value” for the government. Generally, this percentage ranges from 20 percent, in cases where the lowest domestic offer is from a large business; to 30 percent, when the lowest domestic offer is from small business; to 50 percent, for Department of Defense procurements, although agencies may adopt higher percentages by regulation. See Federal Acquisition Regulation: Maximizing Use of American-Made Goods, Products, and Materials, 86 Fed. Reg. 6180 (Jan. 21, 2021) (increasing the percentages from 6 percent to 20 percent for large businesses and from 12 percent to 30 percent for small businesses; the Department of Defense percentage is unchanged and the increases apply to solicitations issued on or after February 22, 2021).

² See Building Resilient Supply Chains, Revitalizing American Manufacturing, and Fostering Broad-Based Growth: 100-Day Reviews under Executive Order 14017 (June 2021) (the “100-Day Supply Chain Review”), <https://www.whitehouse.gov/wp-content/uploads/2021/06/100-day-supply-chain-review-report.pdf>. For summaries of U.S. government reports required under the 100-Day Supply Chain Review about securing certain critical U.S. supply chains, please see our previous client alerts on batteries, critical minerals, pharmaceuticals, and semiconductors [here](#), [here](#), [here](#), and [here](#).

³ This reporting requirement would not apply to Commercially Available Off-the-Shelf (“COTS”) items.

⁴ *Federal Acquisition Regulation: Amendments to the FAR Buy American Act Requirements*, 86 Fed. Reg. 40980, 40995 (July 30, 2021).