

Client Alert: Proposed Buy American Act Amendments – Public Comment Period Ends September 28, 2021

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A Proposed Rule amending the Buy American Act (“BAA”) of the Federal Acquisition Regulations (“FAR”), designed to benefit U.S. manufacturers, proposes to immediately increase the threshold needed to be considered a “domestic end product” or “domestic construction material” from 55 percent to 60 percent, with increases to 65 percent in 2024 and 75 percent in 2029. [Comments on the Proposed Rule are due September 28, 2021.](#)

Under the BAA, contractors are given “price preferences” when they supply items or materials with a minimum amount of domestic content. Currently, the BAA’s “component test” (also known as the “domestic content test”) requires that the cost of domestic components of most end products, other than Commercially Available Off-the-Shelf items (“COTS”), exceed 55 percent of the item’s total cost for the offeror to receive a price preference. Once triggered, the price preference adds 20 percent to the non-BAA compliant low offer price when determining the “domestic” offer’s price reasonableness, or 30 percent if the domestic supplier is a small business.

To implement President Biden’s Executive Order 14005 (titled, *Ensuring the Future Is Made in All of America by All of America’s Workers*), the Proposed Rule would immediately increase the threshold needed to be considered a “domestic end product” or “domestic construction material” to 60 percent with increases to 65 percent in 2024 and 75 percent in 2029. Contracts under performance when these percentages increase will be required to comply with each step increase.

Iron and steel end products, which already must exceed 95% domestic content to receive a price preference, are not affected by the Proposed Rule.

Submit comments in response to FAR Case 2021-008 to <https://www.regulations.gov>

Submit comments via the Federal eRulemaking portal by searching for “FAR Case 2021-008”. Select the link “Comment Now” that corresponds with “FAR Case 2021-008.” Follow the instructions provided on the screen.

The Proposed Rule also includes the following:

A future list of “critical” items will likely be subject to even more dramatic price preferences. The Proposed Rule will already require contractors to report domestic content percentage data on “critical” items (other than COTS items) within 15 days of award in an effort to provide OMB with benchmarking data.

The Proposed Rule also requests comments from the public on other EO 14005 topics:

- The commercial information technology (“IT”) items exemption from the BAA;
- The COTS exemption from the BAA;
- Federal government promotion of Made in America services; and
- Whether there are ways to comply with the Trade Agreements Act (“TAA”) while also further promoting US critical supply chains.

Although the Proposed Rule does not impact COTS items, the Federal Register notice makes the following observation, perhaps foreshadowing curtailment of the BAA waiver for COTS purchases:

With respect to COTS items, the Administrator for Federal Procurement Policy, using authorities provided at 41 U.S.C. 1907 to reduce administrative burdens imposed by Government-unique requirements, waived the component test of the Buy American statute for the acquisition of COTS items in 2009. For this reason, it is not expected at this time that the clause will apply to that class of acquisitions. However, as explained in OMB Memorandum M-21-26, *Increasing Opportunities for Domestic Sourcing and Reducing the Need for Waivers from Made in America Laws*, the Made in America Office, in collaboration with the Administrator, other members of the FAR Council, and interested parties, will review the findings and conclusions of the 2009 determination. The results of that review will help to inform if and the extent to which the component test should be restored.

The interplay between the BAA and the Trade Agreements Act (“TAA”) can be complicated; and COTS isn’t necessarily “off of a shelf.” Federal contracting has a unique structure and a unique language; Nexsen Pruet attorneys stand ready to assist with your FAR compliance issues.