



The Buy American Act: Proposed Rules

September 22, 2021

On July 30, 2021, the Department of Defense, General Services Administration, and National Aeronautics and Space Administration—which, along with the Administrator of the Office of Federal Procurement Policy, make up the Federal Acquisition Regulatory Council (FAR Council)—published several [proposed rules](#) regarding the [Buy American Act](#) (BAA). The proposed rules, which are contained within one rulemaking notice, address [Section 8 of Executive Order 14005](#), “Ensuring the Future Is Made in All of America by All of America’s Workers.” This Insight provides an overview of the four proposed rules, including one not mentioned specifically in the executive order, and briefly mentions the FAR Council’s guidance regarding feedback on the proposed rules.

Increase the Domestic Content Threshold

The BAA provides a means for determining whether supplies and construction materials qualify as domestic end products. This determination relies partly on whether the end product meets the appropriate, current [domestic content threshold](#): “The cost of [a domestic end product’s] components mined, produced, or manufactured in the United States [must] exceed[] 55 percent of the cost of all its components.” This is known as the “component test.” End products consisting “wholly or predominantly of iron or steel or a combination of both” are treated differently from other manufactured products in government purchases. They are considered domestic products only if the cost of “foreign iron and steel constitutes less than 5 percent of the cost of all of the components used in the end product.” The proposed rule would not change the threshold for iron and steel products.

The proposed rule would initially [increase the domestic content threshold](#) from 55% to 60%. The second increase, to 65%, would apply to items delivered in years 2024-2028, and the final increase, to 75%, would apply to items delivered beginning in 2029. If a [threshold increase occurs during the performance period of a contract](#), the contractor would be “required to comply with each increased threshold for the items in the year of delivery.”

The proposed rule provides a [fallback threshold](#). If implemented as drafted, the rule would 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 or construction materials that meet the new domestic content threshold are not available or are of unacceptable cost.” The fallback threshold would *not* apply to products or construction materials that consist predominantly or wholly of iron or steel or both metals.

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Establish a Higher Price Preference for Certain Products and Components

The BAA does not prohibit federal agencies from purchasing foreign products; rather, it establishes a [price preference](#) for domestic products. Under [Federal Acquisition Regulation \(FAR\) 25.105\(b\)](#), if a domestic offer is not the low offer, then the price of the lowest offer is increased by 20% or 30% depending on whether a large business or a small business, respectively, submitted the lowest domestic offer. The price of the offer is raised only for the purpose of implementing the BAA. (An agency may elect to use a different price preference; for example, the [Department of Defense uses a price preference of 50%](#).)

The proposed rule would establish an [“enhanced price preference”](#) for “end products and construction material deemed to be critical or made up of critical components.” If applicable, this additional price preference (e.g., 5%) would be added to the applicable price preference (20% or 30%). The definition of *critical* would hinge on whether an item or component is [“deemed critical to the U.S. supply chain,”](#) although [not all critical products “will necessarily qualify for the preference.”](#) A list of critical items and components will be developed through a [separate rulemaking](#) that also “will determine the enhanced price preference for each critical item or end product with critical components.” The FAR Council will consider comments to update or revise the list at least once every four years.

Replace the Component Test

E.O. 14005 directs the FAR Council to consider replacing the component test “with a test under which [domestic content is measured by the value that is added to the product](#) through U.S.-based production or U.S. job-supporting economic activity.” In lieu of issuing a proposed rule at this time, the council is seeking information “regarding the strengths and shortcomings” of a value-added test. In its effort to obtain public input regarding the development of such a test, [the FAR Council solicited feedback regarding the following issues:](#)

- (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).

Create a Post-Contract Award Domestic Content Reporting Requirement

The FAR Council’s rationale for this proposed requirement, which is not mentioned in E.O. 14005, is it would assist the federal government in [gaining “insight into the actual domestic content of products sold under contract](#) and thereby support the Administration’s broader supply chain security initiatives.” Presently, contractors are not required to quantify the specific domestic content for any items they provide to a federal agency.

[The proposed rule](#) would require contractors “to provide the specific [percentage of] 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.” The [applicable contract clauses](#) would not take effect until the list of critical items and domestic end products containing one or more critical components is established in the FAR.

FAR Council Solicits Feedback

In addition to soliciting feedback regarding the establishment of a value-based component test, [the FAR Council posed questions on the following topics](#): increased domestic content thresholds, fallback thresholds, price preferences, enhanced price preferences, content reporting, and contracting with small and disadvantaged businesses.

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