

FAR Council Issues Proposed Buy American Rule

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WHAT: Consistent with President Biden’s Executive Order (EO) related to strengthening “Made In America Laws,” the Federal Acquisition Regulatory (FAR) Council issued a proposed rule that would once again alter existing Buy American Act rules applicable to federal procurements. The proposed rule contemplates four changes to Buy American Act rules:

- **Increasing the Domestic Content Threshold:** The proposed rule initially increases the domestic preference threshold for non-iron and steel products from 55% to 60%. After two years, the threshold would increase to 65%, and again increase five years later to 75%. The proposed rule requires contractors to comply with the threshold that is in existence when the product is delivered.
- **Allowing for a Lower Domestic Content Threshold in Cases of Unavailability or Unreasonable Cost:** The proposed rule allows the Government to use the 55% threshold for products or construction materials that are not available or are of an unreasonable cost until one year after the threshold increases to 75%. Offerors will be required to indicate which of their otherwise foreign products exceed 55% domestic content in order for contracting officers to evaluate whether this so-called “fallback threshold” should be applied.
- **Increasing Price Preference for “Critical Items” and “Critical Components”:** The proposed rule creates a framework for applying a higher price preference for critical items and components, which will be defined pursuant to EO 14017, America’s Supply Chains. Under this framework, offerors will be required to identify when an end product is made with a

Authors

Kevin J. Maynard
Partner
202.719.3143
kmaynard@wiley.law
Christopher B. Weld
Partner
202.719.4651
cweld@wiley.law
Cara L. Sizemore
Partner
202.719.4192
csizemore@wiley.law

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critical component.

- ***Requiring Contractors to Report Domestic Content of “Critical Items” and “Critical Components” Postaward:*** The proposed rule imposes a reporting requirement on contractors that are supplying critical items or products containing a critical component. Such contractors will be required to provide the specific domestic content of each.

WHEN: The proposed rule was issued July 29, 2021. Comments on the proposed rule are due by September 28, 2021.

WHAT DOES IT MEAN FOR INDUSTRY: The proposed rule could have significant practical implications for contractors that are subject to the Buy American Act. Most simply, the staggered increase in the domestic content threshold could pose compliance challenges, especially for multi-year contracts that require the delivery of products across years where the domestic content threshold has increased.

Further, the proposed rule could have significant impact on those contractors providing critical items or products consisting of critical components. Although “critical item” and “critical component” is not yet defined – and contractors will have the opportunity to submit comments on rulemaking related to those terms – the proposed rule will impose post-award requirements on those contractors, requiring reporting of information that the contractor may not currently track.

Contractors and other interested parties affected by these proposed changes should consider submitting comments to have an opportunity to make their voices heard.

Wiley will continue to monitor this issue and will provide additional alerts as the rulemaking progresses.