

Significant Changes To Long-Standing Buy American Act Rules

January 19, 2021

WHAT: The Federal Acquisition Regulation (FAR) Council issued a final rule on January 19, 2021 that makes significant changes to long-standing rules under the Buy American Act. As we previously discussed, in July 2019, President Trump issued an Executive Order proposing an overhaul of current Buy American standards. The final rule largely adopts the Executive Order's proposed revisions and imposes three significant changes to the current Buy American rules.

First, the final rule increases the percentage of domestic content that an end product (other than iron or steel) must contain in order to qualify as a "domestic end product." Under long-standing rules implementing the Buy American Act, an end product qualified as domestic if 50% of the cost of components were of U.S. origin. Consistent with the Executive Order, the new rule increases the domestic content requirement from 50% to 55%, meaning that an end product must now consist of more than 55% of U.S.-origin components (by cost) to be considered domestic for purposes of the Buy American Act.

Second, the final rule imposes a separate, higher domestic content requirement for iron or steel products. In particular, the final rule implements the Executive Order's requirement that domestic iron and steel end products may contain no more than 5% foreign iron or steel. Thus, iron or steel products must now contain at least 95% U.S. content to qualify as domestic. This increased domestic content requirement applies to any end product that consists "predominantly" of iron or steel (*i.e.*, iron or steel accounts for 50% of the total cost of the product), including iron or steel products that qualify as commercial items. The final rule, however, exempts commercial-off-the-shelf fasteners from the domestic content requirements.

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Third, the final rule increases the price evaluation preference enjoyed by offerors of domestic end products under the Buy American Act. Prior to the issuance of the final rule, offerors of domestic end products received an evaluation preference of 6% (12% if the domestic offeror was a small business) compared to offerors of foreign end products in civilian procurements. The final rule increases the price evaluation preference for domestic offerors to 20% for other-than-small businesses and 30% for small businesses. The final rule does not affect the 50% evaluation preference in U.S. Department of Defense (DOD) procurements.

WHEN: The final rule was published on January 19, 2021. It will become effective on January 21, 2021. The rule applies to solicitations issued on or after February 22, 2021 and resultant contracts.

WHAT DOES IT MEAN FOR INDUSTRY: As we previewed in our coverage of the Executive Order, these changes could have far-reaching implications for government contractors subject to the Buy American Act. Those government contractors should closely examine their supply chain to ensure they are complying with the new rules. Wiley's cross-disciplinary team is continuing to monitor developments in this area, including potential changes in Buy American priorities and enforcement in the new Administration.