

More Changes to Buy American Act

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WHAT: As previewed in our prior alert, the Federal Acquisition Regulatory (FAR) Council on March 7, 2022 issued a final rule aimed at strengthening Buy American rules applicable to federal procurement. The final rule, which is largely consistent with the proposed rule, makes three key changes to the FAR's Buy American Act rules:

- ***Increasing the Domestic Content Threshold:*** In the short term, the rule increases the domestic content threshold for non-iron and steel products from 55% to 60%, effective October 25, 2022. Longer term, the rule increases the domestic content threshold to 65% beginning in calendar year 2024, and ultimately to 75% beginning in calendar year 2029. Contractors will be generally required to comply with the threshold in effect *in the year of delivery*, even if the contract spans across different threshold years. However, the rule does allow agencies to allow contractors to apply the domestic content threshold in effect *at time of contract award* for the entire period of performance, subject to approval by the senior procurement executive in consultation with the Office of Management and Budget's (OMB's) Made In America Office.
- ***Allowing for a Lower Domestic Content Threshold in Cases of Unavailability or Unreasonable Cost:*** The rule also creates a "fallback threshold," which allows an agency to use the old 55% threshold for products or construction materials that are not available or are of an unreasonable cost. The fallback threshold is available only until calendar year 2030. Offerors will be required to indicate when they are relying on the fallback procedures.

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- ***Increasing Price Preference for “Critical Items” and “Critical Components”***: The rule creates a framework for applying a higher price preference for critical items and components, in accordance with EO 14017, America’s Supply Chains. According to the FAR Council, the list of critical components, along with the enhanced price evaluation preference to be applied to each critical component, will be developed through a later rulemaking, and updated every four years. Unlike the proposed rule, the final rule does not require postaward reporting of domestic content in critical end products.

The FAR Council also noted that it received comments on other topics contemplated by the proposed rule, such as the commercial information technology acquisition exemption, the partial waiver for commercially-available off-the-shelf (COTS) items, and the use of waivers to the Buy American statute in general. No action is being taken with respect to these issues at this time.

WHEN: The final rule is effective October 25, 2022, in order to give contractors time to review and revise their supply chains to ensure compliance with the increased 60% domestic content threshold. The rule also suggests that Contracting Officers could modify existing contracts to incorporate the increased threshold, although under those circumstances, contractors could seek increased costs or schedule extensions.

WHAT DOES IT MEAN FOR INDUSTRY: Contractors should begin to review their supply chains for products subject to the Buy American Act to ensure they will be able to comply with the increased 60% domestic content threshold that takes effect beginning October 25, 2022. Contractors should also begin thinking about how to ensure continued compliance with the Buy American Act rules as the thresholds increase over the next seven years. Violations of the Buy American Act can result in significant criminal and civil penalties.