# Buy American Final Rule Ups the Domestic Content Ante

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The Biden Administration continues to advance its Made in America policy priorities through amendments to the Federal Acquisition Regulation (FAR) implementing the Buy American Act (BAA). The latest such amendment, a final rule published March 7, 2022:

- Increases the current 55 percent domestic content threshold for end products or construction material to 60 percent as of October 25, 2022;
- Further increases the domestic content threshold to 65 percent in calendar year 2024; and
- Increases the threshold to 75 percent in calendar year 2029.

The FAR amendment also:

- Provides a fallback threshold to allow products meeting a 55 percent domestic content to qualify as a domestic product under certain circumstances; and
- Establishes a framework for an enhanced price preference for domestic products considered to be "critical" or made up of "critical components" (to be defined in a subsequent rulemaking).

*See* Federal Acquisition Regulation: Amendments to the FAR Buy American Act Requirements, 87 Fed. Reg. 12780, 12787 (Mar. 7, 2022).

The final rule arises from President Biden's January 2021 Executive Order 14005, *Ensuring the Future Is Made in All of America by All of America's Workers*, which directed the FAR Council to consider and propose for public comment the upward revisions to the domestic component content calculation of the FAR's two-part Buy American Act standard for domestic end products and construction materials. The FAR Council proposed to amend the FAR accordingly in a July 30, 2021 notice of proposed rulemaking (86 Fed. Reg. 40980). The March 7, 2022 rule finalizes the proposed rule with certain changes, with an effective date of October 25, 2022.

In anticipation of the final rule's new component content standard, companies that supply the Federal Government and intend to offer BAA-compliant domestic end products and construction materials should commence reviews of their input sourcing and manufacturing practices to assess their products compliance with the more rigorous domestic origin standard, particularly in light of the soon-approaching October effective date. Manufacturers and suppliers should consider modifying schedule listings, term sheets and other marketing materials that claim compliance with the BAA

pending such reviews and should examine the accuracy of any compliance certifications.

In addition to compliance activities aimed at guarding against any direct government enforcement actions, companies should assess the impacts on the competitive landscape within their respective supply chains. The legal mechanisms that competitors' or whistleblowers can use for leverage in the Buy American regimes will be enhanced as the administration fully implements its policy priorities. Companies should monitor their competitors' investments which may signal a competitors' intent to offer products that meet the heighted origin standard in order to avail itself of the procurement preference afforded by the BAA. Businesses are also frequently in the best position to know if a competitors' compliance certifications can be substantiated or, conversely, may serve as the grounds for bid protests or other legal actions.

***Schedule for Increased Domestic Content Thresholds***

As the domestic content thresholds increase, contractors will need to adjust throughout the performance of a contract – not just at the time of award. Ongoing compliance monitoring is therefore required. Under the increased domestic content threshold, suppliers with a federal contract performance period spanning multiple thresholds "shall be required to comply with each increased threshold for the items in the year of delivery." 87 Fed. Reg. at 12792. For example, a supplier awarded a five-year contract in 2027 will have to comply with the 65 percent domestic content threshold initially, but in 2030 will have to supply products with 75 percent domestic content. *Id.* at 12781. More immediately, a supplier awarded a five-year contract on October 25, 2022 will have to comply with the 60 percent domestic content threshold initially, but beginning January 1, 2024 will have to supply products with 65 percent domestic content. *See id.*

The final rule includes two exceptions to the scheduled increases. First, where a contracting agency's senior procurement executive, after consultation with OMB's Made in America Office, "allows for application of an alternate domestic content test," *id.* at 12792, then the domestic content threshold in effect at the time of contract award will apply throughout the entire period of performance. Although the details of the consultation process have yet to be worked out, *see id.*, the alternate domestic content test could be appropriate where the requirement to comply with changing domestic content thresholds "would not be feasible" for a particular contract, *see id.* at 12781.

The second exception, available until January 1, 2030, is a 55 percent "fallback" threshold applicable only to (i) construction material that does not consist wholly or predominantly of iron or steel or a combination of both and that is not a COTS item, or (ii) end products that do not consist wholly or predominantly of iron or steel or a combination of both and that are not COTS items. *See id.* This threshold applies only in instances where an agency has determined either that there are no end products or construction materials that meet the new domestic content threshold, or, through application of the Buy American Act price preference, that any such products are of unreasonable cost. *Id.* For example, if, in 2023, a domestic end product that exceeds the 60 percent content threshold is determined to be of unreasonable cost after application of the price preference, then for evaluation purposes the Government will treat an end product that is manufactured in the United States and exceeds 55 percent (but not 60 percent) domestic content as a "domestic end product." *Id.*

Other existing exemptions or carve-outs, such as those for acquisitions of commercial products (including COTS items) and services, continue to apply, or not apply, "as they did prior to this rule." 87 Fed. Reg. at 12787. For example, FAR 25.202(a)(4) still exempts commercial IT products from Buy American requirements, and COTS items that are manufactured in the United States are still

"domestic" under FAR 25.003. Other domestic content restrictions and corresponding carve-outs, such as those in DoD's Specialty Metals statutory restrictions, also are not impacted by this final rule. *See, e.g.*, 10 U.S.C. § 2533b(h)(2)-(3). The former exception for COTS products consisting "wholly or predominantly" of iron or steel or a combination of both, removed last year by the prior administration, *see* 86 Fed. Reg. 6180 (Jan. 19, 2021) remains unavailable, except for COTS fasteners made wholly or predominantly of iron or steel.

***Higher Price Preferences for "Critical" Domestic Items***

An important issue that was not finalized in the rule but will be an important issue on the Buy American horizon is the designation of "critical" items and components. For "critical" domestic items or domestic items made of "critical" components, the rule contemplates a framework for higher price preferences in the form of an "additional preference factor" to be added to the existing price preference for domestic items (which is 20 percent for large businesses, or 30 percent for small businesses). 87 Fed. Reg. at 12791. The final rule defines "critical items" as domestic construction material or domestic end products that are deemed critical to U.S. supply chain resiliency, and "critical components" as components that are mined, produced, or manufactured in the United States and deemed critical to the U.S. supply chain. *Id.* at 12797. Subsequent rulemaking will establish the "definitive" list of critical items and critical components at FAR 25.105, as well as their associated additional price preference factors. *Id.* at 12781. The definition of "component" in FAR 25.003 is currently limited to an article, material, or supply *incorporated directly* into an end product or construction material. How the new "critical" framework will treat inputs to components – like raw materials or subcomponents – remains to be seen.

***Important Points and Takeaways***

Some important points and takeaways for contractors and their suppliers:

- *Prepare for compliance*. Contractors should immediately review their supply chains and compliance systems to assess whether they can accurately certify compliance with the new thresholds. If not, contractors wishing to offer domestic end products and construction materials will need to take steps to ensure they can comply or to obtain approval from the Government of the "alternate domestic content test." Offerors may need to renegotiate and modify subcontracts to ensure compliance with changing requirements. Also, offerors serving both the U.S. Government and the commercial marketplace may wish to consider deploying dual inventories in order to segregate those products offered for commercial sale from those intended for sale to the Government.

- *Note that a contracting officer may seek to apply the new thresholds even to existing contracts (that is, contracts awarded on or before the October 25, 2022 effective date)*. As the FAR Council explains, in accordance with FAR 1.108(d), "FAR changes apply to existing contracts at the discretion of contracting officers." 81 Fed. Reg. at 12784. If the contracting officer seeks to modify your existing contract to apply the new thresholds, consider rejecting the new requirements, seeking application of the alternate domestic content test, or accepting the new requirements and submitting a corresponding request for equitable adjustment.

- *Take note of the new certificate requirements*. Under the new Buy American Certificate, offers intending to rely on the fallback procedures must indicate in the Buy American Certificate which foreign end products exceed 55 percent domestic content (except for those that are COTS items). Additionally, following subsequent rulemaking, offers will be required to list the line item numbers of domestic end products that contain a "critical component." 87 Fed. Reg. at 12795-

98.

- *If necessary, revisit marketing materials*. Companies marketing themselves as Buy American Act-compliant may need to revisit or clarify their materials and schedule listings to ensure they are accurate. Consider whether your competitors might be able to use your marketing materials against you. Manufacturers and suppliers that falsely assert compliance with the BAA face civil, criminal and contractual liability, including competitor claims under the Lanham Act and *qui tam* suits under the False Claims Act. Conversely, consider whether you might be able to use competitors' marketing information in your favor should they fail to comply with BAA requirements.
- *BAA compliance risks are not limited to those posed by competitors*. Non-compliance with Buy American requirements can cause serious issues with your Government customer, too. These can range from contractual remedies such as price renegotiation and rip-and-replace directives on one end of the scale, to nonpayment, termination and even suspension or debarment from future contracting at the other, as well as False Claims Act suits initiated by the Department of Justice. Recent settlements reported by DOJ reveal an uptick in prosecutions for false claims involving BAA certifications.

Given the numerous implications, prompt attention to the new Buy American requirements is vital.

**About Kelley Drye & Warren**

Kelley Drye & Warren has decades of experience in legislative advocacy and the practical application of the patchwork of Buy America(n) laws that apply to direct federal and federally aided government procurements, country of origin marking requirements applicable to imports, and the Federal Trade Commission's "Made in USA" policy as it pertains to product marketing. Our attorneys are recognized as thought leaders on "Buy National" preferences applied to government spending programs. Our legislative advocates routinely advise clients on federal and state "Buy America" procurement preference policies and conduct policy advocacy and lobbying on behalf of a range of industries. We frequently engage with agencies implementing such laws including the Environmental Protection Agency and U.S. Department of Transportation, and have successfully challenged agency application of "Buy America" statutes.

Our Government Contracts team advises clients regarding their rights and obligations when doing business with the federal government and has distinct experience helping clients understand and comply with domestic sourcing requirements under Federal Government contracts including the Buy America(n) laws, the Trade Agreements Act, and the Berry Amendment. We help federal contractors navigate this complex area of the law and serve as a guide for contractors who are being investigated or facing federal enforcement action – particularly as the Government expands "Buy American" requirements and prioritizes their enforcement. We help clients recover money owed under Federal contracts, protest problematic contract awards, defend against competitors' protests, and challenge adverse agency actions.