

New 'Buy American' Rules Bear Risks For Prime Contractors

By **Amy Conant Hoang** and **Erica Bakies**

On Sept. 14, the Federal Acquisition Regulatory Council published a long-delayed proposed rule implementing Executive Order 13881, "Maximizing Use of American-Made Goods, Products, and Materials." [1] The proposed rule will affect all contractors subject to the Buy American Act, or BAA, with the most significant impact to contractors supplying iron or steel end products.



Amy Conant Hoang

Here are the major takeaways:

- The proposed rule increases domestic content requirements from 51% to 55% for all supplies other than steel or iron end products.
- The proposed rule increases domestic contract requirements from 51% to 95% for all steel or iron end products, including commercially available off-the-shelf, or COTS, products.
- The proposed rule increases the price preference provided to domestic suppliers from 6% to 20% for large businesses and from 12% to 30% for small businesses.
- The proposed rule only affects those procurements subject to the BAA, such as small business set-asides, sole source awards, and procurements below the dollar threshold for Trade Agreements Act applicability — currently \$182,000 for supply contracts and \$7,008,000 for construction contracts.
- The deadline for commenting on the proposed rule is Nov. 13.



Erica Bakies

Applicability of the Buy American Act

The BAA mandates that federal agencies conducting procurements for public use or public construction purchase:

Only unmanufactured articles, materials, and supplies that have been mined or produced in the United States, and only manufactured articles, materials, and supplies that have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured in the United States. [2]

The Federal Acquisition Regulation implements this mandate by requiring agencies to apply a price preference to offerors supplying domestic end products and construction materials. After the application of the price preference, if an offeror of foreign products is still the lowest offeror, the agency may procure the foreign products on the basis that the cost of the domestic products is unreasonable.

Notably, the BAA only applies to purchases over the micropurchase threshold and under the threshold for Trade Agreements Act applicability — currently \$182,000 for supply contracts and \$7,008,000 for construction contracts.[3]

The BAA also applies to certain categories of acquisition regardless of whether the contract exceeds the Trade Agreements Act threshold: (1) small business set-asides; (2) acquisitions of arms, ammunition, or war materials, or purchases indispensable for national security or for national defense purposes; (3) acquisitions from Federal Prison Industries Inc. or nonprofit agencies employing people who are blind or severely disabled; and (4) sole-source awards.[4]

However, outside of these exceptions, the BAA — and therefore the revisions included in the Sept. 14 proposed rule — will only affect supply contracts under \$182,000 and construction contracts under \$7,008,000.

Three Key Changes to BAA Requirements

The proposed rule's changes to BAA requirements fall into three categories:

1. Domestic content requirements for supplies and construction materials;
2. Domestic content requirements for steel or iron end products; and
3. Price preferences for suppliers of domestic products.

These changes are illustrated in the chart below.

	Supplies (DOD)	Supplies (Civilian)	Construction Mat'ls (DOD and Civilian)	COTS Items (DOD and Civilian)
Domestic Content Increase for Supplies Other Than Steel/Iron Products	From 51% to 55%	From 51% to 55%	From 51% to 55%	N/A - domestic content requirement waived for COTS items
Domestic Content Increase for Steel/Iron Products	From 51% to 95%	From 51% to 95%	From 51% to 95%	From 51% to 95% (domestic content requirement NOT waived, except for fasteners)
Domestic Item Price Preference Increase	N/A – DoD already exceeds these percentages	From 6% to 20% (large businesses) From 12% to 30% (small businesses)	From 6% to 20% (no separate small business price preference on construction contracts)	From 6% to 20% (large businesses) From 12% to 30% (small businesses)

Domestic Content Requirements for Supplies and Construction Materials

The BAA states that an agency may only acquire domestic end products. The proposed rule increases domestic content necessary for supplies and construction materials to be considered domestic.

Manufactured products must meet a two-part test to be considered domestic end products under the FAR: (1) manufacturing must occur in the U.S., and (2) the end product must either consist of more than 50% U.S. component parts (calculated by cost) or qualify as a COTS item.[5]

The proposed rule increases the domestic content from 51% to 55%:

Nonsteel and Noniron Manufactured Products: Moderate Change



The proposed rule would maintain the exception to the domestic content requirement for COTS items.

Domestic Content Requirements for Steel or Iron End Products

While the proposed rule's change to domestic content for general supplies and construction materials is fairly moderate, the proposed rule includes a significant change to domestic content requirements for steel or iron end products.

The FAR currently does not provide a separate domestic content requirement for steel or iron end products; instead, such products are subject to the standard 51% domestic content requirement.

The proposed rule creates a separate domestic content requirement for end products that are predominately steel or iron, defined as products whose steel and iron content exceeds 50% of the total cost of the product's components.

The proposed rule increases the domestic content requirement of such products from 51% to 95% — measured by cost — based on a good faith estimate by the contractor. The proposed rule also measures the 95% by total content as opposed to the total-component-parts test used in the nonsteel/noniron rule.

Steel and Iron Manufactured Products: Significant Change



In another notable change, the proposed rule does not apply the COTS exception to iron or steel end products. As a result, iron or steel end products must meet the 95% domestic content requirement regardless of whether the steel or iron end product qualifies as a COTS item.

The proposed rule does, however, make an exception for fasteners. Fasteners, defined as hardware devices that mechanically join or affix two or more objects together — e.g., nuts, bolts, pins, rivets, nails, clips and screws — still qualify for the COTS waiver.

Price Preference for Suppliers of Domestic End Products

Finally, the proposed rule increases the civilian agency price preference enjoyed by offerors of domestic supplies and construction materials. As stated above, the BAA promotes the purchase of domestic supplies and construction materials by requiring agencies to apply a price preference to domestic offers during price evaluation.

Civilian agencies apply a price penalty — i.e., a price increase for evaluation purposes — of 6% to offers of foreign supplies if the competing offer proposing domestic supplies is from a large business and 12% if the competing offer proposing domestic supplies is from a small business.[6]

Agencies apply the same preference to the evaluation of construction materials but do not increase the preference from 6% to 12% for domestic small business offers.[7] U.S. Department of Defense agencies apply a heightened preference of 50% for both large and small businesses, making the price preference essentially determinative in many DOD procurements.[8]

The proposed rule increases the price preference on supply contracts from 6% to 20% for large business offers of domestic supplies, and from 12% to 30% for small business offers of domestic supplies.

Like the current regulation, the proposed rule applies a single price preference to the evaluation of construction materials: 20% for both large and small offers of domestic construction materials. The proposed rule does not affect the DOD's price preference, which already exceeds the increase in the proposed rule.

Industry Impacts

As noted in the proposed rule, these revisions will only apply to a narrow set of procurements. However, contractors must fully understand how and when the BAA applies in order to determine whether any of its contracts fit within this narrow set of procurements.

Even contractors over the \$182,000 threshold for Trade Agreements Act applicability may find themselves subject to the BAA — and therefore these revised, heightened requirements — if certain exceptions apply. Determining BAA applicability is imperative, because for those procurements that will be affected, these changes may be significant.

These changes will impact the entire supply chain of a prime contractor subject to the BAA. While the FAR provisions implementing the BAA, including those provisions revised by this proposed rule, do not contain mandatory flow-down language, a prime contractor must necessarily flow down certain domestic content requirements to subcontractors furnishing components or materials for the prime contractor's end product.

Prime contractors need to impose these requirements in order to ensure that the end product or construction material ultimately provided to the government meets BAA requirements. While a prime contractor may not need its supplier to certify to BAA-compliant components — provided that the prime contractor's end product still meets the necessary domestic content and manufacturing requirements — it will nevertheless need to ensure that it understands the percentages of domestic and foreign content in its end product.

The proposed rule's new specific requirements for steel or iron end products may also impact a prime contractor's BAA compliance policies. Not only must contractors now satisfy a significantly higher domestic content requirement for steel or iron end products, they may need to alter how they calculate domestic content to be consistent with the proposed rule's change from a component test to a content test.

Contractors may also need to add another step to their compliance process to determine whether their products qualify as a steel or iron end product, thereby triggering the increased domestic content requirements, and if so, how they will conduct their good faith estimate of total domestic content.

Finally, this proposed rule, and the underlying executive order that prompted its implementation, highlight continued government focus on strengthening and promoting domestic supply chains. In fact, the questions for industry comment included in the proposed rule suggest the further changes that could be on the horizon, specifically an eventual increase to a 75% domestic content requirement for end products and construction materials subject to the BAA.

Amy Conant Hoang and Erica L. Bakies are associates at K&L Gates LLP.

The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

[1] See Steven McCain and Amy Conant Hoang, "Buy American III: How Does the Latest 'Buy American' Executive Order Affect Government Contractors and their Supply Chains?", July 19, 2019, K&L Gates Policy Insight, available at <https://www.klgates.com/Buy-American-III--How-Does-The-Latest-Buy-American-Executive-Order-Affect-Government-Contractors-And-Their-Supply-Chains-07-19-2019>.

[2] 41 U.S.C. § 8302(a)(1) (supplies); 41 U.S.C. § 8303(a) (construction).

[3] FAR 25.100(b), 25.402(b).

[4] FAR 25.401(a).

[5] FAR 25.003.

[6] FAR 25.101.

[7] FAR 25.204.

[8] DFARS 225.101.