



# Program

- The Buy American Statute and FAR Part 25/DFAR 225 Implementation
- Trade Agreements Act
- 2021 Buy American FAR Rule
- 2021 President Biden EO
- Determining Which Buy American Laws Apply  
Key for Construction and Supply Contractors

# FAR Part 25 & The Application Of “Buy American” Laws

- Buy American Act of 1933: The BAA mandates that federal agencies conducting procurements for public use purchase:  
“[o]nly 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.”
- FAR Part 25, “Foreign Acquisition” (and Defense FAR Supplement (DFARS) Part 225) implement the BAA.

## Buy American Act

- These BAA requirements likewise apply to contractors on Government construction contracts in the United States.
- The FAR implements this mandate by requiring agencies to apply a price preference for certain supplies and construction materials if the lowest offer in a procurement is not for the domestic articles, materials, and supplies described above.
- If, after the application of the pricing preference, the lowest offer is for the designated foreign articles, materials, and supplies, then the agency may select the foreign offer for award.
- The BAA and regulations outlines a number of exceptions.

## Trade Agreements Act of 1979:

- The TAA allows the president to waive procurement requirements, including the BAA, from “designated countries.”
- “Designated countries” are countries with which the United States has trade agreements that, in a procurement context, require foreign goods from that country to be treated the same as U.S. domestic products.
  - The TAA waiver applies when three circumstances are present:
  - (1) the anticipated procurement value is below the threshold established in the relevant trade agreement, (2) the procurement involves goods or construction materials listed in the relevant trade agreement, and (3) none of the other exceptions outlined in the trade agreements apply—e.g., the procurement is set aside for small business concerns or it is being conducted as a solesource procurement

# 2021 BAA FAR Final Rule

- A new, much tougher Buy American FAR rule now applies in 2021 to solicitations issued by the Government. The final rule implements former President Trump’s “Maximizing Use of America-Made Goods, Products, and Materials” Executive Order (EO). <https://www.govinfo.gov/content/pkg/FR-2021-01-19/pdf/2021-00710.pdf>.
- These changes may impact supply chains and will likely form the basis for increased enforcement actions by the Government against contractors.

## Here are key changes for contractors:

- **The domestic content requirement for end products or construction materials to be considered domestic is increased from 50% to 55% measured as a percentage of cost.**
- **A new category “end products or construction materials that consist wholly or predominantly of iron or steel or a combination of both.”** These are products where the cost of the iron and steel content exceeds 50% of the total cost of the product’s components.
- **New 95% content standard created for “end products or construction materials that consist wholly or predominantly of iron or steel or a combination of both.”** Thus 95% of the iron or steel components of these products must be domestic. A bidder must make a good-faith estimate that the cost of the iron or steel content not produced in the United States is less than 5% of the total cost of all components of the end product or material.

## Here are key changes for contractors:

- **The percentage added to bids using foreign end products and construction material is increased.** The Final Rule increase these from 6% for bidders that are large businesses and 12% for small businesses to 20% and 30%. The Department of Defense rule remains at 50%.
- **New domestic content test for commercially available off-the-shelf (COTS) items that “consist wholly or predominantly of iron or steel or a combination of both,” as defined by the final rule.** Before all COTS items qualified as domestic if manufactured in the United States, regardless of the origin of its components. This final rule removes the COTS exemption for this specific class of COTS items. Other COTS items that do not fall under the new domestic content test continue to qualify as domestic if manufactured in the United States.



# New Final Rule for BAA

- The increase to 95% domestic iron and steel content for wholly or predominantly iron and steel end products or construction materials is huge.
- The domestic content increase from 50% to 55% for non-COTS end products while a smaller increase is not insignificant.
- For COTS products with predominant iron or steel content the changes require evaluation of the supply chain as well as, where applicable, working on BAA exceptions and waivers like public interest or non-availability.
- These new Buy American requirements will likely lead to tougher enforcement by the Government because the standards are tightened.
- The Government will want to make sure contractors have changed content or received waivers. The old days of easier compliance with domestic content restrictions are ancient history now. With the new Biden EO, compliance will get even tougher in the future.

# BIDEN “BUY AMERICAN” EXECUTIVE ORDER

- This 2021 Biden EO, applicable to the nearly 700 billion (FY20) in federal government contracts sets forth procedures related to the many domestic preference laws including: the Buy America, Buy American, and Jones Acts, as well as other “Made in America Laws.” <https://www.govinfo.gov/content/pkg/FR-2021-01-28/pdf/2021-02038.pdf>.
- Directing the Federal Acquisition Regulatory (FAR) Council to consider amending the Buy American Act and replace the FAR Part 25 “component test” – which is a somewhat convoluted process used to identify and measure the domestic content in construction materials.
- The EO suggests instead that the FAR consider a “value added” approach wherein “domestic content is measured by the value that is added to the product through U.S.-based production or U.S. job-supporting economic activity.”

# Biden EO “Doubles Down” on Buy American

- Requiring the FAR Council to increase the numerical threshold for domestic content requirements for end products and construction materials.
- Federal agencies must now conduct “supplier scouting” to identify American companies – regardless of size – that are able to produce goods, products, and materials in the United States.
- Requiring OMB to establish a “Made in America Office” and an associated Director to govern the waiver process for any agency seeking to waive the “Made in America Laws.”
- The EO sets forth the new waiver protocol that must be followed.
- GSA will then maintain a publicly available website to document proposed and granted waivers.

# Biden EO “Doubles Down” on Buy American

- Federal agencies to report biannually to the new Made In America OMB Director on their progress related to Made in America requirements. Specifically, the agency must report:
  - 1) ongoing implementation of, and compliance with, Made in America Laws;
  - 2) analysis of goods, products, materials and services not subject to Made in America Laws or where requirements have been waived;
  - 3) analysis of spending as a result of waivers issued pursuant to the Trade Agreements Act (separated by country of origin); and
  - 4) recommendations for how to further effectuate President Biden’s Made in America goals.

# Biden EO “Doubles Down” on Buy American

- The consideration of a change from the component test to a value added test for domestic construction materials is an important development.
- The impact of all the EO requirements on the construction industry remains to be seen. There is no immediate effect on federal contractors until a new FAR rule is released. But most economists agree that it will raise the costs of the projects.
- For example, the U.S. Chamber of Commerce said the initiative was unlikely to bring home lost manufacturing jobs and would boost the cost of government projects.
- Labor Unions, however, including the AFL-CIO have stated its “a good first step in revitalizing U.S. manufacturing.”

# Biden “Made in All of America” EO 14005 continued

- Practical problems to overcome: cost and lack of adequate domestic supply chain
- Made in America Office in Office of Management and Budget
- Agency reporting requirements
- Likely increase in fraud risk and enforcement
- Celeste Drake named Director of Made in America on April 27, 2021.

## Determining What BAA rules apply

- For Buy American purposes, contracts generally fall into one of three categories: (1) supplies, (2) services, or (3) construction.
- The type of contract affects whether a procurement will be subject to the BAA or the TAA.
- Although both acts encourage domestic sources of supplies, the TAA allows products of certain “designated countries” to be treated as domestic pursuant to various trade agreements.

# Type of Contract

- Supply contracts, governed by FAR Subpart 25.1, can be subject to either the BAA or the TAA, depending on the contract value.
- The TAA applies to contracts above a certain dollar threshold, while the BAA applies to contracts below the threshold.
- Construction contracts, governed by FAR Subpart 25.2, are also subject to either the BAA or TAA, but with different dollar thresholds for TAA applicability.
- Service contracts, in contrast, always apply the TAA rather than the BAA.



## What is the contract value?

- In general, the BAA applies to contracts over the micropurchase threshold (increased to \$10,000 for both the DOD and civilian agencies) and under the TAA threshold.
- The U.S. Trade Representative (USTR) establishes the TAA threshold, which is published at FAR 25.402(b) and updated biennially. The USTR updated the thresholds most recently effective through 31 Dec 2021, to \$182,000 for supply contracts and \$7,008,000 for construction contracts.
- Although contract value often governs which Buy American laws apply, certain categories of acquisition apply the BAA regardless of price, as discussed later.

# Who is the acquiring agency?

- Occasionally the rules will change based on the acquiring agency. For instance, DOD agencies apply a stricter BAA price preference than civilian agencies.
- The BAA encourages the use of domestic sources by applying a price penalty to foreign supplies. The FAR in 2021 requires civilian agencies to apply a 20% price penalty to foreign end products (large business) and 30% (small businesses) for price evaluation purposes.
- Under DOD procurements, however, the penalty jumps to a 50% increase to foreign end products.
- The DOD also provides an exception to BAA and TAA requirements for certain “qualifying countries” as a result of various memoranda of understanding and international agreements.
- The “qualifying countries” exception allows DOD agencies to procure end products from 26 countries that would otherwise be prohibited under the BAA. NOT CONSTRUCTION PRODUCTS.

## What Items or services ?

- Certain items are exempt from the BAA because they have been predetermined as unavailable in sufficient quantities, or they are under a micropurchase threshold of typically \$10,000.
- The BAA exempts other products if an agency head determines that their purchase is inconsistent with public interest.
- Additionally, trade agreements exclude certain categories of items (arms, ammunition, or war materials and purchases indispensable for national security or for national defense purposes) from TAA coverage, and therefore the BAA will apply even above the TAA applicability dollar thresholds.
- Finally, the BAA (but not the TAA) permits agencies to purchase foreign end products if procuring information technology that is a commercial item.

## What are the acquired items made of?

- Additionally, certain items made of specific materials may face differing or additional requirements. Pursuant to the specialty metals restriction, the DOD cannot buy any aircraft, missile and space system, ship, tank and automotive item, weapon system, ammunition, or any components thereof, containing a specialty metal that was not melted or produced in the United States.
- New 2021 FAR 95% steel rule.

# Questions?

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LEGAL INSIGHT FOR GOVERNMENT CONTRACTORS

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