

FAR COUNCIL OFFERS OPPORTUNITY TO COMMENT ON BUY AMERICAN ACT'S DOMESTIC NONAVAILABILITY LIST

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On May 13, 2020, the Department of Defense, General Services Administration, and National Aeronautics and Space Administration (the agencies that make up the Federal Acquisition Regulation (FAR) Council) published an [advance notice of proposed rulemaking](#) to update the list of domestically nonavailable articles under the Buy American Act.

THE BUY AMERICAN ACT AND THE DOMESTIC NONAVAILABILITY EXCEPTION

The Buy American Act and its implementing regulations generally require that agencies conducting procurements for public use purchase only “domestic end products.”¹ The Buy American statute provides an exception for articles not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality. To assist agencies in determining whether certain articles are reasonably available from domestic sources, the FAR includes a list of items that have been predetermined as “nonavailable,” meaning that domestic sources can only meet 50% or less of total U.S. government and nongovernment demand.²

The list, published at FAR 25.104(a), contains a wide-ranging mix of natural resources, compounds, materials, components, and other miscellaneous items that could present risks to the federal supply chain. Items on the list may qualify for the exception based on the potential for domestic shortages and/or quality associated with domestic alternatives. For example, microprocessors are currently on the nonavailability list due to their fundamental implementation across NASA, DOD, and commercial platforms, as well as the criticality of their compliance with precise performance and manufacturing specifications. Additionally, materials such as tantalum, cadmium, and platinum are on the list because they are universally used to produce electronic components widely used by federal agencies including capacitors, resistors, batteries, alloys, electroplated coatings, solar cells, and fuel cells.

The FAR mandates that the FAR Council publish the list in the *Federal Register* for public comment every five years to consider revisions to the current list. Pursuant to this mandate, the FAR Council recently published a notice seeking information to determine whether some of the articles should be removed from the list because they are now mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality. Interested parties should submit comments on or before July 13, 2020.

A MOVE TOWARD STRENGTHENING THE DEFENSE INDUSTRIAL BASE

The pending revision will likely be consistent with recommendations presented in the report, [*Assessing and Strengthening the Manufacturing and Defense Industrial Base and Supply Chain Resiliency of the United States*](#), which issued in response to Executive Order 13806, signed by President Trump in July of 2017. One of the report's key findings was a decline in U.S. manufacturing capability and capacity, as well as the "collateral damage of globalization" resulting from other countries industrial policies. The report recommended reducing security risks throughout the federal supply chain by increasing investments in domestic components and materials, and diversifying the supplier base in areas where the United States is currently dependent on foreign suppliers.

Accordingly, it is likely that the FAR Council will reduce the number of exceptions listed in FAR 25.104(a), thereby reducing the number of authorized sources for those materials and products. Such a reduction can be either beneficial and/or detrimental for suppliers, depending on the nature of their business.

INDUSTRY IMPLICATIONS

The FAR Council's notice and request for comment provides an important opportunity for companies who contract with the U.S. government and are subject to Buy American Act requirements. For domestic suppliers of items on the nonavailability list, this notice provides an opportunity to demonstrate that your supplies are available in sufficient quantities domestically and should be removed from the nonavailability list, thereby limiting agencies' ability to procure the items from foreign sources.

In contrast, manufacturers who rely on foreign sources for articles on the domestic nonavailability list and who do not believe that they would be able to find domestic sources in sufficient quantities and quality may want to use this opportunity to advocate why certain articles should remain on the domestic nonavailability list.

SUBMITTING A COMMENT

The public may submit a comment by visiting the [Proposed Rule Change Page](#) on the official website of the Federal Register, and clicking the green "SUBMIT A FORMAL COMMENT" button, prior to the July 13, 2020 deadline. Comments are effective to the extent that they provide relevant information that will assist the FAR Council in analyzing the proposed change and its effects. Accordingly, those submitting a comment should include an introduction, explaining who you are, including distinguishing credentials and the relevance of the rule to you or your organization. A background of interest in the rule and an analysis of the potential impact of the proposed change can also increase the effectiveness of a submitted comment, as are alternate recommendations, if the comment disagrees with the proposed rule change. Simply supporting or opposing a policy is not as persuasive as explaining how the policy would positively or negatively affect an individual or business.

FOOTNOTES

¹ See 41 U.S.C. §§ 8301–8305; FAR 25.101. For more in-depth analysis of the application of the Buy American Act and related domestic sourcing requirements, see our Briefing Paper, "Real Steps Towards 'Buy American' Compliance."

² FAR 25.103(b).

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