

# PROPOSED RULE IMPLEMENTING PORTION OF "MADE IN AMERICA" EXECUTIVE ORDER: ITS IMPACT ON FEDERAL CONTRACTORS AND THEIR SUPPLY CHAINS

Date: 9 August 2021

## **U.S. Policy and Regulatory Alert**

By: Melody A. Alemansour, Amy C. Hoang

On 30 July 2021, the Federal Acquisition Regulatory (FAR) Council published a proposed rule revising the regulations implementing the Buy American Act (BAA). The proposed rule responds to President Biden's "Made in America" Executive Order (E.O.) 14005 from 25 January 2021.

## **KEY TAKEAWAYS**

The proposed rule would affect government contractors and their supply chains that perform contracts subject to the BAA. The proposed rule outlines three changes to current BAA regulations:

### **1. Increased Domestic Content Requirements**

The proposed rule would increase the percentage of domestic material an item must contain in order to qualify as a "domestic end product." Specifically, the rule proposes an increase to 60 percent. The rule also proposes an increase to 65 percent in two years, as well as an increase to 75 percent five years after the second increase. For more information on how to prepare for these percentages, reach out to our team.

### **2. Enhanced Price Preference for Select Critical Products**

The proposed rule would apply an enhanced price preference for domestic end products categorized as "critical items" or containing "critical components." While the proposed rule does not list the critical items or components affected by the price preference, it does state that the identification process would utilize the quadrennial critical supply chain review established in E.O. 14017 (America's Supply Chains) as well as the national COVID-19 strategy. The proposed rule indicates that the creation of the list and the specifics of the enhanced price preference will be addressed in further rulemaking.

### **3. New Domestic Content Reporting Requirement.**

The proposed rule would require companies supplying "critical items" or end products containing "critical components" to report the specific domestic content of those items. The reporting requirement would be limited to "critical items" and "critical components."

## **INDUSTRY IMPACT**

The proposed rule will impact companies performing federal contracts subject to the BAA. These include supply contracts and construction contracts under a certain dollar threshold as well as certain categories of contracts like

small business set-asides. Of the affected contractors, the proposed rule would have the most significant impact on suppliers of “critical items” and “critical components.” While the proposed rule would potentially make these products more competitive in the federal marketplace, they will also be subject to heightened reporting requirements. Subcontractors and suppliers doing business with federal prime contracts may also be impacted by flow-down requirements of the proposed rule.

## **SUBMITTING A COMMENT**

Comments on the proposed rule must be submitted by 28 September 2021. Additionally, the FAR Council and the Made in America Office will host a virtual public meeting on 26 August 2021 to solicit feedback on these changes as well as other aspects of the Made in America E.O.

Please contact us if you have questions regarding how the proposed rule could impact your business.

---

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.