

PUBLICATION

Buy American Act in 2021: Key Changes and Future Outlook

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On January 19, 2021, the domestic content restrictions of the Buy American Act (BAA) were significantly changed via a final rule (Final Rule) issued by the Federal Acquisition Regulation (FAR) Council. The Final Rule stemmed from a July 2019 Executive Order issued by President Trump, titled "Maximizing Use of American-Made Goods, Products, and Materials," which sought to overhaul domestic content restrictions associated with federal procurement subject to the BAA.

It is more important than ever for government contractors subject to the BAA to understand the Final Rule's updated requirements, especially as the Biden Administration turns its attention to further tightening the BAA's restrictions. Soon after the publication of the Final Rule, President Biden issued another BAA-focused Executive Order that may result in even further significant revisions to the contours of the BAA. This alert will first outline the three key changes to the BAA that went into effect in January 2021, and will follow with an analysis of the potential impact of President Biden's 2021 BAA mandates for the FAR Council.

Background

As implemented in Part 25 of the FAR, the BAA generally requires contractors to certify to the contracting agency that they are offering "domestic end products" and use "domestic construction materials" in connection with a particular solicitation. The BAA serves to establish a price preference for domestic end products rather than to prohibit the acquisition of foreign goods. The BAA also has multiple exclusions and waiver processes available that allow for the purchase of foreign end products, including when the product is a commercially available off-the-shelf (COTS) item, where the product is determined to be non-available domestically, and where the cost of the foreign end product meets a comparative price evaluation test. An additional waiver process is available for foreign end products from certain qualifying countries, and the Trade Agreements Act (TAA) allows for the procurement of foreign end products from specified countries with which the U.S. maintains an applicable free trade agreement.

Historically, an end product was considered to be "domestic" under the BAA if it was either:

- (i) an unmanufactured end product mined or produced in the U.S., or
- (ii) an end product manufactured in the U.S. if the cost of components mined, produced or manufactured in the U.S. exceeded 50 percent of the cost of all components (Component Test).

However, the Final Rule increased, in some cases significantly, the domestic content restrictions imposed by the Component Test.

New FAR Final Rule

The Final Rule contains three significant changes to the BAA, including:

1. **An increase in the Component Test's domestic content restrictions from 50 percent to 55 percent.** A manufactured end product will now only be considered "domestic" under the Component Test if the end product consists of more than 55 percent U.S.-origin components.

2. **The establishment of a stand-alone domestic content requirement for products made "wholly or predominantly" of iron and steel.** Such iron and steel end products will now be required to contain at least 95 percent U.S.-origin content to be considered "domestic." Importantly, the Final Rule also eliminates the Component Test's COTS exception for products made "wholly or predominantly" of iron and steel.
3. **An increase in the comparative price evaluation factors used to determine when a foreign end product may be purchased under the BAA,** which is authorized when a U.S.-manufactured end product is more expensive than the foreign end product offered. Previously, civilian contracting agencies would conduct a comparative price evaluation analysis wherein a foreign offeror would receive a "penalty" of 6 percent for large businesses and 12 percent for small businesses. Under the Final Rule, these percentages were increased from 6 percent to 20 percent and from 12 percent to 30 percent respectively. Accordingly, if a domestic end product is not the lowest offer received for a particular solicitation, the contracting agency will now apply a price evaluation "penalty" of either 20 percent or 30 percent on the foreign end product offered, depending on the size of the business.

These changes, effective January 21, stand to impact a large majority of government contractors subject to the BAA, and the updated domestic content restrictions and foreign end product price evaluations will apply to solicitations issued on or after February 22, 2021.

President Biden's BAA Executive Order

Days after the publication of the Final Rule, President Biden took action to further tighten BAA regulations and enforcement, signing an Executive Order titled "Ensuring the Future Is Made in All of America by All of America's Workers" on January 25, 2021 (Order). Pursuant to the Order, the FAR Council will take under consideration several additional proposed regulatory updates to the BAA – some of which may have the immediate effect of significantly altering the newly updated domestic content restrictions contained in the Final Rule described above.

Most notably, the Order directs the FAR Council to consider *replacing* the Component Test in its entirety with "a test under which 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." There are no specific definitions or proposed methods for calculating this "value added" formula, and it will be up to the FAR Council to propose such a method via a notice and public comment process. If the Component Test is indeed eliminated from the BAA, the Final Rule and its domestic content requirement changes may be rendered altogether moot.

The Order also proposes to increase transparency in the BAA exemption and waiver processes. For example, the Order mandates the establishment of a "Made in America Office" within the Office of Management and Budget that will be tasked with reviewing agency BAA waiver decisions and justifications. As part of this process, a public website will be established that maintains a list and description of each proposed BAA waiver issued along with the agency justification. The Made in America Office will also play a role in reviewing and proposing changes to the list of domestically non-available end products that qualify for a BAA exemption.

The FAR Council will publish any proposed changes under the Order within the next 180 days, before July 25, 2021. Interested parties will have a chance to comment on such changes to provide the FAR Council with feedback on specific BAA-related proposals issued under the Order.

Next Steps and Practical Advice

The issuance of the Final Rule and then the Order from separate Presidential administrations confirms continued strong bipartisan support for robust Buy American regulations and policies. The BAA clearly will be a focus of the Biden Administration given the immediate attention it received upon President Biden taking office.

In the short term, the Final Rule's updated domestic content restrictions are vastly important for government contractors.

All government contractors should be reviewing their supply chains and BAA-compliance regimes, particularly for end products that utilize the Component Test for current compliance. However, while ensuring compliance with the Final Rule, contractors also must continue to monitor how the FAR Council intends to implement President Biden's Executive Order in the coming months since the rules and mandates proposed therein stand to significantly overhaul the very foundation of the BAA.

If you have any questions about the BAA's updated domestic content restrictions or President Biden's Buy American Executive Order, please contact any member of [Baker Donelson's Government Contracts Team](#) or [International Trade and National Security Team](#).