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Are You Ready for Increasing Buy American Act Content Requirements?

*By Merle M. DeLancey Jr.**

In this article, the author explains that contractors should confirm that the products currently being sold to the government comply with the new 60 percent domestic content requirement and also should keep in mind that the requirement will increase to 65 percent in 2024.

The domestic content requirements for government purchases subject to the Buy American Act (BAA) has increased, effective October 25, 2022. A March 7, 2022, final rule implemented significant domestic content threshold increases over a seven-year timeframe for procurements subject to the BAA requirements of FAR Part 25. These increases were based on President Biden's January 25, 2021, Executive Order 14005, Ensuring the Future Is Made in All of America by All of America's Workers. (Note that these changes apply to the BAA as implemented in non-Department of Defense (DoD) purchases—the rules for implementing the BAA in DoD acquisitions are set forth in the DFARS, and differ from the FAR implementation in several important respects.)

Unlike the Trade Agreements Act (TAA), which bans government purchases of non-compliant products, the BAA applies pricing preferences to encourage government agencies to purchase “domestic end products.” Thus, items that are not BAA compliant may still be purchased by government agencies, but they must be significantly less expensive. Currently, FAR Part 25 provides that large businesses offering domestic end products receive a 20 percent price preference and small businesses offering domestic end products receive a 30 percent price preference. The FAR sets forth a two-part test to determine whether a manufactured end product or construction material qualifies as a domestic end product: (1) the end product or construction material must be manufactured in the United States; and (2) the cost of any components mined, produced, or manufactured in the United States must exceed a certain percentage of the cost of all components.

CAVEATS

Importantly, there are several caveats to application of the BAA and its two-part test.

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First, currently, the BAA only applies to procurements valued at less than \$183,000. For procurements equal to or exceeding \$183,000, the Trade Agreements Act (TAA) applies. This dollar threshold does not apply to small business procurements. The TAA does not apply to small business procurements; rather, for all small business procurements exceeding the micro-purchase threshold (currently \$10,000), the BAA applies.

Further, the second prong of the BAA domestic end product test—the component percentage test—does not apply to the acquisition of commercially available off-the-shelf (COTS) items. The test also does not apply to end products or construction materials that consist wholly or predominantly of iron or steel or a combination of both, which are subject to more stringent domestic preference requirements that were not impacted by the final rule.

However, contractors need to be careful because they often fail to appreciate that, even though the component test does not apply, a COTS item, for example, must still satisfy the first prong of the domestic end product test—the end product or construction material must be manufactured in the United States.

COST INCREASE

Effective October 25, 2022, to be BAA compliant, the cost of domestic components increased from exceeding 55 percent to 60 percent of the cost of all components. Notably, the domestic content threshold will continue to increase to 65 percent for calendar year 2024, and 75 percent for calendar year 2029. The final rule also allows a “fallback threshold,” until 2030, for the use of the original 55 percent domestic content threshold in instances where the procuring agency determines that no end products or construction materials meet the new domestic content threshold or that such products can be obtained only at an unreasonable cost. The fallback threshold only applies to construction material and end products that do not consist wholly or predominantly of iron or steel or a combination of both and that are not COTS items.

For multi-year contracts, contractors are required to comply with the domestic content threshold for the applicable year. An agency’s senior procurement executive, after consultation with the Office of Management and Budget’s Made in America Office, may allow a contractor to comply with the domestic content threshold applicable when a contract was awarded for the entire period of performance. This relaxation, like the “fallback threshold,” expires in 2030. Contractors should not rely too heavily on receiving this type of waiver given the requirement that agency BAA waivers are now publicly reported. Agencies will want to avoid such public shaming.

CONCLUSION

Contractors continue to wait for regulations concerning higher price preferences that will apply to end products and construction material deemed to be “critical” or made of “critical components.” These terms have not been defined. A post-award reporting requirement on the specific amount of domestic content in critical end products, construction material, or components receiving the enhanced price preference is also contemplated.

Contractors should confirm that the products currently being sold to the government comply with the 60 percent domestic content requirement and keep in mind that the requirement will increase to 65 percent in 2024.