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Recent & Anticipated Changes To The Buy American Act's Implementing Rules & Regulations Present New Challenges & Opportunities For American Manufacturers

*By Gale Monahan and Keric Chin**

The Buy American Act's restrictions on the use of foreign sources of supplies have been a pillar of federal procurement policy for the better part of the past century. For most of that time, the Buy American Act's statutory requirements[1] were interpreted and implemented through federal procurement regulations and contract terms[2] in a relatively consistent manner. These regulations and contract terms generally required contractors to manufacture end products in the United States and comply with a cost-of-components test focused on the end product's domestic versus foreign content makeup. Over the past two federal election cycles, however, the Buy American Act and the regulations that apply its requirements to federal contractors have become a focal point of the executive branch's policy and rulemaking efforts. Certain of these efforts culminated in recent changes to the Federal Acquisition Regulation's (FAR's) Buy American Act rules, which went into effect in early 2021.[3] Among other things, these new rules significantly changed the way federal agencies procure iron- and steel-based products. The current Administration has signaled that more changes are coming, and not just for iron- and steel-based products. Recent executive actions indicate that the rules governing how federal agencies procure all types of supplies may change drastically.[4] Even the traditional cost-of-components test may be on the proverbial chopping block. These recent rule changes, as well as those additional changes on the horizon, likely will impact which

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contractors continue to do business with the Government, how and where production process and facilities investments are made, and where materials are sourced from, as well as the Government's enforcement posture on these matters.

This BRIEFING PAPER focuses on recent changes to the FAR's implementing regulations and contract terms, with a particular emphasis on the new rules governing federal agencies' procurement of supplies made predominantly of iron and steel and recent increases to the domestic content requirements. This PAPER then discusses the recent Executive Order directing additional changes to the FAR's rules[5] and how various types of changes may impact Government contractors. The PAPER also provides a detailed overview of the new rules, as well as relevant examples and decisions points, to afford readers a better understanding of how these rules may create competitiveness and compliance challenges and opportunities.

History Of The Buy American Act & Its Implementation In Federal Procurement Policy

The history of the Buy American Act is marked by a persistent tug-of-war between the protection of American workers and industry, on the one hand, and the promotion of U.S. foreign policy and trade, on the other.[6] Congress adopted the Buy American Act in the midst of the Great Depression principally as a means to protect American workers from competition with inexpensive foreign labor.[7] But even among its proponents, there were differing views as to whether the legislation went too far or not far enough in restricting the use of foreign materials by U.S. manufacturers. These two debates continue to this day.

The Buy American Act was first introduced in the U.S. House of Representatives on March 22, 1932, by Representative Wilson in H.R. 10743.[8] The so called "Wilson bill" provided that "only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States *wholly of articles, materials or supplies mined, produced, or manufactured, as the case may be, in the United States* shall be acquired for public use."[9] Thus, the bill not only required that the end product be manufactured in the United States, it also required all of the components used to manufacture the end product originate in the United States. The bill, however, did not ban the use of foreign products entirely. It included exceptions where the use of such domestic articles, materials, or supplies was inconsistent with the public interest, the cost was unreasonable, or the articles, materials, or supplies were not mined, produced, or manufactured in the United States.

A number of members of Congress opposed the bill on the grounds that it would invite retaliation by other countries, stymy international trade upon which the United States depended, and negatively impact European nations. Congressman Celler, for example, remarked:

> Psychologically you do grievous wrong to the European nations, particularly at this time, if you pass this bill.
>
> The foreign press, the foreign chauvinists, will exag-

Editor: Valerie L. Gross

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> gerate its importance. Demagogues in Europe will use it for their selfish ends. It is very easy to stand here and drape your-self in the American flag and say this is a highly patriotic proposition. To my mind it is unpatriotic. I would rather say it is patriotic to increase trade than to decrease trade, which will be done by this bill.[10]

Other members of Congress, while generally supportive of the bill, raised concerns about restrictions on the use of foreign articles, materials, or supplies by American manufactures. For instance, to avoid harming manufacturers that relied on foreign materials, Representative Granfield proposed an amendment to the Wilson bill that would permit American manufacturers to use foreign articles, materials, or supplies (i.e., components) when those materials were not available in the United States. Representative Granfield explained:

> [The exception under the current bill] covers the situation where the articles to be used by the Government—for instance, raw coffee—are not produced in the United States; but it does not cover the case where the material used in manufacture in the United States, such as rubber or silk or magnesite, is not produced here.[11]

The congressman argued that an exception for the materials used in the manufacturing of supplies "is required to insure protection of our own manufactures as well as the interest of the Government."[12] Ultimately, Congressman Granfield's proposal was not adopted, and the House passed the bill by a vote of 150 in favor and 18 against.[13]

The bill then moved to the Senate on January 17, 1933, where the debate between the proponents of free trade and the proponents of protectionist policies continued. When Senator Johnson proposed amending the House appropriations bill for the Treasury and Post Office Departments, H.R. 13520, to incorporate the Wilson bill, Senator Gore objected to considering the amendment on procedural grounds, stating:

> Mr. President, I may want to offer some amendments to this proposition myself. I may wish to offer amendments providing that no State shall buy anything that is not produced within the State, and that no county shall buy anything that is produced outside the county,. . .and also offer a motion that the American eagle shall be displaced as the emblem of the Republic and a terrapin be substitute in its stead—a terrapin closed up in its shell and hermetically sealed. If trade is a curse let us stop it.[14]

Importantly, the bill offered by Senator Johnson and eventually adopted by Congress on March 3, 1933,[15] amended the Wilson bill in at least one significant respect: it eliminated the requirement that end products be manufactured in the United States "wholly" from articles, materials, and supplies produced in the United States, and instead, required that end products be manufactured in the United States "substantially all" from articles, materials, and supplies produced in the United States.[16] This amendment helped allay the concerns of some legislators that the Wilson bill had gone too far, while others continued to insist that any restrictions on the origins of the materials used by American manufacturers would negatively impact certain industries. By way of example, Senator Blaine noted that 237 American paper mills relied on foreign pulp or pulpwood to manufacture paper, and, as a result, the bill would discriminate against the paper industry, its stockholders, and workers.[17]

For 20 years following the passage of the Buy American Act, it essentially operated as a "super tariff" imposed on foreign manufacturers seeking to do business with the Government.[18] The Government applied a price evaluation factor of 25% to a manufactured product if the cost of the foreign supplies used to manufacture the product was more than 25% of the total cost of all such supplies.[19]

In 1954, President Eisenhower issued Executive Order 10582 redefining what constitutes a foreign product for purposes of the Buy American Act.[20] The Executive Order provided that "materials shall be considered to be of foreign origin if the cost of the foreign products used in such materials constitutes fifty per centum or more of the cost of all the products used in such materials."[21] The price differential for determining whether the price of domestic materials is unreasonable as compared to price of foreign materials also was revised from 25% to either 6% or 10%, depending upon the bid or offered price of foreign materials.[22]

For the next 65 years, the 50% cost-of-components

test, or some variation of it, became a fixture in Federal Government contracts, providing some modicum of predictability for American manufacturers that did business with the Government, with a few notable exceptions. First, in 1979, Congress adopted the Trade Agreements Act,[23] which authorized the President to waive the application of discriminatory laws and regulations to eligible products originating in countries that had acceded to the World Trade Organization Agreement on Government Procurement, countries that had entered into trade agreements with the United States, and certain other designated countries.[24] The Trade Agreements Act introduced a new, much more flexible (and arguably subjective) test, known as the "substantial transformation" test, for determining the country of origin for manufactured products.[25] Today, it restricts federal agencies from procuring supplies, services, or construction materials that do not originate from, or are not substantially transformed in, the United States or a designated country. The Trade Agreements Act, however, only applies to certain types of acquisitions valued in excess of applicable dollar thresholds (currently $182,000 for supply or service contracts and $7,008,000 for construction contracts).[26] For acquisitions valued below those thresholds and in all instances where federal agencies are acquiring certain types of products, such as arms, ammunition, war materials, and materials indispensable for national security and defense, the Buy American Act still applies.[27]

Second, on January 15, 2009, the FAR Council promulgated a rule waiving application of the cost-of-components test to commercially available off-the-shelf (COTS) items.[28] Waiver of the cost-of-components test allowed COTS items to be treated as domestic end products irrespective of the origin of their components so long as the items are manufactured in the United States. In waiving the cost-of-components test for COTS items, the FAR Council acknowledged the realities of commercial manufacturing in the modern era:

> Today's markets are globally integrated with foreign components often indistinguishable from domestic components. Manufacturers' component purchasing decisions are based on factors such as cost, quality, availability, and maintaining the state of the art, not the country of origin, making it much more difficult in today's market for a manufacturer to guarantee the source of its components over the term of a contract. It is even more difficult for a dealer to determine and guarantee the source of the components included in products on the shelf. The difficulty in tracking the country of origin of components is a disincentive for firms to become defense contractors, limiting the ability of the Government to purchase products already in the commercial distribution systems.[29]

More recently, on July 15, 2019, President Trump issued Executive Order 13881, "Maximizing Use of American-Made Goods, Products, and Materials," upending the longstanding 50% cost-of-components test for manufactured products subject to the Buy American Act and introducing a new test for end products made wholly or predominantly from iron or steel.[30] The final rule implementing Executive Order 13881 was promulgated on January 19, 2021, and is discussed below.[31]

Given the Executive's authority to define the criterion for determining whether a bid or offer is domestic or foreign and what constitutes "substantially all" under the Buy American Act, it is somewhat surprising that the 50% cost-of-components test endured for over six decades.[32] Alas, the days of such predictability in federal procurement policies covering this area may be behind us.

New Buy American Act Rules

The new Buy American Act rules represent a distinct shift in federal policy toward greater protectionism and a concomitant tightening of the restrictions on the use of foreign materials by American manufacturers, especially foreign iron or steel. The stated purpose of Executive Order 13881 is to maximize the use of goods, products, and materials produced in the United States and to enforce the Buy American Act to the greatest extent permitted by law.[33] To those ends, Executive Order 13881 directed the FAR Council to propose amendments to the FAR that would establish new standards for when materials are considered to be of foreign origin. The Executive Order specifically provided that, for iron and steel end products (or construction materials), the end products are consid-

ered of foreign origin if the cost of foreign iron and steel constitutes 5% or more of the cost of all the products used in manufacturing such iron and steel end products.[34] For all other end products (i.e., non-iron and steel end products), the end products are considered of foreign origin if the cost of the foreign products constitutes 45% or more of the cost of all the products used in manufacturing such end products.[35]

The January 19, 2021 final rule implementing Executive Order 13881 amended the applicable provisions in the FAR effective January 21, 2021.[36] The new rule is considerably more complex than its predecessor.

To determine whether an end product is domestic or foreign, the new rule requires as a threshold matter that contractors determine whether the end product is wholly or "predominantly of iron or steel or a combination of both."[37] The FAR defines "predominantly of iron or steel or a combination of both" to mean that the cost of the iron and steel content of the product exceeds 50% of the total cost of all its components.[38] The cost of iron and steel includes (1) the cost of the iron or steel mill products, castings, or forgings utilized in the manufacture of the product, *and* (2) a "good faith estimate" of the cost of iron or steel components, excluding COTS fasteners (such as nuts, bolts, pins, rivets, nails, clips, and screws).[39]

Consider, for example, a refrigerator, which consists of many components and materials. The exterior cabinet and door and the inner cabinet of this refrigerator are steel. The refrigerator also includes insulation, a cooling system, refrigerant, and fixtures. The refrigerator costs $2,000 to produce and the cost of all components in the refrigerator is $1,000. If the cost of the steel plates and a good faith estimate of the cost of other steel components (excluding COTS fasteners) utilized in the manufacture of the refrigerator exceeds $500 (i.e., 50% of the total cost of all the components), then the refrigerator consists predominantly of steel. Notably, the actual cost to produce the refrigerator, which includes the cost of labor and overhead in addition to the cost of all the components, is not relevant.[40]

For end products wholly or predominantly of iron or steel or a combination of both, the end product qualifies as domestic if it is manufactured in the United States and the cost of foreign iron and steel[41] constitutes less than 5% of the cost of all the components, including non-iron and non-steel components, used in the end product.[42] Thus, in the example above, in order to comply with Buy American Act requirements, the cost of foreign iron and steel products must be less than $50 or 5% of the cost of all components used in the manufacture of the refrigerator (i.e., $1,000 x 5% = $50). Critically, the new rule does not waive the component test for iron or steel end products that are COTS items, meaning the end product must be manufactured in the United States and the cost of foreign iron and steel must be less than 5% of the total cost of all components. Thus, even a commercial refrigerator, which likely would qualify as a COTS item for all other federal procurement purposes, is not exempt from these new restrictions if it is made predominantly from iron and steel or a combination of both.

For end products other than those wholly or predominantly of iron or steel or a combination of both, the test for determining whether the products are domestic is more familiar and straightforward because it follows the traditional FAR cost-of-components test, except the relevant thresholds have been increased. Under the current test applicable to end products other than those wholly or predominantly of iron or steel or a combination of both, end products meet the relevant FAR requirements if they are manufactured in the United States and the costs of the domestic components exceed 55% of the total cost of all components or qualify as COTS items, in which case there is no cost-of-components test applied.[43]

Turning back to our refrigerator example, if the cost of the steel plates and a good faith estimate of the cost other steel components (excluding COTS fasteners) utilized in the manufacture of the refrigerator does *not* exceed $500 (i.e., 50% of the total cost of all the components), then the refrigerator does not consist predominantly of iron or steel.[44] This means that the cost of foreign iron and steel used in the manufacture of the refrigerator is treated the same as the cost of all other components used to manufacture the refrigerator and the only relevant considerations are whether (1)

the refrigerator is manufactured in the United States and (2) 55% or more of the cost of all components are produced in the United States or the refrigerator is considered a COTS item, in which case the cost of components is not relevant.

Additional Examples

Following are a few additional examples to illustrate application of the new Buy American Act rules:

(1) *Vacuum*—A widely-available commercial floor vacuum consists of multiple components and materials, including a plastic body, electric motor, rotating brush, filter, and dust bag. The vacuum costs $100 to produce and the total cost of all components is $50. In addition, the cost of the iron or steel content does not exceed 50% of the cost of all the components, meaning the vacuum is not made predominantly of iron or steel or a combination of both. The electric motor and rotating brush are domestic components. The remaining components are of foreign (or unknown) origin. The vacuum is a domestic end product if it is manufactured in the United States and is a COTS item, regardless of the origin of its components.

(2) *Projector*—A projector for a National Aeronautics and Space Administration International Space Station docking simulator consists of a steel body, projection lens, lamp, integrated circuit board, fan, and various ports for cables. The cost to produce the projector is $500 and the total cost of all components is $200. In addition, the cost of the iron or steel content, including the steel body, does not exceed 50% of the cost of all the components, meaning the projector is not predominantly of iron or steel or a combination of both. The projection lens and lamp are domestic components, while the remaining components are foreign. The projector is a domestic end product if the cost of the projection lens and lamp exceed 55% (i.e., $110) of the total cost of all the components and the projector is manufactured in the United States.

(3) *Steel beam*—A steel beam consists wholly of steel. The cost of all material in the steel beam is $50. If the steel beam is rolled in the United States from steel bloom that originates in the United States, then the steel beam is a domestic end product because the cost of foreign steel is zero. However, if the steel beam is welded or riveted from separate steel plates, and some of the steel plates were made from foreign steel, the steel beam will not qualify as a domestic end product or construction material if the cost of the foreign steel plates used to make the steel beam equals or exceeds $2.50 (i.e., 5% of the cost of all the components used in the product).[45]

Trade Agreements Act

End products that qualify as domestic end products for Buy American Act purposes may or may not qualify as "U.S. made end products" under the Trade Agreements Act, thereby creating an additional layer of complexity and frustration for American manufacturers. For contracts that exceed the Trade Agreements Act thresholds,[46] the cost-of-components test discussed above may not apply. Instead, manufacturers must contend with the so-called "substantial transformation test."[47]

The Trade Agreements Act requires that contractors deliver only "U.S.-made end products" or "eligible products" from "designated countries."[48] The Trade Agreements Act provides that:

> An article is a product of a country or instrumentality only if (i) it is wholly the growth, product, or manufacture of that country or instrumentality, or (ii) in the case of an article which consists in whole or in part of materials from another country or instrumentality, it has been *substantially transformed* into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed.[49]

Whether an article has been substantially transformed into a new and different article of commerce is based on the totality of the circumstances.[50] In determining whether an article has been substantially transformed, the following factors are relevant: (1) the country of origin of the item's components; (2) extent of the processing that occurs within a country, and whether such processing renders a product with a new name, character, and use; (3) the resources expended on product design and development; (4) the extent and nature of post-assembly inspection and testing procedures; and (5) worker skill required during the actual

manufacturing process.[51] No one factor is determinative.

Thus, for example, an end product composed almost entirely of foreign materials, may qualify as a U.S.-made end product if the manufacturing process in the United States is extensive enough to substantially transform the materials into a new and different article of commerce. The same end product, however, may not qualify as a domestic end product for Buy American Act purposes because the cost of the domestic components does not exceed 55% of the total cost of all components.

Stay Tuned . . . More Changes On The Horizon

American manufacturers that are restructuring their manufacturing processes and supply chains to comply with the new Buy American Act rule should understand that the new rule may be short lived. On January 25, 2021, President Biden issued Executive Order 14005, "Ensuring the Future Is Made in All of America by All of America's Workers," with the same goal of maximizing the use of goods, products, and materials produced in, and services offered in, the United States.[52] Among other things, the Executive Order directs the FAR Council to consider proposing a new rule and amending the applicable provisions of the FAR to:

(1) replace the cost-of-components test with a test that measures domestic content based on the value that is added to the product through U.S.-based production or U.S. job-supporting economic activity;

(2) increase the numerical threshold for purposes of evaluating compliance with domestic content requirements;

(3) increase the price preferences applicable to domestic end products and domestic construction materials; and

(4) review the commercial item information technology exception at FAR 25.103.[53]

To implement these directives, FAR Case No. 2021-008 was opened and amendments to the current rules are under review.[54] While it is impossible to predict what these rule changes might entail, any significant changes to the cost-of-components test, including increases to the applicable thresholds and the adoption of value-added considerations, will be significant to American manufacturers and likely will require re-evaluation of manufacturing processes and supply chain activities and a better understanding of a products cost inputs. Below are a few thoughts on potential changes that the FAR Council might consider.

First, consideration of the value added to the product through U.S.-based production or U.S. job-supporting economic activity may increase the selling opportunities for American manufacturers that use skilled labor and complex manufacturing processes to "transform" relatively inexpensive foreign materials or components into high value products. Under the current and former Buy American Act rules, the value added to an end product by the design, production, testing, and manufacturing processes is irrelevant as long as the product is manufactured in the United States and the relative cost of the domestic and foreign components meets the criterion specified in the FAR. Thus, in the example above, the $1,000 of value added to the refrigerator components by the American manufacturer through design, production, testing, and management currently is not a consideration, even though it constitutes half the cost to produce the refrigerator.

By contrast, the rules that are promulgated in response to Executive Order 14005 likely will consider at a minimum the costs of producing the end product in addition to the costs of the constituent components, whether foreign or domestic, assuming the Buy American Act allows for such (see discussion below). The FAR defines the cost of components to mean:

> (1) For components purchased by the Contractor, the acquisition cost, including transportation costs to the place of incorporation into the end product (whether or not such costs are paid to a domestic firm), and any applicable duty (whether or not a duty-free entry certificate is issued); or
>
> (2) For components manufactured by the Contractor, all costs associated with the manufacture of the compo-

> nent, including transportation costs as described in paragraph (1) of this definition, plus allocable overhead costs, but excluding profit. *Cost of components does not include any costs associated with the manufacture of the end product.*[55]

The missing consideration, as noted in the definition above, is the cost associated with the manufacture of the end product, which arguably is a proxy for the value added to the end product or the economy by the U.S.-based processes. By requiring consideration of the value added through U.S.-based production or economic activity, including design, manufacturing, and testing, Executive Order 14005 appears to recognize that the cost of an end product is not merely the sum of its constituent parts. How encompassing these new rules may be in terms of including other labor and production costs remains to be seen. For example, should U.S.-based indirect costs allocable to an end product and built into the contractor's cost and price structure count towards the costs of producing the end product? These types of questions will have to be answered. Regardless, the Government likely can expand its industrial base and promote U.S. economic activity by casting a wider net in terms of the costs that count towards meeting the Buy American Act's requirements.

Next, the Executive Order requires an increase in the numerical threshold for domestic content. The current threshold for end products not wholly or predominantly of iron or steel or a combination of both is 55%.[56] With the addition of costs associated with the manufacture of the end product, assuming costs for these activities qualify as content under the Buy American Act's language, the threshold may increase to 65%, 75%, or more, although there is no way to predict this. Assuming for argument sake that the threshold is increased to 75%, this would mean that an end product would be considered domestic if the cost of its domestic components together with the costs associated with the design, production, and testing (among other things) of the end product exceed 75% of the total cost of the end product.

Turning back to our refrigerator example, a refrigerator costs $2,000 to produce. $1,000 of these costs are attributable to the cost of components, $500 of which are domestic components. An additional $1,000 of costs are attributable to design, production, and testing operations, all of which are associated with work performed in the United States. Under the current FAR requirements, the refrigerator is not a domestic end product and, therefore, noncompliant with the "Buy American—Supplies (Jan. 2021)" clause at FAR 52.225-1, because, even though it is 100% designed, produced, and tested in the United States, the cost of the domestic components does not exceed 55% of the cost of all of the underlying components. However, under a hypothetical new FAR rule that requires 75% or more of the cost of an end product be attributable to U.S.-based processes and/or domestic components, the refrigerator would be compliant because $1,500 of the $2,000 cost to produce the refrigerator are attributable to U.S.-based manufacturing activities and domestic content and, thus, the hypothetical 75% requirement is satisfied.

There is one potentially significant obstacle to adopting such an approach; namely, that the Buy American Act expressly requires that manufactured end products are "manufactured in the United States *substantially* all from articles, materials, or supplies mined, produced, or manufactured in the United States."[57] This means that a reduction and/or potential elimination of the cost-of-components test, such that manufacturers could deliver end products consisting of less domestic components, as long as they perform more domestic operations, by regulatory fiat may be contrary to law. The "substantially all" requirement currently is interpreted to mean that more than 55% of the cost of all components must be domestic.[58] While there is precedent for adjusting this threshold, there presumably are limits to what constitutes substantially all. With respect to COTS items, the complete elimination of the cost-of-components test arose from statutory changes, not regulatory changes.[59]

Finally, it also is possible, that the FAR Council, in consultation with the Administration, and based on the potential statutory hurdle described above, goes in the opposite direction and imposes a new domestic operations requirement in conjunction with an increased domestic components threshold. In this scenario, separate tests presumably would apply to U.S.-based

processes (e.g., design, production, and testing) and the cost of components. A dual track approach to domestic content would make it more onerous for manufacturers to comply with Buy American Act requirements, but would offer more of an incentive for contractors to increase U.S.-based operations, to the extent they are performing any design, production, and testing work overseas. Under this scenario the hypothetical FAR rule might require that the cost of all domestic components in the end product exceed 55% of the total cost of all its components, thereby satisfying the substantially all requirement, *and* that the value added by U.S.-based processes (excluding components) accounts for at least some percentage of the remaining cost of producing the end product.

Again, turning back to our refrigerator example, this would mean that the cost of the refrigerator components produced in the United States would need to exceed $550 or 55% of the total cost of all its components ($1,000), and the value added by the U.S.-based processes (e.g., design, manufacturing, testing) would need to account for at least some percentage, let's say half, of the remaining cost of the refrigerator. Given the cost of the refrigerator is $2,000 in this scenario and the total cost of all of its components is $1,000, the value added by the U.S.-based processes would need to equal or exceed $500 to satisfy the hypothetical FAR rule.

Conclusion

Today American manufacturers that sell to the Government face tremendous uncertainty as they attempt to restructure their manufacturing processes and supply chains to comply with the current Buy American Act requirements. For over six decades, the 50% component test provided a predictable and straightforward method for determining whether goods were domestic end products. Reflecting a shift toward greater protectionism, and consistent with the broader shift towards more regulatory action, Executive Order 13881 upended the longstanding 50% cost-of-components test, while introducing a new standard for end products wholly or predominantly of iron or steel or a combination of both. While manufacturers are busily scrambling to understand what the new FAR rules mean for their businesses, Executive Order 14005 promises another wave of changes may be coming soon.

Guidelines

These *Guidelines* are intended to assist you in understanding the recent revisions to the FAR rules implementing the Buy American Act and the potential impact of likely future changes. They are not, however, a substitute for professional representation in any specific situation.

1. The traditional cost-of-components test has changed. New domestic content rules apply to all end products, and new, more complex rules apply to end products consisting wholly or predominantly of iron and steel. This means that the threshold question of whether an end product consists wholly or predominantly of iron and steel must be answered at the outset of any cost-of-components analysis.

2. End products consist wholly or predominantly of iron and steel when the iron and steel content of an end product exceeds 50% of the total cost of all its components. For end products that consist wholly or predominantly of iron and steel, such end products comply with FAR 52.225-1 if they (a) are manufactured in the United States and (b) consist of less than 5% foreign iron and steel components when compared to the cost of all components, including non-iron and non-steel components. There is no exception for COTS items that consist wholly or predominantly of iron and steel.

3. When end products do not consist wholly or predominantly of iron and steel, the more traditional cost-of-components test applies, but the domestic content requirement has increased from 50% to 55%. These types of end products comply with FAR 52.225-1 if they (a) are manufactured in the United States and (b) consist of more than 55% domestic components when compared to the cost of all components or are a COTS item, in which case the cost-of-components test is waived.

4. Significant changes to the rules implementing the Buy American Act are coming. American manufactur-

ers should monitor these rule changes closely to determine how they will impact their relevant business processes, supply chains, and compliance functions.

ENDNOTES:

[1]41 U.S.C.A. §§ 8301–8305.

[2]See FAR pt. 25.

[3]Federal Acquisition Regulation: Maximizing Use of American-Made Goods, Products, and Materials, 86 Fed. Reg. 6180 (Jan. 19, 2021) (amending FAR pts. 12, 25, and 52, effective Jan. 21, 2021, to implement Exec. Order No. 13881 of July 15, 2019, "Maximizing Use of American-Made Goods, Products, and Materials," 84 Fed. Reg. 34,257 (July 18, 2019)).

[4]See Exec. Order No. 14005 of Jan. 25, 2021, "Ensuring the Future Is Made in All of America by All of America's Workers," 86 Fed. Reg. 7475 (Jan. 28, 2021).

[5]86 Fed. Reg. 7475.

[6]See Charles F. Szurgot, "Comment: The Buy American Act: Reverse Discrimination Against Domestic Manufacturers; Implications of the Trade Agreements Act of 1979 on the Rule of Origin Test," 7 Admin. L.J. Am. U. 737, 739–42 (Fall 1993/Winter 1994); see also Soohyun Choi, "Note: 'Buy American and Hire American': President Trump's Options for Strengthening the Buy American Act," 47 Pub. Cont. L.J. 79, 82 (Fall 2017).

[7]This concern is typified by the remarks of Senator Davis on the floor of the Senate: "The adoption of this amendment will mean work for our workers. It will help stem the tide of foreign competition and thus prevent further reduction of wages for the American worker." Allis-Chalmers Corp., Hydro-Turbine Div. v. Friedkin, 635 F.2d 248, 257 n.17 (3d Cir. 1980) (quoting 76 Cong. Rec. 1933 (1933) (remarks of Sen. Davis)).

[8]75 Cong. Rec. 6692 (1932).

[9]H.R. 10743, 72d Cong. (1932) (emphasis added).

[10]76 Cong. Rec. 1893–94 (1933) (remarks of Rep. Celler).

[11]76 Cong. Rec. 1892 (1933) (remarks of Rep. Granfield).

[12]76 Cong. Rec. at 1893.

[13]76 Cong. Rec. at 1897.

[14]76 Cong. Rec. 2868 (1933) (remarks of Sen. Gore).

[15]Pub. L. No. 72-428, ch. 212, tit. III, 47 Stat. 1520 (1933) (codified as subsequently amended at 41 U.S.C.A. §§ 8301–8305).

[16]76 Cong. Rec. at 2869; see 41 U.S.C.A. §§ 8302(a)(1), 8303(a)(2).

[17]76 Cong. Rec. 3252 (1933) (remarks of Sen. Blaine).

[18]See Textron, Inc., Bell Helicopter Textron Div. v. Adams, 493 F. Supp. 824, 830 (D.D.C. 1980).

[19]See, e.g., 14 Fed. Reg. 522 (Feb. 8, 1949); see also Charles F. Szurgot, "Comment: The Buy American Act: Reverse Discrimination Against Domestic Manufacturers; Implications of the Trade Agreements Act of 1979 on the Rule of Origin Test," 7 Admin. L.J. Am. U. 737, 740 (Fall 1993/Winter 1994).

[20]Exec. Order No. 10582 of Dec. 17, 1954, "Prescribing Uniform Procedures for Certain Determinations Under the Buy-American Act," 19 Fed. Reg. 8723 (Dec. 21, 1954).

[21]Exec. Order No. 10582, § 2(a), 19 Fed. Reg. 8723.

[22]Exec. Order No. 10582, § 2(b)–(c), 19 Fed. Reg. 8723.

[23]Pub. L. No. 96-39, tit. III, 93 Stat. 144, 236 (July 26, 1979) (codified at 19 U.S.C.A. ch. 13); see also FAR subpt. 25.4.

[24]19 U.S.C.A. § 2511.

[25]19 U.S.C.A. § 2518(4)(B); see FAR 25.001(c)(2).

[26]See FAR 25.402(b).

[27]Certain acquisitions are categorically exempted from the Trade Agreements Act. They include (a) acquisitions set aside for small businesses; (b) acquisitions of arms, ammunition, or war materials, or purchases indispensable for national security or for national defense purposes; (c) acquisitions of end products for resale; (d) required acquisitions from Federal Prison Industries, Inc., and nonprofit agencies employing people who are blind or severely disabled; and (e) sole-source and other acquisitions not using full and open competition. FAR 25.401.

[28]74 Fed. Reg. 2713 (Jan. 15, 2009). Waiver of the component test for COTS items was accomplished in accordance with the Federal Acquisition Reform Act of 1996, which is found at Division D of the National Defense Authorization Act (NDAA) for Fiscal Year 1996, Pub. L. No. 104–106, 110 Stat. 186 (Feb. 10, 1996). Section 4203 of the 1996 NDAA provides that the FAR shall include a list of provisions of law that are inapplicable to contracts for the procurement of commercially available off-the-shelf items. 41 U.S.C.A. § 1907; see FAR 12.505(a), 25.101(a), 25.201(b). It also is noteworthy that the Buy American Act restrictions do not apply to information technology that is a commercial item. FAR 25.103(e).

[29]74 Fed. Reg. at 2715.

[30]84 Fed. Reg. 34,257.

[31]86 Fed. Reg. 6180.

[32]To the Allis-Chalmers Mfg. Co., B-147210, 41 Comp. Gen. 339, 1961 CPD ¶ 69 (Nov. 27, 1961) ("[I]t is our opinion that, since the Buy American Act is silent as to the basis upon which it is to be determined whether or not an item is manufactured 'substantially all' in the United States, the criterion stipulated in the Executive order for determining whether a bid is domestic or foreign is properly within the Executive discretion.").

[33]Exec. Order No. 13881, § 1, 84 Fed. Reg. 34,257.

[34]Exec. Order No. 13881, § 2, 84 Fed. Reg. 34,257–58. The Executive Order's focus on iron and steel aligns with the various Buy America requirements applicable to federal-aid projects. For example, under the Federal Highway Administration (FHWA) Buy American Act provisions, if iron or steel materials are permanently incorporated into a FHWA-funded construction project, all manufacturing processes for those materials, including application of coatings, must take place in the United States. 23 C.F.R. § 635.410(b); 23 U.S.C.A. § 313. This includes processes such as melting, refining, forming, rolling, drawing, finishing, fabricating, and coating. See also 49 U.S.C.A. § 5323(j) (Federal Transit Administration); 49 U.S.C.A. § 50101 (Federal Aviation Administration); 49 U.S.C.A. § 22905 (Federal Railroad Administration, High Speed Rail Program).

[35]Exec. Order No. 13881, § 2, 84 Fed. Reg. 34,257–58.

[36]86 Fed. Reg. 6180.

[37]See "Buy American—Supplies (Jan. 2021)," FAR 52.225-1; see also "Buy American—Construction Materials" (Feb. 2021), FAR 52.225-9.

[38]FAR 25.003; see FAR 52.225-1(a); see also FAR 52.225-9(a).

[39]FAR 25.003; see FAR 52.225-1(a); see also FAR 52.225-9(a).

[40]See 86 Fed. Reg. at 6182 (refrigerator example).

[41]"Foreign iron and steel means iron or steel products not produced in the United States. Produced in the United States means that all manufacturing processes of the iron or steel must take place in the United States, from the initial melting stage through the application of coatings, except metallurgical processes involving refinement of steel additives. The origin of the elements of the iron or steel is not relevant to the determination of whether it is domestic or foreign." FAR 25.003; see FAR 52.225-1(a); see also FAR 52.225-9(a).

[42]FAR 25.003; see FAR 52.225-1(a); see also FAR 52.225-9(a). The FAR Council intended to include the cost of subcomponents in the domestic content calculations. However, acknowledging the difficulty that contractors may have in determining the cost of all of the subcomponents in the iron or steel items, the final rule requires that contractors make a "good faith estimate" of the cost of all foreign iron or steel components. 86 Fed. Reg. at 6183.

[43]FAR 25.003; see FAR 52.225-1(a); see also FAR 52.225-9(a).

[44]See 86 Fed. Reg. at 6182 (refrigerator example).

[45]See 86 Fed. Reg. at 6182 (steel beam example).

[46]See FAR 25.402(b).

[47]19 U.S.C.A. § 2518(4)(B); see FAR 25.001(c)(2).

[48]See FAR subpt. 25.4; see also FAR 25.003.

[49]19 U.S.C.A. § 2518(4)(B) (emphasis added).

[50]Energizer Battery, Inc. v. United States, 190 F. Supp. 3d 1308, 1318 (2016) ("The case law also indicates that a determination of substantial transformation must be based on a totality of factors.").

[51]See U.S. Customs Ruling Letter N308827 (Jan. 31, 2020) (electric motor); U.S. Customs Ruling Letter N311063 (Apr. 21, 2020) (upright vacuum cleaner).

[52]86 Fed. Reg. 7475.

[53]Exec. Order No. 14005, §§ 8, 10, 86 Fed. Reg. at 7477.

[54]See U.S. Dep't of Defense, Open FAR Cases as of 5/10/2021, https://www.acq.osd.mil/dpap/dars/opencases/farcasenum/far.pdf.

[55]FAR 52.225-1(a) (emphasis added); see FAR 25.003; see also FAR 52.225-9(a).

[56]FAR 25.003; see FAR 52.225-1(a); see also FAR 52.225-9(a).

[57]41 U.S.C.A. § 8302(a)(1) (emphasis added); see also 41 U.S.C.A. § 8303(a)(2).

[58]FAR 25.003.

[59]See 41 U.S.C.A. § 1907; see also FAR 12.505(a), 25.101(a), 25.201(b).

BRIEFING PAPERS