

## CLIENT ALERT

### Buy (Even More) American – FAR Council Proposes New Rules Implementing Executive Order 14005, "Ensuring the Future is Made in All of America by All of America's Workers"

August 3, 2021

On July 30, 2021, the FAR Council published a [Proposed Rule](#) to implement President Biden's [January 2021 Executive Order](#) seeking to maximize the use of American-made products and materials in federal procurements. Coming just six months after a recent January 2021 [Final Rule](#) increasing both the domestic content percentage and the price evaluation preferences for U.S. products and materials under the Buy American Act, the Proposed Rule would further increase the domestic content percentage for the Buy American Act, while also adopting new policies specifically aimed at increasing domestic production of "critical" goods and components. The Proposed Rule advances three major policy changes:

- **Phased Increase of Domestic Content Requirements:** To provide time for supply chains to adjust, the Proposed Rule would provide phased step increases in the percentage of domestic component cost needed for the end product to qualify as domestic – jumping initially to 60%, then going to 65% for deliveries occurring in calendar years 2024 through 2028 and further increasing to 75% for deliveries scheduled for 2029 or beyond. If no offered end product qualifies as "domestic" under these new thresholds (or is determined, under the evaluation preferences, to be offered at an "unreasonable cost"), the contracting officer is instructed to evaluate as "domestic" any offered end products with more than the current threshold of 55% domestic content. The new rules leave intact the recent change applicable to domestic construction materials "wholly or predominantly of iron or steel or a combination of both" which requires that foreign iron and steel in such construction material constitute less than 5% of the cost of all components.
- **Increased Price Preferences for "Critical" Goods and Materials:** The Proposed Rule also introduces a framework for increasing the price evaluation preferences to products and construction materials deemed critical to the domestic supply chain, including end products or construction materials containing critical components. This price evaluation preference for domestic products would vary for each product, material, or component that the FAR Council – through subsequent rulemakings occurring at least once every four years – deems "critical."
- **Additional Reporting Requirements to Increase Transparency:** Finally, the Proposed Rule would require contractors to report the specific domestic content of such designated "critical" products, materials, and components, with the exception of commercially-available-off-the-shelf items, to provide the Government greater visibility and insight into the strengths and weaknesses of the domestic supply chain.

In addition, the Proposed Rule seeks input on a number of longstanding issues concerning how the regulations determine what constitutes a domestic end product. The FAR Council, for example, seeks public comment on whether alternative approaches to calculating domestic content would better serve the goals of the Buy American Act than the traditional "component cost" test which completely ignores final assembly labor costs even where substantial. It also seeks industry input on whether the "substantial transformation" test – used to determine country of origin for purposes of the Trade Agreements Act exception – is a useful tool for promoting domestic jobs and manufacturing.

Finally, the FAR Council poses various questions to industry such as (1) impact of a roll-back of the longstanding statutory exception for commercial information technology and (2) how the Government might promote the use of “Made in America” services, potentially foreshadowing a new Buy American preference for domestic services.

The Proposed Rule is anticipated to generate significant public interest and participation in light of its significant potential to impact domestic suppliers and manufacturers. In addition to the ordinary opportunity to submit comments, the FAR Council has also tentatively scheduled a virtual public meeting for August 26, 2021 for a discussion of the rule that interested parties should consider attending.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

**Adelicia R. Cliffe**

Partner – Washington, D.C.

Phone: +1.202.624.2816

Email: [acliffe@crowell.com](mailto:acliffe@crowell.com)

**Alan W. H. Gourley**

Partner – Washington, D.C.

Phone: +1.202.624.2561

Email: [agourley@crowell.com](mailto:agourley@crowell.com)

**William B. O'Reilly**

Counsel – Washington, D.C.

Phone: +1.202.624.2820

Email: [woreilly@crowell.com](mailto:woreilly@crowell.com)