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Federal Acquisition Regulation: Amendments to the FAR Buy American Act Requirements

A Rule by the [Defense Department](#), the [General Services Administration](#), and the [National Aeronautics and Space Administration](#) on 03/07/2022

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Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION:

Final rule.

SUMMARY:

DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement an Executive order addressing domestic preferences in Government procurement.

DATES:

Effective: October 25, 2022.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

I. Background

In his first week in office, President Biden signed Executive Order (E.O.) 14005, *Ensuring the Future is Made in All of America by All of America's Workers*, launching a whole-of-Government initiative to strengthen the use of Federal procurement to support American manufacturing. With over \$600 billion in annual procurement spending, almost half of which is in manufactured products from helicopter blades to trucks to office furniture, the Federal Government is a major buyer in a number of markets for goods and services and the single largest purchaser of consumer goods in the world. Leveraging that purchasing power to shape markets and accelerate innovation is a key part of the Administration's industrial strategy (<https://www.atlanticcouncil.org/commentary/transcript/brian-deese-on-bidens-vision-for-a-twenty-first-century-american-industrial-strategy/> (<https://www.atlanticcouncil.org/commentary/transcript/brian-deese-on-bidens-vision-for-a-twenty-first-century-american-industrial-strategy/>)) to grow the

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industries of the future to support U.S. workers, communities, and firms.

On July 30, 2021, DoD, GSA, and NASA published a proposed rule at 86 FR 40980 (/citation/86-FR-40980) to implement section 8 of E.O. 14005, (/executive-order/14005) which directs the Federal Acquisition Regulatory Council (FAR Council) to strengthen the impact of Federal procurement preferences in the Buy American statute for products and construction materials that are domestically manufactured from substantially all domestic content. Consistent with section 8, the proposed changes to the implementation of the Buy American statute were designed to support greater domestic production of products critical to our national and economic security and help ensure America's workers thrive. This final rule makes limited changes from the proposed rule and amends the FAR to implement—

- A near-term increase to the domestic content threshold following a short grace period during which contractors and the workforce prepare for the increase and a schedule for future increases;
- A fallback threshold that would allow for products meeting a specific lower domestic content threshold to qualify as domestic products under certain circumstances; and
- A framework for application of an enhanced evaluation factor (price preference) for a domestic product that is considered a critical item or made up of critical components.

A. Increase to the Domestic Content Threshold

This rule increases the domestic content threshold initially from 55 percent to 60 percent, then to 65 percent in calendar year 2024 and to 75 percent in calendar year 2029. See FAR 25.101(a)(2)(i) and 25.201(b)(2)(i). The initial increase to 60 percent will occur several months from publication of the final rule, to allow industry time to plan for the new threshold and to provide workforce training on the new fallback threshold.

The increase of the domestic content threshold ultimately to 75 percent is consistent with the Infrastructure Investment and Jobs Act (Pub. L. 117-58 (<https://www.govinfo.gov/link/plaw/117/public/58?link-type=html>)) (IIJA) which was enacted on November 15, 2021. Section 70921 of this statute includes a “sense of Congress” that the FAR be amended to increase the domestic content requirements for domestic end products and domestic construction material to 75 percent.

A supplier that is awarded a contract with a period of performance that spans the schedule of domestic content threshold increases will be required to comply with each increased threshold for the items in the year of delivery. For example, a supplier awarded a five-year contract in 2027 will have to comply with the 65 percent domestic content threshold initially, but in 2030 will have to supply products with 75 percent domestic content. However, in response to comments received, in instances where this requirement to comply with changing domestic content thresholds throughout its life would not be feasible for a particular contract, the rule at FAR 25.101(d) and 25.201(c) provides for a senior procurement executive to allow the application of an alternate domestic content test in defining “domestic end product” or “domestic construction material” after consultation with Office of Management and Budget’s Made in America Office (MIAO). The alternate domestic content test would allow the supplier to comply with the domestic content threshold that applies at the time of contract award, for the entire period of performance for that contract. The MIAO will work with the agencies to develop an appropriate process for consultation.

B. Fallback Threshold

This rule also allows, until one year after the increase of the domestic content threshold to 75 percent, for the use of the 55 percent domestic content threshold (*i.e.*, the threshold in effect prior to the effective date of this rule) in instances where an agency has determined that there are no end products or construction materials that meet the new domestic content threshold or such products are of unreasonable cost. See FAR 25.106(b) (2) and (c)(2), and 25.204(b)(1)(ii) and (b)(2). For example, if a domestic end product that exceeds the 60 percent domestic content threshold is determined to be of unreasonable cost after application of the price preference, then for evaluation purposes the Government will treat an end product that is manufactured in the United States and exceeds 55 percent domestic content, but not 60 percent domestic content, as a domestic end product. The fallback threshold requires offerors to indicate which of their foreign end products exceed 55 percent domestic content. The fallback threshold only applies to construction material that does not consist wholly or predominantly of iron or steel or a combination of both and that are not commercially available off-the-shelf (COTS) items, as well as to end products that do not consist wholly or predominantly of iron or steel or a combination of both and that are not COTS items.

Section 70921 of the IIJA also envisions use of a fallback threshold, and suggests that the threshold should be set at 60 percent and continue indefinitely, but does not mandate this approach; it is simply offered as a “sense of Congress”.

This rule retains the approach to the fallback threshold set forth in the proposed rule: A consistent 55 percent threshold that is available until 2030 for use where domestic products at a higher threshold are not available or the cost to acquire them would be unreasonable. DoD, GSA, and NASA find this approach achieves the best balance between giving small disadvantaged businesses and other market participants a reasonable chance to adjust their supply chains to meet the higher content requirements and rewarding entities who lead their industries in adopting higher content levels. Equally important, sunseting the fallback will send a clear signal to the Federal marketplace that the Federal Government is fully committed to suppliers who increase their reliance on domestic supply chains. Other Administration efforts to strengthen our economic and national security will support this transition to greater investment in domestic markets and make

increased reliance on domestic supply chains feasible and desirable. These efforts include, among others, strategic actions by the Supply Chain Task Force pursuant to E.O. 14017 (/executive-order/14017) to address supply chain disruptions for critical products and components, investments in workforce training and apprenticeships by the Department of Labor to ensure workers can transition quickly and succeed in good quality jobs, and small business supports, including the creation of a manufacturing office at the Small Business Administration to help small manufacturers access Federal contracts, financing, and business development support.

C. Enhanced Price Preference for Critical Products and Critical Components

The rule provides for a framework through which higher price preferences will be applied to end products and construction material deemed to be critical or made up of critical components. A subsequent rulemaking will establish the definitive list at FAR 25.105 of critical items and critical components in the FAR, along with their associated enhanced price preference(s). When a final rule goes into place establishing the list and preference factors at 25.105, the higher price preference for critical items or critical components shall be used.

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The final rule does not include language from the proposed rule to require postaward reporting on the specific amount of domestic content in critical end products, construction material, or components receiving the enhanced price preference. Reporting remains a priority for helping the Federal Government more clearly understand the extent to which entities in its supplier base are increasing reliance on domestic sources for critical items and components. For this reason, coverage on this requirement will be deferred to the rulemaking that establishes the definitive list at FAR 25.105 of critical items and critical components so that respondents can better understand and comment on the scope and scale of reporting and have that input considered by the regulatory drafters before a requirement is finalized.

See the proposed rule for more information about the changes and about the Buy American statute (for its applicability and exceptions see 86 FR 40980 (/citation/86-FR-40980) at page 40981).

Seventy respondents submitted comments on the proposed rule.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the public comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments are provided as follows:

A. Summary of Significant Changes

The following significant changes from the proposed rule are made in the final rule:

- Domestic content threshold grace period. The proposed rule envisioned an immediate increase to the domestic content threshold from 55 percent to 60 percent, with the increase to 65 percent scheduled to begin in approximately two years in calendar year 2024 and the increase to 75 percent scheduled to begin five years after that increase, in calendar year 2029. In response to the comments received to the proposed rule, the Councils have provided for a delayed effective date (*i.e.*, a grace period) before the initial increase to 60 percent occurs in the final rule. Ordinarily, rules take effect 30 days after publication of the final rule. Delaying the effective date until after the beginning of the next fiscal year will allow industry to prepare for the new domestic content threshold and give the acquisition workforce time to be trained for the new concepts contained in this rule, helping to ensure a smoother transition to the rule's new requirements. The

schedule for domestic content threshold increases to 65 percent and 75 percent remains unchanged from the proposed rule and is reflected in the amendments throughout FAR part 25 and to FAR clauses 52.225-1, 52.225-3, 52.225-9, and 52.225-11.

- Use of an alternate domestic content test to apply the domestic content threshold in effect at contract award throughout the life of a contract. The proposed rule required a contract with a period of performance that spans the schedule of threshold increases to comply with each increased threshold for the items in the year of delivery. In response to the comments received to the proposed rule, the final rule adds a process by which an agency's senior procurement executive may, after consultation with the MIAO, allow for application of an alternate domestic content test. In the event use of an alternate domestic content test is authorized, the contract would require compliance with the domestic content threshold in effect at time of contract award for the entire life of the contract. Amendments are made to FAR 25.101, 25.201, 25.1101, and 25.1102 to implement the alternate domestic content test. Alternates to FAR clauses 52.225-1, 52.225-3, 52.225-9, and 52.225-11 are created for those contracts where use of an alternate domestic content test is authorized. Due to the new Alternates, conforming changes were made to FAR 13.302-5 and FAR clauses 52.212-5 and 52.213-4.
- Clarifications regarding application of the fallback threshold. As part of implementing the fallback threshold, the proposed rule would have required offerors to identify which of their foreign end products and foreign construction material met the fallback threshold. The final rule clarifies that this identification would only be required for end products and construction material where the fallback procedures are used, *i.e.*, for end products and construction material that do "not consist wholly or predominantly of iron or steel or a combination of both" and are not COTS items. To reflect these clarifications, the final rule makes amendments at newly-designated FAR 25.106 and 25.204; FAR provisions 52.212-3, 52.225-2, and 52.225-4; and FAR clauses 52.225-9 and 52.225-11. The proposed rule also did not contain any guidance on what the use of the fallback procedures would mean in relation to the procedures associated with exceptions to the Buy American statute, specifically the exception for nonavailability. Language has been added at FAR 25.103(b)(2)(i) and 25.202(a)(2), clarifying that a nonavailability determination is not required when the fallback procedures are used.
- Postaward reporting requirement. The proposed rule included two new clauses that would require contractors to provide the specific domestic content of critical items, domestic end products containing a critical component, and domestic construction material containing a critical component, that were awarded under a contract. The final rule removes this requirement and will instead propose this requirement in the subsequent rule establishing the list of critical items and critical components in the FAR, along with their associated enhanced price preference.

B. Analysis of Public Comments

1. SUPPORT FOR THE RULE

Comment: Some respondents were supportive of the rule in general, though many had specific feedback—whether supportive or not—that is captured in the remaining categories of comments. One respondent was supportive of the rule as long as the Government still maintained a level of quality for the products it buys and protected against price gouging. Another respondent strongly recommends that the policy changes to the Buy American requirements closely align with U.S. national security objectives.

Response: The Councils acknowledge the respondents' support for the rule.

2. CONCERNS WITH THE RULE

Comment: Some respondents expressed general concerns with the rule. These respondents did not believe the rule would impact their specific industry or entire manufacturing sector, believed the rule overcomplicates an already complicated process, or believed the Buy American statute itself and/or its

existing implementation is already problematic. One respondent was concerned that the rule is too broad and that it may cause delays to acquisitions and increased pricing. One respondent believed the rule was overly burdensome and may invite protectionist policies from trading partners. A few respondents expressed concerns that the rule would have adverse results such as higher proposal prices and a reduction in the competitiveness of U.S. companies. □

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Response: The Councils acknowledge the respondents' general concerns with the rule. The Councils address respondents' feedback on specific aspects of the rule in the following categories of comments.

3. DOMESTIC CONTENT THRESHOLD

Comment: Many respondents provided comments on the aspect of the rule that proposed increases to the domestic content threshold:

Approximately half the respondents supported increasing the domestic content threshold over time, as proposed. One of these supported increasing the threshold only if the exception to the Buy American statute under the Trade Agreements Act remains. A couple of these respondents encouraged increasing the domestic content threshold to 75 percent earlier than the proposed date of 2029 (*i.e.*, earlier than the proposed 7 years after the initial increase to 60 percent). The other half were not supportive of increasing the domestic content threshold over time.

The majority of the respondents that were not supportive urged that the increases to the domestic content threshold happen over a longer period of time than proposed, as domestic suppliers cannot currently meet the higher thresholds and manufacturers would need more time to secure adequate domestic suppliers and make the requisite changes to their supply chains. According to one respondent, failure to provide industry the appropriate amount of preparation time to comply with the higher domestic content thresholds could result in “material shortages, delayed deliveries, overextended suppliers, and inflationary pricing.” One of these respondents specifically recommended that the increases to the domestic content threshold happen in 3 to 5 year intervals, and another respondent asked that the increase occur over a 10-year span instead of 7 years, but the others did not provide specific alternate timeframes for consideration.

Many of these respondents expressed concerns with possible unintended consequences of increasing the domestic content threshold to the amounts and along the timeline proposed. One concern is that the higher thresholds will cause increased costs for compliance, which will reduce the number of businesses that participate in the Federal marketplace, especially small businesses, thereby limiting the availability of domestic products and the competitiveness of innovative commercial products offered to the Federal Government. Another concern is that the imposition of higher domestic content thresholds will invite similar retaliatory actions from trading partners, which would limit U.S. businesses' access to the global government procurement market. Some of the respondents expressed concerns specific to those U.S. businesses who maintain a global supply chain and/or those that participate both in the commercial marketplace and the Federal marketplace. According to these respondents, complying with the higher domestic content thresholds for the Federal market would cause these businesses to consider restructuring operations, including their supply chains, to separate commercial sales from Government sales. These respondents predict that such a separation would occur because the commercial market does not have similar requirements for domestic content and would not support the higher prices that would flow from compliance with such requirements. A couple of respondents also pointed out that instead of complying with the higher

domestic content requirements, businesses could find it more beneficial to reduce their current level of domestic content in order to reduce their cost enough to make their foreign end product competitive even after application of the price preference provided by the Buy American statute to domestic products.

A number of these respondents stated that the increased domestic content thresholds would be difficult, if not impossible, to comply with because of a shortage of available domestic components and subcomponents.

A couple of the respondents believed that the higher domestic content thresholds would not promote U.S. manufacturing and would not accomplish the Administration's stated objective. One of those respondents urged an adoption of the "substantial transformation" standard instead of the use of a component test.

Response: The Councils believe that the concerns raised regarding the level and schedule for threshold increases are largely addressed by the fallback threshold, which recognizes that some market participants, especially socioeconomic small businesses from underserved communities and other small businesses, may need additional time beyond what is provided in the schedule to make adjustments to their supply chains. Those contractors that are not ready or otherwise make a business decision not to modify their supply chains will still be able to bid on Federal contracts and could still enjoy a price preference if their end product meets the current definition of domestic end product (*i.e.*, exceeding 55 percent domestic content). In the event that the Government does not receive any offers of domestic end products or the domestic end products are of unreasonable cost, the Government will treat the end products that have at least 55 percent domestic content as a domestic end product for evaluation purposes. See Section I.B. Fallback Threshold, earlier in this preamble. This approach will help prevent scheduled increases in the content threshold from taking work away from domestic suppliers who are actively adjusting their supply chains and avoid unintentionally raising the foreign content of Federal purchases through increased use of waivers. As more companies come into compliance with the higher thresholds over time, there will be a more competitive environment to sustain fair and reasonable pricing for products with higher domestic content. For these reasons, the final rule reflects the same threshold increases and schedule for those increases as the proposed rule. However, the Councils have decided to delay the effective date of the rule, which would delay implementation of the initial increase of the domestic content threshold to 60 percent by several months. This short grace period is expected to allow more time for industry to prepare for the increased domestic content threshold.

Comment: Some of the respondents expressed concerns with the aspect of the proposed rule which required that a supplier holding a contract with a period of performance that spans the schedule of domestic content threshold increases will be required to comply with each increased threshold for the items in the year of delivery. These respondents specifically called out indefinite-delivery, indefinite-quantity (IDIQ) contracts and fixed-price contracts as being adversely affected by such a requirement. A couple of these respondents explained that requiring a contract to comply with changing domestic content thresholds during the contract period of performance presents an administrative burden on contractors to track compliance through lower tiers, considering subcontractors and suppliers, as well as creating an administrative burden on both the Government and contractors in terms of having to renegotiate and modify the existing contracts to reflect the changing requirements. Another respondent believed that such a requirement placed an unreasonable burden on companies bidding on fixed-price contracts because these companies would need to identify a supply chain that meets the highest domestic content requirement and price that out for its proposal although the highest requirement might be several years away. These respondents recommended that a contractor only be required to comply with a single domestic content threshold—the one in effect at award—throughout the performance period of a contract.

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Response: In light of the points raised by the public with regard to this requirement, the Councils acknowledge there are some instances where it is not feasible to require a contract that is subject to the Buy American statute to meet changing domestic content thresholds throughout its period of performance. In recognition of such instances, the final rule creates a process whereby an agency senior procurement executive, after consultation with the MIAO, may allow for application of an alternate domestic content test to the definition of “domestic construction material” and “domestic end product” and require the contractor to comply only with the domestic content threshold that is in effect at contract award for the entire contract term.

Comment: One respondent asked for clarification regarding the applicability of the changes in the proposed rule to existing IDIQ contracts and other multi-year contracts. Specifically, the respondent asked whether the new requirements would apply to delivery orders issued after the effective date of this final rule against IDIQ contracts awarded prior to the effective date of this final rule. The respondent stated that because applying the new requirements would impact pricing for the IDIQ contractors, they recommend that orders include a price adjustments clause that would allow both agencies and contractors to deal with any price increases stemming from changing the domestic content requirements.

Response: In accordance with the convention stated at FAR 1.108(d), FAR changes apply to existing contracts at the discretion of contracting officers, unless otherwise specified. This final rule does not otherwise specify a different application of the FAR change to existing contracts than the convention.

4. FALLBACK THRESHOLD

Comment: A few respondents provided comments on the aspect of the rule that created the concept of a fallback threshold. Most of those comments were supportive. A couple of the respondents further recommended keeping the fallback threshold beyond the proposed one-year period after the last increase of the domestic content threshold. One of these respondents believed that companies would need more than one year to comply with the 75 percent domestic content threshold while the other respondent believed that the fallback threshold should be used on an as-needed basis in the future to account for “periods of economic difficulty or increased input prices.” A few of these respondents recommended that the fallback threshold increase over time to match the increases to the domestic content threshold, *i.e.* fallback threshold increases from 55 percent to 60 percent in 2024, and to 65 percent in 2029.

One of the respondents stated that while the fallback threshold allows time for companies to comply with the changing domestic content thresholds, it does not address the cost of the changes, such as those associated with engineering, vendor qualification, first article inspections, testing and fixturing, etc. The respondent recommended lower domestic content thresholds instead of a fallback threshold. With regard to the recommendation for increasing the fallback threshold over time to match the increases to the domestic content threshold, the respondent acknowledged that having multiple transitional thresholds and fallbacks would add complexity towards administration, supplier coordination, and associated reporting. Another respondent stated that the fallback threshold would not incentivize contractors because it does not address the issue of disparate product costs between the U.S. and lower-cost countries. Instead, this respondent recommended replacing the fallback threshold with a tiered system of price preferences, starting from a price preference to those contractors who have less than 35 percent domestic content and then scaling up to the highest tier of price preferences for those who have more than 90 percent domestic content.

Response: Based on the predominantly supportive public comments for a fallback threshold, the congressional support for use of a fallback that is articulated in the sense of Congress in section 70921 of the IIJA, and the important role a fallback will play in giving small businesses and other market participants time to make adjustments to their supply chains, the Councils have retained in the final rule the concept and procedures for the fallback threshold from the proposed rule. The Councils believe the fallback threshold, as set forth in the proposed rule, should: (1) Help prevent scheduled increases in the content threshold from taking work away from domestic suppliers who are actively adjusting their supply chains; and (2) avoid unintentionally raising the foreign content of Federal purchases through increased use of waivers while domestic suppliers adjust. With regard to the recommendation that the fallback threshold increase over time to match the increases to the domestic content threshold, the Councils have determined that an increasing fallback threshold could, by adding complexity to the rule's provisions, make firms' efforts in supply chain coordination, solicitation certifications, and contract administration more difficult, rather than less. That said, the fallback threshold will be a temporary measure designed to limit foreign content while contractors transition to U.S.-based supply chains.

5. FRAMEWORK FOR ENHANCED PRICE PREFERENCE FOR CRITICAL ITEMS AND CRITICAL COMPONENTS

Comment: Several respondents provided comments on the aspect of the rule that proposed a framework for providing enhanced price preferences for a domestic product that is considered a critical item or made up of critical components.

About half of the respondents were supportive of the framework and concept. Many of these respondents recommended specific items or categories of items be added to the eventual FAR list of critical items and critical components: Hull, mechanical and electrical vessel components and systems, including engines and propulsion components; personal protective equipment; essential medicines; ammonium perchlorate and sodium perchlorate; tantalum and niobium; tungsten; titanium and superalloys; rare earths and material; and steel. One respondent recommended that the enhanced price preference be 25 percent for large businesses and 35 percent for small businesses, an addition of 5 percentage points to the current price preference provided in the FAR for acquisitions subject to the Buy American statute. One respondent was supportive of the concept as long as the exception to the Buy American statute under the Trade Agreements Act remains. Another respondent recommended that critical items and critical components be excluded from the United States' trade obligations. That respondent also urged a "whole of Government" approach to the designation of items on the critical list, pointing out that E.O. 14005 (/executive-order/14005) requires a review and update of the list of domestically nonavailable articles at ☐ FAR section 25.104, which the respondent believes contains many items that are the "focus of the initiatives to strengthen U.S. supply chains and sources of critical inputs."

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A few respondents expressed concerns with the concept of providing enhanced price preference for critical items and components. Some of the respondents stated that it was premature to create a framework and difficult to comment on the framework and evaluate its effect until the list of critical items and components, and their associated enhanced price preferences, are known. A few of the respondents believed that the concept seems to add administrative burden in terms of time and effort needed to track enhanced preferences, additional compliance costs for the U.S. Government and the Federal acquisition supply chain, and create unintended consequences. As alternatives to the concept, these respondents recommend instead providing contracting officers the ability to identify specific products or categories that will receive additional price preferences and then tailor their solicitation; or pursuing other public policies that would attempt to enhance domestic manufacturing by increasing access to highly-skilled affordable workforce, simplifying

government regulations, or lowering the cost of raw materials and energy. As examples of such policies, respondents cited incentives like research and development investment credits, tax breaks, loans, subsidies, etc.

A couple of respondents pointed out that providing enhanced price preferences would have limited benefit when there is only one supplier of a critical item; however, one of the respondents acknowledged that the enhanced price preference could be beneficial in encouraging domestic investment for critical items that are primarily imported. One respondent commented that identifying critical components would be difficult for design-build construction contracts and recommended exempting those types of contracts from this concept. Another respondent appeared to instead recommend that “electronic connectors, harness associated with the assembly, and cabling” be identified as items for the critical list. Another comment from this respondent was that any implementation of an enhanced price preference should be limited to the most critical and sensitive items; mandating a price preference could lead to the U.S. losing access to a superior product developed and produced by an ally. That respondent suggested that creating a “critical list” of items must include confirmation that a domestic supply is and will be available.

One respondent, with regard to the proposed requirement for offerors to identify when a proposed end product contains a critical component, commented that the establishment of a separate representation process can create administrative burden and cost for vendors, as associated compliance mechanisms will be required to assure the accuracy of such separate representations. It was not clear to this respondent what benefit is achieved with the creation of this process, or whether any associated cost implications have been assessed. Another respondent commented that contractors are unable to comply with the “reporting requirements,” appearing to refer to the reporting requirement associated with identifying which offered item contains a critical component.

Response: The Councils are retaining in the final rule the framework for enhanced price preference for critical items and critical components as contained in the proposed rule. The various recommendations for items/components to be deemed critical will be shared with the appropriate parties that will make such decisions.

The Councils note that the public will have another opportunity to provide feedback on this framework, and any associated reporting requirement(s), in the subsequent rulemaking that will establish the list of critical items and critical components in the FAR, along with their associated enhanced price preference. That separate FAR rule will present more context for the public to provide more informed feedback on the subject.

Comment: As requested in the preamble of the proposed rule, a few of the respondents provided feedback on the process for identifying items and components for the critical list, the frequency of adjustments to the critical list, and how to apply the enhanced price preferences.

Response: As stated in the proposed rule, establishing a list of critical items and critical components, along with their associated enhanced price preference, will be determined in a separate FAR rulemaking. The feedback provided by these respondents will be considered in the development of that separate/forthcoming FAR proposed rule.

6. POSTAWARD REPORTING REQUIREMENT

Comment: Several respondents provided comments on the aspect of the rule that proposed a requirement for postaward reporting on critical items and items containing critical components.

A few respondents were supportive of the requirement. One respondent believed they could easily comply given that they have 100% domestic content but urged that the reporting requirement be designed in a way to be least burdensome on small businesses—for example, by making the reporting period no sooner than one year instead of 15 days. Another respondent stated that reporting is an effective way of ensuring greater compliance with the Buy American statute since transparency is a component of enforcement; this respondent further recommended that the reports be made public. One respondent, while supportive of the requirement as a first step, believed that it is too narrow in scope and that data related to contract adherence to the existing Buy American statute is inadequate. A couple of the respondents stated that reporting requirements associated with the Buy American statute already have very low difficulty of compliance, and it is unlikely that the proposed changes will significantly increase that burden on any businesses, small and disadvantaged or otherwise. One of these respondents recommended better transparency and public reporting be coupled with efforts to engage unions and shop floor workers in monitoring compliance with the Buy American statute. The respondent encouraged agencies to share information with unions, including compliance reports and the contracting agency's expectations about where contract work, including the supply chain for manufactured supplies on Federal contracts, is being performed.

A majority of the respondents that commented on the postaward reporting requirement expressed concern with the requirement. A number of the respondents stated that the full impact of the reporting requirement could not be known without first knowing how and what products and components will be listed as critical. One respondent provided an example that the burden of the requirement could be great if it turned out that there are “many critical components within various end items” or “there are many end products that contain a critical component”; the respondent also pointed out that the 15-day reporting period could limit competition where contractors are furnishing end products with a lead time outside of the proposed reporting requirement. Another respondent urged the Councils to provide industry an opportunity to provide feedback on the proposed 15-day timeframe for reporting ☐ once the list of critical items and components is established, because without knowing the scope and scale of the list, contractors will not know if that timeframe is feasible.

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Some of the respondents requested further clarity on the proposed requirement. One of the respondents asked what defines a critical item and what to do about reporting on contract “obsolete items” or when the critical item list changes. Another respondent requested the Government clarify the “types, detail, and level of reporting.” Another respondent asked whether a contractor's ultimate inability to deliver a product with the domestic content amount specified in the report would be considered a breach of contract.

Some of the respondents stated that the postaward reporting requirement would increase administrative burden and cost to contractors. One of these respondents specifically recommended that COTS products not be subject to the reporting requirement because it would result in a great deal of time and money spent. A couple of the respondents commented on potential negative impacts of the requirement. One of the respondents stated that increased reporting requirements, which flow down to subtiers, would make it more difficult for them to work with small businesses. The respondent explained that the reporting requirement would negatively impact small businesses because they would have to absorb the cost of validating the domestic content of all their components up front. This respondent also stated that the requirement would present a barrier to entry for many prospective suppliers. Another respondent stated that the requirement could limit competition where a contractor is furnishing an end product with a lead time that is outside the proposed reporting timeframe of 15 days. This respondent stated that limited competition will also be likely

due to the additional compliance costs and risks. According to this respondent, the requirement could result in increased prices from the Federal contracting community, which in turn could put them at a disadvantage with competitors in other markets, such as commercial markets.

A few of the respondents pointed out the difficulty of obtaining country-of-origin information for components from their suppliers, who are either unwilling or unable to provide the necessary information.

A few of the respondents expressed concerns over the security of the required information. One of these respondents worried about forcing equipment manufacturers to reveal potentially sensitive information about equipment manufacturing processes to the public, which could then be accessed by domestic and foreign competitors. A couple of the respondents also believed the required information is sensitive and critical, and that industry needs assurances that the information will be protected and secured. The respondents pointed out existing concerns about supply chain vulnerabilities, and that would-be adversaries as well as other contractors will want this competition-sensitive information. One of the respondents urged the Government to consider the relative sensitivity and security of the reported data and implement a plan to appropriately protect and secure it, possibly by imposing restrictions on public access to supply chain/component data. This respondent stated that making the reported data accessible to the public could harm competition and create security concerns by forcing contractors to reveal key elements of a solution.

Some of the respondents offered up alternatives to the proposed postaward reporting requirement. A couple of the respondents proposed alternatives to aspects of the proposed requirement, such as a longer timeframe for reporting than the proposed 15 days or simplification of the reporting lines (*i.e.* instead of having the pre-award certifications going to the contracting officer and the postaward reporting going to the MIAO). A few of the respondents proposed that instead of creating the reporting requirement, the Government should find other ways to accomplish its objective of gaining insight. One of the respondents recommended tailoring the Federal Procurement Data System (FPDS) and incentivizing contractors through something like a “Buy American certificate” into voluntarily providing the required data. Another respondent recommended leveraging or mirroring and modifying the Federal Trade Commission’s “Made in the USA” framework to implement domestic sourcing policies for Federal procurements. This respondent recommended that the MIAO establish a web portal or repository to enable a supplier that claims its product is “Made in the USA” to voluntarily register their product claim.

One of the respondents wanted an exception for design-build construction contracts, stating that the reporting requirement would be impractical for such a contract. Another respondent believed the reporting requirement would be difficult for contractors to meet if the reporting pertained to domestic content of components rather than the end item. One respondent proposed a system that they had created as the method for providing transparency into supply chains. One respondent commented that contractors are unable to comply with the “reporting requirements.”

Response: Reporting remains a priority because it will help the Federal Government more clearly understand the extent to which entities in its supplier base are increasing reliance on domestic sources for critical items and components. However, in light of the questions and concerns raised by the public in the absence of information, including a specific list of critical items and components, sufficient to convey the scope and scale of reporting that would be required, the Councils have determined to remove the requirement from this rule. Instead, the postaward reporting requirement will be included in the subsequent rulemaking planned for establishing the list of critical items and critical components in the FAR, along with their associated enhanced price preference. It is expected that when provided the context of an actual list of

critical items and critical components, the public can provide more informed input for consideration by MIAO, Office of Federal Procurement Policy (OFPP), and other policy offices on how best to shape the reporting requirements.

7. COMMENTS ON OTHER TOPIC AREAS OF E.O. 14005 (/EXECUTIVE-ORDER/14005)

Comment: A majority of the 70 respondents commented on topics that were highlighted in the preamble of the proposed rule as topics that pertain to other sections of E.O. 14005 (/executive-order/14005) than the one that is specifically being addressed in this particular FAR rule and on which public feedback was sought. These topics consisted of the commercial information technology acquisition exemption from the Buy American statute; the partial waiver for COTS items; Made in America services; the role of trade agreements; the use of waivers to the Buy American statute in general; the effectiveness of current price preferences under the Buy American statute; and replacing the component test.

Response: The Councils appreciate the comments offered in response to the questions posed to help the FAR Council, MIAO, and other interested Federal offices understand the public's views on important issues affecting Made in America policy beyond the actions addressed in this rulemaking. While no action is being taken in this FAR case with regard to the feedback ☐ received on those areas, the FAR Council and the MIAO intend to consider the feedback received in those topic areas for other activities required by the E.O., as well as related initiatives to strengthen domestic supply chains.

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8. OUTSIDE THE SCOPE OF THIS RULE AND OTHER ACTIVITIES UNDER E.O. 14005 (/EXECUTIVE-ORDER/14005)

Comment: Several respondents submitted comments that did not address any aspect of this rule or any other action by the FAR Council that is contemplated under E.O. 14005 (/executive-order/14005). These comments included complaints about the existing Buy American statute, existing FAR implementation of the Buy American statute, and specific procurement actions; recommendations for FAR changes that go beyond what is required by E.O. 14005 (/executive-order/14005) or authorized by any statute; marketing campaigns; and recommendations for non-procurement actions to incentivize domestic production.

Response: The respondents' comments are outside the scope of this FAR rule and are not necessary for implementation of section 8 of E.O. 14005 (/executive-order/14005).

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT) and for Commercial Products (Including Commercially Available Off-the-Shelf (COTS) Items) or for Commercial Services

This rule amends the provisions and clauses at FAR—

- 52.212-3, Offeror Representations and Certifications—Commercial Products and Commercial Services;
- 52.213-4, Terms and Conditions—Simplified Acquisitions (Other Than Commercial Products and Commercial Services);
- 52.225-1, Buy American—Supplies;
- 52.225-2, Buy American Certificate;
- 52.225-3, Buy American—Free Trade Agreements—Israeli Trade Act;
- 52.225-4, Buy American—Free Trade Agreements—Israeli Trade Act Certificate;
- 52.225-9, Buy American—Construction Materials; and
- 52.225-11, Buy American—Construction Materials Under Trade Agreements.

Those provisions and clauses continue to apply, or not apply, to acquisitions at or below the SAT, to acquisitions for commercial products (including COTS items), and to acquisitions of commercial services as they did prior to this rule.

This rule creates alternates for the clauses at FAR—

- 52.225-1, Buy American—Supplies;
- 52.225-3, Buy American—Free Trade Agreements—Israeli Trade Act;
- 52.225-9, Buy American—Construction Materials; and
- 52.225-11, Buy American—Construction Materials Under Trade Agreements.

These alternates continue to apply, or not apply, to acquisitions at or below the SAT, to acquisitions for commercial products (including COTS items), and to acquisitions of commercial services, as their basic clauses did prior to this rule.

IV. Expected Impact of the Rule

This rule adds two sets of changes to the FAR's implementation of the Buy American statute:

- An increase to the domestic content threshold that a product must meet to be defined as “domestic”; a schedule for future increases (see FAR 25.101(a)(2)(i) and 25.201(b)(2)(i)); and a fallback threshold that would allow products meeting a specific lower domestic content threshold to qualify as a domestic product under certain circumstances (see FAR 25.106(b)(2) and (c)(2), and 25.204(b)(1)(ii) and (b)(2)); and
- A framework for application of an enhanced price preference for a domestic product that is considered a critical product or made up of critical components (see FAR 25.106(c) and 25.204(b)(2)).

The impact of each set of changes is addressed individually below. DoD, GSA, and NASA sought information from the public to assist with this analysis. Feedback from the public was used to help further inform the regulatory drafters in the formation of this final rule.

A. Scheduled Increase to the Domestic Content Threshold and the Use of a Fallback Threshold

The fundamental goal of the rule is to increase the share of American-made content in a domestic end product or construction material. The graduated increase, after a grace period before the initial increase, is intended to drive to this goal in a proactive but measured fashion so that contractors have adequate time to make adjustments in their supply chains. When this rule is implemented, domestic industries supplying domestic end products are likely to benefit from a competitive advantage.

Federal Procurement Data System (FPDS) data for fiscal year 2020 indicate there were 121,063 new contract awards for products and construction, valued over the micro-purchase threshold through the threshold at which the World Trade Organization Government Procurement Agreement applies, to which the Buy American statute applied. It is estimated that 37,503 of these awards were for COTS items. Because the domestic content threshold test does not apply to COTS items (except those involving iron/steel), those awards were subtracted from the 121,063 total eligible awards. After removing potential COTS item acquisitions from the data, there are estimated to be 83,560 contract awards to 14,163 unique contractors.

It is unclear if the pool of qualified suppliers would be reduced, resulting in less competition (and a possible increase in prices that the Government will pay to procure these products). The fallback threshold is intended to: (1) Help prevent scheduled increases in the content threshold from taking work away from domestic suppliers who are actively adjusting their supply chains; and (2) avoid unintentionally raising the foreign content of Federal purchases through increased use of waivers while domestic suppliers adjust. The fallback threshold will be a temporary measure designed to limit foreign content while contractors transition to U.S.-based supply chains.

Based on responses received to the questions posed to the public, the FAR Council has considered implementing smaller increases in the content threshold as well as differently timed increases in the final rule, but determined that the size and schedule of the increases put forth in the proposed rule (*i.e.*, initial increase to 60 percent, then increase to 65 percent in 2024, and then increase to 75 percent five years after the previous increase) reflect a reasonable approach to achieving the goals of section 8 of E.O. 14005 (/executive-order/14005) and increasing reliance on domestic supply chains.

This determination was based on considerations such as potential impact on competition; potential impact on supplier diversity, including participation of small disadvantaged businesses and businesses in other underserved communities; lost opportunities for American workers; and other factors identified by public comment and other interested parties, including MIAO, which also has been considering the potential impact of the proposed rule. The Councils also considered the procurement provisions at issue and the sense of Congress expressed in the IIJA.

At least three arguments point to the possibility that any increased burden with regard to the timed increase to the domestic content threshold, on contractors in particular, could be small if not de minimis. □

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First, DoD, GSA, and NASA do not anticipate significant cost arising from contractor familiarization with the rule given the history of rulemaking and E.O.s in this area. The basic mechanics of the Buy American statute (*e.g.*, general definitions, certifications required of offerors to demonstrate end products are domestic) remain unchanged and continue to reflect processes that have been in place for decades. Under the proposed rule, when deciding whether to pursue a procurement or what kind of product mix (*i.e.*, domestic or foreign) and pricing to propose in response to a solicitation, offerors now will have to plan for future changes to the domestic content threshold during the period of performance of the contemplated contract, unless use of an alternate domestic content threshold, which is the threshold in effect at time of contract award, has been authorized. Those offerors that make a business decision not to modify their supply chains over time to comply with the scheduled increases to the domestic content threshold will still be able to propose an offer for Federal contracts but will generally no longer enjoy a price preference.

Second, some, if not many, contractors may already be able to comply with the higher domestic content requirement needed to meet the definition of domestic end product under E.O. 14005 (/executive-order/14005) and the final rule. Laws such as the SECURE Technology Act, Public Law 115-390 (<https://www.govinfo.gov/link/plaw/115/public/390?link-type=html>), which requires a series of actions to strengthen the Federal infrastructure for managing supply chain risks, are placing significantly increased emphasis on the need for Federal agencies and Federal Government contractors to identify and reduce risk in their supply chains. One way to reduce supply chain risk is to increase domestic sourcing of content. A U.S. Bureau of Economic Analysis study using 2015 data, https://www.commerce.gov/sites/default/files/migrated/reports/2015-what-is-made-in-america_o.pdf (<https://www.commerce.gov/sites/default/files/migrated/reports/2015-what-is-made-in->

america_o.pdf), found that on average, 82 percent of the value of U.S. manufacturing output consists of domestic content. This indicates that a domestic content threshold of 60 percent would not inflict additional burden on many contractors. Based on the assumption that the products purchased in 2021 will be similar to the products procured in the future, a preliminary analysis of available data in FPDS on the impact of an increase early in 2021 in the domestic content threshold from 50 percent to 55 percent did not reveal an uptick in waivers, suggesting companies may already be incorporating content that can meet at least the 55 percent level:

	Feb-Dec 2021	Feb-Dec 2020	Feb-Dec 2019	Feb-Dec 2018
	Total spend (millions of \$)	Total spend (millions of \$)	Total spend (millions of \$)	Total spend (millions of \$)
Total	\$36,137	\$40,120	\$40,948	\$44,517
Buy American Waived *	\$161	\$177	\$155	\$166
Percent Waived	0.44%	0.44%	0.38%	0.37%

** Waivers included here are Commercial Information Technology, Domestic Non-availability, Public Interest Determination, Resale, or Unreasonable Cost. They do not include waivers due to trade agreements or DoD qualifying country, which would not be impacted by a change in the content threshold.*

Third, it is anticipated that some contractors' products and construction materials may not meet the definition of domestic end product and construction material unless the contractors take steps to adjust their supply chains to increase the domestic content. Those contractors that make a business decision not to modify their supply chains will still be able to bid on Federal contracts and could still enjoy a price preference if their end product meets the prior definition of domestic end product (*i.e.*, exceeding 55 percent). In the event that the Government does not receive any offers of domestic end products or the domestic end products are of unreasonable cost, the Government will treat the end products that have at least 55 percent domestic content as a domestic end product for evaluation purposes. Offerors now have an information collection burden of identifying when a foreign end product meets the fallback threshold (see section VIII of this preamble), but that burden should be offset by the benefit of potentially still receiving a price preference for those end products that would have been considered domestic prior to the increases to the domestic content threshold implemented in this rule.

Offerors have an option to increase their reliance on domestic content and continue to offer domestic products, in which case they may benefit from the price preference for domestic products, or they may continue to offer the same product, which will now be evaluated as foreign but may still benefit from a price preference. DoD, GSA, and NASA do not have any data on how many currently domestic products would fall into this category or have any knowledge as to which option an offeror of such products would select, since this is a business decision for each offeror to make.

In recognition of the feedback provided by the public, DoD, GSA, and NASA have decided to delay the effective date of this rule by several months. The expectation is that this grace period will allow the contracting community more time to plan for the new threshold and prepare for the new procedures. Coupled with the implementation of the fallback threshold, the grace period should help to minimize any increased burden associated with the higher domestic content thresholds.

B. Enhanced Price Preference for Critical Items

The goal of the enhanced price preference for critical items and components is to provide a steady source of demand for domestically produced critical products. As explained above, the rule only creates a framework. A separate rulemaking will be undertaken to add critical products and components to the FAR and to establish the associated preferences. Therefore, the impact associated with this concept will be captured in the subsequent rulemaking.

There is an information collection burden associated with offerors identifying when a domestic end product or domestic construction material contains a critical component (see section VIII of this preamble), but that burden should be offset by the larger price preference received for these items.

Therefore, based on public comments received, DoD, GSA, and NASA have concluded that the initial assessment is correct that the cost impact of this rule is not significant, and any impact is predominantly positive. □

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V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 (/executive-order/13563) emphasizes the importance of quantifying both costs and

benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993.

VI. Congressional Review Act

As required by the Congressional Review Act (5 U.S.C. 801 (<https://www.govinfo.gov/link/uscode/5/801?type=usc&year=mostrecent&link-type=html>)-808) before an interim or final rule takes effect, DoD, GSA, and NASA will send the rule and the “Submission of Federal Rules Under the Congressional Review Act” form to each House of the Congress and to the Comptroller General of the United States. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. The Office of Information and Regulatory Affairs (OIRA) in the Office of Management and Budget has determined that this is not a major rule under 5 U.S.C. 804 (<https://www.govinfo.gov/link/uscode/5/804?type=usc&year=mostrecent&link-type=html>).

VII. Regulatory Flexibility Act

DoD, GSA, and NASA have prepared a Final Regulatory Flexibility Analysis (FRFA) consistent with the Regulatory Flexibility Act, 5 U.S.C. 601 (<https://www.govinfo.gov/link/uscode/5/601?type=usc&year=mostrecent&link-type=html>)-612. The FRFA is summarized as follows:

DoD, GSA, and NASA are amending the Federal Acquisition Regulation (FAR) to implement an Executive Order regarding ensuring the future is made in all of America by all of America's workers.

The objective of this rule is to strengthen domestic preferences under the Buy American statute, as required by section 8 of E.O. 14005, (</executive-order/14005>) Ensuring the Future is Made in All of America by All of America's Workers, by providing—

- An increase to the domestic content threshold required to be met for a product to be defined as “domestic” and a schedule for future increases;
- A fallback threshold which would allow for products meeting a specific lower domestic content threshold to qualify as a domestic product under certain circumstances; and
- A framework for application of an enhanced price preference for a domestic product that is considered a critical product or made up of critical components.

One respondent commented that they disagreed with the statement in the Initial Regulatory Flexibility Analysis (IRFA) that the rule will not have significant economic impact on a substantial number of small entities. The respondent believed the public burden of information collection created by the proposed reporting requirements was significantly more than what the IRFA estimated. Specifically, the respondent believed the aspect of the rule which increases the domestic content threshold over time will impact contractors more than that stated in the IRFA as the estimated time required for compliance.

Since no data were provided by the respondent with regard to the estimated burden for the various information collection requirements created by this rule, the estimate was not revised. However, the final rule does remove the postaward reporting requirement so estimates related to that have been removed from this final regulatory flexibility analysis.

With regard to the comment that the IRFA did not account for the additional compliance efforts that small businesses will need to apply for the increases to the domestic content threshold over time, this final regulatory flexibility analysis acknowledges that impact.

Different parts of the rule are expected to apply to a different number and universe of small entities. The impacted small entities, by portion of the rule, are described below. But in general, the rule will apply to contracts subject to the Buy American statute. The statute does not apply to services, or overseas, nor does it apply to acquisitions of micro-purchases (contracts at or below \$10,000) or to acquisitions to which certain trade agreements apply (*e.g.* World Trade Organization Government Procurement Agreement (WTO GPA)). The maximum possible number of small entities to which the rule will apply are the 31,103 active small business registrants in the System for Award Management (SAM) who do not provide services.

- Timed increase to the domestic content threshold and allowance of a fallback threshold. Federal Procurement Data System (FPDS) data for fiscal year 2020 indicates there were 86,490 new contract awards to small business for products and construction materials, valued over the micro-purchase threshold through the threshold at which the WTO GPA applies, to which the Buy American statute applied. It is estimated that 24,459 of these awards were for commercially available off-the-shelf (COTS) items. Because the domestic content threshold test does not apply to COTS items (except those involving iron/steel), those awards were subtracted from the 86,490 total eligible awards. After removing potential COTS item acquisitions from the data, there are estimated to be 62,031 contract awards to 11,704 unique small businesses. In recognition of the feedback provided by the public, DoD, GSA, and NASA have decided to delay the effective date of this rule by several months. The expectation is that this grace period will allow the contracting community more time to acclimate to the new threshold and prepare for the new procedures. Coupled with the implementation of the fallback threshold, the grace period should minimize any increased burden associated with the higher domestic content thresholds.
- Enhanced preference for a critical product or component. This rule only creates a framework. Separate rulemaking will be done to add critical products and components to the FAR and to establish the associated preferences. However, the Government assumes that 10 percent of the contract awards subject to Buy American statute will be for critical products or components. Therefore, the Government estimates that 8,649 (10 percent of 86,490) of awards to small businesses may be impacted. This translates to 1,632 unique small businesses.

The final rule will strengthen domestic preferences under the Buy American statute and provide small businesses the opportunity and incentive to deliver U.S. manufactured products from domestic suppliers. It is expected that this rule will benefit U.S. manufacturers.

This rule does not include any new recordkeeping or other compliance requirements for small businesses. Prior to this rule, small businesses already had to monitor compliance with contract requirements pertaining to the domestic content threshold for contracted items. However, the increases in the domestic content threshold implemented in this rule may result in disruption to existing contractor supply chains across impacted contracts, which in turn, may require more effort on small businesses to monitor compliance.

This rule does contain a few additional reporting requirements for certain offerors, including small businesses.

Small businesses who submit an offer for a solicitation subject to the Buy American statute already have to list the foreign end products included in their offer. This rule will require that the offeror also identify which of these foreign end products, that are not COTS items and do not consist wholly or predominantly of iron or steel or a combination of both, meet or exceed the fallback domestic content threshold. This rule will also require proposals to identify which offered domestic end products contain a critical component. Without that information, contracting officers will not be able to apply the “enhanced price preference” when applicable. These reporting requirements are not specific to small businesses so data does not exist to estimate the number of small businesses subject to these requirements. However, the data suggests that there will be approximately 8,800 impacted respondents total, small and other than small.

There are no known significant alternative approaches to the final rule.

Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat Division. The Regulatory Secretariat Division has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration. □

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VIII. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. 3501 (<https://www.govinfo.gov/link/uscode/44/3501?type=usc&year=mostrecent&link-type=html>)-3521) applies. The rule contains information collection requirements. OMB has provided pre-approval of the revised information collection requirements under OMB Control Number 9000-0024, Buy American, Trade Agreements, and Duty-Free Entry.

The proposed rule contained a new information collection requirement that is no longer included in this final rule. As such, the Regulatory Secretariat Division has withdrawn its request to the Office of Management and Budget for approval of a new information collection requirement concerning “Domestic Content Reporting Requirement.”

List of Subjects in 48 CFR Parts 13 (/select-citation/2022/03/07/48-CFR-13), 25, and 52

- Government procurement

William F. Clark,

Director, Office of Government-Wide Acquisition Policy, Office of Acquisition Policy, Office of Government-Wide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 13 (/select-citation/2022/03/07/48-CFR-13), 25, and 52 as set forth below:

1. The authority citation for 48 CFR parts 13 (/select-citation/2022/03/07/48-CFR-13), 25, and 52 continues to read as follows:

Authority: 40 U.S.C. 121 (<https://www.govinfo.gov/link/uscode/40/121?type=usc&year=mostrecent&link-type=html>)(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113 (<https://www.govinfo.gov/link/uscode/51/20113?type=usc&year=mostrecent&link-type=html>).

PART 13—SIMPLIFIED ACQUISITION PROCEDURES

2. Amend section 13.302-5 by revising paragraph (d)(3)(i) and adding paragraph (d)(4) to read as follows:

13.302-5 **Clauses.**

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(d) * * *

(3) * * *

(i) When an acquisition for supplies for use within the United States cannot be set aside for small business concerns and trade agreements apply (see subpart 25.4), substitute the clause at FAR 52.225-3, Buy American-Free Trade Agreements-Israeli Trade Act, used with the appropriate Alternate (see 25.1101(b)(1)), instead of the clause at FAR 52.225-1, Buy American-Supplies.

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(4) When the senior procurement executive allows for application of an alternate domestic content test for the contract in accordance with 25.101(d), so that the initial domestic content threshold will apply to the entire period of performance, the contracting officer shall fill in the 52.213-4(b)(1) (xvii)(B) for 52.225-1 Alternate I as follows: For contracts that the contracting officer estimates will be awarded in calendar year 2022 or 2023, the contracting officer shall insert “60” in paragraph (1) (ii)(A) of the definition of domestic end product. For contracts that the contracting officer estimates will be awarded in calendar year 2024, 2025, 2026, 2027, or 2028, the contracting officer shall insert “65”. For contracts that the contracting officer estimates will be awarded after calendar year 2028 the contracting officer shall insert “75”.

PART 25—FOREIGN ACQUISITION

3. Amend section 25.003 by—

- a.** Adding in alphabetical order definitions for “Critical component” and “Critical item”;
- b.** In the definition “Domestic construction material” revising the first sentence of paragraph (1)(i)(B)(1); and
- c.** In the definition “Domestic end product” revising the first sentence of paragraph (1)(ii)(A).

The additions and revisions read as follows:

25.003 **Definitions.**

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Critical component means a component that is mined, produced, or manufactured in the United States and deemed critical to the U.S. supply chain. The list of critical components is at 25.105.

Critical item means a domestic construction material or domestic end product that is deemed critical to the U.S. supply chain. The list of critical items is at 25.105.

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Domestic construction material * * *

(1) * * *

(i) * * *

(B) * * *

(1) The cost of the components mined, produced, or manufactured in the United States exceeds 60 percent of the cost of all its components, except that the percentage will be 65 percent for items delivered in calendar years 2024 through 2028 and 75 percent for items delivered starting in calendar year 2029 (unless an alternate percentage is established for a contract in accordance with FAR 25.201(c)). * * *

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Domestic end product * * *

(1) * * *

(ii) * * *

(A) The cost of its components mined, produced, or manufactured in the United States exceeds 60 percent of the cost of all its components, except that the percentage will be 65 percent for items delivered in calendar years 2024 through 2028 and 75 percent for items delivered starting in calendar year 2029 (unless an alternate percentage is established for a contract in accordance with FAR 25.101(d)). * * *

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4. Amend section 25.100 by—

- a.** Removing the word “and” at the end of paragraph (a)(3);
- b.** Redesignating paragraph (a)(4) as (a)(5); and
- c.** Adding a new paragraph (a)(4).

The addition reads as follows:

25.100 Scope of subpart.

(a) * * *

(4) Executive Order 14005, (/executive-order/14005) January 25, 2021; and

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5. Amend section 25.101 by—

- a.** Removing from paragraph (a) introductory text the phrase “Buy American statute and E.O. 13881 (/executive-order/13881)” and adding the phrase “Buy American statute, E.O. 13881, (/executive-order/13881) and E.O. 14005 (/executive-order/14005)” in its place;

b. Revising the first sentence of paragraph (a)(2)(i); and

c. Adding paragraph (d).

The revision and addition read as follows:

25.101 General.

(a) * * *

(2)(i) Except for an end product that consists wholly or predominantly of iron or steel or a combination of both, the cost of domestic components shall exceed 60 percent of the cost of all the components, except that the percentage will be 65 percent for items delivered in calendar years 2024 through 2028 and 75 percent for items delivered starting in calendar year 2029. But see paragraph (d) of this section. * * *

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(d)(1) A contract with a period of performance that spans the schedule of domestic content threshold increases specified in paragraph (a)(2)(i) of this section shall be required to comply with each increased threshold for the items in the year of delivery, unless the senior procurement executive of the contracting agency allows for application of an alternate domestic content test for that contract under which the domestic content threshold in effect at time of contract award will apply to the entire period of performance for the contract. This authority is not delegable. The senior procurement executive shall consult the Office of Management and Budget's Made in America Office before allowing the use of the alternate domestic content test.

(2) When a senior procurement executive allows for application of an ☐ alternate domestic content test for a contract—

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(i) See 25.1101(a)(1)(ii) or 25.1101(b)(1)(v) for use of the appropriate Alternate clause to reflect the domestic content threshold that will apply to the entire period of performance for that contract; and

(ii) Use the fill-in at 52.213-4(b)(1)(xvii)(B) instead of including 52.225-1 Alternate I when using 52.213-4, Terms and Conditions—Simplified Acquisitions (Other Than Commercial Products and Commercial Services).

6. Amend section 25.103 by—

a. Adding a sentence to the end of paragraph (b)(2)(i); and

b. Removing from paragraph (c) “25.105” and “Subpart 25.5” and adding “25.106” and “subpart 25.5” in their places, respectively.

The addition reads as follows:

25.103 Exceptions.

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(b) * * *

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(i) * * * A determination is not required before January 1, 2030, if there is an offer for a foreign end product that exceeds 55 percent domestic content (see 25.106(b)(2) and 25.106(c)(2)).

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25.105 [Redesignated as 25.106]

7. Redesignate section 25.105 as section 25.106.

8. Add a new section 25.105 to read as follows:

25.105 Critical components and critical items.

(a) The following is a list of articles that have been determined to be a critical component or critical item and their respective preference factor(s).

(1)-(2) [Reserved]

(b) The list of articles and preference factors in paragraph (a) of this section will be published in the **Federal Register** for public comment no less frequently than once every 4 years. Unsolicited recommendations for deletions from this list may be submitted at any time and should provide sufficient data and rationale to permit evaluation (*see* 1.502).

(c) For determining reasonableness of cost for domestic end products that contain critical components or are critical items (*see* 25.106(c)).

9. Amend newly redesignated section 25.106 by—

a. In paragraph (a)(1) removing the phrase “paragraph (b) of this section” and adding the phrase “paragraphs (b) and (c) of this section” in its place;

b. In paragraph (a)(2) removing the word “Subpart” and adding the word “subpart” in its place; and

c. Revising paragraphs (b) and (c).

The revisions read as follows:

25.106 Determining reasonableness of cost.

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(b) *For end products that are not critical items and do not contain critical components.* (1)(i) If there is a domestic offer that is not the low offer, and the restrictions of the Buy American statute apply to the low offer, the contracting officer must determine the reasonableness of the cost of the domestic offer by adding to the price of the low offer, inclusive of duty—

(A) 20 percent, if the lowest domestic offer is from a large business concern; or

(B) 30 percent, if the lowest domestic offer is from a small business concern. The contracting officer must use this factor, or another factor established in agency regulations, in small business set-asides if the low offer is from a small business concern offering the product of a small business concern that is not a domestic end product (see subpart 19.5).

(ii) The price of the domestic offer is reasonable if it does not exceed the evaluated price of the low offer after addition of the appropriate evaluation factor in accordance with paragraph (a) or (b)(1)(i) of this section. See evaluation procedures at subpart 25.5.

(2)(i) For end products that are not COTS items and do not consist wholly or predominantly of iron or steel or a combination of both, if the procedures in paragraph (b)(1)(i) of this section result in an unreasonable cost determination for the domestic offer or there is no domestic offer received, and the low offer is for a foreign end product that does not exceed 55 percent domestic content, the contracting officer shall—

(A) Treat the lowest offer of a foreign end product that is manufactured in the United States and exceeds 55 percent domestic content as a domestic offer; and

(B) Determine the reasonableness of the cost of this offer by applying the evaluation factors listed in paragraph (b)(1)(i) of this section to the low offer.

(ii) The price of the lowest offer of a foreign end product that exceeds 55 percent domestic content is reasonable if it does not exceed the evaluated price of the low offer after addition of the appropriate evaluation factor in accordance with paragraph (a) or (b)(1)(i) of this section. See evaluation procedures at subpart 25.5.

(iii) The procedures in this paragraph (b)(2) will no longer apply as of January 1, 2030.

(c) *For end products that are critical items or contain critical components.* (1)(i) If there is a domestic offer that is not the low offer, and the restrictions of the Buy American statute apply to the low offer, the contracting officer shall determine the reasonableness of the cost of the domestic offer by adding to the price of the low offer, inclusive of duty—

(A) 20 percent, plus the additional preference factor identified for the critical item or end product containing critical components listed at section 25.105, if the lowest domestic offer is from a large business concern; or

(B) 30 percent, plus the additional preference factor identified for the critical item or end product containing critical components listed at section 25.105, if the lowest domestic offer is from a small business concern. The contracting officer shall use this factor, or another factor established in agency regulations, in small business set-asides if the low offer is from a small business concern offering the product of a small business concern that is not a domestic end product (see subpart 19.5).

(ii) The price of the domestic offer is reasonable if it does not exceed the evaluated price of the low offer after addition of the appropriate evaluation factor in accordance with paragraph (a) or (b) of this section. See evaluation procedures at subpart 25.5.

(2)(i) For end products that are not COTS items and do not consist wholly or predominantly of iron or steel or a combination of both, if the procedures in paragraph (c)(1)(ii) of this section result in an unreasonable cost determination for the domestic offer or there is no domestic offer received, and the low offer is for a foreign end product that does not exceed 55 percent domestic content, the contracting officer shall—

(A) Treat the lowest offer of a foreign end product that is manufactured in the United States and exceeds 55 percent domestic content as a domestic offer; and

(B) Determine the reasonableness of the cost of this offer by applying the evaluation factors listed in paragraph (c)(1) of this section to the low offer.

(ii) The price of the lowest offer of a foreign end product that exceeds 55 percent domestic content is reasonable if it does not exceed the evaluated price of the low offer after addition of the appropriate evaluation factor in accordance with paragraph (a) or (b) of this section. See evaluation procedures at subpart 25.5. □

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(iii) The procedures in this paragraph (c)(2) will no longer apply as of January 1, 2030.

10. Amend section 25.200 by—

- a.** In paragraph (a)(3) removing the word “and”;
- b.** Redesignating paragraph (a)(4) as paragraph (a)(5);
- c.** Adding a new paragraph (a)(4); and
- d.** In paragraph (c) removing the word “Subpart” and adding the word “subpart” in its place.

The addition reads as follows:

25.200 Scope of subpart.

(a) * * *

(4) Executive Order 14005, (/executive-order/14005) January 25, 2021; and

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11. Amend section 25.201 by—

- a.** Removing from paragraph (b) introductory text the phrase “statute and E.O. 13881 (/executive-order/13881) use” and adding the phrase “statute, E.O. 13881, (/executive-order/13881) and E.O. 14005 (/executive-order/14005) use” in its place;
- b.** Revising the first sentence of paragraph (b)(2)(i); and
- c.** Adding paragraph (c).

The revision and addition read as follows.

25.201 Policy.

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(b) * * *

(2)(i) Except for construction material that consists wholly or predominantly of iron or steel or a combination of both, the cost of domestic components must exceed 60 percent of the cost of all the components, except that the percentage will be 65 percent for items delivered in calendar years 2024 through 2028 and 75 percent for items delivered starting in calendar year 2029, but see paragraph (c) of this section. * * *

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(c)(1) A contract with a period of performance that spans the schedule of domestic content threshold increases specified in paragraph (b)(2)(i) of this section shall be required to comply with each increased threshold for the items in the year of delivery, unless the senior procurement executive of the contracting agency allows for application of an alternate domestic content test for that contract under which the domestic content threshold in effect at time of contract award will apply to the entire period of performance for the contract. This authority is not delegable. The senior procurement executive shall consult the Office of Management and Budget's Made in America Office before allowing the use of the alternate domestic content test.

(2) When a senior procurement executive allows for application of an alternate domestic content test for a contract, see 25.1102(a)(3) or (c)(4) for use of the appropriate Alternate clause to reflect the domestic content threshold that will apply to the entire period of performance for that contract.

12. Amend section 25.202 by adding a sentence to the end of paragraph (a)(2) to read as follows:

25.202 Exceptions.

(a) * * *

(2) * * * A determination is not required before January 1, 2030, if there is an offer for a foreign construction material that exceeds 55 percent domestic content (see 25.204(b)(1)(ii) and 25.204(b)(2)(ii)).

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13. Amend section 25.204 by revising paragraph (b) to read as follows:

25.204 Evaluating offers of foreign construction material.

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(b)(1) *For construction material that is not a critical item and does not contain critical components.* (i) Unless the head of the agency specifies a higher percentage, the contracting officer shall add to the offered price 20 percent of the cost of any foreign construction material proposed for exception from the requirements of the Buy American statute based on the unreasonable cost of domestic construction materials. In the case of a tie, the contracting officer shall give preference to an offer that does not include foreign construction material excepted at the request of the offeror on the basis of unreasonable cost.

(ii) For construction material that is not a COTS item and does not consist wholly or predominantly of iron or steel or a combination of both, if the procedures in paragraph (b)(1)(i) of this section result in an unreasonable cost determination for the domestic construction material offer or there is no domestic construction material offer received, and the low offer is for foreign construction material that does not exceed 55 percent domestic content, the contracting officer shall—

(A) Treat the lowest offer of foreign construction material that is manufactured in the United States and exceeds 55 percent domestic content as a domestic offer; and

(B) Determine the reasonableness of the cost of this offer by applying the evaluation factor listed in paragraph (b)(1)(i) to the low offer.

(iii) The procedures in paragraph (b)(1)(ii) of this section will no longer apply as of January 1, 2030.

(2) *For construction material that is a critical item or contains critical components.* (i) The contracting officer shall add to the offered price 20 percent, plus the additional preference factor identified for the critical item or construction material containing critical components listed at section 25.105, of the cost of any foreign construction material proposed for exception from the requirements of the Buy American statute based on the unreasonable cost of domestic construction materials. In the case of a tie, the contracting officer shall give preference to an offer that does not include foreign construction material excepted at the request of the offeror on the basis of unreasonable cost. See 25.105 for the list of critical components and critical items.

(ii) For construction material that is not a COTS item and does not consist wholly or predominantly of iron or steel or a combination of both, if the procedures in paragraph (b)(2)(i) of this section result in an unreasonable cost determination for the domestic construction material offer or there is no domestic construction material offer received, and the low offer is for foreign construction material that does not exceed 55 percent domestic content, the contracting officer shall—

(A) Treat the lowest offer of foreign construction material that is manufactured in the United States and exceeds 55 percent domestic content as a domestic offer; and

(B) Determine the reasonableness of the cost of this offer by applying the evaluation factors listed in this paragraph (b)(2) to the low offer.

(iii) The procedures in paragraph (b)(2)(ii) of this section will no longer apply as of January 1, 2030.

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25.501 [Amended]

14. Amend section 25.501 by—

a. Removing from paragraph (c) the word “Subpart” and adding the word “subpart” in its place; and

Removing from paragraph (d) the word “Must” and adding the phrase “When trade agreements are

- b.** involved, must” in its place.

15. Amend section 25.502 by revising paragraphs (c)(2) and (3) and (c)(4) introductory text to read as follows:

25.502 Application.

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(c) * * *

(2) If the low offer is a noneligible offer and there were no domestic offers (*see* 25.103(b)(3)), award on the low offer. The procedures at 25.106(b)(2) and 25.106(c)(2) do not apply.

(3) If the low offer is a noneligible offer and there is an eligible offer that □ is lower than the lowest domestic offer, award on the low offer. The procedures at 25.106(b)(2) and 25.106(c)(2) do not apply.

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(4) Otherwise, apply the appropriate evaluation factor provided in 25.106 to the low offer. The procedures at 25.106(b)(2) and 25.106(c)(2) do not apply.

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16. Amend section 25.503 by—

a. Removing from paragraph (a)(1) the word “Subpart” and adding the word “subpart” in its place; and

b. Adding paragraph (d).

The addition reads as follows:

25.503 Group offers.

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(d) If no trade agreement applies to a solicitation and the solicitation specifies that award will be made only on a group of line items or all line items contained in the solicitation, determine the category of end products (*i.e.*, domestic or foreign) on the basis of each line item, but determine whether to apply an evaluation factor on the basis of the group of items (*see* 25.504-4(c), Example 3).

(1) If the proposed price of domestic end products exceeds 50 percent of the total proposed price of the group, evaluate the entire group as a domestic offer. Evaluate all other groups as foreign offers.

(2) Apply the evaluation factor to the entire group in accordance with 25.502, except where 25.502(c)(4) applies and the evaluated price of the low offer remains less than the lowest domestic offer. Where the evaluated price of the low offer remains less than the lowest domestic offer, treat as a domestic offer any group where the proposed price of end products with a domestic content of at least 55 percent exceeds 50 percent of the total proposed price of the group.

(3) Apply the evaluation factor to the entire group in accordance with 25.502(c)(4).

17.Amend section 25.504-1 by—

- a. In the table in paragraph (a)(1), revising the entry for “Offer C”;
- b. Revising paragraph (a)(2); and
- c. Adding paragraph (c).

The revision and addition read as follows:

25.504-1 Buy American statute.

(a)(1) * * *

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	*	*	*

Offer C \$10,100 U.S.-made end product (not domestic), small business.

(2) *Analysis.* This acquisition is for end products for use in the United States and is set aside for small business concerns. The Buy American statute applies. Since the acquisition value is less than \$25,000 and the acquisition is set aside, none of the trade agreements apply. Perform the steps in 25.502(a). Offer C is of 50 percent domestic content, therefore Offer C is evaluated as a foreign end product, because it is the product of a small business but is not a domestic end product (*see* 25.502(c)(4)). Since Offer B is a domestic offer, apply the 30 percent factor to Offer C (*see* 25.106(b)(2)). The resulting evaluated price of \$13,130 remains lower than Offer B. The cost of Offer B is therefore unreasonable (*see* 25.106(b)(1)(ii)). The 25.106(b)(2) procedures do not apply. Award on Offer C at \$10,100 (*see* 25.502(c)(4)(i)).

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(c)(1) *Example 3.*

Offer A	\$14,000	Domestic end product (complies with the required domestic content), small business.
Offer B	12,500	U.S.-made end product (not domestic, exceeds 55% domestic content), small business.
Offer C	10,100	U.S.-made end product (not domestic, with less than 55% domestic content), small business.

(2) *Analysis.* This acquisition is for end products for use in the United States and is set aside for small business concerns. The Buy American statute applies. Since the acquisition value is less than \$25,000 and the acquisition is set aside, none of the trade agreements apply. Perform the steps in 25.502(a). Offers B and C are initially evaluated as foreign end products, because they are the products of small businesses but are not domestic end products (*see* 25.502(c)(4)). Offer C is the low offer. After applying the 30 percent factor, the evaluated price of Offer C is \$13,130. The resulting evaluated price of \$13,130 remains lower than Offer A. The cost of Offer A is therefore

unreasonable. Offer B is then treated as a domestic offer, because it is for a U.S.-made end product that exceeds 55 percent domestic content (*see* 25.106(b)(2)). Offer B is determined reasonable because it is lower than the \$13,130 evaluated price of Offer C. Award on Offer B at \$12,500.

18. Amend section 25.504-4 by adding paragraph (c) to read as follows:

25.504-4 Group award basis.

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(c) *Example 3.*

Item	Offers		
	A	B	C
1	DO = \$17,800	FO (>55%) = \$16,000	FO (<55%) = \$11,200.
2	FO (>55%) = \$9,000	FO (>55%) = \$8,500	DO = \$10,200.
3	FO (<55%) = \$11,200	FO (>55%) = \$12,000	FO (<55%) = \$11,000.
4	DO = \$10,000	DO = \$9,000	FO (<55%) = \$6,400.
Total	\$48,000	\$45,500	\$38,800.

Key:

DO = Domestic end product (complies with the required domestic content).

FO > 55% = Foreign end product with domestic content exceeding 55%.

FO < 55% = Foreign end product with domestic content of 55% or less.



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Problem: The solicitation specifies award on a group basis. Assume only the Buy American statute applies (*i.e.*, no trade agreements apply) and the acquisition cannot be set aside for small business concerns. All offerors are large businesses.

Analysis: (see 25.503(d))

STEP 1: Determine which of the offers are domestic (see 25.503(d)(1)):

	Domestic (percent)	Determination
A	\$17,800 (Offer A1) + \$10,000 (Offer A4) = \$27,800 \$27,800/\$48,000 (Offer A Total) = 58%	Domestic.
B	\$9,000 (Offer B4)/\$45,500 (Offer B Total) = 19.8%	Foreign.
C	\$10,200 (Offer C2)/\$38,800 (Offer C Total) = 26.3%	Foreign.

STEP 2: Determine which offer, domestic or foreign, is the low offer. If the low offer is a foreign offer, apply the evaluation factor (see 25.503(d)(2)). The low offer (Offer C) is a foreign offer. Therefore, apply the factor to the low offer. Addition of the 20 percent factor (use 30 percent if Offer A is a small business) to Offer C yields an evaluated price of \$46,560 (\$38,800 + 20 percent). Offer C remains the low offer.

STEP 3: Determine if there is a foreign offer that could be treated as a domestic offer (see 25.106(b)(2) and 25.503(d)(2)).

	Amount of domestic content (percent)	Determination
A	N/A	N/A.
B	<div>\$9,000 (Offer B4)/\$45,500 (Offer B Total) \$ = 19.8% is domestic</div> <div>AND</div> <div>\$16,000 (Offer B1) + \$8,500 (Offer B2) + \$12,000 (Offer B3) = \$36,500</div> <div>\$36,500/\$45,500 (Offer B Total) = 80.2% can be treated as domestic</div> <div>19.8% + 80.2% = 100% is domestic or can be treated as domestic</div>	Can be treated as domestic.
C	\$10,200 (Offer C2)/\$38,800 (Offer C Total) = 26.3% is domestic	Foreign.

STEP 4: If there is a foreign offer that could be treated as a domestic offer, compare the evaluated price of the low offer to the price of the offer treated as domestic (see 25.503(d)(3)). Offer B can be treated as a domestic offer (\$45,500). The evaluated price of the low offer (Offer C) is \$46,560. Award on Offer B.

19.Amend section 25.1101 by—

- a. Redesignating paragraphs (a)(1)(i) through (iii) as paragraphs (a)(1)(i)(A) through (C);
- b. Redesignating paragraph (a)(1) introductory text as paragraph (a)(1)(i); and
- c. Adding paragraphs (a)(1)(ii) and (b)(1)(v).

The additions read as follows:

25.1101 Acquisition of supplies.

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(a)(1) * * *

(ii) The contracting officer shall use the clause with its Alternate I to reflect the domestic content threshold that will apply to the entire period of performance, when the senior procurement executive allows for application of an alternate domestic content test for the contract in accordance with 25.101(d). For contracts that the contracting officer estimates will be awarded in calendar year 2022 or 2023, the contracting officer shall insert “60” in paragraph (1)(ii)(A) of the definition of “domestic end product.” For contracts that the contracting officer estimates will be awarded in calendar year 2024, 2025, 2026, 2027, or 2028, the contracting officer shall insert “65”. For contracts that the contracting officer estimates will be awarded after calendar year 2028 the contracting officer shall insert “75”.

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(b)(1) * * *

(v) The contracting officer shall use the clause with its Alternate IV to reflect the domestic content threshold that will apply to the entire period of performance, when the senior procurement executive allows for application of an alternate domestic content test for the contract in accordance with 25.102(d). For contracts that the contracting officer estimates will be awarded in calendar year 2022 or 2023, the contracting officer shall insert “60” in paragraph (1)(ii)(A) of the definition of “domestic end product.” For contracts that the contracting officer estimates will be awarded in calendar year 2024, 2025, 2026, 2027, or 2028, the contracting officer shall insert “65”. For contracts that the contracting officer estimates will be awarded after calendar year 2028 the contracting officer shall insert “75”.

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20. Amend section 25.1102 by adding paragraphs (a)(3) and (c)(4) to read as follows:

25.1102 Acquisition of construction.

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(a) * * *

(3) The contracting officer shall use the clause with its Alternate I to reflect the domestic content threshold that will apply to the entire period of performance, when the senior procurement executive allows for application of an alternate domestic content test for the contract in accordance with 25.201(c). For contracts that the contracting officer estimates will be awarded in calendar year 2022 or 2023, the contracting officer shall insert “60” in paragraph (1)(ii)(A) of the definition of “domestic construction material.” For contracts that the contracting officer estimates will be awarded in calendar year 2024, 2025, 2026, 2027, or 2028, the contracting officer shall insert “65”. For contracts that the contracting officer estimates will be awarded after calendar year 2028 the contracting officer shall insert “75”.

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(c) * * *

(4) The contracting officer shall use the clause with its Alternate II to reflect the domestic content threshold that will apply to the entire period of performance, when the senior procurement executive allows for application of an alternate domestic content test for the contract in accordance with 25.201(c). For contracts that the contracting officer estimates will be awarded in calendar year 2022 or 2023, the contracting officer shall insert “60” in paragraph (1)(ii)(A) of the definition of “domestic construction material.” For contracts that the contracting officer estimates will be awarded in calendar year 2024, 2025, 2026, 2027, or 2028, the contracting officer shall insert “65”. For contracts that the contracting officer estimates will be awarded after calendar year 2028 the contracting officer shall insert “75”.

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PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

21. Amend section 52.212-3 by—

a. Revising the date of the provision;

- b.** In paragraph (f)(1)(i) removing the word “product” and adding the phrase “product and that each domestic end product listed in paragraph (f)(3) of this provision contains a critical component” in its place;
- c.** Adding two sentences to the end of paragraph (f)(1)(ii);
- d.** Redesignating paragraph (f)(1)(iii) as paragraph (f)(1)(iv) and adding a new paragraph (f)(1)(iii);
- e.** Removing from the newly redesignated paragraph (f)(1)(iv) the phrase “The terms “domestic end product,” ” and adding the phrase “The terms “commercially available off-the-shelf (COTS) item,” “critical component,” “domestic end product,” ” in its place;
- f.** Revising the table in paragraph (f)(2);
- g.** Redesignating paragraph (f)(3) as paragraph (f)(4) and adding a new paragraph (f)(3);
- h.** In the newly redesignated paragraph (f)(4) removing the word “Part” and adding the word “part” in its place;
- i.** In paragraph (g)(1)(i)(A) removing second occurrence of the word “product” and adding the phrase “product and that each domestic end product listed in paragraph (g)(1)(iv) of this provision contains a critical component” in its place;
- j.** In paragraph (g)(1)(i)(B) removing the phrases “Peruvian end product,” “domestic end product,” ” and adding in their places the phrases “Peruvian end product,” “commercially available off-the-shelf (COTS) item,” “critical component,” “domestic end product,” ”;
- k.** Adding two sentences at the end of paragraph (g)(1)(iii) introductory text and revising the table;
- l.** Redesignating paragraph (g)(1)(iv) as paragraph (g)(1)(v) and adding a new paragraph (g)(1)(iv); and
- m.** In the newly redesignated paragraph (g)(1)(v) removing the word “Part” and adding the word “part” in its place.

The revisions and additions read as follows:

52.212-3

Offeror Representations and Certifications—Commercial Products and Commercial Services.

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Offeror Representations and Certifications—Commercial Products and Commercial Services (OCT 2022)

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(ii) * * * For those foreign end products that do not consist wholly or predominantly of iron or steel or a combination of both, the Offeror shall also indicate whether these foreign end products exceed 55 percent domestic content, except for those that are COTS items. If the percentage of the domestic content is unknown, select “no”.

(iii) The Offeror shall separately list the line item numbers of domestic end products that contain a critical component (see FAR 25.105).

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(2) * * *

Line Item No.	Country of origin	Exceeds 55% domestic content (yes/no)

[List as necessary]

(3) Domestic end products containing a critical component:

Line Item No. ____

[List as necessary]

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(g)(1) * * *

(iii) * * * For those foreign end products that do not consist wholly or predominantly of iron or steel or a combination of both, the Offeror shall also indicate whether these foreign end products exceed 55 percent domestic content, except for those that are COTS items. If the percentage of the domestic content is unknown, select “no”.

Other Foreign End Products:

Line Item No.	Country of origin	Exceeds 55% domestic content (yes/no)

[List as necessary]

(iv) The Offeror shall list the line item numbers of domestic end products that contain a critical component (see FAR 25.105).

Line Item No. ____

[List as necessary]

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22. Amend section 52.212-5 by—

- a.** Revising the date of the clause;
- b.** Redesignating paragraph (b)(48) as paragraph (b)(48)(i) and removing from the newly redesignated paragraph (b)(48)(i) the date “(NOV 2021)” and adding “(OCT 2022)” in its place;
- c.** Adding paragraph (b)(48)(ii);
- d.** Removing from paragraph (b)(49)(i) the date “(NOV 2021)” and adding “(OCT 2022)” in its place; and
- e.** Adding paragraph (b)(49)(v).

The revision and additions read as follows:

52.212-5 Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Products and Commercial Services.

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Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Products and Commercial Services (OCT 2022)

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(b) * * *

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___ (ii) Alternate I (OCT 2022) of 52.225-1.

___ (49) * * *

___ (v) Alternate IV (OCT 2022) of 52.225-3.

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23. Amend section 52.213-4 by—

- a.** Revising the date of the clause;
- b.** Redesignating paragraphs (b)(1)(xvii)(A) and (B) as paragraphs (b)(1)(xvii)(A)(1) and (2) and redesignating paragraph (b)(1)(xvii) introductory text as paragraph (b)(1)(xvii)(A) and;
- c.** In the newly redesignated paragraph (b)(1)(xvii)(A) removing the date “(NOV 2021)” and adding “(OCT 2022)” in its place; and
- d.** Adding paragraph (b)(1)(xvii)(B);

The revision and addition read as follows:

52.213-4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Products and Commercial Services).

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Terms and Conditions—Simplified Acquisitions (Other Than Commercial Products and Commercial Services) (OCT 2022)

(b) * * *

(1) * *

(xvii) * * *

(B) *Alternate I* (OCT 2022) (Applies if the Contracting Officer has filled in the domestic content threshold below, which will apply to the entire contract period of performance. Substitute the following sentence for the first sentence of paragraph (1)(ii)(A) of the definition of *domestic end product* in paragraph (a) of 52.225-1:

(A) The cost of its components mined, produced, or manufactured in the United States exceeds ____ percent of the cost of all its components. [*Contracting officer to insert the percentage per instructions at 13.302-5(d)(4).*]

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24. Amend section 52.225-1 by—

- a.** Revising the date of the clause;
- b.** Adding in alphabetical order a definition for “Critical component” in paragraph (a);
- c.** In paragraph (a), in the definition of “Domestic end product” revising the first sentence of paragraph (1)(ii)(A); and
- d.** Adding Alternate I to the end of the section.

The revisions and additions read as follows:

52.225-1 Buy American—Supplies.

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Buy American—Supplies (OCT 2022)

(a) * * *

Critical component means a component that is mined, produced, or manufactured in the United States and deemed critical to the U.S. supply chain. The list of critical components is at FAR 25.105.

Domestic end product * * *

(1) * * *

(ii) * * *

(A) The cost of its components mined, produced, or manufactured in the United States exceeds 60 percent of the cost of all its components, except that the percentage will be 65 percent for items delivered in calendar years 2024 through 2028 and 75 percent for items delivered starting in calendar year 2029. * * *

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Alternate I (OCT 2022). As prescribed in 25.1101(a)(1)(ii) substitute the following sentence for the first sentence of paragraph (1)(ii)(A) of the definition of “domestic end product” in paragraph (a):

(A) The cost of its components mined, produced, or manufactured in the United States exceeds ____ percent of the cost of all its components. [*Contracting officer to insert the percentage.*]

25. Amend section 52.225-2 by—

- a.** Revising the date of the provision;
- b.** Revising paragraph (a)(1);
- c.** Adding two sentences at the end of paragraph (a)(2);
- d.** Redesignating paragraph (a)(3) as paragraph (a)(4) and adding a new paragraph (a)(3);
- e.** In newly redesignated paragraph (a)(4) removing the phrase “The terms” and adding the phrase “The terms “commercially available off-the-shelf (COTS) item,” “critical component,” ” in its place;
- f.** Revising the table in paragraph (b);
- g.** Redesignating paragraph (c) as paragraph (d) and adding a new paragraph (c).

The revisions and additions read as follows:

52.225-2 Buy American Certificate.

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Buy American Certificate (OCT 2022)

(a)(1) The Offeror certifies that each end product, except those listed in paragraph (b) of this provision, is a domestic end product and that each domestic end product listed in paragraph (c) of this provision contains a critical component.

(2) * * * For those foreign end products that do not consist wholly or predominantly of iron or steel or a combination of both, the Offeror shall also indicate whether these foreign end products exceed 55 percent domestic content, except for those that are COTS items. If the percentage of the domestic content is unknown, select “no”.

(3) The Offeror shall separately list the line item numbers of domestic end products that contain a critical component (see FAR 25.105).

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(b) * * *

Line Item No.	Country of origin	Exceeds 55% domestic content (yes/no)

[List as necessary]

(c) Domestic end products containing a critical component:

Line Item No. ____

[List as necessary]

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26.Amend section 52.225-3 by—

- a. Revising the date of the clause;
- b. Adding in alphabetical order a definition for “Critical component” in paragraph (a);
- c. In paragraph (a), in the definition “Domestic end product” revising the first sentence of paragraph (1)(ii)(A); and
- d. Adding Alternate IV.

The revisions and additions read as follows:

52.225-3 Buy American—Free Trade Agreements—Israeli Trade Act.

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Buy American—Free Trade Agreements—Israeli Trade Act (OCT 2022)

(a) * * *

Critical component means a component that is mined, produced, or manufactured in the United States and deemed critical to the U.S. supply chain. The list of critical components is at FAR 25.105.

Domestic end product * * *

(1) * * *

(ii) * * *

(A) The cost of its components mined, produced, or manufactured in the United States exceeds 60 percent of the cost of all its components, except that the percentage will be 65 percent for items delivered in calendar years 2024 through 2028 and 75 □ percent for items delivered starting in calendar year 2029. * * *

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Alternate IV (OCT 2022). As prescribed in 25.1101(b)(1)(v) substitute the following sentence for the first sentence of paragraph (1)(ii)(A) of the definition of *domestic end product* in paragraph (a):

(A) The cost of its components mined, produced, or manufactured in the United States exceeds ____ percent of the cost of all its components. [*Contracting officer to insert the percentage.*]

27. Amend section 52.225-4 by—

- a.** Revising the date of the provision;
- b.** Revising paragraph (a)(1);
- c.** In paragraph (a)(2) removing the phrases “Peruvian end product,” “domestic end product,” and adding in their places “Peruvian end product,” “commercially available off-the-shelf (COTS) item,” “critical component,” “domestic end product,”;
- d.** Redesignating paragraph (c) as paragraph (c)(1) and adding two sentences at the end of newly designated paragraph (c)(1);
- e.** Revising the table in newly designated paragraph (c)(1); and
- f.** Adding paragraph (c)(2).

The revisions and additions read as follows:

52.225-4 Buy American—Free Trade Agreements—Israeli Trade Act Certificate.

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Buy American—Free Trade Agreements—Israeli Trade Act Certificate (OCT 2022)

(a)(1) The Offeror certifies that each end product, except those listed in paragraph (b) or (c)(1) of this provision, is a domestic end product and that each domestic end product listed in paragraph (c)(2) of this provision contains a critical component.

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(c)(1) * * * For those foreign end products that do not consist wholly or predominantly of iron or steel or a combination of both, the Offeror shall also indicate whether these foreign end products exceed 55 percent domestic content, except for those that are COTS items. If the percentage of the domestic content is unknown, select “no”.

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Line Item No.	Country of origin	Exceeds 55% domestic content (yes/no)

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(2) The Offeror shall list the line item numbers of domestic end products that contain a critical component (see FAR 25.105).

Line Item No. ____

[List as necessary]

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28.Amend section 52.225-9 by—

- a. Revising the date of the clause;
- b. Adding in alphabetical order definitions for “Critical component” and “Critical item”;
- c. In the definition “Domestic construction material” revising the first sentence of paragraph (1)(ii)(A);
- d. Revising paragraph (b)(3)(i); and
- e. Adding Alternate I to the end of the section.

The revisions and additions read as follows:

52.225-9 Buy American—Construction Materials.

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Buy American—Construction Materials (OCT 2022)

(a) * * *

Critical component means a component that is mined, produced, or manufactured in the United States and deemed critical to the U.S. supply chain. The list of critical components is at FAR 25.105.

Critical item means a domestic construction material or domestic end product that is deemed critical to U.S. supply chain resiliency. The list of critical items is at FAR 25.105.

Domestic construction material * * *

(1) * * *

(ii) * * *

(A) The cost of its components mined, produced, or manufactured in the United States exceeds 60 percent of the cost of all its components, except that the percentage will be 65 percent for items delivered in calendar years 2024 through 2028 and 75 percent for items delivered starting in calendar year 2029. * * *

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(b) * * *

(3) * * *

(i) The cost of domestic construction material would be unreasonable.

(A) *For domestic construction material that is not a critical item or does not contain critical components.*

(1) The cost of a particular domestic construction material subject to the requirements of the Buy American statute is unreasonable when the cost of such material exceeds the cost of foreign material by more than 20 percent;

(2) For construction material that is not a COTS item and does not consist wholly or predominantly of iron or steel or a combination of both, if the cost of a particular domestic construction material is determined to be unreasonable or there is no domestic offer received, and the low offer is for foreign construction material that is manufactured in the United States and does not exceed 55 percent domestic content, the Contracting Officer will treat the lowest offer of foreign construction material that exceeds 55 percent domestic content as a domestic offer and determine whether the cost of that offer is unreasonable by applying the evaluation factor listed in paragraph (b)(3)(i)(A)(1) of this clause.

(3) The procedures in paragraph (b)(3)(i)(A)(2) of this clause will no longer apply as of January 1, 2030.

(B) *For domestic construction material that is a critical item or contains critical components.* (1) The cost of a particular domestic construction material that is a critical item or contains critical components, subject to the requirements of the Buy American statute, is unreasonable when the cost of such material exceeds the cost of foreign material by more than 20 percent plus the additional preference factor identified for the critical item or construction material containing critical components listed at FAR 25.105.

(2) For construction material that does not consist wholly or predominantly of iron or steel or a combination of both, if the cost of a particular domestic construction material is determined to be unreasonable or there is no domestic offer received, and the low offer is for foreign construction material that does not exceed 55 percent domestic content, the Contracting Officer will treat the lowest foreign offer of construction material that is manufactured in the United States and exceeds 55 percent domestic content as a domestic offer, and determine whether the cost of that offer is unreasonable by applying the evaluation factor listed in paragraph (b)(3)(i)(B)(1) of this clause.

(3) The procedures in paragraph (b)(3)(i)(B)(2) of this clause will no longer apply as of January 1, 2030.

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Alternate I (OCT 2022). As prescribed in 25.1102(a)(3), substitute the following sentence for the first sentence in paragraph (1)(ii)(A) of the definition of “domestic construction material” in paragraph (a):

(A) The cost of its components mined, produced, or manufactured in the United States exceeds ____ percent of the cost of all its components. [*Contracting officer to insert the percentage.*]

29. Amend section 52.225-11 by—

- a.** Revising the date of the clause;
- b.** Adding in alphabetical order definitions for “Critical component” and “Critical item” in paragraph (a);
- c.** In paragraph (a), in the definition “Domestic construction material” □ revising the first sentence of paragraph (1)(ii)(A);
- d.** Revising paragraph (b)(4)(i); and
- e.** Adding Alternate II.

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The revisions and additions read as follows:

52.225-11 Buy American—Construction Materials Under Trade Agreements.

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Buy American—Construction Materials Under Trade Agreements (OCT 2022)

(a) * * *

Critical component means a component that is mined, produced, or manufactured in the United States and deemed critical to the U.S. supply chain. The list of critical components is at FAR 25.105.

Critical item means a domestic construction material or domestic end product that is deemed critical to U.S. supply chain resiliency. The list of critical items is at FAR 25.105.

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Domestic construction material * * *

(1) * * *

(ii) * * *

(A) The cost of its components mined, produced, or manufactured in the United States exceeds 60 percent of the cost of all its components, except that the percentage will be 65 percent for items delivered in calendar years 2024 through 2028 and 75 percent for items delivered starting in calendar year 2029. * * *

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(b) * * *

(4) * * *

(i) The cost of domestic construction material would be unreasonable.

(A) *For domestic construction material that is not a critical item or does not contain critical components.* (1) The cost of a particular domestic construction material subject to the restrictions of the Buy American statute is unreasonable when the cost of such material exceeds the cost of foreign material by more than 20 percent;

(2) For construction material that is not a COTS item and does not consist wholly or predominantly of iron or steel or a combination of both, if the cost of a particular domestic construction material is determined to be unreasonable or there is no domestic offer received, and the low offer is for foreign construction material that does not exceed 55 percent domestic content, the Contracting Officer will treat the lowest offer of foreign construction material that is manufactured in the United States and exceeds 55 percent domestic content as a domestic offer and determine whether the cost of that offer is unreasonable by applying the evaluation factor listed in paragraph (b)(4)(i)(A)(1) of this clause.

(3) The procedures in paragraph (b)(4)(i)(A)(2) of this clause will no longer apply as of January 1, 2030.

(B) *For domestic construction material that is a critical item or contains critical components.* (1) The cost of a particular domestic construction material that is a critical item or contains critical components, subject to the requirements of the Buy American statute, is unreasonable when the cost of such material exceeds the cost of foreign material by more than 20 percent plus the additional preference factor identified for the critical item or construction material containing critical components listed at FAR 25.105.

(2) For construction material that does not consist wholly or predominantly of iron or steel or a combination of both, if the cost of a particular domestic construction material is determined to be unreasonable or there is no domestic offer received, and the low offer is for foreign construction material that does not exceed 55 percent domestic content, the Contracting Officer will treat the lowest offer of foreign construction material that is manufactured in the United States and exceeds 55 percent domestic content as a domestic offer, and determine whether the cost of that offer is unreasonable by applying the evaluation factor listed in paragraph (b)(4)(i)(B)(1) of this clause.

(3) The procedures in paragraph (b)(4)(i)(B)(2) of this clause will no longer apply as of January 1, 2030.

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Alternate II (OCT 2022). As prescribed in 25.1102(c)(4) substitute the following sentence for the first sentence of paragraph (1)(ii)(A) of the definition of *domestic construction material* in paragraph (a):

(A) The cost of its components mined, produced, or manufactured in the United States exceeds ____ percent of the cost of all its components. [*Contracting officer to insert the percentage.*]

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