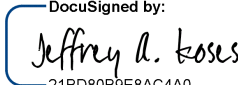


November 15, 2021

MEMORANDUM FOR CHIEF ACQUISITION OFFICERS
SENIOR PROCUREMENT EXECUTIVES
SENIOR ACCOUNTABLE OFFICIALS
FOR DOMESTIC SOURCING
DEFENSE ACQUISITION REGULATIONS COUNCIL
CIVILIAN AGENCY ACQUISITION COUNCIL

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Date: 2021.11.15 15:59:46 -05'00'
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SUBJECT: Issuance of Agency Deviations to Implement Requirements Addressing the Use
of Nonavailability Waivers Under E.O. 14005

The purpose of this memorandum is to provide agencies that award contracts under the Federal Acquisition Regulation (FAR) with direction to promote consistent application of guidance in the memorandum [Improving the Transparency of Made in America Waivers](#) (“the waiver transparency memorandum”), which was issued by the Office of Management and Budget’s Made in America Office (MIAO) and Office of Federal Procurement Policy (OFPP) on October 26, 2021 to address the use of nonavailability waivers under [Executive Order 14005](#), [Ensuring the Future is Made in All of America by All of America’s Workers](#) (“the order”).

Background

The order and OMB Memorandum M-21-26, [Increasing Opportunities for Domestic Sourcing and Reducing the Need for Waivers from Made in America Laws](#), require a centralized strategic waiver review process managed by MIAO to provide sellers of U.S.-made products

with greater insight of the needs of the Federal marketplace and help MIAO and agencies more effectively close gaps in U.S. domestic supply chains. The waiver transparency memorandum directs that an agency shall not issue nonavailability procurement waivers unless the agency has: (1) in accordance with agency protocols, submitted a proposed waiver digitally via [SAM.gov](https://sam.gov) for MIAO review and posting on the [MadeinAmerica.gov](https://madeinamerica.gov) portal; and (2) received confirmation that MIAO has completed its review or waived review of the proposed waiver.

The waiver transparency memorandum provides exceptions to the requirement for submitting preaward waivers, including: (1) where the acquisition is conducted under reduced competition due to urgency (see FAR 6.302-2 and 13.106-1(b)), or the agency is otherwise required by law to act more quickly than the review procedures allow; or (2) where the required products have been determined to be nonavailable on a class basis and are listed in FAR 25.104, Nonavailable articles. The waiver transparency memorandum made clear that these requirements apply beginning November 16, 2021, for agencies subject to the Chief Financial Officers Act (CFO Act),¹ and January 1, 2022, for all other agencies covered by the order.²

The waiver transparency memorandum also directs the FAR Council to provide appropriate policy direction to acquisition offices by recommending that agencies exercise their authority under FAR Subpart 1.4, Deviations from the FAR, as may be necessary, to promote consistent and immediate application of the guidance in the waiver transparency memorandum while regulatory changes are being considered.

Guidance

The FAR Council has developed the attached FAR text to support agencies in meeting the deadlines set forth in the waiver transparency memorandum. Contracting officers should follow the direction for use of the text set forth in the deviations issued by their respective agencies.

Agencies are reminded of the following points as they develop and issue their deviations:

1. No exception from posting proposed waivers on MadeinAmerica.gov based on lack of offers for domestic end products. The order and the waiver transparency memorandum require an agency to submit a proposed waiver for MIAO review even if competition is expected to yield, or yields, no offers of domestic end products. Greater awareness of nonavailable domestic products and materials along with an explanation of market research and outreach conducted to identify domestic sources will help MIAO and potential future sources to understand and close gaps in U.S. supply chains. For this reason, the FAR text of the deviation deletes FAR 25.103(b)(3), which excused agencies from including in the contract file a written determination of nonavailability where competition resulted in no offers of domestic end products.

¹31 USC § 901.

² Executive Order 14005 applies to an “agency” as defined in 44 U.S.C. § 3502(l) that is not an “independent regulatory agency” as defined in 44 U.S.C. § 3505(5).

2. Maximizing the impact of the price preference. The waiver transparency memorandum states that agencies should include the appropriate Buy American FAR clause/provision, even when market research suggests that there are no apparent domestic end products. This additional step, which is reflected in the text changes for Subpart 25.11, will ensure that the preference can be readily applied if a domestic source was missed during market research and submits an offer in response to the solicitation.

3. Civilian agency coordination of deviations. Civilian agencies that adopt the attached clause language without change in their deviations will be presumed to have consulted with the Chair of the Civilian Agency Acquisition Council (CAAC) required by FAR 1.404(a)(1). However, if a civilian agency intends to use FAR text different than the deviated FAR text provided, the agency must consult with the CAAC Chair, William Clark, who will consult with OFPP and MIAO to ensure consistency with Administration policy. Any such request must be emailed to william.clark@gsa.gov.

Once processed, agencies are requested to share the deviation widely among their workforces to ensure full awareness of, and compliance with, the order. Civilian agencies should furnish a copy of their approved class deviations to the FAR Secretariat, General Services Administration, by emailing the deviation to GSAREgSec@gsa.gov.

4. Length of deviation. The FAR Council intends to open a case to make appropriate amendments in the FAR to reflect the requirements of the order. Agencies are encouraged to make their deviations effective until the FAR is amended or the deviation is otherwise rescinded by the agency.

Attachment

ATTACHMENT - Deviation to FAR Text

Baseline is FAC 2021-07, effective September 10, 2021.

Changes to baseline shown as **[bolded, bracketed additions]** and ~~struckthrough deletions~~.

FAR text unchanged shown as asterisks.

PART 25—FOREIGN ACQUISITION

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Subpart 25.1—Buy American—Supplies

* * * * *

25.103 Exceptions.

When one of the following exceptions applies, the contracting officer may acquire a foreign end product without regard to the restrictions of the Buy American statute:

* * * * *

(b) *Nonavailability*. The Buy American statute does not apply with respect to articles, materials, or supplies if articles, materials, or supplies of the class or kind to be acquired, either as end items or components, are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.

(1) *Class [nonavailability] determinations.* * * * * *

(2) *Individual [nonavailability waiver] determinations.*

(i) The head of the contracting activity **[shall first]** ~~may~~ make a determination that an article, material, or supply is not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality **[(i.e., individual nonavailability waiver determinations) in accordance with agency procedures. Prior to award, the agency shall comply with the procedures in paragraph (b)(2)(iii) of this section].**

(ii) If the contracting officer considers that the nonavailability of an article is likely to affect future acquisitions, the contracting officer may submit a copy of the determination and

supporting documentation to the appropriate council identified in 1.201-1, in accordance with agency procedures, for possible addition to the list in 25.104.

[(iii) Pursuant to the policy in OMB Memorandum “Improving the Transparency of Made in America Waivers,” dated October 26, 2021, contracting officers shall post a proposed individual nonavailability waiver determination to MadeinAmerica.gov via SAM.gov for review, unless an exception applies. The contracting officer shall not make an award until the contracting officer has received confirmation that the Office of Management and Budget’s Made in America Office (MIAO) has completed its review of the proposed nonavailability waiver determination; MIAO has waived the requirement for a review; or an exception to posting the proposed nonavailability waiver determination applies. The agency shall make the final determination on whether to grant a waiver.

(A) Contracting officers shall post a proposed individual nonavailability waiver determination to MadeinAmerica.gov via SAM.gov and input the required information into a digital waiver. The digital waiver requires the standardized nonavailability waiver determination information listed in the Attachment to Office of Management and Budget (OMB) Memorandum M-21-26, dated June 11, 2021 and additional information, such as the proposed duration of the nonavailability waiver determination and whether the waiver determination is for an indefinite-delivery type contract (i.e., a “multi-procurement waiver” in the digital form) or for a contract that is not an indefinite-delivery type contract (i.e., an “individual waiver” in the digital form), as implemented through the Made in America Digital Waiver Portal User Guide accessible via SAM.gov.

(B) Unless waived, all proposed nonavailability waiver determination information posted using the digital waiver will be reviewed by MIAO. Certain information from the nonavailability waiver determination will be available to the public at MadeinAmerica.gov immediately upon posting of the proposed waiver and prior to review by MIAO. The digital waiver and the user guide identify for the contracting officer those fields that will be made public and those fields that are for government use only (not public). Contracting officers shall not enter source selection information (see 2.101 and 3.104) in any field. Contracting officers must not enter in the public fields any information that cannot be made public.

(C) MIAO plans to complete the majority of nonavailability waiver determination reviews within 3-7 business days, but not more than 15 business days from submission to OMB. Waivers involving certain small dollar transactions (e.g., over the micro-purchase threshold but less than \$25,000), will generally be reviewed by MIAO rapidly, but waivers for larger and more complex acquisitions, or waivers implicating critical supply chains, may take the full 15 business days. Contracting officers should consider the timeframes above for acquisition planning.

(D) Contracting officers are not required to post proposed individual nonavailability waiver determinations to MadeinAmerica.gov via SAM.gov prior to waiver determination issuance when –

(1) The acquisition is conducted under reduced competition due to urgency (see FAR 6.302-2 and 13.106-1(b)) or where the agency is obligated by law to act more quickly than the review procedures established in this section allow. In these instances, contracting officers shall report such waivers using information found in the digital waiver portal accessed via SAM.gov within 30 days of award. MIAO will make relevant information available to the public on MadeinAmerica.gov but will not make a determination on such waivers; or

(2) The acquisition is for products that have been determined to be nonavailable on a class basis and are listed in 25.104.]

~~(3) A written determination is not required if all of the following conditions are present:~~

~~(i) The acquisition was conducted through use of full and open competition.~~

~~(ii) The acquisition was synopsized in accordance with 5.201.~~

~~(iii) No offer for a domestic end product was received.~~

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Subpart 25.2 - Buy American-Construction Materials

* * * * *

25.202 Exceptions.

(a) When one of the following exceptions applies, the contracting officer may allow the contractor to acquire foreign construction materials without regard to the restrictions of the Buy American statute:

(1) * * *

(2) Nonavailability. The head of the contracting activity may determine that a particular construction material is not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality. The **[nonavailability waiver]** determinations of the articles listed at 25.104(a) and the procedures at 25.103(b)(~~4~~) also apply if any of those articles are acquired as construction materials.

* * * * *

Subpart 25.5 - Evaluating Foreign Offers-Supply Contracts

* * * * *

25.502 Application.

(a) * * *

(b) For acquisitions covered by the WTO GPA (see subpart 25.4)-

(1) * * *

(2) * * *

(3) If there were no offers of U.S.-made or designated country end products, make a nonavailability **[waiver]** determination (see **[procedures at]** 25.103(b)(~~2~~)) and award on the low offer (see 25.403(c)).

(c) For acquisitions not covered by the WTO GPA, but subject to the Buy American statute (an FTA or the Israeli Trade Act also may apply), the following applies:

(1) If the low offer is a domestic offer or an eligible offer under an FTA or the Israeli Trade Act, award on that offer.

(2) If the low offer is a noneligible offer and there were no domestic offers (see **[procedures at]** 25.103(b)(~~3~~)), award on the low offer. * * *

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Subpart 25.11 - Solicitation Provisions and Contract Clauses

25.1101 Acquisition of supplies.

The following provisions and clauses apply to the acquisition of supplies and the acquisition of services involving the furnishing of supplies.

(a) (1) Insert the clause at 52.225-1, Buy American-Supplies, in solicitations and contracts with a value exceeding the micro-purchase threshold but not exceeding \$25,000; and in solicitations

and contracts with a value exceeding \$25,000, if none of the clauses prescribed in paragraphs (b) and (c) of this section apply, except if-

(i) The solicitation is restricted to domestic end products in accordance with subpart 6.3;

(ii) The acquisition is for supplies for use within the United States and an exception to the Buy American statute applies (e.g., ~~nonavailability~~, public interest, or information technology that is a commercial item)], **other than individual nonavailability waiver determinations (see 25.103(b)(2))**]; or

(iii) The acquisition is for supplies for use outside the United States.

(2) Insert the provision at 52.225-2, Buy American Certificate, in solicitations containing the clause at 52.225-1.

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