

## **Reciprocal Defense Procurement Memoranda of Understanding and the Buy American Act**

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### **Background on Reciprocal Defense Procurement Memoranda of Understanding**

#### **Background:**

In general, Reciprocal Defense Procurement Memoranda of Understanding (“RDP MOUs”) are binding international agreements, which create obligations for the parties thereto. The Secretary of Defense (or his/her delegee) is authorized by law to negotiate and enter into RDP MOUs with foreign countries. The law provides that RDP MOUs are agreements that relate to research, development, or production of defense equipment, or to the reciprocal procurement of defense items. The U.S. Government has also indicated that RDP MOUs have a goal of promoting rationalization, standardization, and interoperability of defense equipment with Allies and friendly governments, and this has been reflected in the text of more recent RDP MOUs. RDP MOUs are individually negotiated and therefore can contain articulations of purpose in varying levels of detail. It is therefore sometimes necessary to review specific RDP MOUs to understand the ambit of their provisions.

From a procurement standpoint, the principal mechanism used in the RDP MOUs to achieve the stated goals described above is a mutual commitment not to discriminate against the supplier of the other country. This commitment generally involves an explicit waiver of “buy national” laws or discriminatory price differentials, as well as a pledge to remove access barriers to the defense procurement market, although exceptions may be provided for certain circumstances.

RDP MOUs may contain numerous provisions calling for further negotiation and cooperation in the development of detailed implementing procedures on particular topics. Such procedures may take the form of numbered annexes, which may be either included by the parties at the time of signing or appended to the original agreements at some point after signing.

#### **Legal and Regulatory Context**

The United States has various “buy national” laws. One of the oldest and broadest – and the one most associated with RDP MOUs – is the Buy American Act. The Buy American Act, with certain exceptions, generally restricts the Federal Government from procuring goods and materials from other than domestic sources. RDP MOUs effectively act as waivers of the Buy American Act. Provisions in Title 10, United States Code address the Secretary of Defense’s responsibilities in the negotiation of RDP MOUs. Similarly, the Trade Agreements Act of 1979 provides that the President may authorize the Secretary of Defense to waive the domestic source restrictions for product of any country or instrumentality which enters into an RDP MOU with the DoD. Even the Buy American Act itself references RDP MOUs.

The DFARS provides specific rules for implementing the waiver of the Buy American Act that is provided by the RDP MOUs. The DFARS contains a list of “qualifying countries.” These are countries which have executed an RDP MOU with the DoD, the terms of which meet certain requirements. The DFARS provides that the DoD has determined that, with certain exceptions, it is inconsistent with the public interest to apply restrictions of the Buy American Act to the acquisition of qualifying country end products. Further, it provides that a “domestic end product” generally includes an end product manufactured in the United States if the cost of its qualifying country components and its U.S.-origin components exceeds 50% of the cost of all its components.

Although RDP MOUs contain binding obligations for the governments party to them, they do not contain formal enforcement mechanisms. However, there are steps the U.S. Government can take in the event the participating country refuses to abide by its obligations. The law provides that if the Secretary of Defense, after consulting with the U.S. Trade Representative, determines that a foreign country party to an RDP MOU has violated its terms by discriminating against a covered American product, he or she may rescind the waiver of the Buy American Act with respect to the same types of products produced in that particular country. Presumably, foreign countries that have entered into RDP MOUs with the DoD have similar measures they can take in the event the U.S. Government does not live up to its obligations.

### **Recent Developments:**

On July 19, 2019, President Trump issued an Executive Order (E.O. 13881) directing the FAR Council to consider proposing an amendment to the FAR that would provide that materials would be considered to be of foreign origin if (i) for iron and steel products, the cost of foreign iron and steel used exceeds 5% of the total cost of all products used in such iron and steel products; and (ii) for all other end products, the cost of the foreign products used in such end products constitutes 45 percent or more of the cost of all the products used in such end products.

Subsequently, the FAR was amended along these lines, so that for FAR purposes, a domestic end product is now defined, in general, as an article manufactured in the United States, the cost of the U.S.-origin components<sup>1</sup> of which must exceed 55% of the cost of all components. (Previously, the FAR provided a must exceed threshold of 50%.)<sup>2</sup> The test is waived for Commercially available Off-The-Shelf (COTS) items. The amendment to the FAR also provided that for an end product that consists wholly or predominantly of iron and/or steel, the cost of foreign iron and steel must constitute less than 5% of the cost of all the components.

Recently, the DoD issued a proposed amendment to the DFARS consistent with the above-described amendment to the FAR. However, the DFARS amendment would include the cost of qualifying country components as well as domestic components in determining whether the 55% threshold was met. Qualifying country iron and steel would be included along with U.S. iron and steel in determining whether the less than 5% foreign content threshold was met

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<sup>1</sup> Components not sufficiently and reasonably available in the United States may also be treated as domestic.

<sup>2</sup> The FAR definition of “domestic end product” does not mention “qualifying countries,” as RDP MOUs are a DoD authority, and do not apply to other government agencies.

(i.e., qualifying country iron and steel would not be considered to be “foreign”). Comments on the DFARS Proposed Rule must be submitted to DoD by October 29, 2021.

In a separate, but related series of events, President Biden, on January 25, 2021, issued an Executive Order (E.O.14005) which, among other things, directed the establishment of the Made in America Office within the OMB, the centralizing of the Buy American Act waiver process, and the FAR Council to consider amending the FAR to (i) replace the component test used to identify domestic content in end products and construction materials; and (ii) increase the numerical threshold for domestic content requirements for end products and construction materials.

On July 30, 2021, the FAR Council issued a Proposed Rule that would amend the FAR. The Proposed Rule would retain the component test, but would increase the numerical threshold for domestic content initially to 60%, and two years after that to 65%, and five years subsequent to the second increase, to 75% - for an increase from 55% to 75% for domestic content over 7 years.

At this time, DoD has not suggested any similar increase to the DFARS domestic content threshold.

Importantly, the FAR Council, in its written discussion of the expected impact of the Proposed Rule seems to specifically provide that waivers of the Buy American Act authorized due to trade agreements or DoD qualifying country-origin of an item or component (i.e., origin from an RDP MOU participating country) would not be impacted by the proposed change in the domestic content threshold.

When a Foreign Military Sales (FMS) program is funded using Foreign Military Financing (FMF) under a Letter of Offer and Acceptance (LOA) between a DoD department or agency and the foreign country purchaser, the DFARS, as well as the FAR, applies to the contract between the DoD department or agency and the contractor entered into pursuant to the LOA. Under the DFARS, if the military end item sold was manufactured in the United States and has components that constitute “qualifying country components” (i.e., components that qualify as RDP-MOU-participant-country-origin components), unless an exception applies, the cost of those components should generally be included with the U.S.-origin content in determining whether the end item qualifies as a “domestic end item.”