



July 31, 2023

Ms. Linda Neilson
Director, Defense Acquisition Regulations Systems
U.S. Department of Defense
Alexandria, VA 22350

Re: Request for Comment on Defense Federal Acquisition Regulation Proposed Rule regarding Buy American Act Requirements (DFARS Case 2022-D019)

Dear Ms. Neilson:

The U.S. Chamber of Commerce (the "Chamber") submits the following comments in response to the Department of Defense's (the "Department" or "DoD") notice of proposed rulemaking to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to supplement the Federal Acquisition Regulation implementation of Executive Order 14005 ("E.O. 14005") addressing domestic preferences in DoD procurement.

The Chamber is submitting comments on behalf of its industrial base members participating in contracting and supplier relationships with the Department and across the Federal Government. These comments are informed by this vast range of industries and highlight concerns of the Department's most valued partners. We ask that you define "domestic content" and address, in partnership with industry, what constitutes a critical component.

Concern:

DFARS Proposed Rule regarding Buy American Act Requirements (DFARS Case 2022-D019) (88 FR 37492) (the "Proposed Rule") is intended to supplement the amendments to the FAR implementing Section 8 of E.O. 14005, which increased the threshold for domestic content. The Proposed Rule would make amendments to the DFARS consistent with those made to the FAR by a Final Rule published on March 7, 2022 (87 FR 12780), but with language that would provide for continued use of Reciprocal Defense Procurement Memoranda of Understanding ("RDP MOUs") (i.e., the Proposed Rule retains the "qualifying country" concept in the existing DFARS but amends the language to incorporate the increased content thresholds).

The Final Rule amending the FAR was made consistent with Section 70921 of the Infrastructure Investment and Jobs Act (P.L. 117-58) ("IIJA"), enacted in 2021, which among other things, provides that it is the sense of Congress that the FAR should be amended to "increase the domestic content requirements for domestic end products and domestic construction material to 75 percent..." (Sec. 70921(c) of the IIJA).

The Proposed Rule provides an increase to the domestic content threshold initially from 55 to 60 percent, with future increases to 65% for calendar years 2024 through 2028, and to 75% beginning calendar year 2029. (Note that these thresholds include components that are mined, produced, or manufactured in the United States and in qualifying countries.)

A DoD contractor that is awarded a contract with a period of performance that spans the schedule of domestic content increases will be required to comply with each increased threshold for the items in the year of delivery. However, in instances in which the requirement to comply with changing domestic content thresholds would not be feasible for a specific contract, the senior procurement executive of the contracting agency may allow 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. The senior procurement executive is required to consult with OMB's Made in America Office before allowing the use of the alternate domestic content test.

The Proposed Rule also allows for use of the existing 55% domestic content threshold until one year after the increase of the domestic content threshold to 75% 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.

Conclusion:

It is worth noting that the Proposed Rule uses the term "domestic content" 111 times, but it does not define it. Under the existing DFARS, "domestic content" is used only 7 times, and is not defined. The context of the term's use in the Proposed Rule seems to indicate that it means "components that are mined, produced, or manufactured in the United States and in qualifying countries." Accordingly, we ask that you define the term "domestic content."

Furthermore, this DFARS case further illuminates what remains to be defined and implemented in future rulemaking with respect to enhanced price preference for domestic content in critical components. In absence of clear definition of what will be considered a "critical component," and guidance on how domestic content of such components will be accounted for and valued in source selection, it remains difficult to fully assess and implement these policy changes. We encourage further dialogue and information exchange with industry and future rulemaking is contemplated.

Sincerely,



Keith Webster
President, Defense and Aerospace Council & Federal
Acquisition Council
U.S. Chamber of Commerce