



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
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MEMORANDUM FOR CHIEF ACQUISITION OFFICERS
SENIOR PROCUREMENT EXECUTIVES
SENIOR ACCOUNTABLE OFFICIALS
FOR DOMESTIC SOURCING

FROM:

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SUBJECT: Strengthening Domestic Sourcing for Critical Items

Section 8 of Executive Order (E.O.) 14005, *Ensuring the Future is Made in All of America by All of America's Workers*, directed government-wide actions to strengthen and modernize application of the Buy American Act (BAA) (41 U.S.C. §§ 8301-8305). These actions are part of a government-wide effort to revitalize the domestic manufacturing base, create new opportunities for U.S. firms and workers, and position U.S. businesses to compete and lead globally in strategic industries. In furtherance of these objectives, this Memorandum: (1) establishes a pilot program for voluntary agency testing of enhanced price preferences (EPPs) to provide additional incentives in Federal acquisitions for the domestic manufacture of critical end products and critical construction materials (hereinafter referred to as “critical items”) subject to the BAA; and (2) reminds agencies of existing authority that might be considered, as appropriate, to facilitate industrial mobilization.

Background

In 2022, the Federal Acquisition Regulatory Council (FAR Council), working with the Made in America Office (MIAO), published a final rule that put in place the most robust updates to the implementation of the BAA in nearly 70 years.¹ The rule created a schedule for increasing domestic content requirements to qualify for preferences given to domestic end products and

¹ [87 FR 12780 \(Mar. 7, 2022\)](#).

domestic construction materials. The first increase (from 55 percent to 60 percent) took effect on October 25, 2022. The threshold will further increase to 65 percent in 2024 and ultimately increase to 75 percent in 2029. These phased increases will strengthen incentives for businesses to rely more heavily on U.S. supply chains, provide them with the time they need to onshore manufacturing, and adjust as necessary to increase the use of American-made components. This change will create more opportunities for small- and medium-sized manufacturers and their employees, including small and disadvantaged businesses, from all parts of the country.

In the 2022 final rule, the FAR Council also established a framework² for applying an EPP to end products and construction materials deemed to be critical. As explained in the preamble to the 2022 final rule, a subsequent rulemaking will identify the critical items to which the EPP (referred to in the rule as an “enhanced evaluation factor”) identified in the rule would apply.³ Once in place, EPPs will support the development and expansion of domestic supply chains for critical items by providing a source of stable demand through Federal procurement.

In the meantime, the Office of Federal Procurement Policy (OFPP), working closely with MIAO, establishes the pilot program described in this memorandum. Results of the pilot program will be shared with the FAR Council to help inform the shape of future rulemaking, including the most effective EPP level. Additionally, the pilot program has the benefit of providing Federal agencies with experience on effectively utilizing EPPs, and considering how use of EPPs may interrelate with agency authority to promote industrial mobilization in FAR 6.302-3. That provision authorizes agencies to restrict competition to items manufactured in the United States or its outlying areas if justified under certain conditions.

Guidance for pilot program

Through this memorandum, OFPP establishes a pilot program pursuant to 41 U.S.C. § 1124, which authorizes OFPP to develop innovative procurement methods and procedures to be tested by interested executive agencies on a voluntary basis. Under this pilot program, agencies may apply an EPP on top of the standard price preferences under the BAA statute when acquiring domestic critical items.⁴ Application of EPPs to components is not generally anticipated because the value of the component to which the EPP is applied may be inconsequential relative to the value of the total acquisition. However, agencies are encouraged to confer with MIAO and OFPP if they wish to test application of EPPs to critical components. Agencies are also encouraged to consider and leverage existing industrial mobilization authorities, as appropriate, to support production of critical components.

² See FAR 25.003 (defining “critical item”), 25.105, 25.106, 25.204, 52.212-3, 52.225-1, 52.225-2, 52.225-3, 52.225-9, and 52.225-11.

³ The EPP would be applied to domestic offers of domestic end products and domestic construction materials that are critical items, in addition to the standard price preference given to offerors of domestic end products and construction materials generally. Unless the agency specifies a higher amount, the standard price preference for end products is 20 percent if the lowest domestic offer is from a large business concern and 30 percent if the lowest domestic offer is from a small business concern (see FAR 25.106). The standard price preference for construction material is 20 percent (see FAR 25.204).

⁴ Agencies would identify the relevant items through the plan described below.

Prior to using an EPP in the source selection for an acquisition, the agency must develop a pilot implementation plan in consultation with MIAO and OFPP. The plan must identify the critical item(s) that will be eligible for an EPP, the size of the EPP, and how the EPP will be applied. The agency must then provide public notice of the plan and a request for comments on the Made in America site at www.madeinamerica.gov.

Specifically, agencies interested in conducting a pilot must take the following steps:

1. Prepare a plan. Agencies must prepare a plan that includes the following elements:
 - a. *The scope of the pilot.* The plan must enumerate the specific items that would be eligible for an EPP, the basis for concluding that the item is critical (which could refer to analyses performed under the E.O. 14017 supply chain reviews) and that federal acquisition is likely to make a meaningful difference towards strengthening U.S. supply chains.
 - b. *The size of the EPP.* The plan must identify the specific size of the EPP that will be applied to acquisitions for critical items that fall within the scope of the pilot. The plan may identify a range for the EPP percentage that might be applied under covered acquisitions, but solicitations or requests for quotes (RFQs) must identify the specific EPP percentage that will be applied in any given acquisition for critical items that meet BAA requirements.

As a general matter, the EPP should be added to the evaluated value of the offer after application of the standard price preference, as opposed to the value of the offer prior to the application of the standard price preference. To ensure that an agency is not paying a premium for foreign-made critical items, or non-critical products, the agency should determine applicability of the basic preference and the EPP line item by line item. Accordingly, the agency must not use the “all or none” option of evaluating on a group basis provided at FAR 25.503(c) when acquiring critical items. Agencies must convey in solicitations that proposals that say “all or none” must be rejected.
 - c. *Post-award report on percentage of domestic content.* To gain insight into the actual domestic content of critical items sold under contract, the plan must require that contractors who receive awards under this pilot authority provide the specific percentage of domestic content by dollar value for the critical items delivered under the contract.
2. Consult with MIAO and OFPP and provide public notice of the plan. Agencies must consult with MIAO and OFPP on the plan, provide public notice of the plan and a request for comments on the Made in America.gov site, provide a period of not less than 15 calendar days for public comment, consider any public comments submitted on the plan, and inform MIAO and OFPP of any changes made to the plan based on review of public comments. The final plan must be posted on the Made in America site and should explain how public comments were addressed in shaping the plan.
3. Prepare a deviation under FAR Subpart 1.4. In conducting pilots, agencies will need to deviate from the existing FAR requirements at 25.1101, 25.1102, or both, and one or more of

the following FAR provisions or clauses to notify offerors that the agency plans to evaluate offers in accordance with the enhanced price preference procedures in their pilot plan:⁵

- 52.225-2, Buy American Certificate or its commercial equivalent, paragraph (f)(4) of FAR provision 52.212-3, Offeror Representations and Certification–Commercial Products and Commercial Services;
- 52.225-4, Buy American – Free Trade Agreements – Israeli Trade Act Certificate or its commercial equivalent, paragraph (g)(1)(v) of FAR provision 52.212-3, Offeror Representations and Certification–Commercial Products and Commercial Services;
- 52.225-9, Buy American - Construction Materials; and
- 52.225-11, Buy American - Construction Materials under Trade Agreements.

Agencies will also need to create a clause to require successful contractor reporting on the specific domestic content of awarded critical items as a contract deliverable.

Agency officials responsible for developing the pilot plan should confer with their agency’s representatives to the Civilian Agency Acquisition Council and Defense Acquisition Regulations Council and share drafts of the deviated provisions or clauses they intend to use when they post notice of their plans. Agencies planning to use EPPs for multiple contract actions should prepare a class deviation in accordance with FAR 1.404.

4. Report on pilot results to MIAO and OFPP. Within 30 days after award of an acquisition under the pilot, the agency should notify MIAO and OFPP of the following:
 - (a) The critical item(s) or construction material(s) that was (or were) the subject of the acquisition;
 - (b) The award value;
 - (c) The EPP percentage applied;
 - (d) If award was not made to a domestic source, whether any domestic offers were submitted;
 - (e) A brief description of the efforts the agency took during market research to identify domestic sources; and
 - (f) Any additional information that might be helpful to MIAO, OFPP, or the FAR Council (e.g., if award was not made to a domestic source, whether a higher EPP is contemplated).

Interested agencies should submit pilot plans and reports to the MIAO mailbox at MBX.OMB.MadeInAmerica@omb.eop.gov.

This pilot program will sunset on the date the FAR final rule addressing the use of EPPs becomes effective. Agencies should consult with MIAO and OFPP if they wish to announce new transactions under their pilot after the effective date of the FAR final rule.

⁵ Depending on the deviated text used for the FAR provisions, the agency may also need to deviate from FAR 25.105 and 25.106 or its construction equivalent at 25.204.

Industrial mobilization

In some situations, EPPs may be insufficient to create or maintain domestic capability for the production of critical items. In addition, application of EPPs to components could be especially challenging because the value of the component to which the EPP is applied may be inconsequential relative to the value of the total acquisition.

Procurement law and regulations⁶ have long provided that full and open competition is not required when an agency can demonstrate that is necessary to award the contract to a particular source or sources in order to —

- Maintain a facility, producer, manufacturer, or other supplier available for furnishing supplies or services in case of a national emergency or to achieve industrial mobilization; or
- To establish or maintain an essential engineering, research, or development capability to be provided by an educational or other nonprofit institution or a Federally funded research and development centers.

Between FYs 2020 to 2022, the industrial mobilization exception was used for more than \$50B in expenditures — more than half for research and development. This includes actions such as advanced biomedical development (e.g., vaccines & pharmaceuticals), commercialized space flight, and maintenance of shipbuilding and repair capability and capacity.

Contracting officers are responsible for preparing the required Justification for Other than Full and Open Competition (JOFOC), and obtaining required approvals. Agencies should consider the following steps as they conduct and document market research, develop their acquisition plan, draft their solicitation documents, and prepare a JOFOC.

1. Document how the agency is using the acquisition to encourage domestic manufacturers to increase their reliance on domestic supply chains. Cite relevant critical supply chain studies, such as those performed in connection with E.O. 14017, that underscore vulnerabilities to U.S. supply chains, and actions taken in connection with the supply chain, such as exercise of the Defense Production Act to accelerate domestic production.
2. Identify offerors with a domestic supply chain, including companies that meet BAA content requirements. Source identification is crucial to determine the appropriate scope of competition.
3. Document the JOFOC file regarding the rationale for limiting competition to domestic manufacturers (e.g., demonstrate that the acquisition is critical to support an emerging domestic market or support and maintain manufacturing capacity for critical components).

⁶ 10 U.S.C. 2304(c)(3), 41 U.S.C. 3304(a)(3); FAR 6.302-3, *Industrial mobilization; engineering, developmental, or research capability; or expert services.*

4. Address if and how domestic manufacturing speeds delivery and enhances security by reducing the likelihood of having to rely on a company controlled by a foreign adversary for production of a product that is critical to the Federal Government's mission.
5. As part of establishing price reasonableness, highlight the overall benefits and policies supporting buying domestically manufactured items. The contracting officer, in coordination with the requiring activity official, should appropriately document the JOFOC file and highlight the overall benefits and policies supporting buying domestic end products when addressing price reasonableness so that the rate is justified.
6. Publicize the action to maximize awareness and participation of domestic sources.
7. To ensure the outcome of the competition is maximizing reliance on domestic supply chains, clearly describe expectations regarding contractor roles and responsibilities. For example, consider —
 - i. Including, as a contract deliverable, a requirement to report what components are domestically produced and where specific components were made; and
 - ii. Identifying incentives or remedies should the critical item not be domestically produced.

Questions regarding this guidance may be submitted to the MIAO mailbox at MBX.OMB.MadeInAmerica@omb.eop.gov and the OFPP mailbox at MBX.OMB.OFPPv2@OMB.eop.gov.