



VIA ELECTRONIC SUBMISSION

Oct. 28, 2021

Mahruba Uddowla  
Procurement Analyst  
U.S. General Services Administration  
1800 F St. NW  
Washington, DC 20405

**Re: RIN 9000-AO22, Notice of Proposed Rulemaking on Federal Acquisition Regulation: Amendments to the FAR Buy American Act Requirements**

Dear Ms. Uddowla:

Associated Builders and Contractors hereby submits the following comments to the U.S. Department of Defense, General Services Administration and National Aeronautical Space Administration in response to the above-referenced proposed rule published in the *Federal Register* on July 30, 2021, at 86 Fed. Reg. 40980.

**About Associated Builders and Contractors**

ABC is a national construction industry trade association representing more than 21,000 members. ABC and its 69 chapters help members develop people, win work and deliver that work safely, ethically and profitably for the betterment of the communities in which ABC and its members work. Our diverse membership is bound by a shared commitment to the merit shop philosophy in the construction industry. The philosophy is based on the principles of nondiscrimination due to labor affiliation and the awarding of construction contracts through open, competitive bidding based on safety, quality and value.

ABC's membership represents all specialties within the U.S. construction industry and is comprised primarily of firms that perform work in the industrial and commercial sectors. Moreover, most of our contractor members are classified as small businesses. This is consistent with the U.S. Census Bureau and Small Business Administration's Office of Advocacy's findings that the construction industry has one of the highest concentrations of small businesses (82% of all construction firms have fewer than 10 employees)<sup>1</sup> and

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<sup>1</sup> U.S. Census Bureau 2019 County Business Patterns:  
<https://data.census.gov/cedsci/table?q=CBP2019.CB1900CBP&n=23&tid=CBP2019.CB1900CBP&hidePreview=true> and <https://www.census.gov/programs-surveys/cbp/data/tables.2019.html>.

industry workforce employment (more than 82% of the construction industry is employed by small businesses).<sup>2</sup>

In addition to small businesses that build public works projects, ABC also has large member companies that contract directly with federal, state and local governments to build large-scale projects subject to government acquisition regulations and subcontract work to qualified small businesses that meet federal, state and local government small business contracting goals. For example, ABC members won 57% of the \$118 billion in direct federal construction contracts exceeding \$25 million awarded during fiscal years 2009-2020.<sup>3</sup>

## **Background**

On Jan. 25, President Biden signed Executive Order 14005, Ensuring the Future Is Made in All of America by All of America's Workers,<sup>4</sup> which aims to amend the regulations implementing the Buy American Act and maximize the use of goods, products and materials produced in the United States, otherwise known as domestic content.<sup>5</sup>

On July 30, the DOD, GSA and NASA (the agencies) issued a notice of proposed rulemaking to implement EO 14005.<sup>6</sup> Specifically, the agencies propose increasing the domestic content threshold initially from 55% to 60%, then to 65% in 2024 and finally to 75% in 2029.<sup>7</sup> The agencies are seeking public feedback on the subsequent threshold increases, among other things.

## **ABC's Comments in Response to the Proposed Rule**

While ABC does not oppose the Buy American Act, the primary concern of these comments is the need for clarity on several aspects of the agencies' proposal. In addition, ABC urges the agencies to consider the following recommendations regarding reporting requirements, the waiver process and the newly established Made in America Office.

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<sup>2</sup> 2020 Small Business Profile, U.S. Small Business Administration Office of Advocacy (2020), at Page 3, <https://cdn.advocacy.sba.gov/wp-content/uploads/2020/06/04144224/2020-Small-Business-Economic-Profile-US.pdf>.

<sup>3</sup> USASpending.gov data (Accessed Dec. 22, 2020) cross-referenced with ABC membership list discussed in greater detail atTheTruthAboutPLAs.com: <https://thetruthaboutplas.com/2021/02/10/february-2021-update-abcs-fight-against-government-mandated-project-labor-agreements/>.

<sup>4</sup> 86 Fed. Reg. 7475.

<sup>5</sup> *Id.*

<sup>6</sup> 86 Fed. Reg. 40980.

<sup>7</sup> 86 Fed. Reg. 40982.

**Keep the proposed fallback threshold policy in place on an as-needed basis.**

ABC federal contractor members and the construction industry at large have been greatly affected by the recent dramatic price increase of various materials and building supplies. Construction input prices have increased more than 20% relative to September 2020.<sup>8</sup> While companies continue to face supply chain disruptions from the COVID-19 health emergency, any attempt to ease burdens for contractors is critical.

Namely, the proposed fallback threshold, which allows for products meeting a specific lower domestic content threshold to qualify as domestic products under certain circumstances, would be of significant benefit to contractors in situations where material prices see a similar increase. Unfortunately, the proposal only maintains the agencies' fallback threshold policy until one year after the 75% domestic content requirement takes effect.<sup>9</sup>

While the industry will likely have recovered from the economic effects of COVID-19 by the time the fallback threshold no longer exists, a similar disruption to the market could happen again. Without the fallback threshold policy in place, the desire to comply with Buy American requirements and capitalize on the price preferences could be diminished during periods of economic difficulty or increased input prices.

ABC urges the agencies to allow for the fallback threshold to continue to be used on an as-needed basis. This would allow the administration to maintain its 75% threshold requirement during "normal" economic times, while at the same time providing contractors with flexibility to drive down project costs and reduce waiver use during severe economic downturns.

**Allow for a more flexible post-award reporting process.**

ABC does not oppose the agencies' decision to implement post-award reporting requirements,<sup>10</sup> as these requirements are important for procuring agencies to conduct oversight on the materials they acquire and, more significantly, promote transparency by informing U.S. taxpayers where and how their tax dollars are being spent on publicly funded projects. However, ABC recommends the agencies take into consideration the following concerns when drafting the final rulemaking to minimize the compliance burdens of the post-award reporting process for federal contractors.

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<sup>8</sup> *Monthly Construction Input Prices Inch Lower in August, But Are Still Elevated Year Over Year, Says ABC*, Sept. 10, 2021, ABC News Release, <https://www.abc.org/News-Media/News-Releases/entryid/18980/monthly-construction-input-prices-inch-lower-in-august-but-are-still-elevated-year-over-year-says-abc>.

<sup>9</sup> 86 Fed. Reg. 40982.

<sup>10</sup> 86 Fed. Reg. 40995.

The proposed post-award reporting process requires contractors to provide the contract number, the amount of domestic content in each critical item and the amount of domestic content in each domestic construction material containing a critical component to the newly established Made in America Office within 15 days of award.<sup>11</sup> However, as the agencies have not yet established the list of critical items or critical components that must be reported,<sup>12</sup> and given the various contracts into which federal agencies enter, the proposed 15-day deadline may not be feasible in certain situations without further clarity or even at all.

Once the list of critical items and components is issued, ABC urges the agencies to allow for feedback regarding the 15-day reporting deadline. This will ensure that contractors and other stakeholders can provide substantive input on the timeline after being given an opportunity to understand which items are considered critical. To the extent that the list of critical items is ultimately extensive, it may be sensible to allow more than 15 days to compile and submit the requested information.

**Clarify the duties and responsibilities of the Made in America Office and limit the burden on contractors for the waiver process.**

Despite several references to the duties of federal contractors when working with the Made in America Office, the duties of the office itself are less explicit in the proposed rule, and there is no mention of the Made in America director throughout the document.

For example, EO 14005 states the Made in America director must notify the head of the relevant federal agency that a waiver request is approved or denied within no more than 15 days.<sup>13</sup> However, the proposed rule neither mentions this deadline nor discusses the consequences should the Made in America director fail to meet the 15-day deadline. The fallback threshold is intended to limit waiver use, but ABC anticipates a short-term increase in the use of waivers during the first several months of the new requirements, as contractors will likely continue to be affected by disrupted supply chains from the COVID-19 pandemic. As a result, ABC is concerned the Made in America Office may not have the capacity and resources to handle the potential influx of waiver requests within the compliance period set by the EO.

Therefore, in order to reduce project delays and additional costs for both the contractor and procuring agency, ABC recommends the agencies provide clear, concise guidance on the steps to take if a waiver is not approved or denied within the deadline. For example, should the director fail to issue a decision within 15 days, it may be helpful to allow for an appeal or review of the request to facilitate a timely decision.

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<sup>11</sup> *Id.*

<sup>12</sup> 86 Fed. Reg. 40982.

<sup>13</sup> 86 Fed. Reg. 7476.

In addition, ABC urges the agencies to provide in explicit detail in its final rulemaking the overall duties and responsibilities of the Made in America director, as well as outline how this newly established position and office will streamline the federal procurement process and reduce administrative costs and burdens for federal contractors.

**Provide clear, concise guidance and educational resources for the federal contracting community and federal procurement officials.**

Given the proposed changes to the waiver process, the establishment of the Made in America Office and the multiple increases to the threshold for domestic materials over the next several years, it is critical that the agencies prepare practical guidance and resources to inform contractors and procuring personnel of their obligations to the new requirements and help them in their compliance efforts.

This rulemaking includes several additional reporting requirements for certain offerors, including small businesses.<sup>14</sup> ABC cautions the agencies against issuing burdensome reporting requirements that will disproportionately impact those small businesses who may not have counsel or compliance officers on payroll. They should not be penalized for not knowing or not understanding new and existing obligations when their efforts are intended to support American manufacturers and suppliers. Issuing new requirements without simultaneously issuing clear, accessible guidance would harm small federal contractors with a history of compliance or contractors and subcontractors who are newly engaging in federal or federally assisted work.

ABC supports any effort from the agencies to assist in compliance, especially among the small business community. This includes publishing compliance assistance documents on their and other federal contracting websites as well as other types of outreach efforts, including webinars and videos for contractors and governmentwide education opportunities to promote uniformity among procuring agencies and their respective procurement officers.

**Do not apply new Buy American threshold requirements to current or long-term contracts.**

The proposal clearly states the domestic content threshold set by EO 14005 supersedes the previous requirements over the course of a given timeline.<sup>15</sup> However, the proposed rule does not provide guidance on multiyear contracts and other contracts that last through increases in the domestic content requirements.

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<sup>14</sup> 86 Fed. Reg. 40987.

<sup>15</sup> 86 Fed. Reg. 40982.

Contractors should be afforded consistency in their supply chain decisions and the process of acquiring materials throughout the contract terms. Such a policy would be consistent with those concerning wage rate determinations.

In determining wage rates on federal contracts, particularly for contractors within the construction industry, it is well settled that the Davis-Bacon Act wage determinations in effect at the time of contract award generally remain for the length of the contract, regardless of whether new wage determinations are issued while the contract is being performed. Having this consistency allows the contractor to set out a plan for the duration of the project without unnecessary burdens caused by changing wage determinations or rulemakings that would affect the agreed-upon rate.

The agencies should adopt a similar policy on multiyear contracts with respect to the Buy American regulations and domestic content threshold to provide consistency and stability for the federal contracting community.

### **Conclusion**

ABC urges the agencies to consider the recommendations stated above as they move forward in the rulemaking process. ABC also welcomes the opportunity to discuss these issues further and collaborate with the agencies on a Buy American standard and waiver process that benefits American producers, the federal contracting community and the construction industry at large.

Respectfully Submitted,



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