



U.S. Department of Justice
Justice Management Division
Senior Procurement Executive

Washington, D.C. 20530

MEMORANDUM FOR BUREAU PROCUREMENT CHIEFS

FROM: Arthur E. Gary
Senior Procurement Executive

**ARTHUR
GARY**

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ARTHUR GARY
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SUBJECT: Federal Acquisition Regulation Class Deviation Regarding Implementation of Executive Order 14005, [Executive Order 14005, Ensuring the Future is Made in All of America by All of America’s Workers](#)

1. PURPOSE

This class deviation is issued under the authority of Federal Acquisition Regulation (FAR) 1.404 authorizing agencies to issue a class deviation to implement [Executive Order 14005, Ensuring the Future is Made in All of America by All of America’s Workers](#) (“the order”). This order required a series of actions to enable the U.S. Government to maximize its use of goods, products, and materials produced in, and services offered in, the United States. The purpose of this Memorandum is to implement the Federal Acquisition Regulatory Council (FAR Council) Class Deviation in support of the Executive Order (E.O) and subsequent Office of Management and Budget (OMB) policy and guidance.

2. BACKGROUND

E.O. 14005 was signed by the President on January 25, 2021 and published in the Federal Register. As a result of E.O. 14005, the OMB issued policy Memorandum, M-21-26, [Increasing Opportunities for Domestic Sourcing and Reducing the Need for Waivers from Made in America Laws](#), with implementing guidance, [Improving the Transparency of Made in America Waivers](#) (“the waiver transparency memorandum”). The waiver transparency memorandum established the Made in American Office (MAIO) and 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](#) for MIAO review and posting on the [MadeinAmerica.gov](#) portal; and (2) received confirmation that MIAO has completed its review or waived review of the proposed waiver. The MIAO will provide greater oversight of waivers from the Made in America laws, thus increasing consistency and public transparency of such waivers.

The E.O. also directs the FAR Council to consider strengthening applicable Made in America

provisions in the Federal Acquisition Regulation (FAR). On November 15, 2021, the FAR Council provided agency guidance on the “Issuance of Agency Deviations to Implement Requirements Addressing the Use of Nonavailability Waivers Under E.O. 14005” until such time as the changes are amended in the FAR.

The E.O. also required the Administrator of General Services to develop a public website that shall include information on all proposed waivers and whether those waivers have been granted.

3. AUTHORITY

This class deviation is issued under the authority of FAR 1.404.

4. DEVIATION

See Attachment 1 – Deviation to FAR Text, Part 25 – Foreign Acquisition

5. EFFECTIVE DATE AND EXPIRATION

This deviation is effective immediately and remains in effect until the FAR is amended or the deviation is otherwise rescinded.

6. SCOPE AND APPLICABILITY

- a. The E.O., OMB Memorandum M-21-26, the subsequent OMB implementing guidance, and the FAR Part 25 Deviation together provides a consistent framework for reducing the need for waivers through a strategic process aimed at achieving consistency across agencies while supporting decision making within U.S. supply chains to increase opportunities for domestic sourcing.
- b. There is no exception from posting proposed waivers on [MadeinAmerica.gov](https://www.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 the 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.
- c. The MIAO shall notify the granting agency of the determination in writing and shall return the proposed waiver to the head of the agency for further consideration, providing the granting agency with a written explanation. The OMB Memorandum and subsequent guidance provides a standardized waiver framework, requires the designation of the

agency Senior Accountability Official (SAO), specifies the agency reporting requirements, and provides a waiver adjudication process for disagreements between the MIAO and agencies. The DOJ Senior Procurement Executive is the agency's SAO.

- d. To achieve the desired outcomes, the guidance provides approaches to maximize 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 FAR 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.

7. **ADDITIONAL INFORMATION**

If you have questions, please contact DOJAcquisitionPolicy@usdoj.gov.

8. **ATTACHMENTS**

Attachment 1 - Deviation to FAR Text

Attachment 2 - OMB M-21-26 Increasing Opportunities for Domestic Sourcing and Reducing Waivers

Attachment 3 - E.O. 14005 Ensuring the Future of Made in all America by all of America Workers

**CLASS DEVIATION
FINDINGS AND DETERMINATION
EXECUTIVE ORDER 14005, ENSURING THE FUTURE IS MADE IN ALL OF
AMERICA BY ALL OF AMERICA’S WORKERS**

Findings

1. Executive Order (E.O.) 14005 (“the order”) was signed by the President on January 25, 2021 and published in the Federal Register at 86 FR 7475. This order requires a series of actions to enable the U.S. Government to maximize its use of goods, products, and materials produced in, and services offered in, the United States. It required the Office of Management and Budget (OMB) to establish a Made in America Office (MIAO) with oversight responsibilities. It required the Director of OMB, through the Director of the MIAO to establish a centralized waiver review process, review agency proposed waivers, and determine that issuing the proposed waiver would not be inconsistent with applicable law or the policy. The MIAO shall notify the granting agency of the determination, in writing, and shall return the proposed waiver to the head of the agency for further consideration, providing the granting agency with a written explanation.
2. As a result of these changes, the Civilian Agency Acquisition Council (CAAC) issued a Memorandum on November 15, 2021, authorizing agencies to issue class deviations implementing these provisions pending formal amendment to the Federal Acquisition Regulation (FAR) via proposed FAR case, FAC 2021-07.

Determination

It is hereby determined that a class deviation is appropriate to implement E.O. 14005. This class deviation will be effective as stated and will remain in effect until cancelled or the authority expires.

Lee J. Lofthus
Assistant Attorney General
for Administration

Date

Deviation to FAR Text

Executive Order 14005, Ensuring the Future is Made in All of America by All of America's Workers

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

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25.103 Exceptions.

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

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(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 synopsisized 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

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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)(~~1~~) also apply if any of those articles are acquired as construction materials.

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Subpart 25.5 - Evaluating Foreign Offers-Supply Contracts

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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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