



November 16, 2021

CAAC Letter 2022-01

MEMORANDUM FOR CIVILIAN AGENCIES

FROM: WILLIAM CLARK
CHAIR
CIVILIAN AGENCY ACQUISITION COUNCIL (CAAC)

SUBJECT: Class Deviation From the Federal Acquisition Regulation (FAR) Regarding Requirements for Nonavailability Determinations Under the Buy American Statute

This CAAC Letter is being issued to serve as consultation in accordance with FAR 1.404, authorizing agencies to issue a class deviation to implement the Memorandum titled "[Improving the Transparency of Made in America Waivers](#)," dated October 26, 2021, by the Made in America Office (MIAO) within the Office of Management and Budget (OMB) and the Office of Federal Procurement Policy (OFPP).

The memorandum issued jointly by the MIAO and OFPP (MIAO memo) provides specific guidance to agencies on the use of a new dedicated portal ([MadeinAmerica.gov](#)), with regards to waivers under the Buy American statute. Note: the MIAO memo refers to the existing written "determinations" of the nonavailability exception under the Buy American statute in the FAR as "Made in America waivers." The MIAO memo builds on the guidance in OMB Memorandum M-21-26, [Increasing Opportunities for Domestic Sourcing and Reducing the Need for Waivers from Made in America Laws](#), dated June 11, 2021. OMB Memo M-21-26, in turn, outlined initial management steps to help agencies prepare for and support a centralized strategic waiver review process as required by Executive Order (EO) 14005, [Ensuring the Future Is Made in All of America by All of America's Workers](#) (86 FR 7475, January 28, 2021).

The MIAO memo prescribes certain requirements pertaining to posting of individual nonavailability waiver determinations under the Buy American statute for agencies. Those requirements become effective on **November 16, 2021**, for agencies subject to the Chief Financial Officers Act¹ and on January 1, 2022, for all other agencies. Agencies should be aware that page 3 of the MIAO memo also includes instructions for their internal protocols as they pertain to nonavailability waiver determinations.

¹ 31 U.S.C. 901.

The posting requirements in the MIAO memo are not reflected in the FAR's coverage at 25.103(b)(2) of individual nonavailability waiver determinations under the Buy American statute. Further, the FAR coverage at 25.103(b)(3) will need to be conformed to the requirements prescribed in the MIAO memo. While the Federal Acquisition Regulatory Council (FAR Council) works on updating the FAR to reflect the requirements of the MIAO memo, the FAR Council is required by the MIAO memo to "provide appropriate policy direction to acquisition offices...to promote consistent application of the guidance" in the MIAO memo. The FAR Council issued a memo² dated November 15, 2021 to provide such direction.

The attached deviation to the FAR Text at FAR 25.103(b) and other conforming changes throughout FAR Part 25 is provided, consistent with the MIAO memo and the FAR Council memo.

This CAAC letter constitutes consultation with the Chair of the CAAC required by FAR 1.404(a)(1). Agencies that adopt the attached FAR text language without change in their deviations will be presumed to have consulted with the Chair of the Civilian Agency Acquisition Council (CAAC) required by FAR 1.404(a)(1). However, if an agency intends to use FAR text different than the deviated FAR text provided, the agency must consult with the CAAC Chair, William Clark, who will consult with OFPP and MIAO to ensure consistency with Administration policy. Any such request must be emailed to william.clark@gsa.gov.

Once processed, agencies are requested to share the deviation widely among their workforces to ensure full awareness of and compliance with the MIAO memo. It is recommended that the deviation be made effective until the FAR is amended. The FAR Council intends to open a new case to implement the changes to the waiver process.

Agencies are reminded that FAR 1.404 requires agencies to furnish a copy of each approved class deviation to the GSA Regulatory Secretariat. Agencies must email the deviation to GSARegSec@gsa.gov. Please include whether or not the document can be posted on [acquisition.gov](https://www.acquisition.gov).

If you have any questions or require additional information about this Letter, please contact Mahruba Uddowla on (703) 605-2868 or at mahruba.uddowla@gsa.gov.

Attachment

² <https://www.whitehouse.gov/wp-content/uploads/2021/11/FAR-Council-Memo-on-EO-14005-MIA-Deviation.pdf>

ATTACHMENT - Deviation to FAR Text

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 end product without regard to the restrictions of the Buy American statute:

* * * * *

(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 by going through SAM.gov and inputting 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 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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