COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS
4401 Wilson Boulevard, Suite 1110
Arlington, Virginia 22203
codsia@codsia.org
www.codsia.org

CODSIA Case – 2021-002

Sent via the Federal Rulemaking Portal: http:// www.regulations.gov

October 28, 2021

Ms. Mahruba Uddowla
Procurement Analyst
U.S. General Services Administration
1800 F St NW
Washington, DC 20006

Subject: FAR Case 2021-008 – Amendments to the FAR Buy American Act Requirements – RIN 9000-AO22

Dear Ms. Uddowla,

On behalf of the members of the Council of Defense and Space Industry Associations (CODSIA), we are pleased to submit these comments in response to the proposed rule to implement amendments to the Federal Acquisition Regulation (FAR) Buy American Act Requirements (Proposed Rule). CODSIA appreciates the Made in America Office and the FAR Council for co-hosting a virtual public meeting and for providing an opportunity for public comments on the Proposed Rule.

It is important to highlight that the Proposed Rule is a significant change in federal contracting, greatly expanding the Buy American requirements for federal procurements as well as expanding oversight and reporting requirements for which federal contractors must bear the cost. The Proposed Rule generally lists three sets of changes to the Federal Acquisition Regulation (FAR) implementation of the Buy American Act: (1) an increase to the domestic content threshold for a product to be defined as "domestic," a schedule for future increases, and a fallback threshold that would allow for products meeting a specific lower domestic content threshold to qualify as a domestic product under certain circumstances; (2) a framework for application of an enhanced price preference for a domestic product that is considered a critical product or incorporates one or more critical components; and (3) a post award domestic content reporting requirement for contractors.

CODSIA has strong concerns that without due consideration and careful policy development, there could be negative unintended consequences that add significant compliance costs and resource burdens on the government, and on companies who provide goods and services to the government. In addition to the potential of considerable up-front and enduring costs, expanding the Buy American Act will compel companies in the federal contracting community to weigh the risks of disrupting or

dismantling established supply chains to meet new domestic thresholds, with their ability to deliver the best products to the federal government and their overall competitiveness in the global market. U.S. Government policy development in this area must consider the wide range of potential effects in a holistic manner.

Many of our member companies – and countless companies across the United States – rely on globally-sourced materials to develop and manufacture the innovative end products that power U.S. national security and support the day to day operation of the U.S government. Additionally, virtually all our member companies rely on products that contain globally sourced materials for carrying out their business activities. While CODSIA does not oppose the array of existing Buy American laws, we believe the potential expansion of domestic-sourcing requirements contemplated by the Proposed Rule will negatively impact competition, supplier diversity, supply chain resiliency, and opportunities for small and disadvantaged businesses to participate in government business opportunities.

With regard to the subsequent comments, an outline of CODSIA concerns and recommendations are:

I. General Concerns Regarding Any Alteration of the Buy American Act

The Proposed Rule alters the definition of what constitutes an American-made product. Companies doing business with the federal government will need to adjust their supply chains as they will be limited by a smaller list of acceptable inputs. This shift in demand

may also over-burden qualified suppliers who may lack initial capacity to respond. Supply shortages will likely be aggravated or created. Furthermore, prices for material of all kinds used to satisfy federal government requirements are continuously affected by a number of factors, including supply chain disruptions, which in turn increase the cost of materials and services and may make it more difficult for businesses to engage with the federal market. As the Proposed Rule creates significant changes to the current Buy American requirements, it will take time for federal suppliers and agency contracting personnel to both understand, and fully comply with, the new standards. Despite rolling out the requirements in a phased approach, as a practical matter these changes represent a sudden increase in domestic content requirements and will risk disrupting the current production flow of goods and cause major impacts on proposal prices. For example, if proposals on federal projects are significantly above the expected price, agencies may be required to withdraw the solicitation, revise the cost or scope, and then re-issue the solicitation at a later time.

Moreover, increasing Buy American Act requirements may interfere with competitiveness of American contractors at home and abroad. If a contractor bids on a project using potentially more expensive American-made products, they will likely assume their competitors' bids include the same costs. The Proposed Rule does nothing to address this problem and only gives preference to domestic bidders (or bidders using domestic products) where the company's offer is "substantially the same" as an offer made by a company that does not include American-made products. If American products turn out to be substantially greater in cost, the contractor that uses them will be less competitive in other bidding opportunities. Likewise, these restrictions will risk interfering with the competitiveness of American contractors abroad. Preferential treatment for American-made products on U.S. soil will encourage reciprocal action abroad. Contractors who do business overseas could lose business on foreign government or commercial projects for which they otherwise would have been competitive.

While considering the risks posed by the Proposed Rule, it is worth examining the underlying premise that Buy American Act requirements should be expanded, as 95 percent of federal agency procurements by value are awarded to U.S. firms. According to the Government Accountability Office (GAO), foreign end products accounted for less than five percent of contract obligations for products potentially subject to the Buy American Act in Fiscal Year 2017.[1] Importantly, many of those awards to foreign companies were to U.S.-based affiliates located abroad. A substantial share of those

[1] GAO, December 2018, *"Buy American Act: Actions Needed to Improve Exception and Waiver Reporting and Selected Agency Guidance."*

contract awards is related to overseas military installation operations where local sourcing of products and services is deemed economical.

II. Refrain from Altering the Trade Agreements Act and Reciprocal Defense Procurement Memoranda of Understanding

In general, CODSIA supports increased bilateral, regional, and multilateral engagement between the United States and allied/partner economies in a manner that promotes technology sector-specific dialogues, increases digital trade partnerships, enhances international regulatory compatibility, and reduces overall barriers to trade. In summary, Department of Defense (DoD) and other Administration officials should carefully consider industry linkages, including robust industry engagement where appropriate, to support a thorough examination of potential policy options by engaging industry associations periodically for input.

As the United States is a party to the World Trade Organization (WTO) Agreement on Government Procurement (GPA), which allows U.S. operations the right to bid on foreign government procurement contracts in the 46 other countries that are parties to the GPA, American companies benefit from a level playing field. The GPA provides U.S. companies' with nondiscriminatory access to foreign government procurement markets with an estimated value of more than $4 trillion, far in excess of total annual U.S. government procurement which was valued at $488 billion in 2016 according to the Federal Procurement Data System. Thus, the GPA regime affords U.S. operations substantial opportunities in foreign government procurement markets. Separately from the GPA, the United States has trade agreements with various countries containing provisions that establish reciprocal market access in government procurement, which are also covered under the Trade Agreements Act (TAA).

Similarly, reciprocal defense Memoranda of Understanding (MOUs) must remain in place. These MOUs promote the standardization and interoperability of defense equipment with allies and other friendly governments. They also seek to achieve greater cooperation in research, development, production, procurement, and logistic support of defense capability. This leads to the most cost-effective and rational use of respective industrial, economic, and technological resources; the widest possible use of standard or interoperable equipment; and an advanced technological capability.

CODSIA supports the Proposed Rule's clear statement that the proposed Buy American restrictions do not apply to acquisitions subject to TAA.[2] To do otherwise would be

[2] *See* FAR subpart 25.4

contrary to long established rules of federal procurement policy, national trade policy, and would be contrary to the expressed position of the Executive Branch.[3]

Engaging the global market in satisfying federal government requirements addresses compelling economic reasons for diversification of sources of supply. On a macro level, full and open competition drives down prices in markets for products and services. Increasing diversification of sources of supply also reduces the likelihood of costly disruptions. On a micro level, companies face realities that make it impossible to change supply chains overnight. They must consider a variety of factors beyond the location of their first and second tier suppliers in making sourcing decisions.

Engaging international partners, including our closest allies, on supply chain issues provides an opportunity to both strengthen diplomatic ties and diversify supply chains. Engagement with allies and partners should focus on creating a trusted environment in which firms can carefully calibrate supply chains, improve global supply chain security and transparency, minimize time-to-market, and account for other considerations that enable them to remain globally competitive, while recognizing and accounting for the complexity, interconnectedness, and significant investment required to operate critical materials supply chains. CODSIA strongly encourages the federal government, and in particular, DoD, to keep these global competitiveness considerations in mind and coordinate policies and strategic objectives with foreign governments to ensure the stability of the materials supply chain.

III. More Research is Needed on the Analysis of the Proposed Rule's Waiver Requests Statistics

The Proposed Rule's analysis of its potential impact for contracts is problematic because it fails to perform an analysis of the number of waivers requested and the corresponding decision on those waivers. Rather, the Proposed Rule cites a total dollar value of waivers issued for only the months of February, March and April for each year from 2018 through 2021. A more accurate evaluation would be for the entire fiscal year or at the very least – the last quarter of the fiscal year. The end of the federal fiscal year is often characterized by a surge in spending to avoid loss of "use it or lose it" budgets. Studies of federal spending have shown that roughly one third of all federal contract

[3] " And all the investments in the American Jobs Plan will be guided by one principle: Buy American. . . . Buy American. And I might note, parenthetically . . . that does not violate any trade agreement. It's been the law since the '30s: Buy American." Biden, J. The White House, Office of the Press Secretary (2021). Remarks by the President in Address to the Joint Session of Congress. Washington, D.C. Retrieved on August 27, 2021 from: https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/04/29/remarks-by-president-biden-in-address-to-a-joint-session-of-congress/

dollars are awarded in the last quarter of the fiscal year.[4] An evaluation of requested waivers may not accurately describe the total impact of the Proposed Rule's changes on federal contracts. CODSIA members report the waiver request process is byzantine, at best, and lengthy, suggesting the cumbersome process artificially depresses true requests for waivers from Buy American requirements. For these reasons, CODSIA recommends further research be performed on the waiver statistics cited in the Proposed Rule.

IV. The Proposed Rule Should Clarify the Roles and Responsibilities of the Made in America Director and its Waiver Process

According to the Executive Order[5] that preceded the Proposed Rule, the Made in America Director must, within 15 days of receiving a waiver request, notify the head of the relevant federal agency that a waiver request is approved or denied. However, the Proposed Rule does little to explain this process or how it will be implemented. Therefore, key questions remain on the practical inter-governmental implementation of the waiver process as well as the establishment of guardrails to ensure the waiver request approval process does not become unduly politicized. For example, what happens if the Made in America Director takes more than 15 days to make a determination? If such a determination is not made within 15 days, will the waiver requests be automatically approved or denied? CODSIA anticipates an increase in volume of waiver requests, particularly during the early months of the Proposed Rule's implementation, which raises concerns about whether, in its current formation, the Made in America Office is sufficiently funded, resourced, and trained to meet these obligations.

V. Alternatives to Creating a New Enhanced Price Preference Framework and Corresponding Post-Award Reporting Requirement

To encourage domestic sourcing of critical items and domestic end products containing a critical component, the Proposed Rule suggests creating a new framework with enhanced price preference for such items. However, doing so creates additional compliance costs for the U.S. Government and the federal acquisition supply chain. Instead, it would likely be more efficient and less burdensome for the government to create other incentives (e.g., tax breaks, loans, subsidies, etc.) to develop competitive, domestic sources of supply for critical items and components.

VI. A Need to Limit Burdensome, Yet-To-Be Disclosed Reporting Requirements

[4] Office of Management and Budget. *The Budget of the United States Government: Budget for America's Future*. February 2020.
[5] 86 FR 7475

Except for commercially available off-the-shelf (COTS) items, the Proposed Rule requires contractors to provide within 15 days of award, **"*the amount of domestic content in each critical item*, *and* the amount of domestic content *in each domestic end product containing a critical component*"** and provides a table for the contractor to insert the "percentage of domestic content" by line item for a "critical component/end product."

This could be a substantial burden for industry depending on what is deemed critical and therefore subject to this post-reporting requirement. If there are many critical components within various end items, satisfying the reporting requirement will take a lot of labor hours to calculate. Our members also have concerns, and request greater clarity, regarding the treatment of items subject to the commercial information technology (IT) exemption that may be considered as critical products or contain critical components. The federal government's identification of a product or component as critical does not change the circumstances that led Congress to legislate an exception to Buy American rules for commercial IT products. Further rulemaking associated with the identification of critical products and components should make the distinction between commercial IT products and other products clear and unambiguous.

Similarly, if there are many end products that contain a critical component and the specific domestic content is required to be reported for the *entire* end product containing the critical component (not just the domestic content of the critical component), that reporting requirement would be a very manual process requiring a lot of labor hours to calculate and/or require significant investment in building out processes and tools needed to calculate and report the required information.

The requirements for contractors to report specific domestic content percentages could also limit competition where contractors are furnishing end products with a lead time outside of the proposed reporting requirement. In that instance, the contractor will need to weigh the benefit of having the ability to source components from multiple vendors (increasing competitiveness and supply chain resilience), each of whom may be able to furnish a component whose domestic content varies, against the need to be able to report within 15 days of a contract award the specific domestic content by percentage of a product that has not yet been manufactured and whose specific domestic content will depend on where the various components are ultimately sourced.

In addition, the post-award reporting requirements will likely adversely impact competition due to additional compliance costs and risk. This is especially of concern for small and disadvantaged businesses who are resource-constrained and businesses who primarily sell to commercial markets which do not require such reporting and

corresponding costs/risk. As a result, the Proposed Rule's post-award reporting requirements and the likelihood of increased prices may place companies in the federal contracting community at a disadvantage compared to competitors in other markets.

U.S. taxpayers deserve to know that their tax dollars are spent wisely and for their intended purposes. Reporting requirements are one way of meeting that need, but not the only way. The introduction of such reporting requirements must be balanced with the reality that disruptions to existing business practices would unnecessarily cause U.S. companies – especially small businesses – to divert their capital and resources to compliance with these new requirements and their attendant risks away from activities that add value to the U.S. economy. While the Proposed Rule contemplates additional post award reporting requirements – which will be used to not only inform taxpayers, but also may allow federal agencies to conduct future oversight – it does not provide any details as to what those requirements are. This is incredibly problematic.

Clarity and consistency are necessary for contractors to come into compliance with the proposed rulemaking, plan for the future of their businesses, and deliver quality, fiscally accurate, and timely projects for federal customers. Yet-to-be released reporting requirements will serve as a barrier to putting these funds to work in an expeditious and efficient manner. In preparing comments for the Proposed Rule, CODSIA consulted with hundreds of federal contractors. Most respondents expressed profound concern with the Proposed Rule's post award reporting requirements; one large federal contractor went so far as to describe them as "frighteningly unclear."

Instead of adding post-award reporting requirements that would adversely affect industry, competition, and supplier diversity, including participation of small and disadvantaged businesses, we urge the government to consider alternative, less burdensome, measures to achieve its objectives of obtaining insight of the domestic content of products that are integral to U.S. national security.

VII. The Increased Burdens Are Not "De Minimis"

CODSIA disagrees with the Proposed Rule's assertion that it will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act. CODSIA believes the public burden of collecting the information required by the proposed reporting requirements is significantly more than what is concluded in the initial regulatory flexibility analysis. Specifically, the impact of the increase in domestic content thresholds will result in significant disruption to existing contractor supply chains across impacted contracts and thus is more than stated in the analysis and the calculated time required for compliance of the Proposed Rule's requirements.

Additionally, the proposed rule outlines an entirely new requirement for contractors to provide post-award domestic content of critical items and components within 15 days of award. Such reporting requirements will be challenging to provide in detail – especially for commercial items – and may potentially cause concern of dissemination and public release of proprietary data related to supply chains. Accordingly, CODSIA recommends appropriate attention to the actual burden be addressed during the issuance of the subsequent rulemaking on this matter.

VIII. Do Not Apply New Requirements to COTS

While changes to COTS items were not identified in the Proposed Rule, the questions for the public included in the Proposed Rule raised specific questions related to the necessity and benefit of extending the current statutory and regulatory exemption and waiver regimes for COTS. CODSIA believes the 2009 rulemaking that waived component test requirements – based on the understanding that manufacturers' component purchasing decisions were determined not on the country of origin but on factors such as cost, quality, and availability – remains as relevant today as it was then. Furthermore, imposing new limitations on the use of COTS in federal procurement would inhibit the flexibility of agencies to acquire readily available commercial items and benefit from the latest innovations COTS provide.

With regard to the statutory Buy American exemption for commercial IT in place since 2004, CODSIA strongly believes the exemption has streamlined procurement processes and allowed federal agencies to maintain access to leading edge commercial IT equipment. Aside from national security program requirements which may demand unique processes, the existing exemption allows federal agencies to procure cutting edge technologies in an efficient and cost-effective manner that is in line with commercial best practices.

CODSIA believes that any future efforts to further bifurcate commercial IT supply chains or restrict federal agencies from commercially available IT will add unnecessary cost and further undermine the achievement of agency IT mission objectives.

Finally, it is worth noting that historically, Buy American Act requirements were not included in services contracts. In discussions with OMB personnel, including but not limited to the Made in America Director, U.S. Government officials have stated that "Made in America" efforts under Executive Order 14005, *Ensuring the Future is Made in All of America by All of America's Workers,* would have implications for services contracts. CODSIA does not see any circumstances which merit a consideration of expanding Made in America rules to services. However, if these officials intend to

consider the imposition of requirements for services contracts, CODSIA strongly encourages them to work closely with industry stakeholders to ensure that any outcomes would not hurt the U.S. Government's ability to ensure reliable access to the best technologies, goods, and services.

IX. Education of Federal Procurement Contracting Officials

The Proposed Rule's changes to the Buy American requirements will take time to understand, teach, train, and enforce by contractors and government procurement personnel alike.

Inherent in the fairness ideal of federal contracting is the presumption that contractors large and small can contribute to the public good through the supply of equipment and services to the government. However, despite well-intentioned law and regulation, increasingly this has not been the case. Compliance burdens are significant especially for small businesses and new entrant subcontractors. The higher the upfront costs to comply with unique government requirements, the fewer companies will participate. The government experiences similar challenges in ensuring that its workforce is trained as new procurement regulations are implemented government-wide.

As the Administration considers implementation of the Proposed Rule, CODSIA would urge government-wide training and education opportunities for contracting officials in order to ensure uniformity across federal agencies and to further reduce contractor bid and performance criteria complexity.

X. Do Not Apply to Current Contracts and Clarify Applicability to Multi-Year Contracts

A. Increased Domestic Content Thresholds Should Apply to New Solicitations Issued On or After the Date on Which the Threshold Increase is Effective

Increased thresholds should apply to new solicitations issued on or after the date on which the threshold increase is effective. Having a domestic content threshold increase after the receipt of proposals will create problems for contractors who have entered into long-term sourcing agreements and may require reopening the solicitation process to reflect the new thresholds before awards are made or the renegotiation of contracts if the new thresholds are included in the contract post-award.

B. Indefinite Delivery, Indefinite Quantity (IDIQ) Contracts

It is unclear how the Proposed Rule applies to "indefinite delivery, indefinite quantity" (IDIQ) contracts – or other similar types of multi-year contracts – that have already been awarded. IDIQ contracts can last many years. These types of contract vehicles allow for agency issuance of task or delivery orders stemming from the original IDIQ contract from a limited pool of contractors. Consequently, the original IDIQ contract acts as a "master contract" that delineates the scope of a project and the responsibilities of the parties to the contract—the contractor and the federal government. However, CODSIA seeks clarification as to whether the task or delivery orders issued after the Proposed Rule takes effect, under IDIQ contracts issued prior to the effective date fall within the mandate of the Proposed Rule. This could have significant impacts on price for contractors at all tiers of the contract. For example, if a task order issued prior to the Proposed Rule's implementation falls under this rule, the FAR Council should explicitly state so in the final rule. Further, if this is the case, for reasons stated above task or delivery orders should include a price adjustments clause related to any changes to domestic content requirements. This would, again, be an issue in future years where IDIQ contracts are awarded and the domestic content is, perhaps, increased multiple times. Otherwise, confusion will exist not only for contractors but also for federal contracting agencies, which could lead to litigation and project delays. Such a price adjustments clause would provide the flexibility for both federal agencies and contractors to deal with any price increases stemming directly from this federal action.

XI. Conclusion

Thank you for your attention to these comments. We believe that the Proposed Rule requires clarification in the key areas we have identified above and a further comment period once those clarifications have been made. We also urge you to recalculate the burden the Proposed Rule presents for businesses, especially small businesses, doing business with the federal government or seeking to do business with the federal government.

In evaluating our comments, we wish to point your attention to the fact that CODSIA was formed in 1964 by industry associations with common interests in federal procurement policy issues at the suggestion of the Department of Defense. CODSIA consists of eight associations – Aerospace Industries Association (AIA), American Council of Engineering Companies (ACEC), Associated General Contractors (AGC), Computing Technology Industry Association (CompTIA), Information Technology Industry Council (ITI), National Defense Industrial Association (NDIA), Professional Services Council (PSC), and U.S. Chamber of Commerce. CODSIA's member associations represent thousands of small and large government contractors nationwide. As such, this comment represents thousands of inputs, not just a single comment by a single commentor. The Council acts as an institutional focal point for

coordination of its members' positions regarding policies, regulations, directives, and procedures that affect them. A decision by any member association to abstain from participation in a particular case is not necessarily an indication of dissent.

We welcome the opportunity to address to address our comments with your drafting team at your convenience. If you have any questions or need any additional information, please contact CODSIA's action officer for these comments, Jordan Howard, Associated General Contractors of America, at Jordan.Howard@agc.com.

Sincerely,

Jimmy Christianson
Regulatory Counsel
Associated General Contractors of America

David Logsdon
Senior Director
Computing Technology Industry Association Federal Procurement Council

Gordon Bitko
Senior Vice President of Policy, Public Sector
Information Technology Industry Council (ITI)

Wesley P. Hallman
Senior Vice President for Policy
National Defense Industrial Association

David J. Berteau
President and CEO
Professional Services Council

Neil L. Bradley
Senior Vice President & Chief Policy Officer
U.S. Chamber of Commerce