



NATIONAL SCIENCE FOUNDATION
2415 Eisenhower Avenue ▪ Alexandria, VA 22314

January 13, 2022

MEMORANDUM

TO: National Science Foundation, Division of Acquisition and Cooperative Support
National Science Foundation Acquisition Workforce

FROM: Patrick K. Breen
Senior Procurement Executive

SUBJECT: Made In America Waiver Documentation and Approval Process and
Federal Acquisition Regulation Class Deviation Regarding Requirements for Non-
Availability Determinations Under the Buy American Statute

PURPOSE: This memorandum (1) issues the Made In America Waiver Documentation and Approval Process for the National Science Foundation and (2) issues a class deviation in accordance with Federal Acquisition Regulation (FAR) 1.404.

The purpose of this FAR deviation is to implement the joint memorandum issued by the Made in America Office (MIAO) within the Office of Management and Budget (OMB) and the Office of Federal Procurement Policy (OFPP) titled “Improving the Transparency of Made in America Waivers,” (Memorandum) dated October 26, 2021.

BACKGROUND: Executive order 14005, requires federal agencies to issue a waiver for procurements and federal financial assistance that buy goods, products, or materials that have not been mined, produced, or manufactured in the United States. “Before an agency grants a waiver, and unless the OMB Director provides otherwise, the agency (granting agency) shall provide the Made in America Director with a description of its proposed waiver and a detailed justification for the use of goods ... that have not been [made] in the United States.” E.O. 14005, Ensuring the Future Is Made in All of America by All of America’s Workers.

The MIAO and OFPP, issued a memorandum titled [Improving the Transparency of Made in America Waivers](#) on October 26, 2021. The Memorandum provides specific guidance to agencies on the use of a new dedicated portal, ([MadeinAmerica.gov](#)), for waivers under the Buy American statute. Federal agencies are required to submit waivers to the MIAO through the portal.

On November 16, 2021, The Civilian Agency Acquisition Council (CAAC) issued CAAC [Letter 2022-01](#), Class Deviation From the Federal Acquisition Regulation (FAR) Regarding Requirements for Nonavailability Determinations Under the Buy American Statute. CAAC Letter 2022-01 serves as consultation to agencies in accordance with FAR 1.404 and authorizes agencies to issue a class deviation to apply requirements from the Memorandum to nonavailability determinations under the Buy American statute.

The memorandum builds on the guidance of [OMB Memorandum M-21-26, Increasing Opportunities for Domestic Sourcing and Reducing the Need for Waiver from Made in America Laws](#), dated June 11, 2021. Memorandum M-21-26 outlines initial management steps to help agencies prepare for and support a centralized strategic waiver review process by the MIAO as required by Executive Order 14005.

Note: The memorandum refers to written determinations for exceptions under the Buy American statute in the FAR as waivers.

APPLICABILITY: This class deviation applies to all NSF procurement actions.

REQUIRED ACTIONS: The Contracting Officer shall comply with the subject FAR Class Deviation and approval process attached to this deviation.

EFFECTIVE DATE: This deviation is effective as dated and shall remain in effect until it is incorporated into the FAR, or until this class deviation is rescinded, extended, or amended.

POINT OF CONTACT: Contact Raymond McCollum at 703-292-4225 or rmccollu@nsf.gov .

ATTACHMENTS:

- Attachment A: FAR Part 25 Foreign Acquisition Deviation Text
- Attachment B: Made In America Waiver Documentation and Approval Process

Attachment A: FAR Part 25 Foreign Acquisition Deviation Text

Baseline is FAC 2021-07, effective September 10, 2021.

Changes to baseline shown as struck through deletions. See CAAC Letter 2022-01 for comprehensive baseline text changes.

FAR text unchanged shown as asterisks.

FAR PART 25 – Foreign Acquisition (DEVIATION NOV 2021)

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

Attachment A: FAR Part 25 Foreign Acquisition Deviation Text

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]**

Attachment A: FAR Part 25 Foreign Acquisition Deviation Text

determinations of the articles listed at 25.104(a) and the procedures at 25.103(b) 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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Attachment B: Made in America Waiver Documentation and Approval Process

PROCESS: Contracting Officers shall follow the process below to complete Made in America waiver requests:

- a. Compose market research documentation in accordance with FAR Part 10. Clearly and succinctly describe the requirement, sources of available products and/or service, estimated dollar threshold, and anticipated acquisition strategy.
- b. Determine whether a waiver is required. (Consider the application of made in America laws – for example: the Buy American Act and trade agreements. See [OMB Memorandum M-21-26, Increasing Opportunities for Domestic Sourcing and Reducing the Need for Waiver from Made in America Laws](#), for additional made in America laws.)
- c. If the contracting officer (CO) determines that a waiver is necessary, the CO will:
 - i. Complete a determination (also known as a waiver request).
 - ii. Send a request for approval of the determination (waiver) including its control number on each page, the market research report, and any additional supporting documentation to the Head of Contracting Activity through the branch chief (BC).
- d. Once the final NSF approval is received the CO will submit the waiver on sam.gov – for the step-by-step process to complete the waiver submission on sam.gov see [https://www.fai.gov/sites/default/files/Digital Waiver Portal Step by Step Process.pdf](https://www.fai.gov/sites/default/files/Digital%20Waiver%20Portal%20Step%20by%20Step%20Process.pdf)
- e. Record transaction in the NSF Made in America waiver log on the P drive (Enter the control number, subject requirement, submission & approval dates in the log.)

REQUIRED CONTENTS: The waiver shall include the following:

- a. *Identification of agency and contracting activity.* Identify the agency, contracting activity, and program (requirements) office.
- b. *Nature and/or description of end item or construction material being acquired.* Identify the item(s) being procured, including:
 - i. A description of the item(s);
 - ii. The impact to the mission if the agency is not able to acquire the item(s);
 - iii. country(ies) of origin and U.S. content (if any), of foreign end item intended for purchase, if known;
 - iv. If the waiver is to be issued pre-award, whether the supplier of the item(s) intended for purchase is a small or disadvantaged business; and
 - v. The estimated value of the procurement (or portion of the procurement) covered by the waiver.
- c. *Market research and outreach conducted* – describe the market research activities and methods used to identify domestically manufactured items capable of satisfying the requirement, including the timing of the research and conclusions reached on the availability of sources (e.g., sources are available but cannot offer sufficient quantity; sources are available but cannot offer sufficient quality; no sources can be identified).

Such analysis might include a review of information on category management dashboards on the acquisition gateway, consultation with category managers, supplier scouting with supply chain

Attachment B: Made in America Waiver Documentation and Approval Process

experts who study domestic capabilities and market trends, such as the MEP, chambers of commerce, industry and trade associations that represent domestic suppliers, and relevant labor unions or worker organizations.

- d. *Use of competition* – if the waiver is to be issued pre-solicitation, describe whether competition is anticipated; if the waiver is to be issued pre-award, describe whether competition was conducted and, if so, how long the solicitation was open; if domestic sources were identified during market research but did not compete, describe potential reason(s), if known.
- e. *Expectation of price preference* – identify whether the solicitation will or did include the provision announcing the agency's intention to provide a price preference for domestic end products and construction material.
- f. *Exclusion of source offering a U.S.-made end product* – if a waiver is to be issued pre-award, explain if a U.S.-made end product was offered but would be rejected for reasons other than price.
- g. *Identification of approving authority* – non-availability determinations above \$25,000 generally should be reviewed and approved at a level no lower than the head of the contracting activity.

Exceptions: Proposed waivers are not required to be submitted in the following circumstances:

- a. *Urgency or other situations where the agency must act in an expedited manner.* Section 4(d) of Executive Order 14005 states that “Nothing shall displace agencies’ authorities or responsibilities under law.”
- b. *Nonavailability determinations based on class determinations.* Agencies are not required to submit proposed waivers to MIAO for review to proceed with nonavailability determinations for products that have been determined to be nonavailable on a class basis and are listed in FAR 25.104, Nonavailable Articles.