

October 27, 2021

The Coalition for Government Procurement

FAR Case 2021-008

To Whom It May Concern:

The Coalition for Government Procurement (Coalition) appreciates the opportunity to comment on the Notice of Proposed Rulemaking (NPR) in the above-referenced FAR Case, which is proposing to amend the Federal Acquisition Regulation (FAR) to implement Executive Order (EO) 14005, "Ensuring the Future Is Made in All of America by All of America's Workers," signed by President Biden on January 25, 2021.

By way of background, the Coalition is a non-profit association of firms selling commercial services, products, and solutions to the Federal Government. Our members collectively account for tens of billions of dollars of the sales generated through the GSA Multiple Award Schedules (MAS) program and IT GWACs. Coalition members include small, medium, and large businesses that account for 40 percent of Federal IT spending, more than \$24 billion in Federal IT contracts, and more than \$145 billion in Federal Government contracts. The Coalition is proud to have worked with Government officials for over 40 years towards the mutual goal of common-sense acquisition.

The Coalition supports efforts to assure the availability, security, and resiliency of our nation's manufacturing capacity and supply base. The pandemic experience exposed challenges to meeting the nation's health needs in an emergency, as well as the reality that critical supplies, like active pharmaceutical ingredients and protective gear, largely are sourced from regions that leave the nation vulnerable to supply disruption. Along these lines, the overseas manufacture of high-tech supplies, like microchips, risks the nation's long-term innovation capability. If expertise gravitates to the point of manufacture, capabilities in the U.S. could diminish, again leaving the nation vulnerable to adversary sources, where visibility into technology product integrity could be limited, increasing the risk of using such products, especially in mission critical platforms.

It is understandable, then, that the Administration would seek to re-build, build, and/or expand the nation's manufacturing base, and it is clear that, in implementing the EO, the NPR seeks this end. After reviewing the NPR, Coalition members have comments in the following areas:

- At a high level, the Coalition believes there are ecosystem drivers that could influence the underlying policy for the NPR, and thus, they should be explored.
- The Coalition believes that the NPR process changes should account for certain business realities and market dynamics as they are implemented.

These areas are discussed below.

Ecosystem Drivers

Again, the Coalition supports efforts to bolster our nation's manufacturing capacity and supply base. At the same time, however, there is concern that the government is trying to achieve these ends by modifying the implementation of a statutory mechanism that was constructed in a different time under different circumstances. The Buy American Act (BAA) was enacted in the 1930s, at a time when the national economy, global trade, and international relations were different from what they are today. This situation prompts questions whether amending the domestic content regime implementing an old law is the best way to achieve the goal of expanding the nation's manufacturing base. Consider, for instance, the elevation of the content requirements and the evaluation preferences for large and small businesses. Whether these changes will have an impact on the expansion of the domestic industrial base is unclear. Domestic suppliers may perceive the requirements as a protective subsidy, producing and pricing to the level of protection afforded them. Similarly, foreign suppliers may attempt to "game" the new thresholds by identifying supply chain inputs that reduce costs enough to overcome the price preference afforded to domestic suppliers. Thus, on balance, these gaming techniques, if implemented successfully, could lead to no or little change in the domestic manufacturing base.

Further, the formulaic approach to the BAA may lead to an odd anomaly. Vendors who successfully account for the thresholds, may turn to products from non-Trade Agreements Act (TAA)-designated countries, like China. At the same time, however, under the TAA, the government is restricted from purchasing products from such countries. Thus, as with gaming techniques, the rule could lead to no or little change in the domestic manufacturing base.

The foregoing suggests that a new policy dynamic should be considered. Currently, the NPR continues a broad sweeping policy approach treating all products the same. So, for example, a ceiling fan has the same significance to the government as a computer chip. Given the challenges of the global environment, however, along with the evolving drivers and needs of the innovation economy, the government might wish to consider supporting products based on strategic needs. Such strategic needs include assuring that platforms exist for the innovation that underlies our national security and economic growth.

Similarly, the global threat environment suggests that the U.S. needs to maintain, if not reinforce, its engagement with allies to address common, evolving national and world threats. In addressing the implementation of the BAA, the government would do well to identify and enhance opportunities for alignment with U.S. allies. One such opportunity for consideration would be the implementation of a "Buy Allied" approach, at least for certain products. This approach would have the benefit of strengthening allied ties, expanding and coordinating allied innovation, and incenting allies to avoid those sources of supply that introduce risk into the supply chain.

All told, the foregoing suggests that, instead of amending the implementation of the BAA, it may be time for the Administration and Congress to revisit the underlying statute to determine whether it needs amending to disincentivize gaming behavior and allow for targeted approaches based on strategic need. By so doing, it could promote stable growth in the manufacturing base and the sustainment of allies in exigent circumstances.

NPR Process Changes

Aside from the aforementioned policy issues, there are practical challenges associated with the NPR:

- Delay and Cost – Under the EO, waivers of the BAA will be vetted with the Made in America Director. In addition, disputes between the Made in America Director and agency heads over the conditions of the waiver will be addressed through the dispute resolution mechanism set forth under section 7 of Executive Order 12866. Where an agency head “is obligated by law to act more quickly than the review procedures ... allow, [he/she] shall notify the Made in America Director as soon as possible and, to the extent practicable, comply with the requirements set forth in this section.”

For all the administrative activity that will be involved here, it is unclear what benefit, if any, will derive. If there is a perceived problem with the current waiver process, a more efficient alternative to the proposal would be to have the Made in America Director revise and clarify a whole of government approach to the waiver process for consistency and retain implementation and review at the agency level. Further, the Made in America Director could test the implementation and clarify the process, providing agencies feedback. As it stands, the proposal risks adding administrative time and cost to procurements. Further, the diffusion of discretion between agencies and the new office could chill even the legitimate utilization of waivers, which could undermine the efficiency and effectiveness of procurement.

- Representation Issues – Under the NPR, offerors will be required to identify domestic end products associated with critical components. In turn, contracting officers will use those representations to identify preferences. The establishment of a separate representation process can create administrative burden and cost for vendors, as associated compliance mechanisms will be required to assure the accuracy of such separate representations. It is not clear what benefit is achieved with the creation of this process, or whether any associated cost implications have been assessed.
- BAA vs. TAA – Currently, solicitations include both BAA and TAA FAR provisions. It is not clear whether these changes implementing the BAA will cause the removal of TAA provisions from solicitations or whether they will operate together. Likewise, if they operate together, it is not clear whether the BAA changes will impact the interpretation of the TAA. Clarification of this issue would be helpful.
- Commercial Items – The NPR states that the government is reviewing the BAA exemption for commercial items. Coalition members appreciate the effort being taken for deliberation on this issue. This exemption, consistent with the law, prompts stakeholders to recognize that implementation of the BAA does not take place in a vacuum. With the increase in global trade facilitated by law and trade agreements, supply chains have globalized. This globalization of supply chains has been driven, in part, by economic efficiency and likely has prompted a dedication of assets and relationships.

In the face of a policy change here, those assets and relationships cannot disappear instantly. Time will be needed to duplicate them domestically, and that duplication will require sufficient and dedicated demand to justify a continued commitment of resources to the market. This

demand may impact prices, as will any change to efficiency associated with domestic supply chain sources.

- Value to the Economy – The EO and NPR discuss exploring whether value added to the economy is a better measure than the component test for achieving the goals of the BAA. Coalition members believe that the government should proceed cautiously when entertaining such a standard. An accurate methodology for calculating “value” could be difficult to identify and apply in a manner that is consistent with the goals of the BAA.

For example, if the raw number of jobs in the U.S. were a value measure, a scenario may exist where, with a foreign source, domestic manufacturing jobs might decrease, but domestic sales, legal, and advocacy jobs might increase. That outcome may not be viewed as maximizing

the use of good, products, and materials produced in the United States in order to strengthen and diversify domestic supplier bases and create new opportunities for U.S. firms and workers[,]

as envisioned under the NPR or the EO.

The Coalition hopes that you find these comments useful and thanks you for your time and consideration.

Sincerely,



Roger Waldron

President