



Homeland  
Security

MEMORANDUM FOR: Heads of Contracting Activities  
PAUL R  
FROM: Paul Courtney COURTNEY  
Chief Procurement Officer  
SUBJECT: Federal Acquisition Regulation Class Deviation (Number 22-04) –  
Requirements for Nonavailability Determinations Under the Buy  
American Statute

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R COURTNEY  
Date: 2021.11.29  
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**Purpose:** This class deviation is issued in accordance with Federal Acquisition Regulation (FAR) 1.404. The purpose of this 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.

**Effective Date:** This deviation is effective on the date of signature.

**Background:** 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 provides specific guidance to agencies on the use of a new dedicated portal, [MadeinAmerica.gov](http://MadeinAmerica.gov), for waivers under the Buy American statute. **Note:** The memorandum refers to written “determinations” for exceptions under the Buy American statute in the FAR as “waivers.” The memorandum 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. 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](#), Ensuring the Future Is Made in All of America by All of America’s Workers.

**Requirement:** Effective immediately, contracting officers shall comply with Attachment 1, FAR Part 25 Foreign Acquisition Deviation Text. Asterisks indicate where the contracting officer should follow the current FAR language. Strikethroughs indicate significant deletions from the FAR text. Please note Acquisition Policy & Legislation, **not** the contracting officer, is responsible for posting waiver determinations (see Attachment 1, FAR 25.103(b)(2)(iii)(A)) requiring review and approval by the MIAO using the Made in America Waivers widget in SAM.gov.

**Applicability:** This class deviation applies to all solicitations and contracts (see definition of contract at FAR 2.101).

**Expiration:** This class deviation will remain in effect until it is incorporated into the FAR or is otherwise rescinded.

**Attachments:**

- Attachment 1 – FAR Part 25 Foreign Acquisition Deviation Text
- Attachment 2 – CAAC Letter 2022-01, Class Deviation From the Federal Acquisition Regulation (FAR) Regarding Requirements for Nonavailability Determinations Under the Buy American Statute

**Additional Information:** Questions or comments about this class deviation may be directed to Shaundra Ford at (202) 447-0056 or email at Shaundra.Ford@hq.dhs.gov.

**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 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](http://MadeinAmerica.gov) via [SAM.gov](http://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

Attachment 1: FAR Part 25 *Foreign Acquisition* Deviation Text

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](https://www.madeinamerica.gov) by going through [SAM.gov](https://www.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](https://www.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](https://www.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](https://www.madeinamerica.gov) via [SAM.gov](https://www.sam.gov) prior to waiver determination issuance when—

(I) 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](https://www.sam.gov) within 30 days of award. MIAO will make

Attachment 1: FAR Part 25 *Foreign Acquisition* Deviation Text

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

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**Subpart 25.5 - Evaluating Foreign Offers-Supply Contracts**

\* \* \* \* \*

**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)) 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)), award on the low offer. \* \* \*

\* \* \* \* \*

## **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., 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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