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FAC 2021-06 ADDRESSES EQUIPMENT ACQUISITIONS, FAIR OPPORTUNITY UNDER TASK AND DELIVERY ORDERS

Federal Acquisition Circular (FAC) 2021-06 consists of two final rules that amend the Federal Acquisition Regulation (FAR). One requires agencies to analyze the most advantageous method for acquiring equipment, and the other increases the threshold for requiring fair opportunity on orders under multiple-award contracts to the micro-purchase threshold.”

■ Analysis for Equipment Acquisitions:

This finalizes, with a minor editorial change, the rule that proposed to revise FAR subpart 7.4, Equipment Acquisition (previously titled “Equipment Lease or Purchase”), to implement the FAA [Federal Aviation Administration] Reauthorization Act of 2018 (Public Law 115-254), Section 555, Cost-Effectiveness Analysis of Equipment Rental, which requires the head of each agency to acquire equipment using the method of acquisition most advantageous to the government based on a case-by-case analysis of comparative costs and other factors, including purchase, short-term rental or lease, long-term rental or lease, interagency acquisition, and acquisition agreements with a state or local government.

The rule proposed to make the following changes to FAR subpart 7.4:

- Replace the word “lease” with “rental or lease agreement,” and the word “leasing” with “rental or leasing” throughout the subpart.
- Amend FAR 7.400, Scope of Subpart, to add that FAR subpart 7.4 implements Section 555.
- Amend FAR 7.401, Acquisition Considerations, to add: “The methods of acquisition to be compared in the analysis shall include, at a minimum: (i) purchase; (ii) short-term rental or lease; (iii) long-term rental or lease; (iv) interagency acquisition (see [FAR] 2.101 [Definitions]); and (v) agency acquisition agreements, if applicable, with a state or local government.”

The following four additional factors that should be compared in the analysis would be added to the five factors already in FAR 7.401:

- Cancellation, extension, and early return conditions and fees;

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- Ability to swap out or exchange equipment;
- Available warranties; and
- Insurance, environmental, or licensing requirements.

Finally, the exceptions to the required analysis that were included in Section 555 would be added to FAR 7.401 as paragraph (c): “(1) When the president has issued an emergency declaration or a major disaster declaration pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 USC 5121 *et seq.*); (2) in other emergency situations if the agency head makes a determination that obtaining such equipment is necessary in order to protect human life or property; or (3) when otherwise authorized by law.”

- FAR 7.403, General Services Administration Assistance and OMB Guidance (previously titled “General Services Administration Assistance”), paragraph (b) would be revised to provide the following information: “For additional GSA assistance and guidance, agencies may: (1) request information from the GSA FAS [Federal Acquisition Service] National Customer Service Center by phone at 1-800-488-3111 or by email at **ncscustomer.service@gsa.gov**; and (2) see GSA website, Schedule 51 V Hardware Superstore-Equipment Rental, (<https://www.gsa.gov/buying-selling/products-services/industrial-products-services/rental-of-industrial-equipment>).”

In addition, the following Office of Management and Budget (OMB) guidance would be added as paragraph (c): “(1) Section 13, Special Guidance for Lease-Purchase Analysis, and paragraph 8.c.(2), Lease-Purchase Analysis, of OMB Circular A-94, Guidelines and Discount Rates for Benefit-Cost Analysis of Federal Programs, (<https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A94/a094.pdf>); and (2) Appendix B, Budgetary Treatment of Lease-Purchases and Leases of Capital Assets, of OMB Circular A-11, Preparation, Submission, and Execution of the Budget (https://www.whitehouse.gov/wp-content/uploads/2018/06/app_b.pdf).”

Five respondents submitted comments on the proposed rule, but none of the comments were adopted. The only difference between the proposed rule and the final rule is that the proposed sentence in paragraph (a) – “When requested by an agency, the General Services Administration (GSA) will assist in lease, rent, or purchase decisions...” – is changed to “When requested by an agency, the General Services Administration (GSA) will assist in *rent*, *lease*, or purchase decisions...” This is to ensure that the terms “rent” and “lease” are used in the same order throughout the rule.

For more on the proposed rule, see the September 2020 *Federal Contracts Perspective* article “FAR to Require Analysis of Equipment Acquisitions.”

Vivina McVay, Editor-in Chief

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■ **Application of Micro-Purchase Threshold to Task and Delivery Orders:** This finalizes, without changes, the rule that proposed to amend FAR 16.505, Ordering [under indefinite-delivery contracts], to implement the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2020 (Public Law 116-92), Section 826, Uniformity in Application of Micro-Purchase Threshold to Certain Task or Delivery Orders, which increases the threshold for requiring fair opportunity on orders under multiple-award contracts from \$2,500 to the “micro-purchase threshold”.

Paragraph (c) of Title 41 of the U.S. Code, Section 4106 (41 USC 4106), Orders [under task and delivery order contracts], requires that “when multiple contracts are awarded...all contractors awarded the contracts shall be provided a fair opportunity to be considered...for each task or delivery order in excess of \$2,500 that is to be issued under any of the contracts...” unless an exception applies. Section 826 increases the \$2,500 threshold in 41 USC 4106(c) to “the micro-purchase threshold”.

To implement Section 826, the rule proposed amending FAR 16.505(b)(1)(i) and FAR 16.505(b)(2)(i) by removing “\$3,500” and replacing it with “the micro-purchase threshold”. In addition, the rule proposed to make the same change to FAR 16.505(b)(2)(ii)(A), which requires the contracting officer to document the basis for using an exception to the fair opportunity process for orders exceeding \$3,500, but not exceeding the simplified acquisition threshold. **(EDITOR’S NOTE:** The \$3,500 threshold in FAR 16.505 was the product of inflation adjustments to the micro-purchase threshold; it was increased from \$2,500 to \$3,000 in 2006 (see “Inflation Adjustment of Acquisition-Related Thresholds” in the October 2006 *Federal Contracts Perspective* article “Micro-Purchase, Cost or Pricing Data, 8(a) Competition Thresholds Adjusted for Inflation”), and from \$3,000 to \$3,500 in 2015 (see “Inflation Adjustment of Acquisition-Related Thresholds” in the August 2015 *Federal Contracts Perspective* article “FAC 2005-83 Adjusts Federal Acquisition-Related Thresholds, Makes FAR Subpart 13.5 Permanent.” Since the 2015 inflation adjustment, the NDAA for FY 2018 (Public Law 115-91), Section 806, Requirements Related to the Micro-Purchase Threshold, has increased the micro-purchase threshold from \$3,500 to \$10,000 – see “Increased Micro-Purchase and Simplified Acquisition Thresholds” in the August 2020 *Federal Contracts Perspective* article “FAC 2020-07 Increases Simplified Acquisition, Micro-Purchase Thresholds.”)

No comments were submitted in response to the proposed rule, so it is finalized without changes. For more on the proposed rule, see “Application of Micro-Purchase Threshold To Task and Delivery Orders” in the November 2020 *Federal Contracts Perspective* article “Revision of ‘Commercial Item’ Definition Proposed.”

PROPOSED FAR RULE TO UPDATE HUBZONE PROGRAM

The FAR Council has published a proposed rule that would amend FAR part 19, Small Business Programs, to reflect changes the Small Business Administration (SBA) made to its regulations for the Historically Underutilized Business Zone (HUBZone) Program (Title 13 of the Code of Federal Regulations, part 126 [13 CFR part 126], HUBZone Program) to reduce the regulatory burdens imposed on HUBZone small businesses and government agencies, implement new statutory provisions, and eliminate ambiguities in the regulations (see “Revision of the HUBZone Program” in the December 2019 *Federal Contracts Perspective* article “SBA Takes on Small Business Contracting Programs”).

To bring FAR part 19 and related FAR sections into conformance with the revised 13 CFR part 126, the following are the significant changes that are proposed:

- The definition of “HUBZone small business concern” in FAR 2.101, Definitions, and FAR 52.219-8, Utilization of Small Business Concerns, would be revised to refer to the requirements in 13 CFR 126.200, What requirements must a concern meet to be eligible as a certified HUBZone small business concern?, and specify that a HUBZone small business concern is designated as such by SBA in the Dynamic Small Business Search (DSBS – https://web.sba.gov/pro-net/search/dsp_dsbs.cfm). The term “qualified” HUBZone would be removed throughout the FAR because all HUBZone small business firms have been qualified by the SBA and identified as in the DSBS.
- In FAR 13.005, List of Laws Inapplicable to Contracts and Subcontracts At or Below the Simplified Acquisition Threshold, paragraph (a)(5) would be removed to eliminate the restriction against applying 15 USC 657a, HUBZone Program, to contracts and subcontracts at or below the simplified acquisition threshold (currently \$250,000).
- FAR 19.306, Protesting a Firm’s Status as a HUBZone Small Business Concern, would be revised to specify: (1) who may protest the prospective contractor’s HUBZone status for HUBZone sole-source awards; (2) that the Director of SBA’s HUBZone Program will determine whether a protested concern has certified HUBZone status; and (3) if SBA upholds the protest, that SBA will remove the concern’s HUBZone status in DSBS. In addition, updated references and procedures for filing protests against a HUBZone joint venture would be added.
- FAR 19.1302, Applicability [of the HUBZone Program], which states “The procedures in this subpart [FAR subpart 19.13, Historically Underutilized Business Zone (HUBZone) Program] apply to all federal agencies that employ one or more contracting officers”, would be removed because all agencies using the FAR employ one or more contracting officers.
- In FAR 19.1303, Status as a HUBZone Small Business Concern, paragraph (d) specifies that, “to be eligible for a HUBZone contract under this section, a HUBZone small business concern must be a HUBZone small business concern both at the time of its initial offer and at the time of contract award.” Paragraph (d) would be deleted because SBA removed this requirement from its regulations. In addition, the corresponding representations in paragraph (g) in the clause at FAR 52.219-3, Notice of HUBZone Set-Aside or Sole-Source Award, and paragraph (f) of FAR 52.219-4, Notice of Price Evaluation Preference for HUBZone Small Business Concerns, would be deleted.
- Paragraph (e) of FAR 19.1304, Exclusions [from the HUBZone program], states that the HUBZone program does not apply to “requirements that do not exceed the micro-purchase threshold.” Paragraph (e) would be deleted because SBA removed this restriction from its regulations.
- In FAR 19.1305, HUBZone Set-Aside Procedures, paragraph (d) states that FAR 19.202-1, Encouraging Small Business Participation in Acquisitions, and FAR 19.402, Small Business Administration Procurement Center Representatives, apply to HUBZone acquisitions “except for

acquisitions not exceeding the simplified acquisition threshold.” This rule would remove “except for acquisitions not exceeding the simplified acquisition threshold” from paragraph (d).

- Paragraph (a)(4) of FAR 19.1306, HUBZone Sole-Source Awards, requires contracting officers to consider awarding a HUBZone sole source contract if “the acquisition is greater than the simplified acquisition threshold.” Paragraph (a)(4) would be removed so HUBZone sole-source contracts at or under the simplified acquisition threshold are authorized.

- The representations for HUBZone small business concerns in paragraph (c)(10)(i) of FAR 52.212-3, Offeror Representations and Certifications Commercial Items, and paragraph (c)(8)(i) of FAR 52.219-1, Small Business Program Representations, would be revised to replace references to SBA’s List of Qualified HUBZone Small Business Concerns with references to DSBS.

Comments on this proposed rule must be submitted by August 13, 2021, identified as “FAR Case 2019-007,” through the Federal eRulemaking portal at <https://www.regulations.gov>.

DOD ISSUES TWO DEVIATIONS, ONE REVISION

The Department of Defense (DOD) took June off, only issuing two Defense FAR Supplement (DFARS) deviations and an update to an original deviation.

- **Deviation on Department of State Rescission of Determination Regarding Sudan:** This deviation implements Department of State Public Notice 11281, Rescission of Determination Regarding Sudan, which removed Sudan from the U.S. list of state sponsors of terrorism, effective December 14, 2020.

The deviation requires the use of DFARS 252.225-7050, Disclosure of Ownership or Control by the Government of a Country that is a State Sponsor of Terrorism (DEVIATION 2021-0006), in place of DFARS 252.225-7050, Disclosure of Ownership or Control by the Government of a Country that is a State Sponsor of Terrorism, and DFARS 252.225-7051, Prohibition on Acquisition of Certain Foreign Commercial Satellite Services (DEVIATION 2021-O0006), in place of DFARS 252.225-7051, Prohibition on Acquisition of Certain Foreign Commercial Satellite Services. Both DFARS 252.225-7050 (DEVIATION 2021-O0006) and DFARS 252.225-7051 (DEVIATION 2021-O0006) remove Sudan from the definition of “state sponsor of terrorism.”

- **Deviation Updating Peer Review Requirements of Acquisitions for Supplies and Services:** This deviation updates the peer review requirements in DFARS 201.170, Peer Reviews, increases the threshold for preaward peer reviews of noncompetitive procurements, and provides further guidance to be used in identifying actions subject to peer reviews.

The original deviation eliminated the conduct of peer reviews “for competitive procurements above \$1 billion, as required by DFARS 201.170(a)(1)(i), except for procurements of major defense acquisition programs above \$1 billion for which the Under Secretary of Defense for Acquisition and Sustainment (USD(A&S)) is the milestone decision authority and USD(A&S)

special interest programs.” In addition, the deviation eliminated the conduct of “postaward peer reviews for acquisitions for services with a total estimated value greater than \$1 billion as required by DFARS 201.170(a)(1)(iii).”

This updated deviation rescinds and supersedes the original deviation. The new deviation: (1) requires that preaward peer reviews for competitive procurements be conducted for all procurements under major defense acquisition programs for which USD(A&S) is the milestone decision authority with an estimated value at \$1 billion or more or for any other contract action designated by the USD(A&S) as requiring a peer review, regardless of value; (2) increases the threshold for peer reviews of noncompetitive contract actions (*e.g.*, new contracts, modifications to existing contracts, requests for equitable adjustment, claims) from \$500 million specified in DFARS 201.170(a)(1)(ii) to \$1 billion; and (3) states that postaward peer reviews will not be conducted for acquisitions of services with a total estimated value greater than \$1 billion in accordance with DFARS 201.170(a)(1)(iii).” Also, the new deviation provides guidance on how to identify actions that are subject review by addressing undefinitized contract action or undefinitized change orders, indefinite-delivery, indefinite-quantity (IDIQ) contracts, and non-competitive actions.

For more on the original deviation, see “Class Deviation on Peer Reviews of Contracts for Supplies or Services” in the September 2019 *Federal Contracts Perspective* article “DOD Resumes DFARS Clean-Up.”

■ **Revision to Deviation on Undefinitized Contract Actions During the National Emergency for the COVID-19:** This deviation revises and supersedes the original deviation, which implemented: (1) Section 13004 of the Coronavirus Aid, Relief, and Economic Security (CARES) Act (Public Law 116-136), which exempts DOD undefinitized contract actions (UCAs) related to COVID-19 from paragraph (b)(3) of Title 10 of the U.S. Code, Section 2326, Undefinitized Contractual Actions: Restriction (10 USC 2326(b)(3)), which restricts the contracting officer from obligating more than 75% of the negotiated overall ceiling price until the contractual terms, specifications, and price are definitized; and (2) Section 13005 of the CARES Act, which allows the head of the agency to waive the provisions of 10 USC 2326(b), which details the limitations on entering into a UCA. To implement Sections 13004 and 13005, the original deviation: (1) made the 75% limit in paragraph (a) of DFARS 217.7404-4, Limitations on Obligations [for UCAs], inapplicable to UCAs related to COVID-19; and (2) authorized the head of the agency to waive the 10 USC 2326(b) limits on entering into a UCA related to COVID-19.

While the replacement deviation retains most of the provisions of the original deviation, the replacement deviation also authorizes the head of the contracting activity to waive the 80% progress payment limit in paragraph (k) of FAR 52.232-16, Progress Payments, for UCAs for COVID-19 relief. The replacement deviation places conditions on the HCA’s waiver authority.

For more on the original deviation, see “DOD Deviation 2020-O0012, Undefinitized Contract Actions During the National Emergency for the Coronavirus Disease 2019” in the May 2020 *Federal Contracts Perspective* article “Acquisition Community Fighting COVID-19 On a Multitude of Fronts.”

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GUIDANCE ON REDUCING MADE IN AMERICA WAIVERS ISSUED

The Office of Management and Budget (OMB) has issued a memorandum titled “Increasing Opportunities for Domestic Sourcing and Reducing the Need for Waivers from Made in America Laws” that provides guidance on complying with Executive Order 14005, Ensuring the Future is Made in All of America by All of America’s Workers. Executive Order 14005 directs that agencies take “a series of actions to enable the United States government to maximize its use of goods, products, and materials produced in, and services offered in, the United States. These actions include, among other things, requiring the Office of Management and Budget (OMB) to establish the Made in America Office (MIAO). The MIAO will provide greater oversight of waivers from Made in America laws, thus increasing consistency and public transparency of such waivers. The Executive Order also directs the Federal Acquisition Regulatory Council (FAR Council) to consider strengthening applicable Made in America provisions in the Federal Acquisition Regulation (FAR).” This OMB memorandum provides initial guidance to agencies regarding the MIAO’s implementation of Executive Order 14005.

The memorandum covers several key Made in America laws: the Buy American Act (see FAR subpart 25.1, Buy American – Supplies, and FAR subpart 25.2, Buy American – Construction Materials; the Berry Amendment (see DFARS 225.7002, Restrictions on Food, Clothing, Fabrics, Hand or Measuring Tools, and Flags); the Kissell Amendment (see Section 604 of the American Recovery and Reinvestment Act of 2009 [Public Law 111-5] and Department of Homeland Security Acquisition Regulation [HSAR] 3025.7002, Restrictions on Clothing, Fabrics, and Related Items); the Merchant Marine Act of 1920 (Public Law 66-261, also known as the “Jones Act” – it “generally provides that no merchandise may be transported between points in the United States to which coastwise laws apply, either directly or via a foreign port, in any vessel unless it is U.S.-built, U.S.-owned, and documented with a coastwise endorsement by the U.S. Coast Guard”); and the Cargo Preference Acts of 1904 and 1954 (“100% of all supplies bought for the DOD, and at least 50% of all equipment, materials, or commodities purchased or financed by non-DOD entities with federal funds, must be carried on privately-owned, U.S.-flag commercial vessels when transported to and from international destinations”) (see FAR subpart 47.5, Ocean Transportation by U.S.-Flag Vessels, for policies and procedures implementing the Merchant Marine Act of 1920 and the Cargo Preference Acts of 1904 and 1954).

The memorandum directs agencies to take the following initial actions:

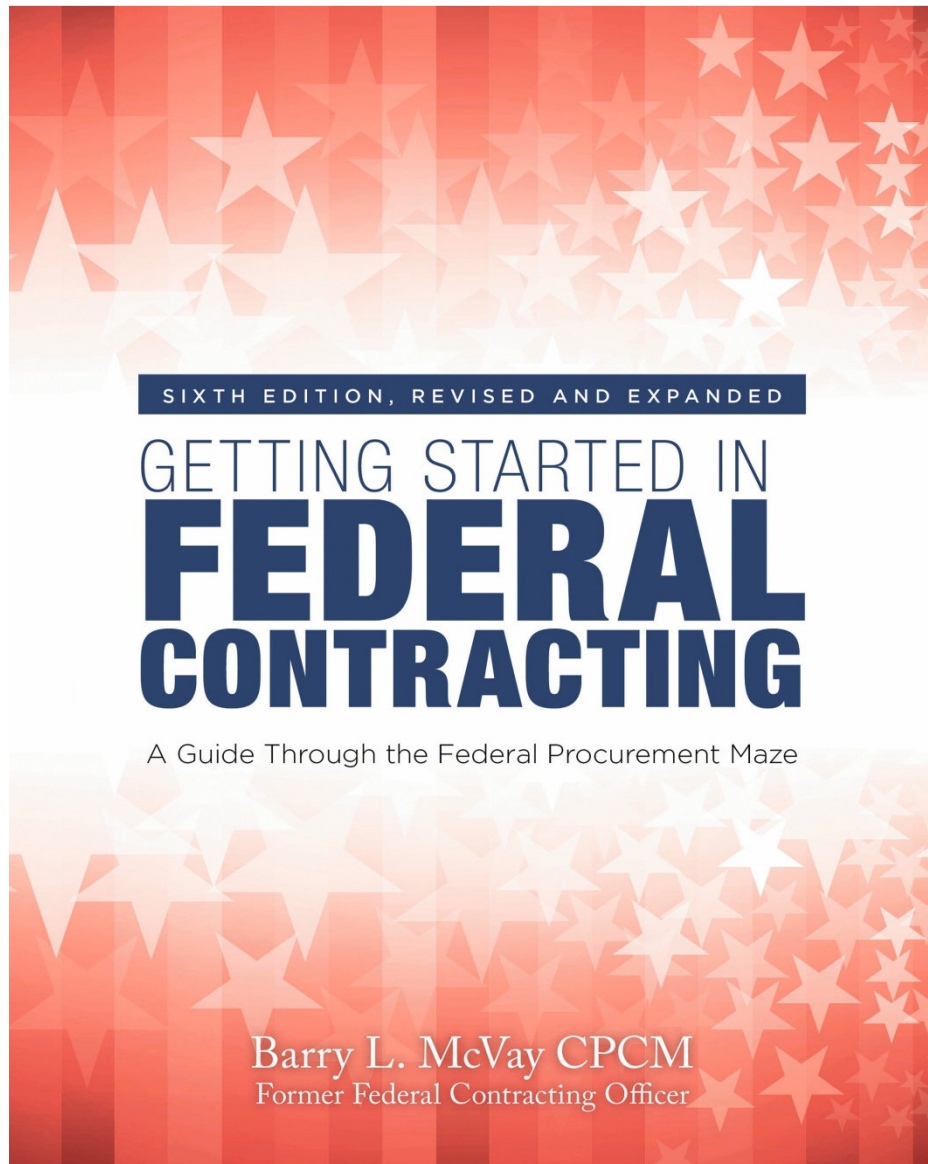
- Designate a senior accountable official (SAO) for domestic sourcing.
- Support product category reviews for federal procurement. The MIAO and the OMB Office of Federal Procurement Policy (OFPP) will convene agencies to explore market conditions for product categories where non-availability determinations (“articles, materials, or supplies are not mined, produced, or manufactured in sufficient and reasonably available commercial quantities and of a satisfactory quality”) are most prevalent.
- Standardize waiver information. OMB provides details on the information that must be submitted to justify a waiver to a Made in America laws.
- Report on use of Made in America laws. Each agency’s SAO must submit a report on: (1) the agency’s implementation of, and compliance with, Made in America laws; (2) the agency’s

ongoing use of any longstanding or nationwide waivers of any Made in America laws; and (3) recommendations for how to further effectuate the executive order's policy.

- Agencies must update reports on Made in America laws semiannually.
- Promoting transparency in federal procurement. OMB will work with the General Services Administration (GSA) on the development of a public website that will include information on all proposed waivers and whether those waivers have been granted. This website is expected to be operational in early Fiscal Year 2022.

In addition, the following are additional planned actions related to waivers:

- The MIAO will seek to understand the relative competitiveness of domestic sources in federal competitions where foreign end-products and construction materials were acquired. The MIAO will work with agencies on a process to share information regarding the differential between the price paid and the price offered by the domestic source that was most competitive.
- Acquisitions of commercial information technology (IT) are exempt by statute from the requirements of the Buy American Act (see paragraph (e) of FAR 25.103, Exceptions [to the Buy American Act]). The MIAO will collaborate with the FAR Council, agency IT experts, the Small Business Administration (SBA), the Federal Acquisition Security Council (FASC), and other interested parties to understand the extent to which the original purpose of the exception, or other goals of the exception, remain relevant, the impact of narrowing or lifting the exception, and the extent to which current conditions may support such narrowing or lifting to further promote Made in America policies with strategies in place to strengthen domestic IT supply chains.
- In 2009, to reduce administrative burdens imposed by government-unique requirements, the OFPP waived the component test of the Buy American Act for acquisition of commercial off-the-shelf products (to qualify as a domestic end product, the item must be manufactured in the United States, and more than 55% of the cost of all the component parts must be manufactured in the United States – see paragraph (a) of FAR 25.101, General). In making the decision, OFPP concluded that manufacturers' component purchasing decisions are based on factors such as cost, quality, availability and maintaining the state of the art, not the country of origin, making it difficult for a manufacturer to guarantee the source of its components over the term of a contract. The MIAO will collaborate with the OFPP, members of the FAR Council, SBA, and other interested parties to review the findings and conclusions of the 2009 determination to understand the extent to which the basis of the waiver remains relevant, the impact of rescinding the waiver, and the extent to which current conditions may support rescission of the waiver to further promote Made in America policies with appropriate strategies to strengthen domestic commercial supply chains.
- The executive order requires GSA to submit to the MIAO recommendations for ensuring that products offered to the general public on federal property are procured in accordance with the executive order's policies. The MIAO will confer with GSA upon receipt of the recommendations to address appropriate follow-on actions.
- The MIAO will work with relevant agencies to review how best to ensure agency compliance with cargo preference requirements to maximize the utilization of U.S.-flag vessels to the greatest extent practicable.



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