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on

"Amendments to the Federal Acquisition Regulation Buy American Act Requirements"

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Public Citizen thanks the Office of Management and Budget (OMB), the Department of Defense (DOD), the General Services Administration (GSA) and the National Aeronautics and Space Administration (NASA) for the opportunity to submit written comments related to the August 26, 2021 public meeting on the proposed amendments to the Federal Acquisition Regulation (FAR) to implement section 8 of the Executive Order 14005, "Ensuring the Future Is Made in All of America by All of America's Workers," related to the Buy American Act. I am Lori Wallach, director of Public Citizen's Global Trade Watch. Public Citizen is a national public interest organization with more than 500,000 members and supporters. For more than 45 years, we have advocated for consumer protections and more generally for government and corporate accountability.

The Biden-Harris administration's focus on strengthening domestic procurement is spot on and incredibly important. Domestic procurement preferences are an important industrial policy tool used here and in other nations to spur desired environmental or labor practices and investment and innovation, reinvest tax dollars in domestic employment and help domestic businesses develop and compete in strategic sectors. Especially given the enormous value of U.S. government procurement – almost $600 billion[1] at the federal level and $1.7 trillion[2] including state-level spending, shaping the way in which U.S. government procurement is conducted is among the most powerful and potentially impactful policy tools to address economic, racial and regional equity; rebuild supply chain resilience; and create U.S. capacity in the industries of the future, including to address China's dominance in such sectors, which leaves U.S. consumers over reliant on imports with respect to some critical goods. Thus, Public Citizen supports the Administration's goals of strengthening Buy American preferences. We also appreciate the supply chain review studies, which were insightful in their diagnosis of the existing vulnerabilities and their provision of some important policy solutions, among them leveraging federal procurement to strengthen U.S. supply chains.[3]

Public Citizen generally supports the FAR amendments and appreciates the focus on improving the domestic content standard and, for certain critical goods, the price preferences that agencies must apply when assessing offers. **However, in order to make Buy American requirements real, the Biden-Harris administration must carry out some important additional steps:**

- **The proposed regulations do not remedy important waivers and loopholes that gut Buy American laws (BAA) and that allow billions of foreign content into the government procurement market, permitting those goods to be designated as "made in America."**
- **Unaddressed is the problem that current U.S. implementation of "trade" pact obligations requires goods and bidders from more than 60 countries to be treated as American for government tenders and contracts.**

[1] GAO, "A Snapshot: Government-Wide Contracting. A 2019 Update." Extracted on June 11, 2021. Available at: https://gaotest.files.wordpress.com/2020/05/contracting-graphic.png
[2] GAO, "The United States and European Union Are the Two Largest Markets Covered by Key Procurement Related Agreements." July 2015. Available at: https://www.gao.gov/assets/gao-15-717.pdf
[3] The White House, "Building Resilient Supply Chains, Revitalizing American Manufacturing, and Fostering Broad-Based Growth: 100-Day Reviews under Executive Order 14017," June 2021. Available at: https://www.whitehouse.gov/wp-content/uploads/2021/06/100-day-supply-chain-review-report.pdf

- **Additionally, the Administration could do much more to enhance the quantity and quality of the data available to the government and the public with regard to the origin of the goods being procured by federal agencies and the level of compliance with BAA.**

The rest of our submission will focus on further improvement needed to guarantee that the U.S. government maximizes the use of goods, 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. This submission includes:

1. An explanation of how the commercially available off-the-shelf (COTS) waiver of BAA's domestic content test allows firms to import tens of billions in components and parts, perform basic assembly operations and sell goods to the federal government as "domestic end products" with BAA preferences. This waiver is not addressed in the proposed regulatory changes.

2. A walkthrough of the Trade Agreements Act (TAA) BAA waiver that allows all procurements above a set threshold, which today is $182,000 for goods under the World Trade Organization (WTO) rules, to evade compliance with value-based domestic content rules. The U.S. government's decision to implement these trade-pact terms in this manner is not addressed in the proposed regulatory changes.

3. Details on the flaws in the current U.S. government data systems with respect to how much the federal government spends on domestic vs. foreign goods and reasons why the new post-award domestic content reporting requirement for contractors selling critical items and goods with critical components is not enough to fix the data issues.

1. The Effectiveness of the Proposed Changes Will Be Significantly Undermined Unless the COTS Waiver Loophole Is Addressed, Which Now Allows Billions in Foreign Content into the Domestic Procurement Market and Allows It to be Counted as U.S. Added Value.

The Buy American Act price preferences, which will be enhanced through the proposed rule for critical products and goods made up of critical components, apply for "domestic end products." However, the COTS loophole to the definition of "domestic end product" must be addressed if the improvements proposed in the new regulations are to have a practical effect.

According to current FAR rules, in order to qualify as a "domestic end product," a good must have a 55% domestic content and be mined produced or manufactured in the United States.[4] This means that the cost of a qualifying goods' components mined, produced, or manufactured in the United States must exceed 55% of the cost of all its components. Thus, this rule of origin allows almost half the value of inputs and components to be foreign. (As described in further detail in the data flaws section below, the total value of such a good would count as domestic in U.S. government procurement data!) Moreover, this rule of origin allows components and inputs that are manufactured domestically from imported subcomponents or inputs to be counted as all U.S. value towards the 55%. That means that

[4] Products made out of steel or iron have special requirements. A recent change to this rule is a 95% domestic ferrous content for products predominantly of iron or steel, although this standard includes no domestic content requirement at all for other metal and non-metal inputs.

the 55% domestic content requirement may include the value of a good manufactured here even if the good has significant foreign value (inputs, parts) embedded in it. These factors have undermined the intent of the domestic preferences in their own right. Thus, the proposed higher rule of origin percentage should have a positive impact on the portion of federal government procurement that supports domestic supply chains.

However, the statutory "domestic end product" standard has been significantly undermined by a 2009 COTS regulation (41 U.S.C. § 1907 and FAR 12.505) that altogether waives the Buy American Act domestic content test for "commercially available off-the-shelf" items. A COTS item that is manufactured in the United States is simply *deemed* domestic-end-product without any regard to the provenance of its components. Under FAR 2.101, COTS are commercial items sold in substantial quantities in the commercial marketplace that are offered to the government in the same form as they are sold in the marketplace. Millions of goods, including those of high value, are covered. Thus, waiving the BAA domestic content test for COTS products opens the door for innumerable super high-value components, potentially worth tens of billions of dollars, that can be imported to the United States, assembled in U.S. territory and be treated as domestic end products, benefiting from the BAA preferences. None of this foreign value is captured in the BAA data, as COTS goods with enormous foreign value are simply recorded as manufactured in the United States.

In the supplementary information included in the proposed rules Federal Register publication, DoD, GSA, and NASA provided a critical datapoint that sheds light on the potential impact of the COTS waiver with regard to BAA. In fiscal year 2020, it is estimated that 37,503 of the 121,063 new contract awards for products and construction, valued over the micro-purchase threshold through the threshold at which the WTO GPA applies, were awards for COTS items.[5] This basically means that 31% of the contracts awarded in fiscal year 2020 for which BAA requirements should apply did not require that the procured goods had a minimum content of genuinely made in America goods!

This is a huge loophole that hollows out BAA policies: If the proposed regulatory changes are to translate into real change, the administration must reverse the COTS rule and build demand for U.S. supply chains in components and inputs.

2. The Effectiveness of the Proposed Changes Will Be Significantly Undermined Absent Changes to Trade-Agreement Waivers and the Means by Which the U.S. Government Implements Them, Which Drastically Narrow the Reach of Buy American Laws.

U.S. manufacturers that wanted to keep lucrative U.S. government contracts and also offshore production to low-wage nations pushed to insert terms into trade agreements that require government procurement policies to treat goods, services and suppliers from trade-pact partner countries the same as U.S. counterparts. Effectively, these interests pushed to apply a concept, known as national treatment, that relates to private-sector trade to the government procurement context. National treatment requires government policies to treat imported goods the same as like domestic goods with respect to regulatory standards and the like. Applying this concept to procurement means foreign-made

[5] Federal Register, "Federal Acquisition Regulation: Amendments to the FAR Buy American Act Requirements," July 30, 2021. Available at: https://www.federalregister.gov/documents/2021/07/30/2021-15881/federal-acquisition-regulation-amendments-to-the-far-buy-american-act-requirements

goods must be treated the same for government purchase contracts. Under this concept, which only was added to trade pacts in past decades, presidents have granted trade-pact exceptions to Buy American and other domestic procurement preferences for 46 nations covered by the WTO Agreement on Government Procurement Agreement and 14 U.S. Free Trade Agreement partners.[6] This exception is sometimes called the 1979 Trade Agreements Act (TAA) waiver or TAA exception and applies for contracts that surpass a monetary threshold. The current threshold for goods purchases in the WTO's GPA is $182,000 and above.

This trade-pact waiver to Buy American means that billions in U.S. tax dollars leak offshore every year because the goods and the companies from 60 other countries are treated like they are American for Buy American qualification. This includes Hong Kong, which is now the same as China, as well as Mexico, Japan, South Korea and all the EU countries.

Some commercial interests have argued that offshoring our tax dollars is fine because in exchange we get better opportunities for individual U.S. firms to get contracts in other countries. However, even if this notion was good policy, the way it's now done, without reciprocity by value, is a bad deal for the United States. The GAO found that the United States currently offers twice as much procurement to foreign firms as the next five largest WTO GPA signatories *combined*, which includes all European Union countries, Japan, South Korea, Norway, and Canada.[7]

A perhaps less known but equally concerning feature of the TAA regime for government procurement is that it entirely guts the domestic content standard for U.S. producers as well. *All* procurements made under the trade-agreement waiver are excluded from having to meet the value-based domestic content rules.

Under the TAA, the rule of origin standard to determine whether a manufactured product is originating in a designated country (one of the countries that have national treatment due to trade agreements' commitments) or is a "U.S.-made end product" is the same: Instead of requiring any specific amount of U.S. or TAA-nation value, the applicable rule of origin is what is called a "substantial transformation" rule. It effectively means that some assembly or other processing must occur in the United States or in a TAA-waiver country that transforms a good in order to qualify. According to FAR 25.003, a product has been "substantially transformed" when a producer uses parts and components, that might have been manufactured in other countries, and transforms them into a new and different article of commerce with a distinct name, character or use. One measure of a transformation is whether there is a change in the tariff line that applies to the final product compared to the input.

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[6] The 60 countries: **Armenia**, **Aruba**, ***Australia***, **Austria**, *Bahrain*, **Belgium**, **Bulgaria**, ***Canada***, *Chile*, *Colombia*, *Costa Rica*, **Croatia**, **Cyprus**, **Czech Republic**, **Denmark**, *Dominican Republic*, *El Salvador*, **Estonia**, **Finland**, **France**, **Germany**, **Greece**, *Guatemala*, *Honduras*, **Hong Kong**, **Hungary**, **Iceland, Ireland**, ***Israel***, **Italy**, **Japan**, **Latvia**, **Liechtenstein**, **Lithuania, Luxemburg**, *Mexico*, **Moldova**, **Malta**, **Montenegro**, *Morocco*, **Netherlands**, **New Zealand**, *Nicaragua*, **Norway**, *Oman*, *Panama*, *Peru*, **Poland**, **Portugal**, **Romania**, ***Singapore***, **Slovak Rep.**, **Slovenia**, ***Korea***, **Spain**, **Sweden**, **Switzerland**, **Taiwan**, **Ukraine**, **UK. (Bold** = WTO AGP and italics = FTA). See: https://www.citizen.org/article/how-overreaching-trade-pact-rules-can-undermine-buy-american-and-other-domestic-preference-procurement-policies/

[7] GAO, "Government Procurement: United States Reported Opening More Opportunities to Foreign Firms Than Other Countries, but Better Data Are Needed," **GAO-17-168**, Feb. 2017, Available at https://www.gao.gov/products/gao-17-168

Like with the COTS exception, the impact of setting a higher threshold will be gutted absent changing the rule that now allows all products above the TAA threshold value to be excluded from meeting the domestic content component test yet get categorized as "U.S.-made end product" in procurement contracts. This is the case because when the TAA threshold dollar amount for a contract is met, the TAA waiver *totally waives* the BAA – both the domestic content requirement and the preference given. That means for procurements above the threshold set in trade pacts, a product assembled in the United States of 100% foreign content, including from China and other countries not on the 60-nation TAA waiver list, is considered a U.S.-made end product and recorded as such in the data. Thus, for *all contracts* for goods valued above the trade-pact threshold price, firms can source inputs from anywhere, assemble in U.S. territory or in another of the 60 nations and compete on equal terms with high U.S.-content goods.

Given many contracts are above $182,000, this adds yet another enormous distortion to what is included in the data recorded as procurement of U.S. goods and the proposed regulatory changes will not do anything to fix this. To put this in perspective, for contracts above the TAA threshold, federal agencies cannot purchase goods from non-TAA countries *at all* unless doing so can be justified by a waiver. (These waivers are on the basis of goods not being available in needed quantities here or in the 60 other TAA countries or because buying domestically or from the 60 other countries is significantly more expensive, for instance.) But even under the new proposed regulations, thanks to the TAA waiver substantial transformation rule, a firm could buy components from China that represent 90% of the value of a good to be assembled in the United States, the finished good would be eligible to be purchased by federal agencies and that purchase would not be listed as having required a waiver for non-TAA foreign countries, a TAA waiver for the 60 TAA-qualifying countries or show any foreign content. Rather, the value would be represented in the procurement database as a U.S.-made end product, despite the Chinese content.

The president has authority to rectify the Trade Agreements Act waiver problems, support U.S. producers and rebuild supply chains. The need to close the trade-pact loophole was flagged in the Build Back Better campaign plan: "Update the trade rules for Buy American: Biden will work with allies to modernize international trade rules and associated domestic regulations regarding government procurement to make sure that the U.S. and allies can use their own taxpayer dollars to spur investment in their own countries."[8] Congress delegated presidents authority to grant trade-pact exceptions to Buy American and also to "modify or withdraw any waiver granted pursuant to" that authority (19 U.S.C.§2511). In early 2021, seven House committee chairs and a dozen Senators wrote to President Biden requesting that he exercise this authority, which is not conditioned on changes in trade-pact terms or other factors.

What would then happen to the United States international law obligations in pacts like the WTO's Agreement on Government Procurement? Actually, the president also has the authority to withdraw from the WTO's GPA by simply providing 60 days written notice to the WTO Director-General without incurring any liability at the WTO.[9] The GPA text makes explicit that the only penalty that can

[8] Biden-Harris Campaign Website, "The Biden Plan to Ensure the Future Is "Made in All of America" by All of America's Workers." Extracted on June 11, 2021. Available at: https://joebiden.com/made-in-america/.
[9] See: WTO GPA Art. XXII – 12 Withdrawal.

be imposed against one WTO member by another for any dispute relating to the GPA is to suspend benefits under the GPA.[10] The standard WTO enforcement system that allows imposition of "cross sectoral" sanctions does not apply to the GPA. Exiting the GPA would support the recommendation of the aforementioned White House report on critical supply chains, which called for using federal procurement policy to create demand to strengthen U.S. supply chains.

An additional benefit of withdrawing from the GPA would be to unshackle the federal government from the limits that "trade" agreements impose on the kind of conditions that agencies may establish when purchasing goods. The rules limiting procurement policies added to "trade" agreements not only forbid preferences for domestic goods and firms *but also limit the criteria governments can use to describe the goods and services they seek and what conditions may be imposed on bidding companies.* Effectively, only descriptions of desired goods and services related to end use are permitted. Thus, a government entity can call for a million sheets of A4 paper of a weight that works in copying machines, but cannot require that it have recycled content or be produced in a manner that does not use chlorine. A government can request X amount of electricity but cannot require that electricity come from renewable sources. A government can order 5,000 extra-long uniforms, but cannot require that they meet sweat-free standards. Bidder qualifications are also limited to only those related to the financial, legal and technical capacity to perform the contract. Thus, our "trade" pact partners could challenge rules excluding firms that refuse to meet prevailing wage requirements or that are based in countries with terrible human or labor rights records.

3. New Reporting Requirements Are Positive but Not Ambitious Enough to Address the Magnitude of the Current U.S. Government Procurement Data Problems.

For years, the government data on BAA compliance has been woefully inadequate. Because of problems in how the data is collected and tabulated, the data do not provide an accurate picture of what value of U.S. government procurement is produced domestically versus offshore. These data problems are amplified by the exceptions and waivers that not only rig the federal procurement framework, but help ensure that enormous foreign content value is embedded in goods that are now deemed as American under BAA and TAA and thus such foreign value is altogether missed by the data.

The proposed new post-award reporting requirements for critical items and critical components are a step toward the goal of arming the government with more reliable data that will enable informed decisions in this policy area, particularly with regards to critical goods supply chains. However, adding post-award requirements for a selected group of goods will not solve the pervasive data collection and processing issues that make the government data on the subject completely unreliable.

A 2018 GAO report audited the actual origin of goods procured relative to the way the procurements were reported by federal agencies and found that a significant portion of contracts reviewed were misreported in favor of excluding foreign goods. One common problem was that agency data systems did not allow for separate reporting if both foreign and domestic qualifying products were included in a procurement contract. The report, entitled *Buy American Act: Actions Needed to Improve Exception and Waiver Reporting and Selected Agency Guidance* (GAO-19-17), concluded that, due to reporting errors and systems limitations, the amount of foreign end products purchased by federal agencies could be greater than reported in the Federal Procurement Data System-Next Generation (FPDS-NG), a

[10] WTO GPA Art. XXII(2) — Consultations and Dispute Settlement.

statistical system administered by GSA. GAO found that: "*6 of the 38 contracts reviewed from the Departments of Defense (DOD), Health and Human Services (HHS), Homeland Security (DHS), and Veterans Affairs (VA) inaccurately recorded waiver or exception information. FPDS-NG system limitations compound these errors because it does not fully capture Buy American Act data. Among other things, the database does not always enable agencies to report the use of exceptions or waivers on contracts for both foreign and domestic products, reducing data accuracy*."

The GAO also noted that when a contract was awarded, the awarding agency is responsible for entering certain information into FPDS-NG, including data regarding the "Place of Manufacture" of the goods procured. Stunningly, agencies were given total discretion to decide how to categorize goods. They could indicate "*that the product is made in the United States, or that it is made outside the United States and qualifies under one of the Buy American Act exceptions, or that it is subject to the requirements of a trade agreement instead of the Buy American Act requirements.*" That is to say that the information gathered by GSA regarding "BAA compliance" was not based on the actual statutory criteria to determine whether a good qualifies as "domestic end product" or "U.S.-made end product," but on a subjective determination made by the official inputting the information into the system. Finally, the GAO raised concerns about agencies' reliance on contractors to certify the origin of goods when contractors' interests in meeting BAA standards could incentivize misrepresentations despite penalties for such conduct.

In March 2020, GSA transitioned most of the databases and reports from FPDS-NG to a new platform, the System for Award Management (SAM).[11] However, there is no indication that the data being displayed via the new platform is any more accurate that of the old system, meaning the severe problems identified by the GAO in its 2018 report that make the data extremely unreliable remain. The new website displays a "Buy American Act Place of Manufacture report," which includes a column entitled "*Mfg in the U.S.*" According to the explanatory notes of the report, this column counts awards and modifications to awards where the "*the action is predominantly for acquisition of manufactured end products that are manufactured predominantly in the United States.*" This criterion is not the origin standard contemplated in the FAR for domestic end products. It would be necessary to know what portion of goods labeled "manufactured in the United States," actually comply with the domestic content requirements established in the FAR, are considered COTS items or fall into the category "U.S.-made end products," according to FAR 25.003 to have a real understanding of the level of compliance with BAA domestic preferences. Additionally, by asking for the place where the goods are *predominantly* manufactured, agencies bundle together foreign products and those made in the United States and label them as "manufactured in the United States." Thus, there are grounds to believe that the new website not only inherited the issues of the old platform, but may have compounded them.

All of these significant problems make clear that the current data on BAA compliance is wildly inaccurate. Consequently, there is no reliable information with regard to the actual proportion of domestic products purchased by the federal government. These data flaws will not be solved with the new post-award reporting requirements for critical goods and components. Therefore, it is critical for the Biden-Harris administration to address the data problems by auditing the procurement collection programs of federal agencies to ensure that accurate reporting is supported by available systems and require improvements as needed.

[11] See: https://sam.gov/content/home

One quick fix that the government could implement rather easily would be reestablishing the data collection codes used before September 30, 2006 to report the "Place of Manufacture" of the goods purchased through a federal procurement contract to the FPDS.[12] Before this date, an agency that was populating GSA's data system had to enter a specific code when the procured goods were deemed manufactured in the United States, but had more than 50% of foreign content. This would be "U.S.-made end products," in accordance with the TAA rules of origin standards.

Since October 1, 2006, this code is no longer valid. And, agencies must mark the code corresponding to the category "manufactured in the U.S.," even if they possess information that reveals the presence of foreign content higher to the domestic content threshold embedded in the procured products. GSA could easily modify the current FPDS Data Dictionary to include codes that reflect the different ways in which, under the current system, procured goods could loosely be considered "made in America." This simple solution would go a long way in enhancing the BAA compliance data available to policymakers and the general public.

4. Conclusion

Public Citizen supports the proposed rules as a first step to fix the various loopholes and flaws that undermine the effectiveness of the current Buy American regime. Yet, many more bold actions are needed. The president has existing authority to modify the COTS rule and the various rules of origin, to withdraw from the WTO's GPA by simply providing 60 days written notice and to modify the scope of or to end the TAA waiver, which is the basis for waiving domestic content rules for a vast amount of procurement covered by contracts above the trade-pact thresholds. The president can also order improvements of the U.S. government procurement data collection and tabulation. None of these important changes require action by the U.S. Congress. We urge the Biden-Harris administration to undertake these reforms, which are necessary if the administration's political commitment to improving Buy American procurement is to translate into real gains for U.S. workers, farmers, consumers, and businesses.

[12] See: https://www.fpds.gov/downloads/Version_1.4.5_specs/FPDSNG_DataDictionary_V1.4.5.pdf