



EXECUTIVE OFFICE OF THE PRESIDENT

OFFICE OF MANAGEMENT AND BUDGET

WASHINGTON, D.C. 20503

October 26, 2021

MEMORANDUM FOR SENIOR ACCOUNTABLE OFFICIALS
DOMESTIC SOURCING CHIEF ACQUISITION OFFICERS
SENIOR PROCUREMENT EXECUTIVES

FROM: Celeste Drake
Director, Made in America Office

Lesley A. Field
Acting Administrator for Federal Procurement Policy

SUBJECT: Improving the Transparency of Made in America Waivers

On June 11, 2021, the Office of Management and Budget (OMB) issued Memorandum M-21-26, *Increasing Opportunities for Domestic Sourcing and Reducing the Need for Waivers from Made in America Laws*, which outlined initial management steps to help agencies prepare for and support a centralized strategic waiver review process by OMB's Made in America Office (MIAO), as required by Executive Order 14005, *Ensuring the Future Is Made in All of America by All of America's Workers* (the Executive Order). Memorandum M-21-26 identified information that agencies must report to establish nonavailability of domestically sourced products, including a description of the market research and outreach conducted. That memorandum also directed Senior Accountable Officials (SAOs) for Domestic Sourcing to take immediate action, in coordination with agency senior procurement executives, to ensure any nonavailability waivers under consideration reflect this information and are appropriately justified.

This memorandum builds upon Memorandum M-21-26 by providing specific guidance to Federal executive branch departments and agencies (agencies) on the use of a digital waiver portal to submit proposed Made in America waivers to MIAO. Proposed waivers will be posted to a new dedicated site (MadeinAmerica.gov) prior to agencies making awards, beginning with waivers for procurement nonavailability.¹ Centralized posting of proposed waivers will provide sellers of U.S.-made products with greater insight of the needs of the Federal marketplace and help MIAO and agencies more effectively close gaps in U.S. domestic supply chains.

Background

Since issuance of Memorandum M-21-26, MIAO has been working with the General Services Administration (GSA) and other agencies to develop MadeinAmerica.gov for agencies

¹ Further guidance and instructions will be issued as MIAO expands its waiver review process to cover all types of waivers from covered Made in America Laws, as defined in Section 2(b) of the Executive Order.

to post proposed waivers to Made in America Laws. To effectuate the policy of the Executive Order “to use terms and conditions of Federal financial assistance awards and Federal procurements to maximize the use of goods, products, and materials produced in, and services offered in, the United States,” the site supports the following strategic objectives associated with pre-award posting of waivers:

- (1) To establish a more transparent Federal marketplace that demonstrates the priority to support Made in America purchasing and enables interested sellers to better understand which U.S.-made products agencies are having trouble finding;
- (2) To increase public trust and confidence in the Federal Government’s commitment to an expanded U.S. manufacturing base; and
- (3) To establish a domestic supplier base that is more robust and resistant to market volatility and manipulation, reducing the need for waivers.

To achieve these objectives, agencies will be required to submit proposed waivers after approval by their agency officials, proposing the acquisition of a foreign-made product due to the nonavailability of domestically made products.² Certain information from proposed waivers will be available to the public on the [MadeinAmerica.gov](https://www.madeinamerica.gov) website prior to review by MIAO or agency’s issuance of an award. Over time, achievement of these objectives will increase U.S.-made content and limit the need for nonavailability waivers.

OMB has prioritized nonavailability waivers³ for the first phase of improved transparency. Later phases will cover additional types of waivers. Greater awareness of individual transactions requiring products and materials not currently available domestically in sufficient quantity or quality will help identify and fill gaps in domestic supply chains. The purpose of centralizing and reporting these gaps across the Federal enterprise is to send clear demand signals to encourage more investment in domestic manufacturing.⁴ Memorandum M-21-26 identified information that agencies must report to establish nonavailability, including a description of market research and outreach conducted. The memorandum also directed SAOs for Domestic Sourcing to take immediate action in coordination with agency senior procurement executives to ensure any nonavailability waivers under consideration reflect this information and are appropriately justified.

² To achieve consistency, agencies will input information in a standardized manner using a digital waiver portal accessible via [SAM.gov](https://sam.gov), which will generate a listing on Made inAmerica.gov. The information required for submitting a proposed waiver will be available via a Federal Acquisition Institute (FAI) training with additional instructions in the digital waiver portal once agencies are ready to submit.

³ As provided by the Buy American Act (BAA) and the applicable provision of the Federal Acquisition Regulation (FAR), agencies may waive BAA requirements where articles, materials, or supplies to be acquired are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and are not of a satisfactory quality. 41 U.S.C. § 8302(a)(2)(B); 48 C.F.R. § 25.103(b). This includes situations where no offers of domestic products are received or where domestic offers are not for a sufficient and reasonably available quantity or quality.

⁴ MIAO is separately working with relevant agencies to implement review of Jones Act waivers, which was identified in Memorandum M-21-26 as covered in the initial phase of waiver reviews.

Guidance

Beginning November 16, 2021, for agencies subject to the Chief Financial Officers Act (CFO Act),⁵ and January 1, 2022, for all other agencies covered by Executive Order 14005,⁶ except as provided in paragraph (D) below, prior to issuing a waiver pursuant to FAR 25.103(b), an agency shall submit the proposed waiver accessible via SAM.gov in accordance with internal agency protocols and the requirements of this guidance. Once submitted, certain information about the waiver will be available to the public via MadeinAmerica.gov. The agency shall not make an award until it has received confirmation that MIAO has completed its review of the proposed waiver, MIAO has waived the requirement for a review, or an exception applies under paragraph (D) below.

A. Internal agency protocols. Internal protocols shall ensure any proposed waiver is necessary. Protocols should require agency personnel to conduct appropriate market research and outreach, document findings and conclusions, secure approval to propose a waiver (generally at a level not lower than the head of the contracting activity if the waiver is for an acquisition expected to be greater than \$25,000), and complete all required fields for the digital waiver on MadeinAmerica.gov so it may be viewed by the public and reviewed by MIAO.

As explained in Memorandum M-21-26, market research analyses might include a review of information on category management dashboards on the acquisition gateway; consultation with category managers and other agency SAOs buying similar items; and supplier scouting with supply chain experts who study domestic capabilities and market trends (e.g., the [Manufacturing Extension Partnership](https://ManufacturingExtensionPartnership.gov)), chambers of commerce, industry and trade associations that represent domestic suppliers, and relevant labor unions or worker organizations. Documentation should 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).

B. MIAO review. The SAO and MIAO's ability to identify successful strategies for meeting requirements through domestic channels requires a clear understanding of an agency's determination that its requirement cannot be domestically sourced. This insight is important for increasing reliance on domestic supply chains and reducing the need for waivers over time. Accordingly, contracting officers or other authorized personnel drafting proposed waivers and approving officials should ensure all fields on the digital waiver are carefully completed, paying particular attention to the following information:⁷

- *Anticipated mission impact if there is no waiver.* Understanding the anticipated impact to the agency's mission if the waiver were not granted can be helpful to MIAO as it works with the

⁵ See section 901 of title 31, United States Code.

⁶ Executive Order 14005 applies to an "agency" as defined in 44 U.S.C. § 3502(l) that is not an "independent regulatory agency" as defined in 44 U.S.C. § 3505(5).

⁷ Agencies may post proposed waivers either prior to issuing a solicitation or after issuing a solicitation, as long as the proposed waiver is posted prior to award, unless the agency is obligated by law to act more quickly than is allowed by the review procedures established in the Executive Order, Memorandum M-21-26, and this guidance.

agency and other agencies facing similar challenges to prioritize efforts for creating, rebuilding, or strengthening domestic supply chains.

- *Market research description and associated outreach questions.* Description of steps the agency has taken to understand market capabilities and capacity will help potential interested sources and supply chain experts identify where opportunities might have been missed and could be pursued when future needs arise. Agencies should continually study the market and reflect recent analysis in their proposed waiver. Contracting officials should not assume that no qualifying product exists simply because one was not found in a prior year.
- *Proposed waivers covering a period of time.* Agencies should take particular note when proposing waivers covering a period of time. Such proposals are most likely to occur in one of the following two situations: (i) a single definitive contract specifying that performance will involve deliveries on different dates in accordance with a schedule (e.g., every three months over one year), or (ii) multiple procurements where the agency places delivery orders for repetitive purchases under an indefinite-delivery contract. (A waiver covering multiple procurements is referred to as a “multi-procurement” waiver.⁸) Whenever a proposed waiver covers a period of time, the agency must: (i) describe the *proposed waiver coverage*, (ii) identify the *expected maximum duration of the proposed waiver* and rationale behind the desired length of the waiver (which generally should not be longer than 6 months), and (iii) provide *the rationale for the basis of the multi-procurement assessment*, which should address why the agency believes that market conditions are not likely to change during the anticipated duration of the waiver. The proposed waiver portal provides fields for each of these three prongs to help MIAO fully understand the agency’s rationale for covering a period of time.

C. Public feedback and review time. As explained above, an important goal of [MadeinAmerica.gov](https://www.madeinamerica.gov) is to improve the transparency of agency waivers for domestic suppliers. A more transparent Federal marketplace that enables interested sellers to better understand where agencies are having trouble finding U.S.-made products will lead to a more responsive supplier base. To be effective at pulling new entrants into the Federal marketplace, potential domestic sources must have adequate opportunities to compete with established non-domestic sources. As such, agencies should include the appropriate Buy American FAR clause/provision in their solicitations⁹ even when market research suggests that there are no apparent domestic end products that are likely to be offered.

Agencies should carefully consider public input on proposed waivers that may help to reduce the need for future waivers and avoid unneeded technical specifications that may inadvertently disqualify domestic suppliers. SAOs are also encouraged to share helpful domestic sourcing information with MIAO and other agency SAOs that may have similar requirements.

⁸A multi-procurement waiver is different from a class waiver under FAR 25.104. The former is limited in duration whereas the latter is of indefinite duration following a regulatory action involving notice and comment to confirm nonavailability into the foreseeable future.

⁹ See FAR sections 25.1101 and 25.1102 for the prescriptions of appropriate clauses and provisions.

MIAO seeks to advance the important benefits of transparency of proposed waivers while ensuring that its review timeframes do not unnecessarily delay an agency's ability to deliver on its mission. As explained in Memorandum M-21-26, MIAO plans to generally complete the majority of waivers reviews within 3-7 business days, but not more than 15 days from submission to OMB. In the case of waivers involving small dollar transactions (e.g., over the micro-purchase threshold but less than \$25,000), MIAO aims to complete reviews more rapidly, unless the waiver involves a critical requirement. Conversely, review periods may be up to 15 days for larger and more complex acquisitions and proposed waivers implicating critical supply chains.

When MIAO completes its review and once an agency makes a contract award using the waiver, the agency shall record information on the final waiver action in the Federal Procurement Data System (FPDS) in accordance with the FAR including Subpart 4.6.

D. Exceptions. Agencies are not required to post proposed waivers on [MadeinAmerica.gov](https://www.madeinamerica.gov) under the following circumstances:

1. *Urgency or other situations where the agency must act in an expedited manner.* Section 4(d) of the Executive Order states that "Nothing shall displace agencies' authorities or responsibilities under law." Accordingly, where the agency is obligated by law to act more quickly than the review procedures established in this section allow, as may be the case where the agency has determined in accordance with the FAR¹⁰ that it needs to limit competition due to urgency, the agency shall complete a waiver report through the digital waiver portal accessible from SAM.gov within 30 days of award, to ensure the MIAO can fulfill its role as a central and transparent source of Made in America waivers.¹¹ The agency must continue to comply with FPDS reporting requirements in the FAR including Subpart 4.6.

2. *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. However, applicable FAR reporting requirements including Subpart 4.6 for FPDS remain in effect. In addition, agencies are reminded of the processes set forth at FAR 25.103(b)(1), which include: (i) conducting market research, (ii) ensuring the solicitation includes the applicable Buy American FAR clauses/provisions if the contracting officer learns at any time before the time designated for receipt of bids in sealed bidding or final offers in negotiations that an article on the list is available domestically in sufficient and reasonably available quantities of a satisfactory quality to meet the agency's requirements, and (iii) notifying the Civilian Agency Acquisition Council or the Defense Acquisition Regulations Council for possible removal of the article from the list.

MIAO intends to work with the Office of Federal Procurement Policy (OFPP), the other member agencies of the Federal Acquisition Regulatory Council (FAR Council), and the Department of Commerce (DOC) to review the current list of nonavailable articles in FAR

¹⁰See FAR 6.302-2, 13.106-1, and 16.505(b)(2).

¹¹In situations of urgency, reporting of the waiver post-award is for informational purposes; MIAO will not provide a determination on such waivers.

25.104 to determine if any items should be removed from the list. In accordance with section 9 of the Executive Order, OFPP will review any future recommendations to add items to the list with MIAO and DOC, paying particular attention to economic analyses of relevant markets and available market research. This will be done to determine whether there is a reasonable basis to conclude that the article, material, and supply is not mined, produced, or manufactured in the U.S. in sufficient and reasonably available commercial quantities and of a satisfactory quality, and make the findings available to the other members of the FAR Council for consideration.

Additional Actions

A. Amendments to the FAR. OFPP, in consultation with MIAO, will work with other FAR Council members to consider appropriate FAR amendments regarding nonavailability determinations at FAR 25.103(b) as necessary.¹² As an initial step, the FAR Council will provide appropriate policy direction to acquisition offices by recommending that agencies exercise their authority under FAR Subpart 1.4, as may be necessary, to promote consistent application of the guidance in this memorandum while regulatory changes are considered.

B. Training. MIAO is working with the Federal Acquisition Institute and the Defense Acquisition University on appropriate training to communicate to the acquisition workforce and the program customers it serves the vision of MIAO as a center of excellence for promoting U.S. manufacturing, the expected impact of centralized waiver review, and the requirements of this guidance. MIAO will also work with SAOs, both individually and collectively, to review the impacts of this process and related efforts and consider refinements as appropriate. Further guidance and information will be provided, as necessary, to refine the instructions in this memo and/or to address the preparation of additional Made in America waivers as the MadeinAmerica.gov website is expanded, as envisioned by the Executive Order.

C. Expansion of transparency and digital waiver capabilities. The MIAO intends to phase in the use of [MadeinAmerica.gov](https://www.madeinamerica.gov) for other types of waivers to Made in America Laws – including procurement, financial assistance, and maritime - in addition to nonavailability waivers, so that the strategic objectives of centralized, transparent posting can be fully achieved. Additional guidance, instructions, and training tools will be provided as digital waiver capabilities are expanded so the workforce can leverage these processes to maximize opportunities for domestic sourcing.

Questions regarding this Memorandum should be sent to MIAO at MadeInAmerica@omb.eop.gov.

¹² For example, FAR 25.103(b)(3) states that an agency is not required to include in the contract file a written determination of nonavailability if the agency has synopsisized the requirement, conducted full and open competition, and not received any offers for a domestic end product. However, under the requirements of this memorandum, the agency would be required to develop and post a proposed waiver on [MadeinAmerica.gov](https://www.madeinamerica.gov) in accordance with guidance paragraphs (A), (B), and (C), unless an exception enumerated in paragraph (D) applied.