

Buy American Act –Nonavailability Determination - Supplies Template

The Buy American Act (the Act) requires the acquisition of domestic end items for use in the US unless the Contracting Officer (CO) determines that the price of the lowest domestic offer is unreasonable or another exception applies.

Federal Acquisition Regulation (FAR) 25.103 describes exceptions to the Act, which include public interest, nonavailability, unreasonable cost, and information technology that is a commercial item. This template provides instructions and a format for a determination based on the nonavailability exception as described in FAR 25.103(b).

The template document herein is generally tailored for nonavailability determinations issued pre-award. There is a possibility that a contractor may request the CO to issue a nonavailability determination postaward. FAR Subpart 25.1 for supplies does not address such a post-award request. However, FAR 25.205 for construction materials provides some insight how such a post-award nonavailability determination might be handled. For example, the contractor must explain why it could not request the determination before contract award or why the need for such determination otherwise was not reasonably foreseeable. If the CO concludes that the contractor should have made the request before contract award, the CO may deny the request. If the CO determines that the contractor's request is reasonable, the CO should add to the determination a detailed justification of the reason for the need to use foreign supplies. The CO should also provide a price comparison between the foreign and domestic supplies, if available. In addition, the CO should get the contractor to recertify FAR provision 52.225-2, Buy American Certificate, to reflect the use of foreign supplies. COs may make other necessary revisions to the base template to cover the specific post award nonavailability determination for supplies.

Note 1: FAR 25.4 discusses policies and procedures applicable to acquisitions that are covered by Trade Agreements. When acquiring certain "*eligible products*" (defined under FAR 25.003) covered under these Trade Agreements, the Buy American Act does not apply. For example, in acquisitions covered by the WTO GPA, Free Trade Agreements, or the Israeli Trade Act, the U.S. Trade Representative has waived the Buy American statute and other discriminatory provisions for eligible products. Offers of eligible products receive equal consideration with domestic offers (see FAR 25.402).

Note 2: COs shall obtain the Procurement Officer's (PO) concurrence prior to submitting this template to the cognizant Headquarters (HQs) Office of Procurement, Procurement Portfolio Manager (PPM). The PO's concurrence affirms the mission support program/project office's awareness of the waiver request. After receipt of HQs' concurrence, COs shall complete the digital waiver in SAM.gov for review by the Office of Management and Budget's Made in America Office (MIAO). The CO shall await confirmation from the MIAO, that it has completed its review of the waiver. Once all the MIAO's comments have been dispositioned and Head of the Contracting Activity approval has been obtained, the CO may update the solicitation and proceed with contract award.

Note 3: Upon submission to HQs the HQs' PPM will obtain the review and concurrence of the HQs Mission Directorate, Office of the General Counsel, Procurement Management & Policy Division Director, Procurement Strategic Operations Division Director, Senior Procurement Executive and the Senior Accountability Official. As a result, COs should consider including two weeks in the acquisition schedule to allow for review and concurrence at HQs.

Note 4: If competition must be limited due to urgency (FAR 6.302-2 and 13.106-1(b)) or if required by law to act more expeditiously than the MIAO's review procedures allow, then the nonavailability determination shall be processed in accordance with the instructions in this template within 30 days of award (this includes completing the digital waiver).

Applicable References:

Executive Order 14005, Ensuring the Future Is Made in All of America by All of America's Workers

Office of Management and Budget (OMB), Memorandum M-21-26, Increasing Opportunities for Domestic Sourcing and Reducing the Need for Waivers from Made in America Laws, June 11, 2021

References to the Federal Acquisition Regulations (FAR) and NASA FAR Supplement (NFS) can be found at:

FAR - <https://www.acquisition.gov/browse/index/far>

NFS - <https://www.hq.nasa.gov/office/procurement/regs/NFS.pdf>

- FAR Subpart 25.1.
- NFS 1825.103.
- Procurement Class Deviation 21-04A

Additional Instructions:

Delete these instruction pages, including the document history log, once the document is ready for review (if required) or signature.

In accordance with NFS 1804.7103, the CO shall complete the electronic document posting checklist prior to uploading, releasing, transmitting, or posting documents or files to an internet accessible location.

Digital signatures are the Office of Procurement preferred method for signing documents. The template can be issued in letter format or copied and pasted into an email. Please see the [digital signature instructions](#) for assistance with digitally signing a document. If for some reason digital signature is not possible, add a date to the signature block of the template.

The red double-underlined text in the template indicates prescriptions/instructions that must be deleted prior to printing the document and submitting it for review.

The *yellow highlighted areas with italicized text* on the template represent places that require fill-ins/completion.

The **blue highlighted areas with bold text** contain thoughts to consider, example wording, or other information related to the areas of template that require completion. For example, choose the applicable contract type and exception. When example language is provided, *it is critical that you tailor the language to be specific to your procurement action being addressed*.

The green highlighted areas with underlined text on the template represent requirements that may not apply to your specific procurement and should be deleted. If applicable, remove the green highlighting prior to printing the document and submitting it for review.

NOTE: All red double-underlined text; yellow highlighted areas with italicized text, blue highlighted areas with bold text, and green highlighted areas with underlined text need to be removed/deleted and changed to regular font prior to completing the document and submitting it for review.

NOTE: The template version identifier is in the lower left corner in the footers of both the instructions and the template. For audit/review purposes, the template version identifier shall not be removed/deleted. The version identifier includes month/year (i.e., XX/XXXX).

Document History Log

Base Issuance Date: 3/26/2021

Revision Effective Date	Description of Change
09/2021	The following items were added in response to OMB Memorandum M-21-26, Increasing Opportunities for Domestic Sourcing and Reducing the Need for Waivers from Made in America Laws: (1) identification of the supplier type (small or disadvantage); (2) description of market research; (3) description of competition anticipated;(4) identification of price preference; (5) identification of any exclusions of sources offering a US made product and (6) signature requirement for determinations above \$25K.
11/2021	The following items were added in response to OMB Memorandum M-21-26, Increasing Opportunities for Domestic Sourcing and Reducing the Need for Waivers from Made in America Laws: (1) “Note 2” on page “i” of the instructions; (2) item “b.(ii)”, identification of the contract type (e.g., cost reimbursable, fixed-price, indefinite-delivery-indefinite-quantity, other); (3) clarification on the signature page that all nonavailability waivers must be approved by the head of the contracting activity; and (4) signature blocks for the concurrence of the Office of General Counsel, Senior Procurement Executive and Senior Accountability Official. Also, an administrative change was made to revise “NMO” to “NOJMO” and a check box indicating the mission directorate has been notified.
07/2022	Added a signature block for NASA Headquarters Office of General Counsel
08/2022	Added an instruction (Note 4) for the processing of the nonavailability determination within 30 days of award when there is an urgency or the need to expedite in accordance with FAR 6.302-2 or 3.106-1(b). Also, revised the template to add optional “Determinations” based on the applicability of FAR 6.302-2 or FAR 13.106-1(b).
12/2022	Added the requirement to include the NAICs Code and PSC for each item.

<https://home.treasury.gov/policy-issues/financial-sanctions/specially-designated-nationals-and-blocked-persons-list-sdn-human-readable-lists>)

(d) Description of the item(s) to be acquired - Provide the name of the program/project/facility/or activity this acquisition supports, provide a technical description of the items and the impact to the mission if the agency is not able to acquire the item(s). Provide detailed rationale of why the foreign products/items are needed instead of buying domestic end products.

(e) Market research was conducted in an attempt to identify responsible sources of supply for the required item(s). 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; no sources can be identified). Such analysis might include a review of information on category management dashboards on the acquisition gateway, consultation with category managers, supplier scouting with supply chain experts who study domestic capabilities and market trends, such as the MEP, chambers of commerce, industry and trade associations that represent domestic suppliers, and relevant labor unions or worker organizations.

(f) Use of competition – If the waiver is to be issued pre-solicitation, describe whether competition is anticipated; if the waiver is to be issued pre-award, describe whether competition was conducted and, if so, how long the solicitation was open; if domestic sources were identified during market research but did not compete, describe potential reason(s), if known.

Note to COs: Read FAR 5.101, “Methods of disseminating information” before selecting the appropriate exception or condition below for paragraph (g). The choices/selections shown below are most often applicable; however other conditions as listed in FAR 5.101 may be applicable to the acquisition. COs shall choose the appropriate selection and delete those below in “f” which are not applicable, or if another exception applies that is not included in the selections below, the CO may tailor paragraph (g) to fit the particular acquisition.

(g) This acquisition was exempt from synopsis in accordance with FAR 5.101(a)(1), as its value did not exceed the \$25,000 threshold for synopsis. This acquisition was also exempt from displaying in a public place pursuant to FAR 5.101(a)(2) as the value did not exceed the \$15,000 threshold for displaying the acquisition.

OR

(g) This acquisition was exempt from synopsis in accordance with FAR 5.101(a)(1), as its value did not exceed the \$25,000 threshold for synopsis. This acquisition was also exempt from displaying in a public place pursuant to FAR 5.101(a)(2)(ii) since the acquisition was pursued as an Oral Solicitation.

OR

(g) **This action was synopsisized and displayed publicly as required by FAR 5.101. There were** describe the number of quotes/responses received and the evaluation results of the offers. Provide rationale for selection of the offer for the foreign end product.

(h) Expectation of price preference - Identify whether the solicitation included a provision announcing the agency's intention to provide a price preference for domestic end products and construction material.

(i) Exclusion of source offering a U.S. made product - If the waiver is to be issued pre-award, explain if a U.S.-made end product was offered but would be rejected for reasons other than price.

(j) The Government's minimum needs can only be satisfied by the unique items available from the country of origin cited in paragraph (c) above, as there are no known domestically available item(s) for the proposed acquisition.

The mission support program/project office must be notified in advance of sending this determination to the procurement portfolio manager. Please check the box to indicate the mission program/project has been notified.

Mission support program/project office has been notified of this determination.

Determination

On the basis of the foregoing, it is hereby determined the items described in paragraph (a) above are not mined, produced, or manufactured (or the articles, materials, or supplies from which the items are manufactured are not mined, produced, or manufactured) in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality. Therefore, the Buy American Act requirement that acquisition be made from domestic sources and that the items be of domestic origin, are not applicable to this acquisition.

This acquisition is within the Buy American Act's nonavailability exception at FAR 25.103(b)(2)(i). Authority is hereby granted to acquire the above-described item(s) of foreign origin at an estimated total cost of \$(Insert dollar value) including duty and transportation costs to destination.

OR

For purchases based on urgency, if FAR 6.302-2 was applied to the acquisition, the CO shall include the paragraphs below:

Determination

The item(s) described in paragraph (a) above are of an unusual and compelling urgency to the Government. Therefore, a justification was issued in accordance with FAR 6.302-2, on *(Insert date the justification for other than full and open competition was approved)* by *(Insert name and title of approving official)*.

This acquisition is within the Buy American Act's nonavailability exception at FAR 25.103(b)(2)(i). Authority is hereby granted to acquire the above-described item(s) of foreign origin at an estimated total cost of \$*(Insert dollar value)* including duty and transportation costs to destination.

OR

For purchases not exceeding SAT, if FAR 13.106-1(b) was applied to the acquisition, the CO shall include the paragraphs below:

Determination

The item(s) described in paragraph (a) above are below the simplified acquisition threshold, and in accordance with FAR 13.106-1(b), are deemed only reasonably available from one source due to *(insert reason, e.g., urgency, exclusive licensing agreements, brand-name or industrial mobilization)*. Therefore, a justification to acquire the items from a single source was issued in *on (Insert date the justification for other than full and open competition was approved)* by *(Insert name and title of approving official)*.

This acquisition is within the Buy American Act's nonavailability exception at FAR 25.103(b)(2)(i). Authority is hereby granted to acquire the above-described item(s) of foreign origin at an estimated total cost of \$*(Insert dollar value)* including duty and transportation costs to destination.

(Insert name of program/project and acquisition identifier)

**BUY AMERICAN ACT – SUPPLIES – NON-AVAILABILITY DETERMINATION
SIGNATURE PAGE**

In accordance with FAR 25.103(b)(2)(i) non-availability determinations must be approved by the head of the contracting activity.

(Insert name)

Contracting Officer

Legal: I have reviewed the above determination and findings and have no legal objection with respect to it. Comments, if any, are included in the file.

(Insert name)

Office of the General Counsel at *(Insert Center name)*

Include the following Procurement Officer concurrence only for NSSC, NOJMO, and HEOMD actions:

Concurrence:

(Insert Name)

Procurement Officer

Concurrence:

(Insert name)

Office of the General Counsel at Headquarters

(Insert name)

Senior Procurement Executive

(Insert name)

Senior Accountability Official The Senior Accountability Official (SAO) is the Agency Chief Financial Officer (CFO)

Approval:

(Insert name) Refer to NFS 1802.101 definition of “head of contracting activity”

Head of Contracting Activity, *(Insert Center name, or if a HEOMD action, insert “Human Exploration and Operations Mission Directorate”)*