

# FAR -- Part 25

## Foreign Acquisition

(FAC 2005-26)  
(12 June 2008)

### **25.000 -- Scope of Part.**

- (a) This part provides policies and procedures for—
  - (1) Acquisition of foreign supplies, services, and construction materials; and
  - (2) Contracts performed outside the United States.
- (b) It implements the Buy American Act, trade agreements, and other laws and regulations.

### **25.001 – General.**

- (a) The Buy American Act—
  - (1) Restricts the purchase of supplies, that are not domestic end products, for use within the United States. A foreign end product may be purchased if the contracting officer determines that the price of the lowest domestic offer is unreasonable or if another exception applies (see [Subpart 25.1](#)); and
  - (2) Requires, with some exceptions the use of only domestic construction materials in contracts for construction in the United States (see [Subpart 25.2](#)).
- (b) The restrictions in the Buy American Act are not applicable in acquisitions subject to certain trade agreements (see [Subpart 25.4](#)). In these acquisitions, end products and construction materials from certain countries receive nondiscriminatory treatment in evaluation with domestic offers. Generally, the dollar value of the acquisition determines which of the trade agreement applies. Exceptions to the applicability of the trade agreements are described in [Subpart 25.4](#).
- (c) The test to determine the country of origin for an end product under the Buy American Act (see the various country “end product” definitions in [25.003](#)) is different from the test to determine the country of origin for an end product under the trade agreements, or the criteria for the report on end products manufactured outside the United States (see [25.004](#)).

(1) The Buy American Act uses a two-part test to define a “domestic end product” (manufacture in the United States and a formula based on cost of domestic components).

(2) Under the trade agreements, the test to determine country of origin is “substantial transformation” (*i.e.*, transforming an article into a new and different article of commerce, with a name, character, or use distinct from the original article).

(3) For the reporting requirement at 25.004, the only criterion is whether the place of manufacture of an end product is in the United States or outside the United States, without regard to the origin of the components.

### **25.002 – Applicability of Subparts.**

The following table shows the applicability of the subparts. [\*\*Subpart 25.5\*\*](#) provides comprehensive procedures for offer evaluation and examples.

	Subpart	Supplies for Use		Construction		Services Performed	
		Inside U.S.	Outside U.S.	Inside U.S.	Outside U.S.	Inside U.S.	Outside U.S.
25.1	Buy American Act—Supplies	X					
25.2	Buy American Act—Construction Materials.			X			
25.3	Contracts Performed Outside the United States		X		X		X
25.4	Trade Agreements	X	X	X	X	X	X
25.5	Evaluating Foreign Offers—Supply Contracts.	X	X				
25.6	[Reserved]						
25.7	Prohibited Sources	X	X	X	X	X	X
25.8	Other International Agreements and Coordination.	X	X		X		X
25.9	Customs and Duties	X					
25.10	Additional Foreign Acquisition Regulations.	X	X	X	X	X	X
25.11	Solicitation Provisions and	X	X	X	X	X	X

	Contract Clauses.						
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### **25.003 -- Definitions.**

As used in this part—

“Canadian end product” means an article that—

- (1) Is wholly the growth, product, or manufacture of Canada; or
- (2) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in Canada into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

“Caribbean Basin country” means any of the following countries: Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, British Virgin Islands, Costa Rica, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Netherlands Antilles, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Trinidad and Tobago.

“Caribbean Basin country end product”

- (1) Means an article that—
  - (i)
    - (A) Is wholly the growth, product, or manufacture of a Caribbean Basin country; or
    - (B) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a Caribbean Basin country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed; and
  - (ii) Is not excluded from duty-free treatment for Caribbean countries under 19 U.S.C 2703(b).
    - (A) For this reason, the following articles are not Caribbean Basin country end products:

- (1) Tuna, prepared or preserved in any manner in airtight containers;
- (2) Petroleum, or any product derived from petroleum.
- (3) Watches and watch parts (including cases, bracelets, and straps) of whatever type including, but not limited to, mechanical, quartz digital, or quartz analog, if such watches or watch parts contain any material that is the product of any country to which the Harmonized Tariff Schedule of the United States (HTSUS) column 2 rates of duty apply (*i.e.*, Afghanistan, Cuba, Laos, North Korea, and Vietnam).
- (4) Certain of the following: textiles and apparel articles; footwear, handbags, luggage, flat goods, work gloves, and leather wearing apparel; or handloomed, handmade, and folklore articles.

(B) Access to the HTSUS to determine duty-free status of articles of the types listed in paragraph (1)(ii)(A)(4) of this definition is available via the Internet at <http://www.usitc.gov/tata/hts/>. In particular, see the following:

- (1) General Note 3(c), Products Eligible for Special Tariff treatment.
- (2) General Note 17, Products of Countries Designated as Beneficiary Countries under the United States—Caribbean Basin Trade Partnership Act of 2000.
- (3) Section XXII, Chapter 98, Subchapter II, Articles Exported and Returned, Advanced or Improved Abroad, U.S. Note 7(b).
- (4) Section XXII, Chapter 98, Subchapter XX, Goods Eligible for Special Tariff Benefits under the United States—Caribbean Basin Trade Partnership Act; and

(B) Refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the acquisition, includes services (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

“Civil aircraft and related articles” means--

- (1) All aircraft other than aircraft to be purchased for use by the Department of Defense or the U.S. Coast Guard;
- (2) The engines (and parts and components for incorporation into the engines) of these aircraft;
- (3) Any other parts, components, and subassemblies for incorporation into the aircraft; and
- (4) Any ground flight simulators, and parts and components of these simulators, for use with respect to the aircraft, whether to be used as original or replacement equipment in the manufacture, repair, maintenance, rebuilding, modification, or conversion of the aircraft and without regard to whether the aircraft or articles receive duty-free treatment under section 601(a)(2) of the Trade Agreements Act.

“Component” means an article, material, or supply incorporated directly into an end product or construction material.

“Construction material” means an article, material, or supply brought to the construction site by a contractor or subcontractor for incorporation into the building or work. The term also includes an item brought to the site preassembled from articles, materials, or supplies. However, emergency life safety systems, such as emergency lighting, fire alarm, and audio evacuation systems, that are discrete systems incorporated into a public building or work and that are produced as complete systems, are evaluated as a single and distinct construction material regardless of when or how the individual parts or components of those systems are delivered to the construction site. Materials purchased directly by the Government are supplies, not construction material.

“Cost of components” means--

- (1) For components purchased by the contractor, the acquisition cost, including transportation costs to the place of incorporation into the end product or construction material (whether or not such costs are paid to a domestic firm), and any applicable duty (whether or not a duty-free entry certificate is issued); or
- (2) For components manufactured by the contractor, all costs associated with the manufacture of the component, including transportation costs as described in paragraph (1) of this definition, plus allocable overhead costs, but excluding profit. Cost of components does not include any costs associated with the manufacture of the end product.

“Designated country” means any of the following countries:

- (1) A World Trade Organization Government Procurement Agreement country (Aruba, Austria, Belgium, Bulgaria, Canada, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland,

Ireland, Israel, Italy, Japan, Korea (Republic of), Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Singapore, Slovak Republic, Romania, Slovenia, Spain, Sweden, Switzerland, or United Kingdom);

(2) A Free Trade Agreement country (Australia, Bahrain, Canada, Chile, Dominican Republic, El Salvador, Guatemala, Honduras, Mexico, Morocco, Nicaragua, or Singapore);

(3) A least developed country (Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Cape Verde, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Djibouti, Dominican Republic, East Timor, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, Laos, Lesotho, Madagascar, Malawi, Maldives, Mali, Mauritania, Mozambique, Nepal, Niger, Rwanda, Samoa, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, Somalia, Tanzania, Togo, Tuvalu, Uganda, Vanuatu, Yemen, or Zambia); or

(4) A Caribbean Basin country (Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, British Virgin Islands, Costa Rica, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Netherlands Antilles, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, or Trinidad and Tobago).

(1) “Designated country end product” means a WTO GPA country end product, an FTA country end product, a least developed country end product, or a Caribbean Basin country end product.

“Domestic construction material” means--

(1) An unmanufactured construction material mined or produced in the United States; or

(2) A construction material manufactured in the United States, if the cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. Components of foreign origin of the same class or kind for which nonavailability determinations have been made are treated as domestic.

“Domestic end product” means--

(1) An unmanufactured end product mined or produced in the United States; or

(2) An end product manufactured in the United States, if the cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. Components of foreign origin of the same class or kind as those that the agency determines are not mined, produced, or manufactured in sufficient and reasonably available commercial quantities of a

satisfactory quality are treated as domestic. Scrap generated, collected, and prepared for processing in the United States is considered domestic.

“Domestic offer” means an offer of a domestic end product. When the solicitation specifies that award will be made on a group of line items, a domestic offer means an offer where the proposed price of the domestic end products exceeds 50 percent of the total proposed price of the group.

“Eligible offer” means an offer of an eligible product. When the solicitation specifies that award will be made on a group of line items, an eligible offer means a foreign offer where the combined proposed price of the eligible products and the domestic end products exceeds 50 percent of the total proposed price of the group.

“Eligible product” means a foreign end product, construction material, or service that, due to applicability of a trade agreement to a particular acquisition, is not subject to discriminatory treatment.

“End product” means those articles, materials, and supplies to be acquired for public use.

“Foreign construction material” means a construction material other than a domestic construction material.

“Foreign contractor” means a contractor or subcontractor organized or existing under the laws of a country other than the United States.

“Foreign end product” means an end product other than a domestic end product.

“Foreign offer” means any offer other than a domestic offer.

“Free Trade Agreement country” means Australia, Bahrain, Canada, Chile, Dominican Republic, El Salvador, Guatemala, Honduras, Mexico, Morocco, Nicaragua, or Singapore.

“Free Trade Agreement country end product” means an article that –

- (1) Is wholly the growth, product, or manufacture of a Free Trade Agreement (FTA) country; or
- (2) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in an FTA country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product, includes services (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

“Israeli end product” means an article that--

- (1) Is wholly the growth, product, or manufacture of Israel; or
- (2) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in Israel into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed.

“Least developed country” means any of the following countries: Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Cape Verde, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Djibouti, East Timor, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, Laos, Lesotho, Madagascar, Malawi, Maldives, Mali, Mauritania, Mozambique, Nepal, Niger, Rwanda, Samoa, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, Somalia, Tanzania, Togo, Tuvalu, Uganda, Vanuatu, Yemen, or Zambia.

“Least developed country end product” means an article that--

- (1) Is wholly the growth, product, or manufacture of a least developed country; or
- (2) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a least developed country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product, includes services (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

“Noneligible offer” means an offer of a noneligible product.

“Noneligible product” means a foreign end product that is not an eligible product.

“United States” means the 50 States, the District of Columbia, and outlying areas.

“U.S.-made end product” means an article that is mined, produced, or manufactured in the United States or that is substantially transformed in the United States into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed.

“World Trade Organization Government Procurement Agreement (WTO GPA) country” means any of the following countries: Aruba, Austria, Belgium, Bulgaria, Canada, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea (Republic of), Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal,

Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, or United Kingdom.

“WTO GPA country end product” means an article that--

- (1) Is wholly the growth, product, or manufacture of a WTO GPA country; or
- (2) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a WTO GPA country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

#### **25.004 – Reporting of Acquisition of End Products Manufactured Outside the United States.**

- (a) In accordance with the requirements of 41 U.S.C. 10a, the head of each Federal agency must submit a report to Congress on the amount of the acquisitions made by the agency from entities that manufacture end products outside the United States in that fiscal year.
- (b) This report will be partially based on information collected from offerors using solicitation provision [52.225-18](#), Place of Manufacture (and its commercial item equivalent in 52.212-3, Offeror Representations and Certifications-Commercial Items). For purposes of this report, the criteria established in the law is only whether the place of manufacture of an end product is in the United States or outside the United States, without regard to the origin of the components (see [25.001\(c\)](#)).

### **Subpart 25.1 -- Buy American Act – Supplies**

#### **25.100 -- Scope of Subpart.**

This subpart implements the Buy American Act (41 U.S.C. 10a-10d) and Executive Order 10582, December 17, 1954. It applies to supplies acquired for use in the United States, including supplies acquired under contracts set aside for small business concerns, if—

- (a) The supply contract exceeds the micro-purchase threshold; or
- (b) The supply portion of a contract for services that involves the furnishing of supplies (e.g., lease) exceeds the micro-purchase threshold.

## **25.101 – General.**

(a) The Buy American Act restricts the purchase of supplies that are not domestic end products. For manufactured end products, the Buy American Act uses a two-part test to define a domestic end product.

- (1) The article must be manufactured in the United States; and
- (2) The cost of domestic components must exceed 50 percent of the cost of all the components.

(b) The Buy American Act applies to small business set-asides. A manufactured product of a small business concern is a U.S.-made end product, but is not a domestic end product unless it meets the component test in paragraph (a)(2) of this section.

(c) Exceptions that allow the purchase of a foreign end product are listed at [25.103](#). The unreasonable cost exception is implemented through the use of an evaluation factor applied to low foreign offers that are not eligible offers. The evaluation factor is not used to provide a preference for one foreign offer over another. Evaluation procedures and examples are provided in [Subpart 25.5](#).

## **25.102 -- Policy.**

Except as provided in [25.103](#), acquire only domestic end products for public use inside the United States.

## **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 Act:

(a) *Public interest.* The head of the agency may make a determination that domestic preference would be inconsistent with the public interest. This exception applies when an agency has an agreement with a foreign government that provides a blanket exception to the Buy American Act.

(b) *Nonavailability.* The Buy American Act 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 determinations.*

- (i) A nonavailability determination has been made for the articles listed in [25.104](#). This determination does not necessarily mean that there is no

domestic source for the listed items, but that domestic sources can only meet 50 percent or less of total U.S. Government and nongovernment demand.

(ii) Before acquisition of an article on the list, the procuring agency is responsible to conduct market research appropriate to the circumstances, including seeking of domestic sources. This applies to acquisition of an article as—

(A) An end product; or

(B) A significant component (valued at more than 50 percent of the value of all the components).

(iii) The determination in paragraph (b)(1)(i) of this section does not apply if the contracting officer learns at any time before the time designated for receipt of bids in sealed bidding or final offers in negotiation that an article on the list is available domestically in sufficient and reasonably available commercial quantities of a satisfactory quality to meet the requirements of the solicitation. The contracting officer must—

(A) Ensure that the appropriate Buy American Act provision and clause are included in the solicitation (see 25.1101(a), 251101(b), or 25.1102);

(B) Specify in the solicitation that the article is available domestically and that offerors and contractors may not treat foreign components of the same class or kind as domestic components; and

(C) Submit a copy of supporting documentation to the appropriate council identified in 1.201-1, in accordance with agency procedures, for possible removal of the article from the list.

(2) *Individual determinations.*

(i) The head of the contracting activity may 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.

(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.

(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 synopsized in accordance with [5.201](#).
- (iii) No offer for a domestic end product was received.

(c) *Unreasonable cost*. The contracting officer may determine that the cost of a domestic end product would be unreasonable, in accordance with [25.105](#) and [Subpart 25.5](#).

(d) *Resale*. The contracting officer may purchase foreign end products specifically for commissary resale.

(e) *Information technology that is a commercial item*. The restriction on purchasing foreign end products does not apply to the acquisition of information technology that is a commercial item, when using fiscal year 2004 or subsequent fiscal year funds (Section 535(a) of division F, Title V, Consolidated Appropriations Act, 2004, and similar sections in subsequent appropriations acts).

#### **25.104 – Nonavailable Articles.**

(a) The following articles have been determined to be nonavailable in accordance with [25.103\(b\)\(1\)\(i\)](#):

Acetylene, black.

Agar, bulk.

Anise.

Antimony, as metal or oxide.

Asbestos, amosite, chrysotile, and crocidolite.

Bamboo shoots.

Bananas.

Bauxite.

Beef, corned, canned.

Beef extract.

Bephenium hydroxynaphthoate.

Bismuth.

Books, trade, text, technical, or scientific; newspapers; pamphlets; magazines; periodicals; printed briefs and films; not printed in the United States and for which domestic editions are not available.

Brazil nuts, unroasted.

Cadmium, ores and flue dust.

Calcium cyanamide.

Capers.

Cashew nuts.

Castor beans and castor oil.

Chalk, English.

Chestnuts.

Chicle.

Chrome ore or chromite.

Cinchona bark.

Cobalt, in cathodes, rondelles, or other primary ore and metal forms.

Cocoa beans.

Coconut and coconut meat, unsweetened, in shredded, desiccated, or similarly prepared form.

Coffee, raw or green bean.

Colchicine alkaloid, raw.

Copra.

Cork, wood or bark and waste.

Cover glass, microscope slide.

Crane rail (85-pound per foot).

Cryolite, natural.

Dammar gum.

Diamonds, industrial, stones and abrasives.

Emetine, bulk.

Ergot, crude.

Erythrityl tetranitrate.

Fair linen, altar.

Fibers of the following types: abaca, abace, agave, coir, flax, jute, jute burlaps, palmyra, and sisal.

Goat and kidskins.

Goat hair canvas.

Grapefruit sections, canned.

Graphite, natural, crystalline, crucible grade.

Hand file sets (Swiss pattern).

Handsewing needles.

Hemp yarn.

Hog bristles for brushes.

Hyoscine, bulk.

Ipecac, root.

Iodine, crude.

Kaurigum.

Lac.

Leather, sheepskin, hair type.

Lavender oil.

Manganese.

Menthol, natural bulk.

Mica.

Microprocessor chips (brought onto a Government construction site as separate units for incorporation into building systems during construction or repair and alteration of real property).

Modacrylic fur ruff.

Nickel, primary, in ingots, pigs, shots, cathodes, or similar forms; nickel oxide and nickel salts.

Nitroguanidine (also known as picrite).

Nux vomica, crude.

Oiticica oil.

Olive oil.

Olives (green), pitted or unpitted, or stuffed, in bulk.

Opium, crude.

Oranges, mandarin, canned.

Petroleum, crude oil, unfinished oils, and finished products.

Pine needle oil.

Platinum and related group metals, refined, as sponge, powder, ingots, or cast bars.

Pyrethrum flowers.

Quartz crystals.

Quebracho.

Quinidine.

Quinine.

Rabbit fur felt.

Radium salts, source and special nuclear materials.

Rosettes.

Rubber, crude and latex.

Rutile.

Santonin, crude.

Secretin.

Shellac.

Silk, raw and unmanufactured.

Spare and replacement parts for equipment of foreign manufacture, and for which domestic parts are not available.

Spices and herbs, in bulk.

Sugars, raw.

Swords and scabbards.

Talc, block, steatite.

Tantalum.

Tapioca flour and cassava.

Tartar, crude; tartaric acid and cream of tartar in bulk.

Tea in bulk.

Thread, metallic (gold).

Thyme oil.

Tin in bars, blocks, and pigs.

Triprolidine hydrochloride.

Tungsten.

Vanilla beans.

Venom, cobra.

Water chestnuts.

Wax, carnauba.

Wire glass.

Woods; logs, veneer, and lumber of the following species: Alaskan yellow cedar, angelique, balsa, ekki, greenheart, lignum vitae, mahogany, and teak.

Yarn, 50 Denier rayon.

(b) This list will be published in the *Federal Register* for public comment no less frequently than once every five years. Unsolicited recommendations for deletions from this list may be submitted at any time and should provide sufficient data and rationale to permit evaluation (see [1.502](#)).

### **25.105 – Determining Reasonableness of Cost.**

(a) The contracting officer--

(1) Must use the evaluation factors in paragraph (b) of this section unless the head of the agency makes a written determination that the use of higher factors is more appropriate. If the determination applies to all agency acquisitions, the agency evaluation factors must be published in agency regulations; and

(2) Must not apply evaluation factors to offers of eligible products if the acquisition is subject to a trade agreement under [Subpart 25.4](#).

(b) If there is a domestic offer that is not the low offer, and the restrictions of the Buy American Act apply to the low offer, the contracting officer must determine the reasonableness of the cost of the domestic offer by adding to the price of the low offer, inclusive of duty—

(1) 6 percent, if the lowest domestic offer is from a large business concern; or

(2) 12 percent, if the lowest domestic offer is from a small business concern. The contracting officer must use this factor, or another factor established in agency regulations, in small business set-asides if the low offer is from a small business concern offering the product of a small business concern that is not a domestic end product (see [Subpart 19.5](#)).

(c) The price of the domestic offer is reasonable if it does not exceed the evaluated price of the low offer after addition of the appropriate evaluation factor in accordance with paragraph (a) or (b) of this section. (See evaluation procedures at [Subpart 25.5](#).)

## **Subpart 25.2 -- Buy American Act -- Construction Materials**

### **25.200 -- Scope of Subpart.**

This subpart implements the Buy American Act (41 U.S.C. 10a-10d) and Executive Order 10582, December 17, 1954. It applies to contracts for the construction, alteration, or repair of any public building or public work in the United States.

### **25.201 – Policy.**

Except as provided in [25.202](#), use only domestic construction materials in construction contracts performed in the United States.

### **25.202 – Exceptions.**

(a) When one of the following exceptions applies, the contracting officer may acquire foreign construction materials without regard to the restrictions of the Buy American Act:

(1) *Impracticable or inconsistent with public interest.* The head of the agency may determine that application of the restrictions of the Buy American Act to a particular construction material would be impracticable or would be inconsistent with the public interest. The public interest exception applies when an agency has an agreement with a foreign government that provides a blanket exception to the Buy American Act.

(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 determinations of nonavailability of the articles listed at [25.104\(a\)](#) and the procedures at [25.103\(b\)\(1\)](#) also apply if any of those articles are acquired as construction materials.

(3) *Unreasonable cost.* The contracting officer concludes that the cost of domestic construction material is unreasonable in accordance with [25.204](#).

(b) *Determination and findings.* When a determination is made for any of the reasons stated in this section that certain foreign construction materials may be used, the contracting officer must list the excepted materials in the contract. The agency must make the findings justifying the exception available for public inspection.

(c) *Acquisitions under trade agreements.* For construction contracts with an estimated acquisition value of \$7,443,000 or more, see Subpart [25.4](#).

### **25.203 – Preaward Determinations.**

(a) For any acquisition, an offeror may request from the contracting officer a determination concerning the inapplicability of the Buy American Act for specifically identified construction materials. The time for submitting the request is specified in the solicitation in paragraph (b) of either [52.225-10](#) or [52.225-12](#), whichever applies. The information and supporting data that must be included in the request are also specified in the solicitation in paragraphs (c) and (d) of either [52.225-9](#) or [52.225-11](#), whichever applies.

(b) Before award, the contracting officer must evaluate all requests based on the information provided and may supplement this information with other readily available information.

### **25.204 -- Evaluating Offers of Foreign Construction Material.**

(a) Offerors proposing to use foreign construction material other than that listed by the Government in the applicable clause at [52.225-9](#), paragraph (b)(2), or [52.225-11](#), paragraph (b)(3) or covered by the WTO GPA or a Free Trade Agreement (paragraph (b)(2) of [52.225-11](#)), must provide the information required by paragraphs (c) and (d) of the respective clauses.

(b) Unless the head of the agency specifies a higher percentage, the contracting officer must add to the offered price 6 percent of the cost of any foreign construction material proposed for exception from the requirements of the Buy American Act based on the unreasonable cost of domestic construction materials. In the case of a tie, the contracting officer must give preference to an offer that does not include foreign construction material excepted at the request of the offer on the basis of unreasonable cost.

(c) Offerors also may submit alternate offers based on use of equivalent domestic construction material to avoid possible rejection of the entire offer, if the Government determines that an exception permitting use of a particular foreign construction material does not apply.

(d) If the contracting officer awards a contract to an offeror that proposed foreign construction material not listed in the applicable clause in the solicitation (paragraph (b)(2) of [52.225-9](#), or paragraph (b)(3) of [52.225-11](#)), the contracting officer must add the excepted materials to the list in the contract clause.

### **25.205 -- Postaward Determinations.**

(a) If a contractor requests a determination regarding the inapplicability of the Buy American Act after contract award, 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 contracting officer concludes that the contractor should have made the request before contract award, the contracting officer may deny the request.

- (b) The contracting officer must base evaluation of any request for a determination regarding the inapplicability of the Buy American Act made after contract award on information required by paragraphs (c) and (d) of the applicable clause at [52.225-9](#) or [52.225-11](#) and/or other readily available information.
- (c) If a determination, under [25.202\(a\)](#), is made after contract award that an exception to the Buy American Act applies, the contracting officer must negotiate adequate consideration and modify the contract to allow use of foreign construction material. When the basis for the exception is the unreasonable price of a domestic construction material, adequate consideration is at least the differential established in [25.202\(a\)](#) or in accordance with agency procedures.

### **25.206 -- Noncompliance.**

The contracting officer must--

- (a) Review allegations of Buy American Act violations;
- (b) Unless fraud is suspected, notify the contractor of the apparent unauthorized use of foreign construction material and request a reply, to include proposed corrective action; and
- (c) If the review reveals that a contractor or subcontractor has used foreign construction material without authorization, take appropriate action, including one or more of the following:
  - (1) Process a determination concerning the inapplicability of the Buy American Act in accordance with [25.205](#).
  - (2) Consider requiring the removal and replacement of the unauthorized foreign construction material.
  - (3) If removal and replacement of foreign construction material incorporated in a building or work would be impracticable, cause undue delay, or otherwise be detrimental to the interests of the Government, the contracting officer may determine in writing that the foreign construction material need not be removed and replaced. A determination to retain foreign construction material does not constitute a determination that an exception to the Buy American Act applies, and this should be stated in the determination. Further, a determination to retain foreign construction material does not affect the Government's right to suspend or debar a contractor, subcontractor, or supplier for violation of the Buy American

Act, or to exercise other contractual rights and remedies, such as reducing the contract price or terminating the contract for default.

(4) If the noncompliance is sufficiently serious, consider exercising appropriate contractual remedies, such as terminating the contract for default. Also consider preparing and forwarding a report to the agency suspending or debarring official in accordance with [Subpart 9.4](#). If the noncompliance appears to be fraudulent, refer the matter to other appropriate agency officials, such as the officer responsible for criminal investigation.

## **Subpart 25.3 – Contracts Performed Outside the United States**

### **25.301 – Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission Outside the United States.**

#### **52.301-1 – Scope.**

(a) This section applies to contracts requiring contractor personnel to perform outside the United States—

(1) In a designated operational area during—

- (i) Contingency operations;
- (ii) Humanitarian or peacekeeping operations; or
- (iii) Other military operations or military exercises, when designated by the combatant commander; or

(2) When supporting a diplomatic or consular mission—

- (i) That has been designated by the Department of State as a danger pay post (see [http://aoprls.state.gov/Web920/danger\\_pay\\_all.asp](http://aoprls.state.gov/Web920/danger_pay_all.asp)); or
- (ii) That the contracting officer determines is a post at which application of the clause at FAR [52.225-19](#), Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission outside the United States, is appropriate.

(b) Any of the types of operations listed in paragraph (a)(1) of this section may include stability operations such as—

- (1) Establishment or maintenance of a safe and secure environment; or

- (2) Provision of emergency infrastructure reconstruction, humanitarian relief, or essential governmental services (until feasible to transition to local government).
- (c) This section does not apply to personal services contracts (see FAR [37.104](#)), unless specified otherwise in agency procedures.

#### **52.301-2 – Government Support.**

- (a) Generally, contractors are responsible for providing their own logistical and security support, including logistical and security support for their employees. The agency shall provide logistical or security support only when the appropriate agency official, in accordance with agency guidance, determines that—
  - (1) Such Government support is available and is needed to ensure continuation of essential contractor services; and
  - (2) The contractor cannot obtain adequate support from other sources at a reasonable cost.
- (b) The contracting officer shall specify in the contract, and in the solicitation if possible, the exact support to be provided, and whether this support is provided on a reimbursable basis, citing the authority for the reimbursement.

#### **52.301-3 – Weapons.**

The contracting officer shall follow agency procedures and the weapons policy established by the combatant commander or the chief of mission when authorizing contractor personnel to carry weapons (see paragraph (i) of the clause at [52.225-19](#), Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission outside the United States).

#### **52.301-4 – Contract Clause.**

Insert the clause at [52.225-19](#), Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission outside the United States, in solicitations and contracts, other than personal service contracts with individuals, that will require contractor personnel to perform outside the United States—

- (a) In a designated operational area during--
  - (1) Contingency operations;
  - (2) Humanitarian or peacekeeping operations; or
  - (3) Other military operations or military exercises, when designated by the combatant commander; or

(b) When supporting a diplomatic or consular mission—

- (1) That has been designated by the Department of State as a danger pay post (see [http://aoprls.state.gov/Web920/danger\\_pay\\_all.asp](http://aoprls.state.gov/Web920/danger_pay_all.asp) ); or
- (2) That the contracting officer determines is a post as which application of the clause FAR [52.225-19](#), Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission outside the United States, is appropriate.

## **Subpart 25.4 -- Trade Agreements**

### **25.400 -- Scope of Subpart.**

(a) This subpart provides policies and procedures applicable to acquisitions that are covered by--

- (1) The World Trade Organization Government Procurement Agreement (WTO GPA), as approved by Congress in the Uruguay Round Agreements Act (Pub. L. 103-465);
- (2) Free Trade Agreements (FTAs), consisting of—
  - (i) NAFTA (the North American Free Trade Agreement, as approved by Congress in the North American Free Trade Agreement Implementation Act of 1993 (19 U.S.C. 3301 note));
  - (ii) Chile FTA (the United States-Chile Free Trade Agreement, as approved by Congress in the United States-Chile Free Trade Agreement Implementation Act (Pub. L. 108-77)); and
  - (iii) Singapore FTA (the United States-Singapore Free Trade Agreement, as approved by Congress in the United States-Singapore Free Trade Agreement Implementation Act (Pub. L. 108-78));
  - (iv) Australia FTA (the United States—Australia Free Trade Agreement, as approved by Congress in the United States—Australia Free Trade Agreement Implementation Act (Pub. L. 108-286);
  - (v) Morocco FTA (The United States—Morocco Free Trade Agreement, as approved by Congress in the United States—Morocco Free Trade Agreement Implementation Act (Pub. L. 108-302));

(vi) CAFTA-DR (The Dominican Republic-Central America-United States Free Trade Agreement, as approved by Congress in the Dominican Republic-Central America-United States Free Trade Agreement Implementation Act (Pub. L. 109-53); and

(vii) United States-Bahrain Free Trade Agreement, as approved by Congress in the United States-Bahrain Free Trade agreement Implementation Act (Pub. L. 109-169):

(3) The least developed country designation made by the U.S. Trade Representative, pursuant to the Trade Agreements Act (19 U.S.C. 2511(b)(4)), in acquisitions covered by the WTO GPA;

(4) The Caribbean Basin Trade Initiative (CBTI) (determination of the U.S. Trade Representative that end products or construction material granted duty-free entry from countries designated as beneficiaries under the Caribbean Basin Economic Recovery Act (19 U.S.C. 2701, *et seq.*), with the exception of Panama, must be treated as eligible products in acquisitions covered by the WTO GPA);

(5) The Israeli Trade Act (the U.S.-Israel Free Trade Area Agreement, as approved by Congress in the United States-Israel Free Trade Area Implementation Act of 1985 (19 U.S.C. 2112 note)); or

(6) The Agreement on Trade in Civil Aircraft (U.S. Trade Representative waiver of the Buy American Act for signatories of the Agreement on Trade in Civil Aircraft, as implemented in the Trade Agreements Act of 1979 (19 U.S.C. 2513)).

(b) For application of the trade agreements that are unique to individual agencies see agency regulations.

### **25.401 – Exceptions.**

(a) This subpart does not apply to--

(1) Acquisitions set aside for small businesses;

(2) Acquisitions of arms, ammunition, or war materials, or purchases indispensable for national security or for national defense purposes;

(3) Acquisitions of end products for resale;

(4) Acquisitions from Federal Prison Industries, Inc., under [Subpart 8.6](#), and acquisitions under [Subpart 8.7](#), Acquisition from Nonprofit Agencies Employing People Who Are Blind or Severely Disabled; and

(5) Other acquisitions not using full and open competition, if authorized by [Subpart 6.2](#) or [6.3](#), when the limitation of competition would preclude use of the procedures of this subpart; or sole source acquisitions justified in accordance with [13.501\(a\)](#); and

(b) In the World Trade Organization Government Procurement Agreement (WTO GPA) and each FTA, there is a U.S. schedule that lists services that are excluded from that agreement in acquisitions by the United States. Acquisitions of the following services are excluded from coverage by the U.S. schedule of the WTO GPA or an FTA as indicated in this table:

The Service (Federal Service Codes from the Federal Procurement Data System Product/Service Code Manual are indicated in parentheses for some services.)	WTO GPA	Bahrain FTA, CAFTA-DR, Chile FTA, and NAFTA	Singapore FTA	Australia and Morocco FTA
(1) All services purchased in support of military services overseas.	X	X	X	X
(2)(i) Automatic data processing (ADP) telecommunications and transmission services (D304), except enhance ( <i>i.e.</i> , value-added) telecommunications services	X	X		
(2)(ii) ADP teleprocessing and timesharing services (D305), telecommunication network management services (D316), automated news services, data services or other information services (D317), and other ADP and telecommunications services (D399).	X	X		
(2)(iii) Basic telecommunications network services ( <i>i.e.</i> , voice telephone services, packet-switched data transmission services, circuit-switched data transmission services, telex services, telegraph services, facsimile services, and private leased circuit services, but not information services, as defined in 47 U.S.C. 153(20)	*	*	X	X
(3) Dredging	X	X	X	X
(4)(i) Operation and management contracts of certain Government or privately owned facilities used for Government purposes, including Federally Funded Research and Development Centers	X		X	

(4)(ii) Operation of all Department of Defense, Department of Energy, or the National Aeronautics and Space Administration facilities; and all Government-owned research and development facilities or Government-owned environmental laboratories.	**	X	**	X
(5) Research and development	X	X	X	X
(6) Transportation services (including launching services, but not including travel agent services—V503)	X	X	X	X
(7) Utility services	X	X	X	X
(8) Maintenance, repair, modification, rebuilding and installation of equipment related to ships (J019)		X		X
(9) Nonnuclear ship repair (J998)		X		X

\*Note 1. Acquisitions of the services listed at (2)(iii) of this table are a subset of the excluded services at (2)(i) and (ii), and are therefore not covered under the WTO GPA.

\*\*Note 2. Acquisitions of the services listed at (4)(ii) of this table are a subset of the excluded services at (4)(i), and are therefore not covered under the WTO GPA.

### **25.402 – General.**

(a)

(1) The Trade Agreements Act (19 U.S.C. 2501, *et seq.*) provides the authority for the President to waive the Buy American Act and other discriminatory provisions for eligible products from countries that have signed an international trade agreement with the United States, or that meet certain other criteria, such as being a least developed country. The President has delegated this waiver authority to the U.S. Trade Representative. In acquisitions covered by the WTO GPA, Free Trade Agreements, or the Israeli Trade Act, the USTR has waived the Buy American Act and other discriminatory provisions for eligible products. Offers of eligible products receive equal consideration with domestic offers.

(2) The contracting officer shall determine the origin of services by the country in which the firm providing the services is established. See [Subpart 25.5](#) for evaluation procedures for supply contracts covered by trade agreements.

(b) The value of the acquisition is a determining factor in the applicability of the trade agreements. Most of these dollar thresholds are subject to revision by the U.S. Trade

Representative approximately every 2 years. The various thresholds are summarized as follows:

Trade agreement	Supply contract (equal to or exceeding)	Service Contract (equal to or exceeding)	Construction contract (equal to or exceeding)
WTO GPA FTAs. ....	\$194,000	\$194,000	\$7,443,000
FTAs			
Australia FTA .....	67,826	67,826	7,443,000
Bahrain FTA .....	194,000	194,000	8,817,449
CAFTA-DR (El Salvador, Dominican Republic, Guatemala, Honduras, and Nicaragua)	67,826	67,826	7,443,000
Chile FTA .....	67,826	67,826	7,443,000
Morocco FTA .....	194,000	194,000	7,443,000
NAFTA .....			
--Canada .....	25,000	67,826	8,817,449
--Mexico .....	67,826	67,826	8,817,449
Singapore FTA .....	67,826	67,826	7,443,000
Israeli Trade Act .....	50.000	.....	.....

### **25.403 – World Trade Organization Government Procurement Agreement and Free Trade Agreements.**

(a) Eligible products from WTO GPA and FTA countries are entitled to the nondiscriminatory treatment specified in [25.402\(a\)\(1\)](#). The WTO GPA and FTAs specify procurement procedures designed to ensure fairness (see [25.408](#)).

(b) *Thresholds.*

(1) To determine whether the acquisition of products by lease, rental, or lease-purchase contract (including lease-to-ownership, or lease-with-option-to purchase), is covered by the WTO GPA or an FTA, calculate the estimated acquisition value as follows:

(i) If a fixed-term contract of 12 months or less is contemplated, use the total estimated value of the acquisition.

(ii) If a fixed-term contract of more than 12 months is contemplated, use the total estimated value of the acquisition plus the estimated residual value of the leased equipment at the conclusion of the contemplated term of the contract.

(iii) If an indefinite-term contract is contemplated, use the estimated monthly payment multiplied by the total number of months that ordering would be possible under the proposed contract, *i.e.*, the initial ordering period plus any optional ordering periods.

(iv) If there is any doubt as to the contemplated term of the contract, use the estimated monthly payment multiplied by 48.

(2) The estimated value includes the value of all options.

(3) If, in any 12-month period, recurring or multiple awards for the same type of product or products are anticipated, use the total estimated value of these projected awards to determine whether the WTO GPA or an FTA applies. Do not divide any acquisition with the intent of reducing the estimated value of the acquisition below the dollar threshold of the WTO GPA or an FTA.

(c) *Purchase restriction.*

(1) Under the Trade Agreements Act (19 U.S.C. 2512), in acquisitions covered by the WTO GPA, acquire only U.S.-made or designated country end products or U.S. or designated country services, unless offers for such end products or services are either not received or are insufficient to fulfill the requirements. This purchase restriction does not apply below the WTO GPA threshold for supplies and services, even if the acquisition is covered by an FTA.

(2) This restriction does not apply to purchases of supplies by the Department of Defense from a country with which it has entered into a reciprocal agreement, as provided in departmental regulations.

#### **25.404 – Least Developed Countries.**

For acquisitions covered by the WTO GPA, least developed country end products, construction material, and services must be treated as eligible products.

#### **25.405 -- Caribbean Basin Trade Initiative.**

Under the Caribbean Basin Trade Initiative, the United States Trade Representative has determined that, for acquisitions covered by the WTO GPA, Caribbean Basin country end products, construction material, and services must be treated as eligible products. In accordance with Section 201(a)(3) of the Dominican Republic—Central America—United States Free Trade Implementation Act (Pub. L. 109-53), when the CAFTA-DR

agreement enters into force with respect to a country, that country is no longer designated as a beneficiary country for purposes of the Caribbean Basin Economic Recovery Act, and is therefore no longer included in the definition of “Caribbean Basin country” for purposes of the Caribbean Basin Trade Initiative.

#### **25.406 – Israeli Trade Act.**

Acquisitions of supplies by most agencies are covered by the Israeli Trade Act, if the estimated value of the acquisition is \$50,000 or more but does not exceed the WTO GPA threshold for supplies (see [25.402\(b\)](#)). Agencies other than the Department of Defense, the Department of Energy, the Department of Transportation, the Bureau of Reclamation of the Department of the Interior, the Federal Housing Finance Board, and the Office of Thrift Supervision must evaluate offers of Israeli end products without regard to the restrictions of the Buy American Act. The Israeli Trade Act does not prohibit the purchase of other foreign end products.

#### **25.407 - Agreement on Trade in Civil Aircraft.**

Under the authority of Section 303 of the Trade Agreements Act, the U.S. Trade Representative has waived the Buy American Act for civil aircraft and related articles, that meet the substantial transformation test of the Trade Agreements Act, from countries that are parties to the Agreement on Trade in Civil Aircraft. Those countries are Austria, Belgium, Bulgaria, Canada, Denmark, Egypt, Finland, France, Germany, Greece, Ireland, Italy, Japan, Luxembourg, Macao, the Netherlands, Norway, Portugal, Romania, Spain, Sweden, Switzerland, and the United Kingdom.

#### **25.408 – Procedures.**

- (a) If the WTO GPA or an FTA applies (see [25.401](#)), the contracting officer must--
  - (1) Comply with the requirements of [5.203](#), Publicizing and response time;
  - (2) Comply with the requirements of [5.207](#), Preparation and transmittal of synopses;
  - (3) Not include technical requirements in solicitations solely to preclude the acquisition of eligible products;
  - (4) Specify in solicitations that offerors must submit offers in the English language and in U.S. dollars (see [52.214-34](#), Submission of Offers in the English Language, and [52.214-35](#), Submission of Offers in U.S. Currency, or paragraph (c)(5) of [52.215-1](#), Instruction to Offerors--Competitive Acquisitions); and
  - (5) Provide unsuccessful offerors from WTO GPA or FTA countries notice in accordance with [14.409-1](#) or [15.503](#).

(b) See [Subpart 25.5](#) for evaluation procedures and examples.

## **Subpart 25.5 – Evaluating Foreign Offers – Supply Contracts**

### **25.501 – General.**

The contracting officer--

- (a) Must apply the evaluation procedures of this subpart to each line item of an offer unless either the offer or the solicitation specifies evaluation on a group basis (see [25.503](#));
- (b) May rely on the offeror's certification of end product origin when evaluating a foreign offer;
- (c) Must identify and reject offers of end products that are prohibited in accordance with Subpart [25.7](#); and
- (d) Must not use the Buy American Act evaluation factors prescribed in this subpart to provide a preference for one foreign offer over another foreign offer.

### **25.502 – Application.**

(a) Unless otherwise specified in agency regulations, perform the following steps in the order presented:

- (1) Eliminate all offers or offerors that are unacceptable for reasons other than price; *e.g.*, nonresponsive, debarred or suspended, or a prohibited source (see [Subpart 25.7](#)).
- (2) Rank the remaining offers by price.
- (3) If the solicitation specifies award on the basis of factors in addition to cost or price, apply the evaluation factors as specified in this section and use the evaluated cost or price in determining the offer that represents the best value to the Government.

(b) For acquisitions covered by the WTO GPA (see Subpart [25.4](#))--

- (1) Consider only offers of U.S.-made or designated country end products, unless no offers of such end products were received;

(2) If the agency gives the same consideration given eligible offers to offers of U.S.-made end products that are not domestic end products, award on the low offer. Otherwise, evaluate in accordance with agency procedures; and

(3) If there were no offers of U.S.-made or designated country end products, make a nonavailability determination (see [25.103\(b\)\(2\)](#)) 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 Act (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 [25.103\(b\)\(3\)](#)), award on the low offer.

(3) If the low offer is a noneligible offer and there is an eligible offer that is lower than the lowest domestic offer, award on the low offer. The Buy American Act provides an evaluation preference only for domestic offers.

(4) Otherwise, apply the appropriate evaluation factor provided in [25.105](#) to the low offer.

(i) If the evaluated price of the low offer remains less than the lowest domestic offer, award on the low offer.

(iii) If the price of the lowest domestic offer is less than the evaluated price of the low offer, award on the lowest domestic offer.

(d) *Ties.*

(1) If application of an evaluation factor results in a tie between a domestic offer and a foreign offer, award on the domestic offer.

(2) If no evaluation preference was applied (*i.e.*, offers afforded nondiscriminatory treatment under the Buy American Act), resolve ties between domestic and foreign offers by a witnessed drawing of lots by an impartial individual.

(3) Resolve ties between foreign offers from small business concerns (under the Buy American Act, a small business offering a manufactured article that does not meet the definition of “domestic end product” is a foreign offer) or foreign offers from a small business concern and a large business concern in accordance with [14.408-6\(a\)](#).)

### **25.503 -- Group Offers.**

(a) If the solicitation or an offer specifies that award can be made only on a group of line items or on all line items contained in the solicitation or offer, reject the offer—

- (1) If any part of the award would consist of prohibited end products (see Subpart [25.7](#)); or
- (2) If the acquisition is covered by the WTO GPA and any part of the offer consists of items restricted in accordance with [25.403\(c\)](#).

(b) If an offer restricts award to a group of line items or to all line items contained in the offer, determine for each line item whether to apply an evaluation factor (see [25.504-4](#), Example 1).

- (1) First, evaluate offers that do not specify an award restriction on a line item basis in accordance with [25.502](#), determining a tentative award pattern by selecting for each line item the offer with the lowest evaluated price.
- (2) Evaluate an offer that specifies an award restriction against the offered prices of the tentative award pattern, applying the appropriate evaluation factor on a line item basis.
- (3) Compute the total evaluated price for the tentative award pattern and the offer that specified an award restriction.
- (4) Unless the total evaluated price of the offer that specified an award restriction is less than the total evaluated price of the tentative award pattern, award based on the tentative award pattern.

(c) If the solicitation specifies that award will be made only on a group of line items or all line items contained in the solicitation, determine the category of end products on the basis of each line item, but determine whether to apply an evaluation factor on the basis of the group of items (see [25.504-4](#), Example 2).

- (1) If the proposed price of domestic end products exceeds 50 percent of the total proposed price of the group, evaluate the entire group as a domestic offer. Evaluate all other groups as foreign offers.
- (2) For foreign offers, if the proposed price of domestic end products and eligible products exceeds 50 percent of the total proposed price of the group, evaluate the entire group as an eligible offer.
- (3) Apply the evaluation factor to the entire group in accordance with [25.502](#).

### **25.504 – Evaluation Examples.**

The following examples illustrate the application of the evaluation procedures in [25.502](#) and [25.503](#). The examples assume that the contracting officer has eliminated all offers that are unacceptable for reasons other than price or a trade agreement (see [25.502\(a\)\(1\)](#)). The evaluation factor may change as provided in agency regulations.

#### **25.504-1 – Buy American Act.**

(a)

(1) *Example 1.*

Offer A \$12,000	Domestic end product, small business.
Offer B \$11,700	Domestic end product, small business.
Offer C \$10,000	U.S.-made end product (not domestic), small business.

(2) *Analysis:* This acquisition is for end products for use in the United States and is set aside for small business concerns. The Buy American Act applies. Since the acquisition value is less than \$25,000 and the acquisition is set aside, none of the trade agreements apply. Perform the steps in [25.502\(a\)](#). Offer C is evaluated as a foreign end product because it is the product of a small business, but is not a domestic end product (see [25.502\(c\)\(4\)](#)). Since Offer B is a domestic offer, apply the 12 percent factor to Offer C (see [25.105\(b\)\(2\)](#)). The resulting evaluated price of \$11,200 remains lower than Offer B. The cost of Offer B is therefore unreasonable (see [25.105\(c\)](#)). Award on Offer C at \$10,000 (see [25.502\(c\)\(4\)\(i\)](#)).

(b)

(1) *Example 2.*

Offer A \$11,000	Domestic end product, small business .
Offer B \$10,700	Domestic end product, small business.
Offer C \$10,200	U.S.-made end product (not domestic), small business.

(2) *Analysis:* This acquisition is for end products for use outside the United States and is set aside for small business concerns. The buy American Act applies. Perform the steps in [25.502\(a\)](#). Offer C is evaluated as a foreign end product because it is the product of a small business, but is not a domestic end product (see [25.502\(c\)\(4\)](#)). After applying the 12 percent factor, the evaluated price of Offer C is \$11,424. Award on Offer B at \$10,700 (see [25.502\(c\)\(4\)\(ii\)](#)).

#### **25.504-2 – WTO GPA/Caribbean Basin Trade Initiative/FTAs.**

*Example 1.*

Offer A . . . .	\$204,000 U.S.-made end product (not domestic).
Offer B . . . .	\$203,000 U.S.-made end product (domestic), small business.
Offer C . . . .	\$200,000 Eligible product.
Offer D . . . .	\$195,000 Noneligible product (not U.S.-made).

*Analysis:* Eliminate Offer D because the acquisition is covered by the WTP GPA and there is an offer of a U.S.-made or an eligible product (see [25.502\(b\)\(1\)](#)). If the agency gives the same consideration given eligible offers to offers of U.S.-made end products that are not domestic offers, it is unnecessary to determine if U.S.-made end products are domestic (large or small business). No further analysis is necessary. Award on the low remaining offer, Offer C (see [25.502\(b\)\(2\)](#)).

#### **25.504-3 -- FTA/Israeli Trade Act.**

(a) *Example 1.*

Offer A . . . .	\$105,000 Domestic end product, small business.
Offer B . . . .	\$100,000 Eligible product.

*Analysis:* Since the low offer is an eligible offer, award on the low offer (see [25.502\(c\)\(1\)](#)).

(b) *Example 2.*

Offer A . . . .	\$105,000 Eligible product.
Offer B . . . .	\$103,000 Noneligible product.

*Analysis:* Since the acquisition is not covered by the WTO GPA, the contracting officer can consider the noneligible offer. Since no domestic offer was received, make a nonavailability determination and award on Offer B (see [25.502\(c\)\(2\)](#)).

(c) *Example 3.*

Offer A . . . .	\$105,000 Domestic end product, large business.
Offer B . . . .	\$103,000 Eligible product.

Offer C . . . .	\$100,000 Noneligible product.
-----------------	--------------------------------

*Analysis:* Since the acquisition is not covered by the WTO GPA, the contracting officer can consider the noneligible offer. Because the eligible offer (Offer B) is lower than the domestic offer (Offer A), no evaluation factor applies to the low offer (Offer C). Award on the low offer (see [25.502\(c\)\(3\)](#)).

#### **25.504-4 – Group award basis.**

*Key:*

DO = Domestic end product

EL = Eligible product

NEL = Noneligible product

(a) *Example 1.*

Item	Offers		
	A	B	C
1	DO = \$55,000	EL = \$56,000	NEL = \$50,000
2	NEL = 13,000	EL = 10,000	EL = 13,000
3	NEL = 11,500	DO = 12,000	DO = 10,000
4	NEL = 24,000	EL = 28,000	NEL = 22,000
5	DO = <u>18,000</u>	NEL = <u>10,000</u>	DO = <u>14,000</u>
	\$121,500	\$116,000	\$109,000

*Problem:* Offeror C specifies all-or-none award. Assume all offerors are large businesses. The acquisition is not covered by the WTO GPA.

*Analysis:* (see [25.503](#))

*STEP 1:* Evaluate Offers A & B before considering Offer C and determine which offer has the lowest evaluated cost for each line item (the tentative award pattern):

*Item 1:* Low offer A is domestic; select A.

*Item 2:* Low offer B is eligible; do not apply factor; select B.

*Item 3:* Low offer A is noneligible and Offer B is a domestic offer. Apply a 6 percent factor to Offer A. The evaluated price of Offer A is higher than Offer B; select B.

*Item 4:* Low offer A is noneligible. Since neither offer is a domestic offer, no evaluation factor applies; select A.

*Item 5:* Low offer B is noneligible; apply a 6 percent factor to Offer B. Offer A is still higher than Offer B; select B.

*STEP 2:* Evaluate Offer C against the tentative award pattern for Offers A and B:

Item	Offers		
	Low offer	Tentative award pattern from A and B	C
1	A	DO=\$55,000	NEL=\$53,000*
2	B	EL=10,000	EL=13,000
3	B	DO=12,000	DO=10,000
4	A	NEL=24,000	NEL=22,000
5	B	NEL=10,600*	DO=14,000
		\$111,600	\$112,000

\* Offer + 6 percent.

On a line item basis, apply a factor to any noneligible offer if the other offer for that line item is domestic.

For Item 1, apply a factor to Offer C because Offer A is domestic and the acquisition was not covered by the WTO GPA. The evaluated price of Offer C, Item 1, becomes \$53,000 (\$50,000 plus 6 percent). Apply a factor to Offer B, Item 5, because it is a noneligible product and Offer C is domestic. The evaluated price of Offer B is \$10,600 (\$10,000 plus 6 percent). Evaluate the remaining items without applying a factor.

*STEP 3:* The tentative unrestricted award pattern from Offers A and B is lower than the evaluated price of Offer C. Award the combination of Offers A and B. Note that if Offer C had not specified all-or-none award, award would be made on Offer C for line items 1, 3, and 4, totaling an award of \$82,000.

(b) *Example 2.*

Item	Offers		
	Offer A	Offer B	Offer C

	A	B	C
1	DO=\$50,000	EL=\$50,500	NEL=\$50,000
2	NEL=10,300	NEL=10,000	EL=10,200
3	EL=20,400	EL=21,000	NEL=20,200
4	DO= <u>10,500</u>	DO= <u>10,300</u>	DO= <u>10,400</u>
	\$91,200	\$91,800	\$90,800

*Problem:* The solicitation specifies award on a group basis. Assume the Buy American Act applies and the acquisition cannot be set aside for small business concerns. All offerors are large businesses.

*Analysis:* (see [25.503\(c\)](#))

*STEP 1:* Determine which of the offers are domestic (see [25.503\(c\)\(1\)](#)):

	Domestic %	Determination
A	$60,500/91,200=66.3\%$	Domestic
B	$10,300/91,800=11.2\%$	Foreign
C	$10,400/90,800=11.5\%$ .	Foreign

*STEP 2:* Determine whether foreign offers are eligible or noneligible offers (see [25.503\(c\)\(2\)](#)):

	Domestic + eligible %	Determination
A	N/A	Domestic
B	$81,800/91,800=89.1\%$	Eligible
C	$20,600/90,800=22.7\%$	Noneligible

*STEP 3:* Determine whether to apply an evaluation factor (see [25.503\(c\)\(3\)](#)). The low offer (Offer C) is a foreign offer. There is no eligible offer lower than the domestic offer. Therefore, apply the factor to the low offer. Addition of the 6 percent factor (use 12 percent if Offer A is a small business) to Offer C yields an evaluated price of \$96,248 ( $\$90,800 + 6$  percent). Award on Offer A (see [25.502\(c\)\(4\)\(ii\)](#)). Note that, if Offer A were greater than Offer B, an evaluation factor would not be applied and award would be on Offer C (see [25.502\(c\)\(3\)](#)).

## Subpart 25.6 – [Reserved]

## **Subpart 25.7 – Prohibited Sources**

### **25.700 – Scope of Subpart.**

This subpart implements—

- (a) Economic sanctions administered by the Office of Foreign Assets Control (OFAC) in the Department of the Treasury prohibiting transactions involving certain countries, entities, and individuals; and
- (b) The Sudan Accountability and Divestment Act of 2007 (Pub. L. 110-174).

### **25.701 – Restrictions on Acquisitions of Supplies or Services From Prohibited Sources.**

- (a) Except as authorized by OFAC, agencies and their contractors and subcontractors must not acquire any supplies or services if any proclamation, Executive order, or statute administered by OFAC, or if OFAC's implementing regulations at 31 CFR chapter V, would prohibit such a transaction by a person subject to the jurisdiction of the United States.
- (b) Except as authorized by OFAC, most transactions involving Cuba, Iran, and Sudan are prohibited, as are most imports from Burma or North Korea into the United States or its outlying areas. In addition, lists of entities and individuals, subject to economic sanctions are included in OFAC's List of Specially Designated Nationals and Blocked Persons at <http://www.treas.gov/offices/enforcement/ofac/sdn/>. More information about these restrictions, as well as updates, is available in OFAC's regulations at 31 CFR chapter V and/or on OFAC's Website at <http://www.treas.gov/offices/enforcement/ofac>.
- (c) Refer questions concerning the restrictions in paragraphs (a) or (b) of this section to the Department of the Treasury, Office of Foreign Assets Control, Washington, DC 20220, (Telephone (202) 622-2490).

### **25.702 – Prohibition on Contracting with Entities that Conduct Restricted Business Operations in Sudan.**

#### **25.702-1 – Definitions.**

As used in this section—

“Appropriate Congressional committees” means—

- (1) The Committee on Banking, Housing, and Urban Affairs, The Committee on Foreign Relations, and the Select Committee on Intelligence of the Senate; and

(2) The Committee on Financial Services, the Committee on Foreign Relations, and the Permanent Select Committee on Intelligence of the House of Representatives.

“Business operations” means engaging in commerce in any form, including by acquiring, developing, maintaining, owning, selling, possessing, leasing, or operating equipment, facilities, personnel, products, services, personal property, real property, or any other apparatus of business or commerce.

“Marginalized populations of Sudan” means—

(1) Adversely affected groups in regions authorized to receive assistance under section 8(c) of the Darfur Peace and Accountability Act (Pub. L. 109-344) (50 U.S.C. 1707 note); and

(2) Marginalized areas in Northern Sudan described in section 4(9) of such Act.

“Person” means—

(1) A natural person, corporation, company, business association, partnership, society, trust, any other nongovernmental entity, organization, or group;

(2) Any governmental entity or instrumentality of a government, including a multilateral development institution (as defined in section 1701(c)(3) of the International Financial Institutions Act (22 U.S.C. 262r(c)(3)); and

(3) Any successor, subunit, parent company or subsidiary of any entity described in paragraphs (1) or (2) of this definition.

“Restricted business operations”—

(1) Means, except as provided in paragraph (2) of this definition, business operations in Sudan that include power production activities, mineral extraction activities, oil-related activities, or the production of military equipment, as those terms are defined in the Sudan Accountability and Divestment Act of 2007 (Pub. L. 110-174).

(2) Does not include business operations that the person conducting the business can demonstrate—

(i) Are conducted under contract directly and exclusively with the regional government of southern Sudan;

(ii) Are conducted pursuant to specific authorization from the Office of Foreign Assets Control in the Department of the Treasury, or are expressly

exempted under Federal law from the requirement to be conducted under such authorization;

- (iii) Consist of providing goods or services to marginalized populations of Sudan;
- (iv) Consist of providing goods or services to an internationally recognized peacekeeping force or humanitarian organization;
- (v) Consist of providing goods or services that are used only to promote health or education; or
- (vi) Have been voluntarily suspended.

#### **25.702-2 – Certification.**

As required by the Sudan Accountability and Divestment Act of 2007 (Pub. L. 110-174), each offeror must certify that it does not conduct restricted business operations in Sudan.

#### **25.702-3 – Remedies.**

Upon the determination of a false certification under subsection [\*\*25.702-2\*\*](#)—

- (a) The contracting officer may terminate the contract;
- (b) The suspending official may suspend the contractor in accordance with the procedures in [Subpart 9.4](#); and
- (c) The debarring official may debar the contractor for a period not to exceed 3 years in accordance with the procedures in [Subpart 9.4](#).

#### **25.702-4 – Waiver.**

- (a) The President may waive the requirement of subsection [\*\*25.702-2\*\*](#) on a case-by-case basis if the President determines and certifies in writing to the appropriate congressional committees that it is in the national interest to do so.
- (b) An agency seeking waiver of the requirement shall submit the request through the Administrator of the Office of Federal Procurement Policy.

### **Subpart 25.8 – Other International Agreements and Coordination**

#### **25.801 – General.**

Treaties and agreements between the United States and foreign governments affect the evaluation of offers from foreign entities and the performance of contracts in foreign countries.

### **25.802 – Procedures.**

- (a) When placing contracts with contractors located outside the United States, for performance outside the United States, contracting officers must --
  - (1) Determine the existence and applicability of any international agreements and ensure compliance with these agreements; and
  - (2) Conduct the necessary advance acquisition planning and coordination between the appropriate U.S. executive agencies and foreign interests as required by these agreements.
- (b) The Department of State publishes many international agreements in the “United States Treaties and Other International Agreements” series. Copies of this publication normally are available in overseas legal offices and U.S. diplomatic missions.
- (c) Contracting officers must award all contracts with Taiwanese firms or organizations through the American Institute of Taiwan (AIT). AIT is under contract to the Department of State.

## **Subpart 25.9 – Customs and Duties**

### **25.900 – Scope of subpart.**

This subpart provides policies and procedures for exempting from import duties certain supplies purchased under Government contracts.

### **25.901 – Policy.**

United States laws impose duties on foreign supplies imported into the customs territory of the United States. Certain exemptions from these duties are available to Government agencies. Agencies must use these exemptions when the anticipated savings to appropriated funds will outweigh the administrative costs associated with processing required documentation.

### **25.902 – Procedures.**

For regulations governing importations and duties, see the Customs Regulations issued by the U.S. Customs Service, Department of the Treasury (19 CFR Chapter 1). Except as provided elsewhere in the customs Regulations (see 19 CFR 10.100), all shipments of imported supplies purchased under Government contracts are subject to the usual

Customs entry and examination requirements. Unless the agency obtains an exemption (see [25.903](#), those shipments are also subject to duty.

### **25.903 – Exempted Supplies.**

- (a) Subchapters VIII and X of Chapter 98 of the Harmonized Tariff Schedule of the United States (19 U.S.C. 1202) list supplies for which exemptions from duty may be obtained when imported into the customs territory of the United States under a Government contract. For certain of these supplies, the contracting agency must certify to the Commissioner of Customs that they are for the purpose stated in the Harmonized Tariff Schedule (see 19 CFR 10.102-104, 10.114, and 10.121 and 15 CFR part 301 for requirements and formats).
- (b) Supplies (excluding equipment) for Government-operated vessels or aircraft may be withdrawn from any customs-bonded warehouse, from continuous customs custody elsewhere than in a bonded warehouse, or from a foreign-trade zone, free of duty and internal revenue tax as provided in 19 U.S.C. 1309 and 1317. The contracting activity must cite this authority on the appropriate customs form when making purchases (see 19 CFR 10.59--10.65).

## **Subpart 25.10 – Additional Foreign Acquisition Regulations**

### **25.1001 – Waiver of Right to Examination of Records.**

- (a) *Policy.* The clause at [52.215-2](#), Audit and Records--Negotiation, prescribed at [15.209](#)(b), and paragraph (d) of the clause at [52.212-5](#), Contract Terms and Conditions Required to Implement Statutes or Executive Orders--Commercial Items, prescribed at [12.301](#)(b)(4), implement 10 U.S.C. 2313 and 41 U.S.C. 254d. The basic clauses authorize examination of records by the Comptroller General.
  - (1) Insert the appropriate basic clause, whenever possible, in negotiated contracts with foreign contractors.
  - (2) The contracting officer may use [52.215-2](#) with its Alternate III or [52.212-5](#) with its Alternate I after—
    - (i) Exhausting all reasonable efforts to include the basic clause;
    - (ii) Considering factors such as alternate sources of supply, additional cost, and time of delivery; and
    - (iii) The head of the agency has executed a determination and findings in accordance with paragraph (b) of this section, with the concurrence of the Comptroller General. However, concurrence of the Comptroller General is

not required if the contractor is a foreign government or agency thereof or is precluded by the laws of the country involved from making its records available for examination.

(b) *Determination and findings.* The determination and findings must--

- (1) Identify the contract and its purpose, and identify if the contract is with a foreign contractor or with a foreign government or an agency of a foreign government;
- (2) Describe the efforts to include the basic clause;
- (3) State the reasons for the contractor's refusal to include the basic clause;
- (4) Describe the price and availability of the supplies or services from the United States and other sources; and
- (5) Determine that it will best serve the interest of the United States to use the appropriate alternate clause in paragraph (a)(2) of this section.

### **25.1002 – Use of Foreign Currency.**

(a) Unless an international agreement or the WTO GPA (see [25.408\(a\)\(4\)](#)) requires a specific currency, contracting officers must determine whether solicitations for contracts to be entered into and performed outside the United States will require submission of offers in U.S. currency or a specified foreign currency. In unusual circumstances, the contracting officer may permit submission of offers in other than a specified currency.

(b) To ensure a fair evaluation of offers, solicitations generally should require all offers to be priced in the same currency. However, if the solicitation permits submission of offers in other than a specified currency, the contracting officer must convert the offered prices to U.S. currency for evaluation purposes. The contracting officer must use the current market exchange rate from a commonly used source in effect as follows:

- (1) For acquisitions conducted using sealed bidding procedures, on the date of bid opening.
- (2) For acquisitions conducted using negotiation procedures--
  - (i) On the date specified for receipt of offers, if award is based on initial offers; otherwise
  - (ii) On the date specified for receipt of final proposal revisions.

(c) If a contract is priced in foreign currency, the agency must ensure that adequate funds are available to cover currency fluctuations to avoid a violation of the Anti-Deficiency Act (31 U.S.C. 1341, 1342, 1511-1519).

## **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 acquisition of services involving the furnishing of supplies.

(a)

(1) Insert the clause at [52.225-1](#), Buy American Act—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 Act applies (*e.g.*, nonavailability, public interest, or information technology that is a commercial item); or
- (iii) The acquisition is for supplies for use outside the United States.

(2) Insert the provision at [52.225-2](#), Buy American Act Certificate, in solicitations containing the clause at [52.225-1](#).

(b)

(1)

(i) Insert the clause at [52.225-3](#), Buy American Act--Free Trade Agreements--Israeli Trade Act, in solicitations and contracts if --

(A) The acquisition is for supplies, or for services involving the furnishing of supplies, for use within the United States, and the acquisition value is \$25,000 or more, but is less than \$194,000;

(B) The acquisition is not for information technology that is a commercial item, using fiscal year 2004 or subsequent fiscal year funds; and

(C) No exception in [25.401](#) applies. For acquisitions of agencies not subject to the Israeli Trade Act (see [25.406](#)), see agency regulations.

(ii) If the acquisition value is \$25,000 or more but is less than \$50,000, use the clause with its Alternate I.

(iii) If the acquisition value is \$50,000 or more but is less than \$67,826, use the clause with its Alternate II.

(2)

(i) Insert the provision at [52.225-4](#), Buy American Act--Free Trade Agreements--Israeli Trade Act Certificate, in solicitations containing the clause at [52.225-3](#).

(ii) If the acquisition value is \$25,000 or more but is less than \$50,000, use the provision with its Alternate I.

(iii) If the acquisition value is \$50,000 or more but less than \$67,826, use the provision with its Alternate II.

(c)

(1) Insert the clause at [52.225-5](#), Trade Agreements, in solicitations and contracts valued at \$193,000 or more, if the acquisition is covered by the WTO GPA (see Subpart [25.4](#)) and the agency has determined that the restrictions of the Buy American Act are not applicable to U.S.-made end products. If the agency has not made such a determination, the contracting officer must follow agency procedures.

(2) Insert the provision at [52.225-6](#), Trade Agreements Certificate, in solicitations containing the clause at [52.225-5](#).

(d) Insert the provision at [52.225-7](#), Waiver of Buy American Act for Civil Aircraft and Related Articles, in solicitations for civil aircraft and related articles (see [25.407](#)), if the acquisition value is less than \$194,000.

(e) Insert the clause at [52.225-8](#), Duty-Free Entry, in solicitations and contracts for supplies that may be imported into the United States and for which duty-free entry may be obtained in accordance with [25.903\(a\)](#), if the value of the acquisition--

- (1) Exceeds the simplified acquisition threshold; or
- (2) Does not exceed the simplified acquisition threshold, but the savings from waiving the duty is anticipated to be more than the administrative cost of waiving the duty. When used for acquisitions that do not exceed the simplified acquisition threshold, the contracting officer may modify paragraphs (c)(1) and (j)(2) of the clause to reduce the dollar figure.

(f) Insert the provision at [52.225-18](#), Place of Manufacture, in solicitations that are predominantly for the acquisition of manufactured end products, as defined in the provision at [52.225-18](#) (*i.e.*, the estimated value of the manufactured end products exceeds the estimated value of other items to be acquired as a result of the solicitation).

### **25.1102 -- Acquisition of Construction.**

- (a) Insert the clause at [52.225-9](#), Buy American Act--Construction Materials, in solicitations and contracts for construction that is performed in the United States valued at less than \$7,443,000.
  - (1) List in paragraph (b)(2) of the clause all foreign construction material excepted from the requirements of the Buy American Act.
  - (2) If the head of the agency determines that a higher percentage is appropriate, substitute the higher evaluation percentage in paragraph (b)(3)(i) of the clause.
- (b)
  - (1) Insert the provision at [52.225-10](#), Notice of Buy American Act Requirement--Construction Materials, in solicitations containing the clause at [52.225-9](#).
  - (2) If insufficient time is available to process a determination regarding the inapplicability of the Buy American Act before receipt of offers, use the provision with its Alternate I.
- (c) Insert the clause at [52.225-11](#), Buy American Act--Construction Materials under Trade Agreements, in solicitations and contracts for construction that is performed in the United States valued at \$7,443,000 or more.
  - (1) List in paragraph (b)(3) of the clause all foreign construction material excepted from the requirements of the Buy American Act, other than WTO GPA, least developed country or FTA country construction material.
  - (2) If the head of the agency determines that a higher percentage is appropriate, substitute the higher evaluation percentage in paragraph (b)(4)(i) of the clause.

(3) For acquisitions valued at \$7,443,000 or more, but less than \$8,817,449, use the clause with its Alternate I. List in paragraph (b)(3) of the clause all foreign construction material excepted from the requirements of the Buy American Act, unless the excepted foreign construction material is from a designated country other than Mexico.

(d)

(1) Insert the provision at [52.225-12](#), Notice of Buy American Act Requirement--Construction Materials under Trade Agreements, in solicitations containing the clause at [52.225-11](#).

(2) If insufficient time is available to process a determination regarding the inapplicability of the Buy American Act before receipt of offers, use the provision with its Alternate I.

(3) For acquisitions valued at \$7,443,000 or more, but less than \$8,817,449, use the clause with its Alternate II.

### **25.1103 -- Other provisions and clauses.**

(a) *Restrictions on certain foreign purchases.* Insert the clause at [52.225-13](#), Restrictions on Certain Foreign Purchases, in solicitations and contracts, unless an exception applies.

(b) *Translations.* Insert the clause at [52.225-14](#), Inconsistency Between English Version and Translation of Contract, in solicitations and contracts if anticipating translation into another language.

(c) *Foreign currency offers.* Insert the provision at [52.225-17](#), Evaluation of Foreign Currency Offers, in solicitations that permit the use of other than a specified currency. Insert in the provision the source of the rate to be used in the evaluation of offers.

(d) The contracting officer shall include in each solicitation for the acquisition of products or services (other than commercial items procured under [Part 12](#)) the provision at [52.225-20](#), Prohibition on Conducting Restricted Business Operations in Sudan—Certification.

# **DoD FAR**

# **Part 225--Foreign Acquisition**

## **TABLE OF CONTENTS**

*(Revised September 15, 2008)*

225.001 General.

225.003 Definitions.

### **SUBPART 225.1--BUY AMERICAN ACT—SUPPLIES**

225.101 General.

225.103 Exceptions.

225.104 Nonavailable articles.

225.105 Determining reasonableness of cost.

225.170 Acquisition from or through other Government agencies.

### **SUBPART 225.2--BUY AMERICAN ACT--CONSTRUCTION MATERIALS**

225.202 Exceptions.

225.206 Noncompliance.

### **SUBPART 225.3--CONTRACTS PERFORMED OUTSIDE THE UNITED**

#### **STATES**

225.301 Contractor personnel in a designated operational area or

supporting a diplomatic or consular mission outside  
the United

States.

225.301-1 Scope.

225.301-4 Contract clause.

## **SUBPART 225.4--TRADE AGREEMENTS**

225.401 Exceptions.

225.401-70 End products subject to trade agreements.

225.401-71 Products or services in support of operations in Iraq or Afghanistan.

225.402 General.

225.403 World Trade Organization Government Procurement Agreement and Free Trade Agreements.

225.408 Procedures.

## **SUBPART 225.5--EVALUATING FOREIGN OFFERS--SUPPLY CONTRACTS**

225.502 Application.

225.503 Group offers.

225.504 Evaluation examples.

## **SUBPART 225.7--PROHIBITED SOURCES**

225.701 Restrictions.

225.701-70 Exception.

225.770 Prohibition on acquisition of United States Munitions List items  
from Communist Chinese military companies.

225.770-1 Definitions.

225.770-2 Prohibition.

225.770-3 Exceptions.

225.770-4 Identifying USML items.

225.770-5 Waiver of prohibition.

**SUBPART 225.8--OTHER INTERNATIONAL AGREEMENTS AND  
COORDINATION**

225.802 Procedures.

225.802-70 Contracts for performance outside the United States and Canada.

225.802-71 End use certificates.

225.870 Contracting with Canadian contractors.

225.870-1 General.

225.870-2 Solicitation of Canadian contractors.

225.870-3 Submission of offers.

225.870-4 Contracting procedures.

225.870-5 Contract administration.

225.870-6 Termination procedures.

225.870-7 Acceptance of Canadian supplies.

225.870-8 Industrial security.

225.871 North Atlantic Treaty Organization (NATO) cooperative projects.

225.871-1 Scope.

225.871-2 Definitions.

225.871-3 General.

225.871-4 Statutory waivers.

225.871-5 Directed subcontracting.

225.871-6 Disposal of property.

225.871-7 Congressional notification.

225.872 Contracting with qualifying country sources.

225.872-1 General.

225.872-2 Applicability.

225.872-3 Solicitation procedures.

225.872-4 Individual determinations.

225.872-5 Contract administration.

225.872-6 Audit.

225.872-7 Industrial security for qualifying countries.

225.872-8 Subcontracting with qualifying country sources.

225.873 Waiver of United Kingdom commercial exploitation levies.

225.873-1 Policy.

225.873-2 Procedures.

#### **SUBPART 225.9--CUSTOMS AND DUTIES**

225.901 Policy.

225.902 Procedures.

225.903 Exempted supplies.

#### **SUBPART 225.10--ADDITIONAL FOREIGN ACQUISITION REGULATIONS**

225.1070 Clause deviations in overseas contracts.

#### **SUBPART 225.11--SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

225.1100 Scope of subpart.

225.1101 Acquisition of supplies.

225.1103 Other provisions and clauses.

**SUBPART 225.70--AUTHORIZATION ACTS, APPROPRIATIONS ACTS, AND**

**OTHER STATUTORY RESTRICTIONS ON FOREIGN ACQUISITION**

225.7000 Scope of subpart.

225.7001 Definitions.

225.7002 Restrictions on food, clothing, fabrics, specialty metals, and hand  
or measuring tools.

225.7002-1 Restrictions.

225.7002-2 Exceptions.

225.7002-3 Contract clauses.

225.7003 Waiver of restrictions of 10 U.S.C. 2534.

225.7004 Restriction on acquisition of foreign buses.

225.7004-1 Restriction.

225.7004-2 Applicability.

225.7004-3 Exceptions.

225.7004-4 Waiver.

225.7005 Restriction on certain chemical weapons antidote.

225.7005-1 Restriction.

225.7005-2 Exception.

225.7005-3 Waiver.

225.7006 Restriction on air circuit breakers for naval vessels.

225.7006-1 Restriction.

225.7006-2 Exceptions.

225.7006-3 Waiver.

225.7006-4 Solicitation provision and contract clause.

225.7007 Restrictions on anchor and mooring chain.

225.7007-1 Restrictions.

225.7007-2 Waiver.

225.7007-3 Contract clause.

225.7008 Reserved.

225.7009 Restriction on ball and roller bearings.

225.7009-1 Scope.

225.7009-2 Restriction.

225.7009-3 Exception.

225.7009-4 Waiver.

225.7009-5 Contract clause.

225.7010 Reserved.

225.7011 Restriction on carbon, alloy, and armor steel plate.

225.7011-1 Restriction.

225.7011-2 Waiver.

225.7011-3 Contract clause.

225.7012 Restriction on supercomputers.

225.7012-1 Restriction.

225.7012-2 Waiver.

225.7012-3 Contract clause.

225.7013 Restrictions on construction or repair of vessels in foreign

shipyards.

225.7014 Restriction on overseas military construction.

225.7015 Restriction on overseas architect-engineer services.

225.7016 Restriction on research and development.

225.7017 Restriction on Ballistic Missile Defense research, development, test,  
and evaluation.

225.7017-1 Definitions.

225.7017-2 Restriction.

225.7017-3 Exceptions.

225.7017-4 Solicitation provision.

**SUBPART 225.71--OTHER RESTRICTIONS ON FOREIGN  
ACQUISITION**

225.7100 Scope of subpart.

225.7101 Definitions.

225.7102 Forgings.

225.7102-1 Policy.

225.7102-2 Exceptions.

225.7102-3 Waiver.

225.7102-4 Contract clause.

**SUBPART 225.72--REPORTING CONTRACT PERFORMANCE  
OUTSIDE THE UNITED STATES**

225.7201 Policy.

225.7202 Exception.

225.7203 Contracting officer distribution of reports.

225.7204 Solicitation provision and contract clauses.

**SUBPART 225.73--ACQUISITIONS FOR FOREIGN MILITARY SALES**

225.7300 Scope of subpart.

225.7301 General.

225.7302 Guidance.

225.7303 Pricing acquisitions for FMS.

225.7303-1 Contractor sales to other foreign customers.

225.7303-2 Cost of doing business with a foreign government or an  
international organization.

225.7303-3 Government-to-government agreements.

225.7303-4 Contingent fees.

225.7303-5 Acquisitions wholly paid for from nonrepayable funds.

225.7304 FMS customer involvement.

225.7305 Limitation of liability.

225.7306 Offset arrangements.

225.7307 Contract clauses.

**SUBPART 225.74--DEFENSE CONTRACTORS OUTSIDE THE  
UNITED**

**STATES**

225.7401 Contracts requiring performance or delivery in a foreign country.

225.7402 Contractor personnel authorized to accompany U.S. Armed Forces  
deployed outside the United States.

225.7402-1 Scope.

225.7402-2 Definitions.

225.7402-3 Government support.

225.7402-4 Contract clauses.

225.7403 Antiterrorism/force protection.

225.7403-1 General.

225.7403-2 Contract clause.

**SUBPART 225.75--BALANCE OF PAYMENTS PROGRAM**

225.7500 Scope of subpart.

225.7501 Policy.

225.7502 Procedures.

225.7503 Contract clauses.

**SUBPART 225.76--SECONDARY ARAB BOYCOTT OF ISRAEL**

225.7601 Restriction.

225.7602 Procedures.

225.7603 Exceptions.

225.7604 Waivers.

225.7605 Solicitation provision.

**SUBPART 225.77--ACQUISITIONS IN SUPPORT OF OPERATIONS  
IN IRAQ**

**OR AFGHANISTAN**

225.7700 Scope.

225.7701 Definitions.

225.7702 Acquisition of small arms.

225.7703 Acquisition of products or services other than small arms.

225.7703-1 Acquisition procedures.

225.7703-2 Determination requirements.

225.7703-3 Evaluating offers.

225.7703-4 Reporting requirement.

225.7703-5 Solicitation provisions and contract clauses.

*(Revised October 26, 2006)*

**225.001 General.**

For guidance on evaluating offers of foreign end products, see [PGI 225.001](#).

**225.003 Definitions.**

As used in this part--

(1) "Caribbean Basin country end product" includes petroleum or any product derived from petroleum.

(2) "Defense equipment" means any equipment, item of supply, component, or end product purchased by DoD.

(3) "Domestic concern" means--

(i) A concern incorporated in the United States (including a subsidiary that is incorporated in the United States, even if the parent corporation is a foreign concern); or

(ii) An unincorporated concern having its principal place of business in the United States.

(4) "Domestic end product" has the meaning given in the clauses at 252.225-7001, Buy American Act and Balance of Payments Program; and 252.225-7036, Buy American Act-Free Trade Agreements--Balance of Payments Program, instead of the meaning in FAR 25.003.

(5) "Eligible product" means, instead of the definition in FAR 25.003--

(i) A foreign end product that--

(A) Is in a category listed in 225.401-70; and

(B) Is not subject to discriminatory treatment, due to the applicability of a trade agreement to a particular acquisition;

(ii) A foreign construction material that is not subject to discriminatory treatment, due to the applicability of a trade agreement to a particular acquisition; or

(iii) A foreign service that is not subject to discriminatory treatment, due to the applicability of a trade agreement to a particular acquisition.

(6) "Foreign concern" means any concern other than a domestic concern.

(7) "Nonqualifying country" means a country other than the United States or a qualifying country.

(8) "Nonqualifying country component" means a component mined, produced, or manufactured in a nonqualifying country.

(9) "Qualifying country" means a country with a memorandum of understanding or international agreement with the United States. Qualifying countries are listed in 225.872-1.

(10) "Qualifying country component" and "qualifying country end product" are defined in the clauses at 252.225-7001, Buy American Act and Balance of Payments Program; and 252.225-7036, Buy American Act--Free Trade Agreements--Balance of Payments Program. "Qualifying country end product" is also defined in the clause at 252.225-7021, Trade Agreements.

(11) "Qualifying country offer" means an offer of a qualifying country end product, including the price of transportation to destination.

(12) "Source," when restricted by words such as foreign, domestic, or qualifying country, means the actual manufacturer or producer of the end product or component.

**225.004 Reporting of acquisition of end products manufactured outside the United States.**

Follow the procedures at [PGI 225.004](#) for entering the data upon which the report required by FAR 25.004 will be based.

## **SUBPART 225.1--BUY AMERICAN ACT--SUPPLIES**

*(Revised January 24, 2008)*

### **225.101 General.**

- (a) For DoD, the following two-part test determines whether a manufactured end product is a domestic end product:
  - (i) The end product is manufactured in the United States; and
  - (ii) The cost of its U.S. and qualifying country components exceeds 50 percent of the cost of all its components. This test is applied to end products only and not to individual components.
- (c) Additional exceptions that allow the purchase of foreign end products are listed at 225.103.

### **225.103 Exceptions.**

- (a)(i)(A) Public interest exceptions for certain countries are in 225.872.
- (B) For procurements covered by the World Trade Organization Government Procurement Agreement, the Under Secretary of Defense (Acquisition, Technology, and Logistics) has determined that it is inconsistent with the public interest to apply the Buy American Act to end products that are substantially transformed in the United States.
- (ii)(A) Normally, use the evaluation procedures in Subpart 225.5, but consider recommending a public interest exception if the purposes of the Buy American Act are not served, or in order to meet a need set forth in 10 U.S.C. 2533. For example, a public interest exception may be appropriate—
  - (1) If accepting the low domestic offer will involve substantial foreign expenditures, or accepting the low foreign offer will involve substantial domestic expenditures;
  - (2) To ensure access to advanced state-of-the-art commercial technology; or

(3) To maintain the same source of supply for spare and replacement parts (also see paragraph (b)(iii)(B) of this section)—

(i) For an end item that qualifies as a domestic end product; or

(ii) In order not to impair integration of the military and commercial industrial base.

(B) Except as provided in [PGI 225.872-4](#), process a determination for a public interest exception after consideration of the factors in 10 U.S.C. 2533—

(1) At a level above the contracting officer for acquisitions valued at or below the simplified acquisition threshold;

(2) By the head of the contracting activity for acquisitions with a value greater than the simplified acquisition threshold but less than \$1,000,000; or

(3) By the agency head for acquisitions valued at \$1,000,000 or more.

(b)(i) A determination that an article, material, or supply is not reasonably available is required when domestic offers are insufficient to meet the requirement and award is to be made on other than a qualifying country or eligible end product.

(ii) Except as provided in FAR 25.103(b)(3), the determination shall be approved—

(A) At a level above the contracting officer for acquisitions valued at or below the simplified acquisition threshold;

(B) By the chief of the contracting office for acquisitions with a value greater than the simplified acquisition threshold but less than \$1,000,000; or

(C) By the head of the contracting activity or immediate deputy for acquisitions valued at \$1,000,000 or more.

(iii) A separate determination as to whether an article is reasonably available is not required for the following articles. DoD has already determined that these articles are not reasonably available from domestic sources:

- (A) End products or components listed in 225.104(a).
- (B) Spare or replacement parts that must be acquired from the original foreign manufacturer or supplier.
- (C) Foreign drugs acquired by the Defense Supply Center, Philadelphia, when the Director, Pharmaceuticals Group, Directorate of Medical Materiel, determines that only the requested foreign drug will fulfill the requirements.

(iv) Under coordinated acquisition (see Subpart 208.70), the determination is the responsibility of the requiring department when the requiring department specifies acquisition of a foreign end product.

(c) The cost of a domestic end product is unreasonable if it is not the low evaluated offer when evaluated under Subpart 225.5.

**225.104 Nonavailable articles.**

(a) DoD has determined that the following articles also are nonavailable in accordance with FAR 25.103(b):

- (i) Aluminum clad steel wire.
- (ii) Sperm oil.

**225.105 Determining reasonableness of cost.**

(b) Use an evaluation factor of 50 percent instead of the factors specified in FAR 25.105(b).

**225.170 Acquisition from or through other Government agencies.**

Contracting activities must apply the evaluation procedures in Subpart 225.5 when using Federal supply schedules.

**SUBPART 225.2--BUY AMERICAN ACT--CONSTRUCTION MATERIALS**

*(Revised April 30, 2003)*

**225.202 Exceptions.**

(a)(2) A nonavailability determination is not required for construction materials listed in FAR 25.104(a) or in 225.104(a). For other materials, a nonavailability determination shall be approved at the levels specified in 225.103(b)(ii). Use the estimated value of the construction materials to determine the approval level.

**225.206 Noncompliance.**

(c)(4) Prepare any report of noncompliance in accordance with the procedures at 209.406-3 or 209.407-3.

**SUBPART 225.3--CONTRACTS PERFORMED OUTSIDE THE UNITED STATES**

*(Added March 31, 2008)*

**225.301 Contractor personnel in a designated operational area or supporting a diplomatic or consular mission outside the United States.**

**225.301-1 Scope.**

(a) “Performance in a designated operational area,” as used in this section, means performance of a service or construction, as required by the contract. For supply contracts, the term includes services associated with the acquisition of supplies (e.g., installation or maintenance), but does not include production of the supplies or associated overhead functions.

(c) For DoD, this section also applies to all personal services contracts.

**225.301-4 Contract clause.**

(1) Use the clause at FAR 52.225-19, Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission Outside the United States, in accordance with the prescription at FAR 25.301-4, except that—

(i) The clause shall also be used in personal services contracts with individuals; and

(ii) The clause shall not be used when all contractor personnel performing outside the United States will be covered by the clause at 252.225-7040.

(2) When using the clause at FAR 52.225-19, the contracting officer shall inform the contractor that the Synchronized Predeployment and Operational Tracker (SPOT) is the appropriate automated system to use for the list of contractor personnel required by paragraph (g) of the clause. Information on the SPOT system is available at <http://www.dod.mil/bta/products/spot.html>.

## **SUBPART 225.4--TRADE AGREEMENTS**

*(Revised September 15, 2008)*

### **225.401 Exceptions.**

(a)(2) If a department or agency considers an individual acquisition of a product to be indispensable for national security or national defense purposes and appropriate for exclusion from the provisions of FAR Subpart 25.4, it may submit a request with supporting rationale to the Director of Defense Procurement and Acquisition Policy (OUSD(AT&L)DPAP). Approval by OUSD(AT&L)DPAP is not required if--

- (A) Purchase from foreign sources is restricted by statute (see Subpart 225.70);
- (B) Another exception in FAR 25.401 applies to the acquisition; or
- (C) Competition from foreign sources is restricted under Subpart 225.71.

### **225.401-70 End products subject to trade agreements.**

Acquisitions of end products in the following Federal supply groups (FSG) are covered by trade agreements if the value of the acquisition is at or above the applicable trade agreement threshold and no exception applies. If an end product is not in one of the listed groups, the trade agreements do not apply. The definition of Caribbean Basin country end products in FAR 25.003 excludes those end products that are not eligible for duty-free treatment under 19 U.S.C. 2703(b). Therefore certain watches, watch parts, and luggage from certain Caribbean Basin countries are not eligible products. However, 225.003 expands the definition of Caribbean Basin country end products to include petroleum and any product derived from petroleum, in accordance with Section 8094 of Pub. L. 103-139.

FSG

Category/Description

- 22 Railway equipment
- 23 Motor vehicles, trailers, and cycles (except 2350 and buses under 2310)
- 24 Tractors
- 25 Vehicular equipment components
- 26 Tires and tubes
- 29 Engine accessories
- 30 Mechanical power transmission equipment
- 32 Woodworking machinery and equipment
- 34 Metalworking machinery
- 35 Service and trade equipment
- 36 Special industry machinery (except 3690)
- 37 Agricultural machinery and equipment
- 38 Construction, mining, excavating, and highway maintenance equipment
- 39 Materials handling equipment
- 40 Rope, cable, chain and fittings
- 41 Refrigeration and air conditioning equipment
- 42 Fire fighting, rescue and safety equipment
- 43 Pumps and compressors
- 44 Furnace, steam plant and drying equipment (except 4470)
- 45 Plumbing, heating, and sanitation equipment
- 46 Water purification and sewage treatment equipment
- 47 Piping, tubing, hose, and fitting
- 48 Valves
- 49 Maintenance and repair shop equipment (except 4920-4927, 4931-4935, 4960)
- 53 Hardware and abrasives
- 54 Prefabricated structures and scaffolding
- 55 Lumber, millwork, plywood, and veneer
- 56 Construction and building materials
- 61 Electric wire, and power and distribution equipment
- 62 Lighting fixtures and lamps
- 63 Alarm and signal systems
- 65 Medical, dental, and veterinary equipment and supplies
- 66 Instruments and laboratory equipment (except aircraft clocks under

6645) - See FAR 25.003 exclusion of certain watches and watch parts for certain Caribbean Basin countries

- 67 Photographic equipment
- 68 Chemicals and chemical products
- 69 Training aids and devices
- 70 General purpose ADPE, software, supplies, and support equipment
- 71 Furniture
- 72 Household and commercial furnishings and appliances
- 73 Food preparation and serving equipment
- 74 Office machines, visible record equipment and ADP equipment
- 75 Office supplies and devices
- 76 Books, maps, and other publications
- 77 Musical instruments, phonographs, and home type radios
- 78 Recreational and athletic equipment
- 79 Cleaning equipment and supplies
- 80 Brushes, paints, sealers, and adhesives
- 81 Containers, packaging and packing supplies (except 8140)
- 83 Pins, needles, and sewing kits (only part of 8315) and flag staffs, flagpoles, and flagstaff trucks (only part of 8345)
- 84 Luggage (only 8460) - See FAR 25.003 for exclusion of luggage for Caribbean Basin countries
- 85 Toiletries
- 87 Agricultural supplies
- 88 Live animals
- 89 Tobacco products (only 8975)
- 91 Fuels, oils, and waxes
- 93 Nonmetallic fabricated materials
- 94 Nonmetallic crude materials
- 96 Ores, minerals, and their primary products
- 99 Miscellaneous

**225.401-71 Products or services in support of operations in Iraq or Afghanistan.**

When acquiring products or services, other than small arms, in support of operations in Iraq or Afghanistan using a procedure specified in 225.7703-1(a), the purchase restriction at FAR 25.403(c) does not apply with regard to products or services from Iraq.

**225.402 General.**

To estimate the value of the acquisition, use the total estimated value of end products covered by trade agreements (see 225.401-70).

**225.403 World Trade Organization Government Procurement Agreement and Free Trade Agreements.**

(c) For acquisitions of supplies covered by the World Trade Organization Government Procurement Agreement, acquire only U.S.-made, qualifying country, or designated country end products unless—

(i) The contracting officer determines that offers of U.S.-made, qualifying country, or designated country end products from responsive, responsible offerors are either

(A) Not received; or

(B) Insufficient to fill the Government's requirements. In this case, accept all responsive, responsible offers of U.S.-made, qualifying country, and eligible products before accepting any other offers; or

(ii) A national interest waiver under 19 U.S.C. 2512(b)(2) is granted on a case-by-case basis. Except as delegated in paragraphs (c)(i)(A) and (B) of this section, submit any request for a national interest waiver to the Director of Defense Procurement and Acquisition Policy in accordance with department or agency procedures. Include supporting rationale with the request.

(A) The head of the contracting activity may approve a national interest waiver for a purchase by an overseas purchasing activity, if the waiver is supported by a written statement from the requiring activity that the products being acquired are critical for the support of U.S. forces stationed abroad.

(B) The Commander or Director, Defense Energy Support Center, may approve national interest waivers for purchases of fuel for use by U.S. forces overseas.

**225.408 Procedures.**

(a)(4) The requirements of FAR 25.408(a)(4), on submission of offers in U.S. dollars, do not apply to overseas acquisitions or to Defense Energy Support Center post, camp, or station overseas requirements.

## **SUBPART 225.5--EVALUATING FOREIGN OFFERS--SUPPLY CONTRACTS**

*(Revised September 15, 2008)*

### **225.502 Application.**

- (b) Use the following procedures instead of the procedures in FAR 25.502(b) for acquisitions subject to the World Trade Organization Government Procurement Agreement:
  - (i) Consider only offers of U.S.-made, qualifying country, or designated country end products, except as permitted by 225.403 or 225.7703-1.
  - (ii) If price is the determining factor, award on the low offer.
- (c) Use the following procedures instead of those in FAR 25.502(c) for acquisitions subject to the Buy American Act or the Balance of Payments Program:
  - (i)(A) If the acquisition is subject only to the Buy American Act or the Balance of Payments Program, then only qualifying country end products are exempt from application of the Buy American Act or Balance of Payments Program evaluation factor.
    - (B) If the acquisition is also subject to a Free Trade Agreement, then eligible products of the applicable Free Trade Agreement country are also exempt from application of the Buy American Act or Balance of Payments Program evaluation factor.
  - (ii) If price is the determining factor, use the following procedures:
    - (A) If the low offer is a domestic offer, award on that offer.
    - (B) If there are no domestic offers, award on the low offer (see example in 225.504(1)).
    - (C) If the low offer is a foreign offer that is exempt from application of the Buy American Act or Balance of Payments Program evaluation factor, award on that offer. (If the low offer is a qualifying country offer from a

country listed at 225.872-1(b), execute a determination in accordance with 225.872-4).

(D) If the low offer is a foreign offer that is not exempt from application of the Buy American Act or Balance of Payments Program evaluation factor, and there is another foreign offer that is exempt and is lower than the lowest domestic offer, award on the low foreign offer (see example in 225.504(2)).

(E) Otherwise, apply the 50 percent evaluation factor to the low foreign offer.

(1) If the price of the low domestic offer is less than the evaluated price of the low foreign offer, award on the low domestic offer (see example in 225.504(3)).

(2) If the evaluated price of the low foreign offer remains less than the low domestic offer, award on the low foreign offer (see example in 225.504(4)).

(iii) If price is not the determining factor, use the following procedures:

(A) If there are domestic offers, apply the 50 percent Buy American Act or Balance of Payments Program evaluation factor to all foreign offers unless an exemption applies.

(B) Evaluate in accordance with the criteria of the solicitation.

(C) If these procedures will not result in award on a domestic offer, re-evaluate offers without the 50 percent factor. If this will result in award on an offer to which the Buy American Act or Balance of Payments Program applies, but evaluation in accordance with paragraph (c)(ii) of this section would result in award on a domestic offer, proceed with award only after execution of a determination in accordance with 225.103(a)(ii)(B), that domestic preference would be inconsistent with the public interest.

(iv) If the solicitation includes the provision at 252.225-7023, Preference for Products or Services from Iraq or Afghanistan, use the evaluation procedures at 225.7703-3.

### **225.503 Group offers.**

Evaluate group offers in accordance with FAR 25.503, but apply the evaluation procedures of 225.502.

### **225.504 Evaluation examples.**

For examples that illustrate the evaluation procedures in 225.502(c)(ii), see [PGI 225.504](#).

## **SUBPART 225.6**

*(Removed July 11, 2006)*

## **SUBPART 225.7--PROHIBITED SOURCES**

*(Revised September 8, 2006)*

### **225.701 Restrictions.**

See 209.104-1(g) for restrictions on contracting with firms owned or controlled by foreign governments.

### **225.701-70 Exception.**

DoD personnel are authorized to make emergency acquisitions in direct support of U.S. or allied forces deployed in military contingency, humanitarian, or peacekeeping operations in a country or region subject to economic sanctions administered by the Department of the Treasury, Office of Foreign Assets Control.

### **225.770 Prohibition on acquisition of United States Munitions List items from Communist Chinese military companies.**

This section implements Section 1211 of the National Defense Authorization Act for Fiscal Year 2006 (Pub. L. 109-163). See [PGI 225.770](#) for additional information relating to this statute, the terms used in this section, and the United States Munitions List.

### **225.770-1 Definitions.**

As used in this section—

- (a) “Communist Chinese military company” and “United States Munitions List” are defined in the clause at 252.225-7007, Prohibition on Acquisition of United States Munitions List Items from Communist Chinese Military Companies.
- (b) “Component” means an item that is useful only when used in conjunction with an end item (22 CFR 121.8).
- (c) “Part” means any single unassembled element of a major or minor component, accessory, or attachment, that is not normally subject to disassembly without the destruction or impairment of design use (22 CFR 121.8).

**225.770-2 Prohibition.**

Do not acquire supplies or services covered by the United States Munitions List (USML) (22 CFR Part 121), through a contract or subcontract at any tier, from any Communist Chinese military company. This prohibition does not apply to components and parts of covered items unless the components and parts are themselves covered by the USML.

**225.770-3 Exceptions.**

The prohibition in 225.770-2 does not apply to supplies or services acquired—

- (a) In connection with a visit to the People’s Republic of China by a vessel or an aircraft of the U.S. armed forces;
- (b) For testing purposes; or
- (c) For the purpose of gathering intelligence.

**225.770-4 Identifying USML items.**

- (a) Before issuance of a solicitation, the requiring activity shall notify the contracting officer in writing whether the items to be acquired are covered by the USML. The notification shall identify any covered item(s) and shall provide the pertinent USML reference(s) from 22 CFR Part 121.
- (b) The USML includes defense articles and defense services that fall into 21 categories. Since not all USML items are themselves munitions (e.g., protective personnel equipment, military training equipment),

the requiring activity should consult the USML before concluding that an item is or is not covered by the USML.

**225.770-5 Waiver of prohibition.**

- (a) The prohibition in 225.770-2 may be waived, on a case-by-case basis, if an official identified in paragraph (b) of this subsection determines that a waiver is necessary for national security purposes.
- (b) The following officials are authorized, without power of delegation, to make the determination specified in paragraph (a) of this subsection:
  - (1) The Under Secretary of Defense (Acquisition, Technology, and Logistics).
  - (2) The Secretaries of the military departments.
  - (3) The Component Acquisition Executive of the Defense Logistics Agency.
- (c) The official granting a waiver shall notify the congressional defense committees within 30 days after the date of the waiver.

**SUBPART 225.8--OTHER INTERNATIONAL AGREEMENTS AND COORDINATION**

*(Revised May 31, 2007)*

**225.802 Procedures.**

- (b) Information on memoranda of understanding and other international agreements is available at [PGI 225.802\(b\)](#).

**225.802-70 Contracts for performance outside the United States and Canada.**

Follow the procedures at [PGI 225.802-70](#) when placing a contract requiring performance outside the United States and Canada. Also see Subpart 225.74, Defense Contractors Outside the United States.

**225.802-71 End use certificates.**

Contracting officers considering the purchase of an item from a foreign source may encounter a request for the signing of a certificate to indicate that the Armed Forces of the United States is the end user of the item, and that the

U.S. Government will not transfer the item to third parties without authorization from the Government of the country selling the item. When encountering this situation, refer to DoD Directive 2040.3, End Use Certificates, for guidance.

**225.870 Contracting with Canadian contractors.**

**225.870-1 General.**

- (a) The Canadian Government guarantees to the U.S. Government all commitments, obligations, and covenants of the Canadian Commercial Corporation under any contract or order issued to the Corporation by any contracting office of the U.S. Government. The Canadian Government has waived notice of any change or modification that may be made, from time to time, in these commitments, obligations, or covenants.
- (b) For production planning purposes, Canada is part of the defense industrial base (see 225.870-2(b)).
- (c) The Canadian Commercial Corporation will award and administer contracts with contractors located in Canada, except for—
  - (1) Negotiated acquisitions for experimental, developmental, or research work under projects other than the Defense Development Sharing Program;
  - (2) Acquisitions of unusual or compelling urgency;
  - (3) Acquisitions at or below the simplified acquisition threshold; or
  - (4) Acquisitions made by DoD activities located in Canada.
- (d) For additional information on production rights, data, and information; services provided by Canadian Commercial Corporation; audit; and inspection, see [PGI 225.870-1\(d\)](#).

**225.870-2 Solicitation of Canadian contractors.**

- (a) If requested, furnish a solicitation to the Canadian Commercial Corporation even if no Canadian firm is solicited.

(b) Handle acquisitions at or below the simplified acquisition threshold directly with Canadian firms and not through the Canadian Commercial Corporation.

**225.870-3 Submission of offers.**

(a) As indicated in 225.870-4, the Canadian Commercial Corporation is the prime contractor. To indicate acceptance of offers by individual Canadian companies, the Canadian Commercial Corporation issues a letter supporting the Canadian offer and containing the following information:

(1) Name of the Canadian offeror.

(2) Confirmation and endorsement of the offer in the name of the Canadian Commercial Corporation.

(3) A statement that the Corporation shall subcontract 100 percent with the offeror.

(b) When a Canadian offer cannot be processed through the Canadian Commercial Corporation in time to meet the date for receipt of offers, the Corporation may permit Canadian firms to submit offers directly. However, the contracting officer shall receive the Canadian Commercial Corporation's endorsement before contract award.

(c) The Canadian Commercial Corporation will submit all sealed bids in terms of U.S. currency. Do not adjust contracts awarded under sealed bidding for losses or gains from fluctuation in exchange rates.

(d) Except for sealed bids, the Canadian Commercial Corporation normally will submit offers and quotations in terms of Canadian currency. The Corporation may, at the time of submitting an offer, elect to quote and receive payment in terms of U.S. currency, in which case the contract—

(1) Shall provide for payment in U.S. currency; and

(2) Shall not be adjusted for losses or gains from fluctuation in exchange rates.

**225.870-4 Contracting procedures.**

(a) Except for contracts described in 225.870-1(c)(1) through (4), award individual contracts covering purchases from suppliers located in

Canada to the Canadian Commercial Corporation, 11th Floor, 50 O'Connor Street, Ottawa, Ontario, Canada, K1A-0S6.

(b) Direct communication with the Canadian supplier is authorized and encouraged in connection with all technical aspects of the contract, provided the Corporation's approval is obtained on any matters involving changes to the contract.

(c) Identify in the contract, the type of currency, i.e., U.S. or Canadian. Contracts that provide for payment in Canadian currency shall--

(1) Quote the contract price in terms of Canadian dollars and identify the amount by the initials "CN", e.g., \$1,647.23CN; and

(2) Clearly indicate on the face of the contract the U.S./Canadian conversion rate at the time of award and the U.S. dollar equivalent of the Canadian dollar contract amount.

**225.870-5 Contract administration.**

Follow the contract administration procedures at [PGI 225.870-5](#).

**225.870-6 Termination procedures.**

When contract termination is necessary, follow the procedures at 249.7000.

**225.870-7 Acceptance of Canadian supplies.**

For information on the acceptance of Canadian supplies, see [PGI 225.870-7](#).

**225.870-8 Industrial security.**

Industrial security for Canada shall be in accordance with the U.S.-Canada Industrial Security Agreement of March 31, 1952, as amended.

**225.871 North Atlantic Treaty Organization (NATO) cooperative projects.**

**225.871-1 Scope.**

This section implements 22 U.S.C. 2767 and 10 U.S.C. 2350b.

**225.871-2 Definitions.**

As used in this section--

(a) “Cooperative project” means a jointly managed arrangement—

- (1) Described in a written agreement between the parties;
- (2) Undertaken to further the objectives of standardization, rationalization, and interoperability of the armed forces of NATO member countries; and
- (3) Providing for—
  - (i) One or more of the other participants to share with the United States the cost of research and development, testing, evaluation, or joint production (including follow-on support) of certain defense articles;
  - (ii) Concurrent production in the United States and in another member country of a defense article jointly developed; or
  - (iii) Acquisition by the United States of a defense article or defense service from another member country.

(b) “Other participant” means a cooperative project participant other than the United States.

**225.871-3 General.**

(a) *Cooperative project authority.*

- (1) Departments and agencies, that have authority to do so, may enter into cooperative project agreements with NATO or with one or more member countries of NATO under DoDD 5530.3, International Agreements.
- (2) Under laws and regulations governing the negotiation and implementation of cooperative project agreements, departments and agencies may enter into contracts, or incur other obligations, on behalf of other participants without charge to any appropriation or contract authorization.
- (3) Agency heads are authorized to solicit and award contracts to implement cooperative projects.

(b) Contracts implementing cooperative projects shall comply with all applicable laws relating to Government acquisition, unless a waiver is

granted under 225.871-4. A waiver of certain laws and regulations may be obtained if the waiver—

- (1) Is required by the terms of a written cooperative project agreement;
- (2) Will significantly further NATO standardization, rationalization, and interoperability; and
- (3) Is approved by the appropriate DoD official.

**225.871-4 Statutory waivers.**

- (a) For contracts or subcontracts placed outside the United States, the Deputy Secretary of Defense may waive any provision of law that specifically prescribes—
  - (1) Procedures for the formation of contracts;
  - (2) Terms and conditions for inclusion in contracts;
  - (3) Requirements or preferences for—
    - (i) Goods grown, produced, or manufactured in the United States or in U.S. Government-owned facilities; or
    - (ii) Services to be performed in the United States; or
  - (4) Requirements regulating the performance of contracts.
- (b) There is no authority for waiver of—
  - (1) Any provision of the Arms Export Control Act (22 U.S.C. 2751);
  - (2) Any provision of 10 U.S.C. 2304;
  - (3) The cargo preference laws of the United States, including the Military Cargo Preference Act of 1904 (10 U.S.C. 2631) and the Cargo Preference Act of 1954 (46 U.S.C. 1241(b)); or
  - (4) Any of the financial management responsibilities administered by the Secretary of the Treasury.

(c) To request a waiver under a cooperative project, follow the procedures at [PGI 225.871-4](#).

(d) Obtain the approval of the Deputy Secretary of Defense before committing to make a waiver in an agreement or a contract.

**225.871-5 Directed subcontracting.**

(a) The Director of Defense Procurement and Acquisition Policy may authorize the direct placement of subcontracts with particular subcontractors. Directed subcontracting is not authorized unless specifically addressed in the cooperative project agreement.

(b) In some instances, it may not be feasible to name specific subcontractors at the time the agreement is concluded. However, the agreement shall clearly state the general provisions for work sharing at the prime and subcontract level. For additional information on cooperative project agreements, see [PGI 225.871-5](#).

**225.871-6 Disposal of property.**

Dispose of property that is jointly acquired by the members of a cooperative project under the procedures established in the agreement or in a manner consistent with the terms of the agreement, without regard to any laws of the United States applicable to the disposal of property owned by the United States.

**225.871-7 Congressional notification.**

(a) Congressional notification is required when DoD makes a determination to award a contract or subcontract to a particular entity, if the determination was not part of the certification made under 22 U.S.C. 2767(f) before finalizing the cooperative agreement.

(1) Departments and agencies shall provide a proposed Congressional notice to the Director of Defense Procurement and Acquisition Policy in sufficient time to forward to Congress before the time of contract award.

(2) The proposed notice shall include the reason it is necessary to use the authority to designate a particular contractor or subcontractor.

(b) Congressional notification is also required each time a statutory waiver under 225.871-4 is incorporated in a contract or a contract

modification, if such information was not provided in the certification to Congress before finalizing the cooperative agreement.

**225.872 Contracting with qualifying country sources.**

**225.872-1 General.**

(a) As a result of memoranda of understanding and other international agreements, DoD has determined it inconsistent with the public interest to apply restrictions of the Buy American Act or the Balance of Payments Program to the acquisition of qualifying country end products from the following qualifying countries:

Australia

Belgium

Canada

Denmark

Egypt

Federal Republic of Germany

France

Greece

Israel

Italy

Luxembourg

Netherlands

Norway

Portugal

Spain

Sweden

Switzerland

Turkey

United Kingdom of Great Britain and Northern Ireland

(b) Individual acquisitions of qualifying country end products from the following qualifying countries may, on a purchase-by-purchase basis (see 225.872-4), be exempted from application of the Buy American Act and the Balance of Payments Program as inconsistent with the public interest:

Austria

Finland

(c) The determination in paragraph (a) of this subsection does not limit the authority of the Secretary concerned to restrict acquisitions to domestic sources or reject an otherwise acceptable offer from a qualifying country source when considered necessary for national defense reasons.

**225.872-2 Applicability.**

(a) This section applies to all acquisitions of supplies except those restricted by—

(1) U.S. National Disclosure Policy, DoDD 5230.11, Disclosure of Classified Military Information to Foreign Governments and International Organizations;

(2) U.S. defense mobilization base requirements purchased under the authority of FAR 6.302-3(a)(2)(i), except for quantities in excess of that required to maintain the defense mobilization base. This restriction does not apply to Canadian planned producers.

(i) Review individual solicitations to determine whether this restriction applies.

(ii) Information concerning restricted items may be obtained from the Deputy Under Secretary of Defense (Industrial Affairs);

(3) Other U.S. laws or regulations (e.g., the annual DoD appropriations act); and

(4) U.S. industrial security requirements.

(b) This section does not apply to construction contracts.

**225.872-3 Solicitation procedures.**

(a) Except for items developed under the U.S./Canadian Development Sharing Program, use the criteria for soliciting and awarding contracts to small business concerns under FAR Part 19 without regard to whether there are potential qualifying country sources for the end product. Do not consider an offer of a qualifying country end product if the solicitation is identified for the exclusive participation of small business concerns.

(b) Send solicitations directly to qualifying country sources. Solicit Canadian sources through the Canadian Commercial Corporation in accordance with 225.870.

(c) Use international air mail if solicitation destinations are outside the United States and security classification permits such use.

(d) If unusual technical or security requirements preclude the acquisition of otherwise acceptable defense equipment from qualifying country sources, review the need for such requirements. Do not impose unusual technical or security requirements solely for the purpose of precluding the acquisition of defense equipment from qualifying countries.

(e) Do not automatically exclude qualifying country sources from submitting offers because their supplies have not been tested and evaluated by the department or agency.

(1) Consider the adequacy of qualifying country service testing on a case-by-case basis. Departments or agencies that must limit solicitations to sources whose items have been tested and evaluated by the department or agency shall consider supplies from qualifying country sources that have been tested and accepted by the qualifying country for service use.

(2) The department or agency may perform a confirmatory test, if necessary.

- (3) Apply U.S. test and evaluation standards, policies, and procedures when the department or agency decides that confirmatory tests of qualifying country end products are necessary.
- (4) If it appears that these provisions might adversely delay service programs, obtain the concurrence of the Under Secretary of Defense (Acquisition, Technology, and Logistics), before excluding the qualifying country source from consideration.
- (f) Permit industry representatives from a qualifying country to attend symposia, program briefings, prebid conferences (see FAR 14.207 and 15.201(c)), and similar meetings that address U.S. defense equipment needs and requirements. When practical, structure these meetings to allow attendance by representatives of qualifying country concerns.

**225.872-4 Individual determinations.**

If the offer of an end product from a qualifying country source listed in 225.872-1(b), as evaluated, is low or otherwise eligible for award, prepare a determination and findings exempting the acquisition from the Buy American Act and the Balance of Payments Program as inconsistent with the public interest, unless another exception such as the Trade Agreements Act applies. Follow the procedures at [PGI 225.872-4](#).

**225.872-5 Contract administration.**

- (a) Arrangements exist with some qualifying countries to provide reciprocal contract administration services. Some arrangements are at no cost to either government. To determine whether such an arrangement has been negotiated and what contract administration functions are covered, contact the Deputy Director of Defense Procurement and Acquisition Policy (Contract Policy and International Contracting), ((703) 697-9351, DSN 227-9351).
- (b) Follow the contract administration procedures at [PGI 225.872-5\(b\)](#).
- (c) Information on quality assurance delegations to foreign governments is in Subpart 246.4, Government Contract Quality Assurance.

**225.872-6 Audit.**

- (a) Memoranda of understanding with some qualifying countries contain annexes that provide for reciprocal “no-cost” audits of contracts and subcontracts (pre- and post-award).
- (b) To determine if such an annex is applicable to a particular qualifying country, contact the Deputy Director of Defense Procurement and Acquisition Policy (Contract Policy and International Contracting), ((703) 697-9351, DSN 227-9351).
- (c) Handle requests for audits in qualifying countries in accordance with 215.404-2(c), but follow the additional procedures at [PGI 225.872-6\(c\)](#).

#### **225.872-7 Industrial security for qualifying countries.**

The required procedures for safeguarding classified defense information necessary for the performance of contracts awarded to qualifying country sources are in the DoD Industrial Security Regulation DoD 5220.22-R (implemented for the Army by AR 380-49; for the Navy by SECNAV Instruction 5510.1H; for the Air Force by AFI 31-601; for the Defense Information Systems Agency by DCA Instruction 240-110-8; and for the National Imagery and Mapping Agency by NIMA Instruction 5220.22).

#### **225.872-8 Subcontracting with qualifying country sources.**

In reviewing contractor subcontracting procedures, the contracting officer shall ensure that the contract does not preclude qualifying country sources from competing for subcontracts, except when restricted by national security interest reasons, mobilization base considerations, or applicable U.S. laws or regulations (see the clause at 252.225-7002, Qualifying Country Sources as Subcontractors).

#### **225.873 Waiver of United Kingdom commercial exploitation levies.**

##### **225.873-1 Policy.**

DoD and the Government of the United Kingdom (U.K.) have agreed to waive U.K. commercial exploitation levies and U.S. nonrecurring cost recoupment charges on a reciprocal basis. For U.K. levies to be waived, the offeror or contractor shall identify the levies and the contracting officer shall request a waiver before award of the contract or subcontract under which the levies are charged.

##### **225.873-2 Procedures.**

When an offeror or a contractor identifies a levy included in an offered or contract price, follow the procedures at [PGI 225.873-2](#).

## **SUBPART 225.9--CUSTOMS AND DUTIES**

*(Revised December 9, 2005)*

### **225.901 Policy.**

Unless the supplies are entitled to duty-free treatment under a special category in the Harmonized Tariff Schedule of the United States (e.g., the Caribbean Basin Economic Recovery Act or a Free Trade Agreement), or unless the supplies already have entered into the customs territory of the United States and the contractor already has paid the duty, DoD will issue duty-free entry certificates for—

- (1) Qualifying country supplies (end products and components);
- (2) Eligible products (end products but not components) under contracts covered by the World Trade Organization Government Procurement Agreement or a Free Trade Agreement; and
- (3) Other foreign supplies for which the contractor estimates that duty will exceed \$200 per shipment into the customs territory of the United States.

### **225.902 Procedures.**

Follow the entry and release procedures at PGI [225.902](#).

### **225.903 Exempted supplies.**

(b)(i) For an explanation of the term “supplies,” see PGI [225.903\(b\)\(i\)](#).

(ii) The duty-free certificate shall be printed, stamped, or typed on the face of, or attached to, Customs Form 7501. A duly designated officer or civilian official of the appropriate department or agency shall execute the certificate in the format provided at PGI [225.903\(b\)\(ii\)](#).

## **SUBPART 225.10--ADDITIONAL FOREIGN ACQUISITION REGULATIONS**

*(Added April 13, 2000)*

### **225.1070 Clause deviations in overseas contracts.**

See 201.403(2) for approval authority for clause deviations in overseas contracts with governments of North Atlantic Treaty Organization (NATO) countries or other allies or with United Nations or NATO organizations.

## **SUBPART 225.11--SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

*(Revised September 15, 2008)*

### **225.1100 Scope of subpart.**

This subpart prescribes the clauses that implement Subparts 225.1 through 225.10. The clauses that implement Subparts 225.70 through 225.75 are prescribed within those subparts.

### **225.1101 Acquisition of supplies.**

- (1) Use the provision at 252.225-7000, Buy American Act--Balance of Payments Program Certificate, instead of the provision at FAR 52.225-2, Buy American Act Certificate. Use the provision in any solicitation that includes the clause at 252.225-7001, Buy American Act and Balance of Payments Program.
- (2) Use the clause at 252.225-7001, Buy American Act and Balance of Payments Program, instead of the clause at FAR 52.225-1, Buy American Act--Supplies, in solicitations and contracts unless--
  - (i) All line items will be acquired from a particular source or sources under the authority of FAR 6.302-3;
  - (ii) All line items must be domestic or qualifying country end products in accordance with Subpart 225.70. (However, the clause may still be required if Subpart 225.70 requires manufacture of the end product in the United States or in the United States or Canada, without a corresponding requirement for use of domestic components);
  - (iii) An exception to the Buy American Act or Balance of Payments Program applies (see FAR 25.103, 225.103, and 225.7501);
  - (iv) One or both of the following clauses will apply to all line items in the contract:
    - (A) 252.225-7021, Trade Agreements.

(B) 252.225-7036, Buy American Act--Free Trade Agreements--Balance of Payments Program; or

(v) All line items will be acquired using a procedure specified in 225.7703-1(a).

(3) Use the clause at 252.225-7002, Qualifying Country Sources as Subcontractors, in solicitations and contracts that include one of the following clauses:

(i) 252.225-7001, Buy American Act and Balance of Payments Program.

(ii) 252.225-7021, Trade Agreements.

(iii) 252.225-7036, Buy American Act--Free Trade Agreements--Balance of Payments Program.

(4) Use the clause at 252.225-7013, Duty-Free Entry, instead of the clause at FAR 52.225-8. Do not use the clause for acquisitions of supplies that will not enter the customs territory of the United States.

(5) Except as provided in paragraph (7) of this section, use the provision at 252.225-7020, Trade Agreements Certificate, instead of the provision at FAR 52.225-6, Trade Agreements Certificate, in solicitations that include the clause at 252.225-7021, Trade Agreements.

(6)(i) Use the clause at 252.225-7021, Trade Agreements, instead of the clause at FAR 52.225-5, Trade Agreements, if the Trade Agreements Act applies.

(ii) Use the clause with its Alternate I in solicitations and contracts that include the clause at 252.225-7024, Requirement for Products or Services from Iraq or Afghanistan, unless the clause at 252.225-7024 has been modified to provide a preference only for the products of Afghanistan.

(iii) Do not use the clause if—

(A) Purchase from foreign sources is restricted, unless the contracting officer anticipates a waiver of the restriction; or

(B) The clause at 252.225-7026, Acquisition Restricted to Products or Services from Iraq or Afghanistan, is included in the solicitation and contract.

(iv) The acquisition of eligible and noneligible products under the same contract may result in the application of trade agreements to only some of the items acquired. In such case, indicate in the Schedule those items covered by the Trade Agreements clause.

(7) Use the provision at 252.225-7022, Trade Agreements Certificate – Inclusion of Iraqi End Products, instead of the provision at FAR 52.225-6, Trade Agreements Certificate, in solicitations that include the clause at 252.225-7021, Trade Agreements, with its Alternate I.

(8) Use the provision at 252.225-7032, Waiver of United Kingdom Levies—Evaluation of Offers, in solicitations if a U.K. firm is expected to--

(i) Submit an offer; or

(ii) Receive a subcontract exceeding \$1 million.

(9) Use the clause at 252.225-7033, Waiver of United Kingdom Levies, in solicitations and contracts if a U.K. firm is expected to--

(i) Submit an offer; or

(ii) Receive a subcontract exceeding \$1 million.

(10) Use the provision at 252.225-7035, Buy American Act--Free Trade Agreements--Balance of Payments Program Certificate, instead of the provision at FAR 52.225-4, Buy American Act--Free Trade Agreements--Israeli Trade Act Certificate, in solicitations that include the clause at 252.225-7036, Buy American Act--Free Trade Agreements--Balance of Payments Program. Use the provision with its Alternate I when the clause at 252.225-7036 is used with its Alternate I.

(11)(i) Except as provided in paragraph (10)(ii) of this section, use the clause at 252.225-7036, Buy American Act--Free Trade Agreements--Balance of Payments Program, instead of the clause at FAR 52.225-3, Buy American Act--Free Trade Agreements--Israeli Trade Act, in solicitations and contracts for the items listed at 225.401-70, when the

estimated value equals or exceeds \$25,000, but is less than \$194,000, and a Free Trade Agreement applies to the acquisition.

- (A) Use the basic clause when the estimated value equals or exceeds \$67,826.
- (B) Use the clause with its Alternate I when the estimated value equals or exceeds \$25,000 but is less than \$67,826.

(ii) Do not use the clause if—

- (A) Purchase from foreign sources is restricted (see 225.401(a)(2)), unless the contracting officer anticipates a waiver of the restriction;
- (B) Acquiring information technology that is a commercial item, using fiscal year 2004 or subsequent funds (Section 535 of Division F of the Consolidated Appropriations Act, 2004 (Pub. L. 108-199), and the same provision in subsequent appropriations acts); or
- (C) Using a procedure specified in 225.7703-1(a).

(iii) The acquisition of eligible and noneligible products under the same contract may result in the application of a Free Trade Agreement to only some of the items acquired. In such case, indicate in the Schedule those items covered by the Buy American Act--Free Trade Agreements--Balance of Payments Program clause.

#### **225.1103 Other provisions and clauses.**

(1) Unless the contracting officer knows that the prospective contractor is not a domestic concern, use the clause at 252.225-7005, Identification of Expenditures in the United States, in solicitations and contracts that--

- (i) Exceed the simplified acquisition threshold; and
- (ii) Are for the acquisition of--
  - (A) Supplies for use outside the United States;

- (B) Construction to be performed outside the United States; or
- (C) Services to be performed primarily outside the United States.

(2) Use the clause at 252.225-7041, Correspondence in English, in solicitations and contracts when contract performance will be wholly or in part in a foreign country.

(3) Use the provision at 252.225-7042, Authorization to Perform, in solicitations when contract performance will be wholly or in part in a foreign country.

(4) Unless an exception in 225.770-3 applies, use the clause at 252.225-7007, Prohibition on Acquisition of United States Munitions List Items from Communist Chinese Military Companies, in solicitations and contracts involving the delivery of items covered by the United States Munitions List.

**SUBPART 225.70--AUTHORIZATION ACTS, APPROPRIATIONS ACTS, AND OTHER STATUTORY RESTRICTIONS ON FOREIGN ACQUISITION**

*(Revised April 23, 2008)*

**225.7000 Scope of subpart.**

- (a) This subpart contains restrictions on the acquisition of foreign products and services, imposed by DoD appropriations and authorization acts and other statutes. Refer to the acts to verify current applicability of the restrictions.
- (b) Nothing in this subpart affects the applicability of the Buy American Act or the Balance of Payments Program.

**225.7001 Definitions.**

As used in this subpart—

- (a) “Bearing components” is defined in the clause at 252.225-7016, Restriction on Acquisition of Ball and Roller Bearings.
- (b) “Component” is defined in the clauses at 252.225-7012, Preference for Certain Domestic Commodities, and 252.225-7016, Restriction on Acquisition of Ball and Roller Bearings.

(c) "Hand or measuring tools" means those tools listed in Federal supply classifications 51 and 52, respectively.

(d) "Specialty metals" is defined in the clause at 252.225-7014, Preference for Domestic Specialty Metals.

**225.7002 Restrictions on food, clothing, fabrics, specialty metals, and hand or measuring tools.**

**225.7002-1 Restrictions.**

The following restrictions implement 10 U.S.C. 2533a (the "Berry Amendment"). Except as provided in subsection 225.7002-2, do not acquire--

(a) Any of the following items, either as end products or components, unless the items have been grown, reprocessed, reused, or produced in the United States:

(1) Food.

(2) Clothing and the materials and components thereof, other than sensors, electronics, or other items added to, and not normally associated with, clothing and the materials and components thereof. Clothing includes items such as outerwear, headwear, underwear, nightwear, footwear, hosiery, handwear, belts, badges, and insignia. For additional guidance and examples, see [PGI 225.7002-1\(a\)\(2\)](#).

(3) Tents, tarpaulins, or covers.

(4) Cotton and other natural fiber products.

(5) Woven silk or woven silk blends.

(6) Spun silk yarn for cartridge cloth.

(7) Synthetic fabric or coated synthetic fabric, including all textile fibers and yarns that are for use in such fabrics.

(8) Canvas products.

(9) Wool (whether in the form of fiber or yarn or contained in fabrics, materials, or manufactured articles).

- (10) Any item of individual equipment (Federal Supply Class 8465) manufactured from or containing any of the fibers, yarns, fabrics, or materials listed in this paragraph (a).
- (b) Specialty metals, including stainless steel flatware, unless the metals were melted in steel manufacturing facilities located within the United States. (For guidance on dealing with noncompliance with this requirement, see [PGI 225.7002-1\(b\)](#).)
- (c) Hand or measuring tools, unless the tools were produced in the United States.

**225.7002-2 Exceptions.**

Acquisitions in the following categories are not subject to the restrictions in 225.7002-1:

- (a) Acquisitions at or below the simplified acquisition threshold.
- (b) Acquisitions of any of the items in 225.7002-1(a) or (b), if the Secretary concerned determines that items grown, reprocessed, reused, or produced in the United States cannot be acquired as and when needed in a satisfactory quality and sufficient quantity at U.S. market prices. (See the requirement in 205.301 for synopsis within 7 days after contract award when using this exception.)
  - (1) The following officials are authorized, without power of redelegation, to make such a domestic nonavailability determination:
    - (i) The Under Secretary of Defense (Acquisition, Technology, and Logistics).
    - (ii) The Secretary of the Army.
    - (iii) The Secretary of the Navy.
    - (iv) The Secretary of the Air Force.
  - (2) The supporting documentation for the determination shall include—
    - (i) An analysis of alternatives that would not require a domestic nonavailability determination; and

(ii) A written certification by the requiring activity, with specificity, why such alternatives are unacceptable.

(3) Defense agencies shall follow the procedures at [PGI 225.7002-2\(b\)\(3\)](#) when submitting a request for a domestic nonavailability determination.

(4) If an official listed in paragraph (b)(1)(ii) through (iv) of this subsection makes a domestic nonavailability determination for the acquisition of titanium or a product containing titanium, that official shall—

(i) Notify the congressional defense committees at least 10 days before the award of a contract that relies on such a determination; and

(ii) Provide a copy of the notification and the determination to the Director, Defense Procurement and Acquisition Policy, as specified in [PGI 225.7002-2\(b\)\(4\)](#).

(5) Follow the procedures at [PGI 225.7002-2\(b\)\(5\)](#) for reciprocal use of domestic nonavailability determinations.

(c) Acquisitions of items listed in FAR 25.104(a), unless the items are hand or measuring tools.

(d) Acquisitions outside the United States in support of combat operations.

(e) Acquisitions of perishable foods by or for activities located outside the United States for personnel of those activities.

(f) Acquisitions of food, specialty metals, or hand or measuring tools—

(1) In support of contingency operations; or

(2) For which the use of other than competitive procedures has been approved on the basis of unusual and compelling urgency in accordance with FAR 6.302-2.

(g) Emergency acquisitions by activities located outside the United States for personnel of those activities.

(h) Acquisitions by vessels in foreign waters.

(i) Acquisitions of items specifically for commissary resale.

(j) Acquisitions of incidental amounts of cotton, other natural fibers, or wool incorporated in an end product, for which the estimated value of the cotton, other natural fibers, or wool--

- (1) Is not more than 10 percent of the total price of the end product; and
- (2) Does not exceed the simplified acquisition threshold.

(k) Acquisitions of waste and byproducts of cotton or wool fiber for use in the production of propellants and explosives.

(l) Acquisitions of foods manufactured or processed in the United States, regardless of where the foods (and any component if applicable) were grown or produced. However, in accordance with Section 8118 of the DoD Appropriations Act for Fiscal Year 2005 (Pub. L. 108-287), this exception does not apply to fish, shellfish, or seafood manufactured or processed in the United States or fish, shellfish, or seafood contained in foods manufactured or processed in the United States.

(m) Purchases of specialty metals by subcontractors at any tier for programs other than—

- (1) Aircraft;
- (2) Missile and space systems;
- (3) Ships;
- (4) Tank-automotive;
- (5) Weapons; and
- (6) Ammunition.

(n) Acquisitions of specialty metals when the acquisition furthers an agreement with a qualifying country (see 225.872).

(o) Acquisitions of fibers and yarns that are for use in synthetic fabric or coated synthetic fabric (but not the purchase of the synthetic or coated synthetic fabric itself), if

- (1) The fabric is to be used as a component of an end product that is not a textile product. Examples of textile products, made in whole or in part of fabric, include

(i) Draperies, floor coverings, furnishings, and bedding (Federal Supply Group 72, Household and Commercial Furnishings and Appliances);

(ii) Items made in whole or in part of fabric in Federal Supply Group 83, Textile/leather/furs/apparel/findings/tents/flags, or Federal Supply Group 84, Clothing, Individual Equipment and Insignia;

(iii) Upholstered seats (whether for household, office, or other use); and

(iv) Parachutes (Federal Supply Class 1670); or

(2) The fibers and yarns are para-aramid fibers and yarns manufactured in

(i) The Netherlands; or

(ii) Another qualifying country (see 225.872) if the Under Secretary of Defense (Acquisition, Technology, and Logistics) makes a determination in accordance with Section 807 of Pub. L. 105-261 that

(A) Procuring articles that contain only para-aramid fibers and yarns manufactured from suppliers within the United States would result in sole source contracts or subcontracts for the supply of such para-aramid fibers and yarns;

(B) Such sole source contracts or subcontracts would not be in the best interest of the Government or consistent with the objectives of the Competition in Contracting Act (10 U.S.C. 2304); and

(C) The qualifying country permits U.S. firms that manufacture para-aramid fibers and yarns to compete with foreign firms for the sale of para-aramid fibers and yarns in that country.

(p) Acquisitions of chemical warfare protective clothing when the acquisition furthers an agreement with a qualifying country. (See 225.872 and the requirement in 205.301 for synopsis within 7 days after contract award when using this exception.)

(q) Acquisitions of commercially available off-the-shelf items containing specialty metals. This exception does not apply when the specialty metal (e.g., raw stock) is acquired directly by the Government or by a prime contractor for delivery to the Government as the end item.

**225.7002-3 Contract clauses.**

Unless an exception applies—

(a) Use the clause at 252.225-7012, Preference for Certain Domestic Commodities, in solicitations and contracts exceeding the simplified acquisition threshold.

(b)(1) Use the clause at 252.225-7014, Preference for Domestic Specialty Metals, in solicitations and contracts exceeding the simplified acquisition threshold that require delivery of an article containing specialty metals.

(2) Use the clause with its Alternate I in solicitations and contracts exceeding the simplified acquisition threshold requiring delivery, for one of the following major programs, of an article containing specialty metals:

(i) Aircraft.

(ii) Missile and space systems.

(iii) Ships.

(iv) Tank-automotive.

(v) Weapons.

(vi) Ammunition.

See DoD Class Deviation [2008-O0002](#), Implementation of New Specialty Metals Restriction, issued on January 29, 2008. This deviation is effective until incorporated into the DFARS or rescinded. See [PGI 225.7002-3](#) for guidance on use of this deviation.

(c) Use the clause at 252.225-7015, Restriction on Acquisition of Hand or Measuring Tools, in solicitations and contracts exceeding the simplified acquisition threshold that require delivery of hand or measuring tools.

**225.7003 Waiver of restrictions of 10 U.S.C. 2534.**

(a) The waiver procedures of this section apply only if specifically authorized by reference elsewhere in this subpart. The restrictions on certain foreign purchases under 10 U.S.C. 2534(a) may be waived as follows:

(1)(i) The Under Secretary of Defense (Acquisition, Technology, and Logistics), without power of delegation, may waive a restriction for a particular item for a particular foreign country upon determination that□

(A) United States producers of the item would not be jeopardized by competition from a foreign country, and that country does not discriminate against defense items produced in the United States to a greater degree than the United States discriminates against defense items produced in that country; or

(B) Application of the restriction would impede cooperative programs entered into between DoD and a foreign country, or would impede the reciprocal procurement of defense items under a memorandum of understanding providing for reciprocal procurement of defense items under 225.872, and that country does not discriminate against defense items produced in the United States to a greater degree than the United States discriminates against defense items produced in that country.

(ii) A notice of the determination to exercise the waiver authority shall be published in the Federal Register and submitted to the congressional defense committees at least 15 days before the effective date of the waiver.

(iii) The effective period of the waiver shall not exceed 1 year.

(iv) For contracts entered into prior to the effective date of a waiver, provided adequate consideration is received to modify the contract, the waiver shall be applied as directed or authorized in the waiver to□

- (A) Subcontracts entered into on or after the effective date of the waiver; and
- (B) Options for the procurement of items that are exercised after the effective date of the waiver, if the option prices are adjusted for any reason other than the application of the waiver.

(2) The head of the contracting activity may waive a restriction on a case-by-case basis upon execution of a determination and findings that any of the following applies:

- (i) The restriction would cause unreasonable delays.
- (ii) Satisfactory quality items manufactured in the United States or Canada are not available.
- (iii) Application of the restriction would result in the existence of only one source for the item in the United States or Canada.
- (iv) Application of the restriction is not in the national security interests of the United States.
- (v) Application of the restriction would adversely affect a U.S. company.

(3) A restriction is waived when it would cause unreasonable costs. The cost of an item of U.S. or Canadian origin is unreasonable if it exceeds 150 percent of the offered price, inclusive of duty, of items that are not of U.S. or Canadian origin.

(b) In accordance with the provisions of paragraphs (a)(1)(i) through (iii) of this section, the Under Secretary of Defense (Acquisition, Technology, and Logistics) has waived the restrictions of 10 U.S.C. 2534(a) for certain items manufactured in the United Kingdom, including air circuit breakers for naval vessels (see 225.7006). This waiver applies to—

(1) Procurements under solicitations issued on or after August 4, 1998; and

(2) Subcontracts and options under contracts entered into prior to August 4, 1998, under the conditions described in paragraph (a)(1)(iv) of this section.

**225.7004 Restriction on acquisition of foreign buses.**

**225.7004-1 Restriction.**

In accordance with 10 U.S.C. 2534, do not acquire a multipassenger motor vehicle (bus) unless it is manufactured in the United States or Canada.

**225.7004-2 Applicability.**

Apply this restriction if the buses are purchased, leased, rented, or made available under contracts for transportation services.

**225.7004-3 Exceptions.**

This restriction does not apply in any of the following circumstances:

- (a) Buses manufactured outside the United States and Canada are needed for temporary use because buses manufactured in the United States or Canada are not available to satisfy requirements that cannot be postponed. Such use may not, however, exceed the lead time required for acquisition and delivery of buses manufactured in the United States or Canada.
- (b) The requirement for buses is temporary in nature. For example, to meet a special, nonrecurring requirement or a sporadic and infrequent recurring requirement, buses manufactured outside the United States and Canada may be used for temporary periods of time. Such use may not, however, exceed the period of time needed to meet the special requirement.
- (c) Buses manufactured outside the United States and Canada are available at no cost to the U.S. Government.
- (d) The acquisition is for an amount at or below the simplified acquisition threshold.

**225.7004-4 Waiver.**

The waiver criteria at 225.7003(a) apply to this restriction.

**225.7005 Restriction on certain chemical weapons antidote.**

**225.7005-1 Restriction.**

In accordance with 10 U.S.C. 2534 and defense industrial mobilization requirements, do not acquire chemical weapons antidote contained in automatic injectors, or the components for such injectors, unless the chemical weapons antidote or component is manufactured in the United States or Canada by a company that—

- (a) Is a producer under the industrial preparedness program at the time of contract award;
- (b) Has received all required regulatory approvals; and
- (c) Has the plant, equipment, and personnel to perform the contract in the United States or Canada at the time of contract award.

**225.7005-2 Exception.**

This restriction does not apply if the acquisition is for an amount at or below the simplified acquisition threshold.

**225.7005-3 Waiver.**

The waiver criteria at 225.7003(a) apply to this restriction.

**225.7006 Restriction on air circuit breakers for naval vessels.**

**225.7006-1 Restriction.**

In accordance with 10 U.S.C. 2534, do not acquire air circuit breakers for naval vessels unless they are manufactured in the United States or Canada.

**225.7006-2 Exceptions.**

This restriction does not apply if the acquisition is—

- (a) For an amount at or below the simplified acquisition threshold; or
- (b) For spare or repair parts needed to support air circuit breakers manufactured outside the United States. Support includes the purchase of spare air circuit breakers when those from alternate sources are not interchangeable.

**225.7006-3 Waiver.**

(a) The waiver criteria at 225.7003(a) apply to this restriction.

(b) The Under Secretary of Defense (Acquisition, Technology, and Logistics) has waived the restriction for air circuit breakers manufactured in the United Kingdom. See 225.7003(b) for applicability.

**225.7006-4 Solicitation provision and contract clause.**

(a) Use the provision at 252.225-7037, Evaluation of Offers for Air Circuit Breakers, in solicitations requiring air circuit breakers for naval vessels unless--

(1) An exception applies; or

(2) A waiver has been granted, other than the waiver for the United Kingdom, which has been incorporated into the provision.

(b) Use the clause at 252.225-7038, Restriction on Acquisition of Air Circuit Breakers, in solicitations and contracts requiring air circuit breakers for naval vessels unless--

(1) An exception applies; or

(2) A waiver has been granted, other than the waiver for the United Kingdom, which has been incorporated into the clause.

**225.7007 Restrictions on anchor and mooring chain.**

**225.7007-1 Restrictions.**

(a) In accordance with Section 8041 of the Fiscal Year 1991 DoD Appropriations Act (Pub. L. 101-511) and similar sections in subsequent DoD appropriations acts, do not acquire welded shipboard anchor and mooring chain, four inches or less in diameter, unless--

(1) It is manufactured in the United States, including cutting, heat treating, quality control, testing, and welding (both forging and shot blasting process); and

(2) The cost of the components manufactured in the United States exceeds 50 percent of the total cost of components.

(b) 10 U.S.C. 2534 also restricts acquisition of welded shipboard anchor and mooring chain, four inches or less in diameter, when used as a component of a naval vessel. However, the Appropriations Act restriction described in paragraph (a) of this subsection takes precedence over the restriction of 10 U.S.C. 2534.

**225.7007-2 Waiver.**

- (a) The Secretary of the department responsible for acquisition may waive the restriction in 225.7007-1(a), on a case-by-case basis, if--
  - (1) Sufficient domestic suppliers are not available to meet DoD requirements on a timely basis; and
  - (2) The acquisition is necessary to acquire capability for national security purposes.
- (b) Document the waiver in a written determination and findings containing--
  - (1) The factors supporting the waiver; and
  - (2) A certification that the acquisition must be made in order to acquire capability for national security purposes.
- (c) Provide a copy of the determination and findings to the House and Senate Committees on Appropriations.

**225.7007-3 Contract clause.**

Unless a waiver has been granted, use the clause at 252.225-7019, Restriction on Acquisition of Anchor and Mooring Chain, in solicitations and contracts requiring welded shipboard anchor or mooring chain four inches or less in diameter.

**225.7008 Reserved.**

**225.7009 Restriction on ball and roller bearings.**

**225.7009-1 Scope.**

This section implements Section 8065 of the Fiscal Year 2002 DoD Appropriations Act (Pub. L. 107-117) and the same restriction in subsequent DoD appropriations acts.

**225.7009-2 Restriction.**

Do not acquire ball and roller bearings or bearing components unless the bearings and bearing components are manufactured in the United States or Canada.

**225.7009-3 Exception.**

The restriction in 225.7009-2 does not apply to contracts or subcontracts for the acquisition of commercial items, except for commercial ball and roller bearings acquired as end items.

**225.7009-4 Waiver.**

The Secretary of the department responsible for acquisition or, for the Defense Logistics Agency, the Component Acquisition Executive, may waive the restriction in 225.7009-2, on a case-by-case basis, by certifying to the House and Senate Committees on Appropriations that--

- (a) Adequate domestic supplies are not available to meet DoD requirements on a timely basis; and
- (b) The acquisition must be made in order to acquire capability for national security purposes.

**225.7009-5 Contract clause.**

Use the clause at 252.225-7016, Restriction on Acquisition of Ball and Roller Bearings, in solicitations and contracts, unless—

- (a) The items being acquired are commercial items other than ball or roller bearings acquired as end items;
- (b) The items being acquired do not contain ball and roller bearings; or
- (c) A waiver has been granted in accordance with 225.7009-4.

**225.7010 Reserved.**

**225.7011 Restriction on carbon, alloy, and armor steel plate.**

**225.7011-1 Restriction.**

- (a) In accordance with Section 8111 of the Fiscal Year 1992 DoD Appropriations Act (Pub. L. 102-172) and similar sections in

subsequent DoD appropriations acts, do not acquire any of the following types of carbon, alloy, or armor steel plate for use in a Government-owned facility or a facility under the control of (e.g., leased by) DoD, unless it is melted and rolled in the United States or Canada:

- (1) Carbon, alloy, or armor steel plate in Federal Supply Class 9515.
- (2) Carbon, alloy, or armor steel plate described by specifications of the American Society for Testing Materials or the American Iron and Steel Institute.

(b) This restriction—

- (1) Applies to the acquisition of carbon, alloy, or armor steel plate as a finished steel mill product that may be used “as is” or may be used as an intermediate material for the fabrication of an end product; and
- (2) Does not apply to the acquisition of an end product (e.g., a machine tool), to be used in the facility, that contains carbon, alloy, or armor steel plate as a component.

#### **225.7011-2 Waiver.**

The Secretary of the department responsible for acquisition may waive this restriction, on a case-by-case basis, by certifying to the House and Senate Committees on Appropriations that—

- (a) Adequate U.S. or Canadian supplies are not available to meet DoD requirements on a timely basis; and
- (b) The acquisition must be made in order to acquire capability for national security purposes.

#### **225.7011-3 Contract clause.**

Unless a waiver has been granted, use the clause at 252.225-7030, Restriction on Acquisition of Carbon, Alloy, and Armor Steel Plate, in solicitations and contracts that—

- (a) Require the delivery to the Government of carbon, alloy, or armor steel plate that will be used in a Government-owned facility or a facility under the control of DoD; or

- (b) Require contractors operating in a Government-owned facility or a facility under the control of DoD to purchase carbon, alloy, or armor steel plate.

**225.7012 Restriction on supercomputers.**

**225.7012-1 Restriction.**

In accordance with Section 8112 of Pub. L. 100-202, and similar sections in subsequent DoD appropriations acts, do not purchase a supercomputer unless it is manufactured in the United States.

**225.7012-2 Waiver.**

The Secretary of Defense may waive this restriction, on a case-by-case basis, after certifying to the Armed Services and Appropriations Committees of Congress that—

- (a) Adequate U.S. supplies are not available to meet requirements on a timely basis; and
- (b) The acquisition must be made in order to acquire capability for national security purposes.

**225.7012-3 Contract clause.**

Unless a waiver has been granted, use the clause at 252.225-7011, Restriction on Acquisition of Supercomputers, in solicitations and contracts for the acquisition of supercomputers.

**225.7013 Restrictions on construction or repair of vessels in foreign shipyards.**

In accordance with 10 U.S.C. 7309 and 7310—

- (a) Do not award a contract to construct in a foreign shipyard--
  - (1) A vessel for any of the armed forces; or
  - (2) A major component of the hull or superstructure of a vessel for any of the armed forces; and
- (b) Do not overhaul, repair, or maintain in a foreign shipyard, a naval vessel (or any other vessel under the jurisdiction of the Secretary of the Navy) homeported in the United States. This restriction does not apply to voyage repairs.

**225.7014 Restriction on overseas military construction.**

For restriction on award of military construction contracts to be performed in the United States outlying areas in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf, see 236.273(a).

**225.7015 Restriction on overseas architect-engineer services.**

For restriction on award of architect-engineer contracts to be performed in Japan, in any North Atlantic Treaty Organization member country, or in countries bordering the Arabian Gulf, see 236.602-70.

**225.7016 Restriction on research and development.**

(a) In accordance with Pub. L. 92-570, do not use DoD appropriations to make an award to any foreign corporation, organization, person, or entity, for research and development in connection with any weapon system or other military equipment, if there is a U.S. corporation, organization, person, or entity--

(1) Equally competent; and

(2) Willing to perform at a lower cost.

(b) This restriction does not affect the requirements of FAR Part 35 for selection of research and development contractors. However, when a U.S. source and a foreign source are equally competent, award to the source that will provide the services at the lower cost.

**225.7017 Restriction on Ballistic Missile Defense research, development, test, and evaluation.**

**225.7017-1 Definitions.**

“Competent,” “foreign firm,” and “U.S. firm” are defined in the provision at 252.225-7018, Notice of Prohibition of Certain Contracts with Foreign Entities for the Conduct of Ballistic Missile Defense Research, Development, Test, and Evaluation.

**225.7017-2 Restriction.**

In accordance with Section 222 of the DoD Authorization Act for Fiscal Years 1988 and 1989 (Pub. L. 100-180), do not use any funds appropriated to or for the use of DoD to enter into or carry out a contract with a foreign government or firm, including any contract awarded as a result of a broad agency

announcement, if the contract provides for the conduct of research, development, test, and evaluation (RDT&E) in connection with the Ballistic Missile Defense Program.

**225.7017-3 Exceptions.**

This restriction does not apply—

- (a) To contracts awarded to a foreign government or firm if the contracting officer determines that--
  - (1) The contract will be performed within the United States;
  - (2) The contract is exclusively for RDT&E in connection with antitactical ballistic missile systems; or
  - (3) The foreign government or firm agrees to share a substantial portion of the total contract cost. Consider the foreign share as substantial if it is equitable with respect to the relative benefits that the United States and the foreign parties will derive from the contract. For example, if the contract is more beneficial to the foreign party, its share of the cost should be correspondingly higher; or
- (b) If the head of the contracting activity certifies in writing, before contract award, that a U.S. firm cannot competently perform a contract for RDT&E at a price equal to or less than the price at which a foreign government or firm would perform the RDT&E. The contracting officer or source selection authority, as applicable, shall make a determination, in accordance with [PGI 225.7017-3\(b\)](#), that will be the basis for the certification.

**225.7017-4 Solicitation provision.**

Unless foreign participation is otherwise excluded, use the provision at 252.225-7018, Notice of Prohibition of Certain Contracts With Foreign Entities for the Conduct of Ballistic Missile Defense Research, Development, Test, and Evaluation, in competitively negotiated solicitations for RDT&E in connection with the Ballistic Missile Defense Program.

**SUBPART 225.71--OTHER RESTRICTIONS ON FOREIGN ACQUISITION**

*(Revised October 26, 2006)*

**225.7100 Scope of subpart.**

This subpart contains foreign product restrictions that are based on policies designed to protect the defense industrial base.

**225.7101 Definitions.**

“Domestic manufacture” is defined in the clause at 252.225-7025, Restriction on Acquisition of Forgings.

**225.7102 Forgings.**

**225.7102-1 Policy.**

When acquiring the following forging items, whether as end items or components, acquire items that are of domestic manufacture to the maximum extent practicable:

<u>ITEMS</u>	<u>CATEGORIES</u>
Ship propulsion shafts	Excludes service and landing craft shafts
Periscope tubes	All
Ring forgings for bull gears	All greater than 120 inches in diameter

**225.7102-2 Exceptions.**

The policy in 225.7102-1 does not apply to acquisitions—

- (a) Using simplified acquisition procedures, unless the restricted item is the end item being purchased;
- (b) Overseas for overseas use; or
- (c) When the quantity acquired exceeds the amount needed to maintain the U.S. defense mobilization base (provided the excess quantity is an economical purchase quantity). The requirement for domestic manufacture does not apply to the quantity above that required to maintain the base, in which case, qualifying country sources may compete.

**225.7102-3 Waiver.**

Upon request from a contractor, the contracting officer may waive the requirement for domestic manufacture of the items listed in 225.7102-1.

**225.7102-4 Contract clause.**

Use the clause at 252.225-7025, Restriction on Acquisition of forgings, in solicitations and contracts, unless—

- (a) The supplies being acquired do not contain any of the items listed in 225.7102-1; or
- (b) An exception in 225.7102-2 applies. If an exception applies to only a portion of the acquisition, specify the excepted portion in the solicitation and contract.

## **SUBPART 225.72--REPORTING CONTRACT PERFORMANCE OUTSIDE THE UNITED STATES**

*(Revised December 19, 2006)*

### **225.7201 Policy.**

- (a) 10 U.S.C. 2410g requires offerors and contractors to notify DoD of any intention to perform a DoD contract outside the United States and Canada when the contract could be performed inside the United States or Canada.
- (b) DoD requires contractors to report the volume, type, and nature of contract performance outside the United States.

### **225.7202 Exception.**

This subpart does not apply to contracts for commercial items, construction, ores, natural gas, utilities, petroleum products and crudes, timber (logs), or subsistence.

### **225.7203 Contracting officer distribution of reports.**

Follow the procedures at [PGI 225.7203](#) for distribution of reports submitted with offers in accordance with the provision at 252.225-7003, Report of Intended Performance Outside the United States and Canada—Submission with Offer.

### **225.7204 Solicitation provision and contract clauses.**

Except for acquisitions described in 225.7202—

- (a) Use the provision at 252.225-7003, Report of Intended Performance Outside the United States and Canada—Submission with Offer, in solicitations with a value exceeding \$11.5 million;

- (b) Use the clause at 252.225-7004, Report of Intended Performance Outside the United States and Canada—Submission after Award, in solicitations and contracts with a value exceeding \$11.5 million;
- (c) Use the clause at 252.225-7006, Quarterly Reporting of Actual Contract Performance Outside the United States, in solicitations and contracts with a value exceeding \$550,000.

## **SUBPART 225.73--ACQUISITIONS FOR FOREIGN MILITARY SALES**

*(Revised December 9, 2005)*

### **225.7300 Scope of subpart.**

- (a) This subpart contains policies and procedures for acquisitions for foreign military sales (FMS) under the Arms Export Control Act (22 U.S.C. Chapter 39). Section 22 of the Arms Export Control Act (22 U.S.C. 2762) authorizes DoD to enter into contracts for resale to foreign countries or international organizations.
- (b) This subpart does not apply to—
  - (1) FMS made from inventories or stocks;
  - (2) Acquisitions for replenishment of inventories or stocks; or
  - (3) Acquisitions made under DoD cooperative logistic supply support arrangements.

### **225.7301 General.**

- (a) The U.S. Government sells defense articles and services to foreign governments or international organizations through FMS agreements. The agreement is documented in a Letter of Offer and Acceptance (LOA) (see DoD 5105.38-M, Security Assistance Management Manual).
- (b) Conduct FMS acquisitions under the same acquisition and contract management procedures used for other defense acquisitions.
- (c) Follow the additional procedures at PGI [225.7301](#)(c) for preparation of solicitations and contracts that include FMS requirements.
- (d) See 229.170 for policy on contracts financed under U.S. assistance programs that involve payment of foreign country value added taxes or customs duties.

## **225.7302 Guidance.**

For guidance on the role of the contracting officer in FMS programs that will require an acquisition, see PGI [225.7302](#).

## **225.7303 Pricing acquisitions for FMS.**

- (a) Price FMS contracts using the same principles used in pricing other defense contracts. However, application of the pricing principles in FAR Parts 15 and 31 to an FMS contract may result in prices that differ from other defense contract prices for the same item due to the considerations in this section.
- (b) If the foreign government has conducted a competition resulting in adequate price competition (see FAR 15.403-1(b)(1)), the contracting officer shall not require the submission of cost or pricing data. The contracting officer should consult with the foreign government through security assistance personnel to determine if adequate price competition has occurred.

### **225.7303-1 Contractor sales to other foreign customers.**

If the contractor has made sales of the item required for the foreign military sale to foreign customers under comparable conditions, including quantity and delivery, price the FMS contract in accordance with FAR Part 15.

### **225.7303-2 Cost of doing business with a foreign government or an international organization.**

- (a) In pricing FMS contracts where non-U.S. Government prices as described in 225.7303-1 do not exist, except as provided in 225.7303-5, recognize the reasonable and allocable costs of doing business with a foreign government or international organization, even though such costs might not be recognized in the same amounts in pricing other defense contracts. Examples of such costs include, but are not limited to, the following:

(1) Selling expenses (not otherwise limited by FAR Part 31), such as—

(i) Maintaining international sales and service organizations;

(ii) Sales commissions and fees in accordance with FAR Subpart 3.4;

(iii) Sales promotions, demonstrations, and related travel for sales to foreign governments. Section 126.8 of the International Traffic in Arms Regulations (22 CFR 126.8) may require Government approval for these costs to be allowable, in which case the appropriate Government approval shall be obtained; and

(iv) Configuration studies and related technical services undertaken as a direct selling effort to a foreign country.

(2) Product support and post-delivery service expenses, such as—

(i) Operations or maintenance training, training or tactics films, manuals, or other related data; and

(ii) Technical field services provided in a foreign country related to accident investigations, weapon system problems, or operations/tactics enhancement, and related travel to foreign countries.

(3) Offset costs (also see 225.7306).

(i) A U.S. defense contractor may recover all costs incurred for offset agreements with a foreign government or international organization if the LOA is financed wholly with customer cash or repayable foreign military finance credits.

(ii) The U.S. Government assumes no obligation to satisfy or administer the offset requirement or to bear any of the associated costs.

(4) Costs that are the subject of advance agreement under the appropriate provisions of FAR Part 31; or where the advance understanding places a limit on the amounts of cost that will be recognized as allowable in defense contract pricing, and the agreement contemplated that it will apply only to DoD contracts for the U.S. Government's own requirements (as distinguished from contracts for FMS).

(b) Costs not allowable under FAR Part 31 are not allowable in pricing FMS contracts, except as noted in paragraph (c) of this subsection.

(c) The limitations for major contractors on independent research and development and bid and proposal (IR&D/B&P) costs for projects that are of potential interest to DoD, in 231.205-18(c)(iii), do not apply to FMS contracts, except as provided in 225.7303-5. The allowability of IR&D/B&P costs on contracts for FMS not wholly paid for from funds made available on a nonrepayable basis is limited to the contract's allocable share of the contractor's total IR&D/B&P expenditures. In pricing contracts for such FMS—

- (1) Use the best estimate of reasonable costs in forward pricing; and
- (2) Use actual expenditures, to the extent that they are reasonable, in determining final cost.

(d) Under paragraph (e)(1)(A) of Section 21 of the Arms Export Control Act (22 U.S.C. 2761), the United States must charge for administrative services to recover the estimated cost of administration of sales made under the Arms Export Control Act.

#### **225.7303-3 Government-to-government agreements.**

If a government-to-government agreement between the United States and a foreign government for the sale, coproduction, or cooperative logistic support of a specifically defined weapon system, major end item, or support item, contains language in conflict with the provisions of this section, the language of the government-to-government agreement prevails.

#### **225.7303-4 Contingent fees.**

(a) Except as provided in paragraph (b) of this subsection, contingent fees are generally allowable under DoD contracts, provided--

(1) The fees are paid to a bona fide employee or a bona fide established commercial or selling agency maintained by the prospective contractor for the purpose of securing business (see FAR Part 31 and FAR Subpart 3.4); and

(2) The contracting officer determines that the fees are fair and reasonable.

(b)(1) Under DoD 5105.38-M, LOAs for requirements for the governments of Australia, Taiwan, Egypt, Greece, Israel, Japan, Jordan, Republic of Korea, Kuwait, Pakistan, Philippines, Saudi Arabia, Turkey, Thailand, or Venezuela (Air Force) shall provide that

all U.S. Government contracts resulting from the LOAs prohibit the reimbursement of contingent fees as an allowable cost under the contract, unless the contractor identifies the payments and the foreign customer approves the payments in writing before contract award (see 225.7307(a)).

(2) For FMS to countries not listed in paragraph (b)(1) of this subsection, contingent fees exceeding \$50,000 per FMS case are unallowable under DoD contracts, unless the contractor identifies the payment and the foreign customer approves the payment in writing before contract award.

**225.7303-5 Acquisitions wholly paid for from nonrepayable funds.**

- (a) In accordance with 22 U.S.C. 2762(d), price FMS wholly paid for from funds made available on a nonrepayable basis on the same costing basis with regard to profit, overhead, IR&D/B&P, and other costing elements as is applicable to acquisitions of like items purchased by DoD for its own use.
- (b) Direct costs associated with meeting a foreign customer's additional or unique requirements are allowable under such contracts. Indirect burden rates applicable to such direct costs are permitted at the same rates applicable to acquisitions of like items purchased by DoD for its own use.
- (c) A U.S. defense contractor may not recover costs incurred for offset agreements with a foreign government or international organization if the LOA is financed with funds made available on a nonrepayable basis.

**225.7304 FMS customer involvement.**

- (a) FMS customers may request that a defense article or defense service be obtained from a particular contractor. In such cases, FAR 6.302-4 provides authority to contract without full and open competition. The FMS customer may also request that a subcontract be placed with a particular firm. The contracting officer shall honor such requests from the FMS customer only if the LOA or other written direction sufficiently fulfills the requirements of FAR Subpart 6.3.
- (b) FMS customers should be encouraged to participate with U.S. Government acquisition personnel in discussions with industry to--
  - (1) Develop technical specifications;

- (2) Establish delivery schedules;
- (3) Identify any special warranty provisions or other requirements unique to the FMS customer; and
- (4) Review prices of varying alternatives, quantities, and options needed to make price-performance tradeoffs.

(c) Do not disclose to the FMS customer any data, including cost or pricing data, that is contractor proprietary unless the contractor authorizes its release.

(d) Except as provided in paragraph (e)(3) of this section, the degree of FMS customer participation in contract negotiations is left to the discretion of the contracting officer after consultation with the contractor. The contracting officer shall provide an explanation to the FMS customer if its participation in negotiations will be limited. Factors that may limit FMS customer participation include situations where--

- (1) The contract includes requirements for more than one FMS customer;
- (2) The contract includes unique U.S. requirements; or
- (3) Contractor proprietary data is a subject of negotiations.

(e) Do not allow representatives of the FMS customer to—

- (1) Direct the exclusion of certain firms from the solicitation process (they may suggest the inclusion of certain firms);
- (2) Interfere with a contractor's placement of subcontracts; or
- (3) Observe or participate in negotiations between the U.S. Government and the contractor involving cost or pricing data, unless a deviation is granted in accordance with Subpart 201.4.

(f) Do not accept directions from the FMS customer on source selection decisions or contract terms (except that, upon timely notice, the contracting officer may attempt to obtain any special contract provisions, warranties, or other unique requirements requested by the FMS customer).

(g) Do not honor any requests by the FMS customer to reject any bid or proposal.

(h) If an FMS customer requests additional information concerning FMS contract prices, the contracting officer shall, after consultation with the contractor, provide sufficient information to demonstrate the reasonableness of the price and reasonable responses to relevant questions concerning contract price. This information--

(1) May include tailored responses, top-level pricing summaries, historical prices, or an explanation of any significant differences between the actual contract price and the estimated contract price included in the initial LOA; and

(2) May be provided orally, in writing, or by any other method acceptable to the contracting officer.

#### **225.7305 Limitation of liability.**

Advise the contractor when the foreign customer will assume the risk for loss or damage under the appropriate limitation of liability clause(s) (see FAR Subpart 46.8). Consider the costs of necessary insurance, if any, obtained by the contractor to cover the risk of loss or damage in establishing the FMS contract price.

#### **225.7306 Offset arrangements.**

In accordance with the Presidential policy statement of April 16, 1990, DoD does not encourage, enter into, or commit U.S. firms to FMS offset arrangements. The decision whether to engage in offsets, and the responsibility for negotiating and implementing offset arrangements, resides with the companies involved. (Also see 225.7303-2(a)(3).)

#### **225.7307 Contract clauses.**

(a) Use the clause at 252.225-7027, Restriction on Contingent Fees for Foreign Military Sales, in solicitations and contracts for FMS. Insert in paragraph (b)(1) of the clause the name(s) of any foreign country customer(s) listed in 225.7303-4(b).

(b) Use the clause at 252.225-7028, Exclusionary Policies and Practices of Foreign Governments, in solicitations and contracts for the purchase of supplies and services for international military education training and FMS.

## **SUBPART 225.74--DEFENSE CONTRACTORS OUTSIDE THE UNITED STATES**

*(Revised March 31, 2008)*

### **225.7401 Contracts requiring performance or delivery in a foreign country.**

- (a) If an acquisition requires performance of work in a foreign country by contractor personnel other than host country personnel, or delivery of items to a Unified Combatant Command designated operational area, follow the procedures at PGI [225.7401](#)(a).
- (b) For work performed in Germany, eligibility for logistics support or base privileges of contractor employees is governed by U.S.-German bilateral agreements. Follow the procedures in Army in Europe Regulation 715-9, available at <http://www.per.hqusareur.army.mil/cpd/docper/GermanyDefault.aspx>.
- (c) For work performed in Japan or Korea, see [PGI 225.7401](#)(c) for information on bilateral agreements and policy relating to contractor employees in Japan or Korea.

### **225.7402 Contractor personnel authorized to accompany U.S. Armed Forces deployed outside the United States.**

For additional information on contractor personnel authorized to accompany the U.S. Armed Forces, see [PGI 225.7402](#).

#### **225.7402-1 Scope.**

- (a) This section applies to contracts that involve contractor personnel authorized to accompany U.S. Armed Forces deployed outside the United States in—
  - (1) Contingency operations;
  - (2) Humanitarian or peacekeeping operations; or
  - (3) Other military operations or military exercises, when designated by the combatant commander.
- (b) Any of the types of operations listed in paragraph (a) of this subsection may include stability operations such as—

- (1) Establishment or maintenance of a safe and secure environment; or
- (2) Provision of emergency infrastructure reconstruction, humanitarian relief, or essential governmental services (until feasible to transition to local government).

**225.7402-2 Definition.**

See [PGI 225.7402-2](#) for additional information on designated operational areas.

**225.7402-3 Government support.**

- (a) Government support that may be authorized or required for contractor personnel performing in a designated operational area may include, but is not limited to, the types of support listed in [PGI 225.7402-3\(a\)](#).
- (b) The agency shall provide logistical or security support only when the appropriate agency official, in accordance with agency guidance, determines in coordination with the combatant commander that—
  - (1) Such Government support is available and is needed to ensure continuation of essential contractor services; and
  - (2) The contractor cannot obtain adequate support from other sources at a reasonable cost.
- (c) The contracting officer shall specify in the solicitation and contract—
  - (1) Valid terms, approved by the combatant commander, that specify the responsible party, if a party other than the combatant commander is responsible for providing protection to the contractor personnel performing in the designated operational area as specified in 225.7402-1;
  - (2) If medical or dental care is authorized beyond the standard specified in paragraph (c)(2)(i) of the clause at 252.225-7040, Contractor Personnel Authorized to Accompany U.S. Armed Forces Deployed Outside the United States; and

(3) Any other Government support to be provided, and whether this support will be provided on a reimbursable basis, citing the authority for the reimbursement.

(d) The contracting officer shall provide direction to the contractor, if the contractor is required to reimburse the Government for medical treatment or transportation of contractor personnel to a selected civilian facility in accordance with paragraph (c)(2)(ii) of the clause at 252.225-7040.

(e) Contractor personnel must have a letter of authorization (LOA) issued by a contracting officer in order to process through a deployment center or to travel to, from, or within the designated operational area. The LOA also will identify any additional authorizations, privileges, or Government support that the contractor personnel are entitled to under the contract. For a sample LOA, see [PGI 225.7402-3\(e\)](#).

#### **225.7402-4 Contract clauses.**

(a) Use the clause at 252.225-7040, Contractor Personnel Authorized to Accompany U.S. Armed Forces Deployed Outside the United States, instead of the clause at FAR 52.225-19, Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission Outside the United States, in solicitations and contracts that authorize contractor personnel to accompany U.S. Armed Forces deployed outside the United States in—

(1) Contingency operations;

(2) Humanitarian or peacekeeping operations; or

(3) Other military operations or military exercises, when designated by the combatant commander.

See DoD Class Deviation [2007-O0010, Implementation of the Synchronized Predeployment and Operational Tracker \(SPOT\) to Account for Contractor Personnel Performing in the United States Central Command Area of Responsibility](#), issued on October 17, 2007. This deviation is effective until incorporated into the DFARS or otherwise rescinded. See [PGI 225.7402-4\(a\)](#) for guidance on use of this deviation.

(b) For additional guidance on clauses to consider when using the clause at 252.225-7040, see [PGI 225.7402-4\(b\)](#).

**225.7403 Antiterrorism/force protection.**

**225.7403-1 General.**

Information and guidance pertaining to DoD antiterrorism/force protection policy for contracts that require performance or travel outside the United States can be obtained from the offices listed in [PGI 225.7403-1](#).

**225.7403-2 Contract clause.**

Use the clause at 252.225-7043, Antiterrorism/Force Protection Policy for Defense Contractors Outside the United States, in solicitations and contracts that require performance or travel outside the United States, except for contracts with

- (a) Foreign governments;
- (b) Representatives of foreign governments; or
- (c) Foreign corporations wholly owned by foreign governments.

**SUBPART 225.75--BALANCE OF PAYMENTS PROGRAM**

*(Revised September 15, 2008)*

**225.7500 Scope of subpart.**

This subpart provides policies and procedures implementing the Balance of Payments Program. It applies to contracts for the acquisition of--

- (a) Supplies for use outside the United States; and
- (b) Construction to be performed outside the United States.

**225.7501 Policy.**

Acquire only domestic end products for use outside the United States, and use only domestic construction material for construction to be performed outside the United States, including end products and construction material for foreign military sales, unless--

- (a) Before issuing the solicitation--

- (1) The estimated cost of the acquisition or the value of a particular construction material is at or below the simplified acquisition threshold;
- (2) The end product or particular construction material is--
  - (i) Listed in FAR 25.104 or 225.104(a)(iii);
  - (ii) A petroleum product;
  - (iii) A spare part for foreign-manufactured vehicles, equipment, machinery, or systems, provided the acquisition is restricted to the original manufacturer or its supplier;
  - (iv) An industrial gas;
  - (v) A brand drug specified by the Defense Medical Materiel Board; or
  - (vi) Information technology that is a commercial item, using fiscal year 2004 or subsequent funds (Section 535 of Division F of the Consolidated Appropriations Act, 2004 (Pub. L. 108-199), and the same provision in subsequent appropriations acts);
- (3) The acquisition is covered by the World Trade Organization Government Procurement Agreement;
- (4) The acquisition of foreign end products or construction material is required by a treaty or executive agreement between governments;
- (5) Use of a procedure specified in 225.7703-1(a) is authorized for an acquisition in support of operations in Iraq or Afghanistan;
- (6) The end product is acquired for commissary resale; or
- (7) The contracting officer determines that a requirement can best be filled by a foreign end product or construction material, including determinations that--

- (i) A subsistence product is perishable and delivery from the United States would significantly impair the quality at the point of consumption;
- (ii) An end product or construction material, by its nature or as a practical matter, can best be acquired in the geographic area concerned, e.g., ice or books; or bulk material, such as sand, gravel, or other soil material, stone, concrete masonry units, or fired brick;
- (iii) A particular domestic construction material is not available;
- (iv) The cost of domestic construction material would exceed the cost of foreign construction material by more than 50 percent, calculated on the basis of--
  - (A) A particular construction material; or
  - (B) The comparative cost of application of the Balance of Payments Program to the total acquisition; or
- (v) Use of a particular domestic construction material is impracticable;

(b) After receipt of offers--

- (1) The evaluated low offer (see Subpart 225.5) is an offer of an end product that--
  - (i) Is a qualifying country end product;
  - (ii) Is an eligible product; or
  - (iii) Is a nonqualifying country end product, but application of the Balance of Payments Program evaluation factor would not result in award on a domestic offer; or
- (2) The construction material is an eligible product; or

(c) At any time during the acquisition process, the head of the agency determines that it is not in the public interest to apply the restrictions

of the Balance of Payments Program to the end product or construction material.

**225.7502 Procedures.**

If the Balance of Payments Program applies to the acquisition, follow the procedures at [PGI 225.7502](#).

**225.7503 Contract clauses.**

Unless the entire acquisition is exempt from the Balance of Payments Program--

- (a) Use the clause at 252.225-7044, Balance of Payments Program--Construction Material, in solicitations and contracts for construction to be performed outside the United States with a value greater than the simplified acquisition threshold but less than \$7,443,000.
- (b) Use the clause at 252.225-7045, Balance of Payments Program--Construction Material Under Trade Agreements, in solicitations and contracts for construction to be performed outside the United States with a value of \$7,443,000 or more. For acquisitions with a value of \$7,443,000 or more, but less than \$8,817,449, use the clause with its Alternate I.

**SUBPART 225.76—SECONDARY ARAB BOYCOTT OF ISRAEL**

*(Revised October 26, 2006)*

**225.7601 Restriction.**

In accordance with 10 U.S.C. 2410i, do not enter into a contract with a foreign entity unless it has certified that it does not comply with the secondary Arab boycott of Israel.

**225.7602 Procedures.**

For contracts awarded to the Canadian Commercial Corporation (CCC), the CCC will submit a certification from its proposed subcontractor with the other required precontractual information (see 225.870).

**225.7603 Exceptions.**

This restriction does not apply to—

- (a) Purchases at or below the simplified acquisition threshold;
- (b) Contracts for consumable supplies, provisions, or services for the support of United States forces or of allied forces in a foreign country; or
- (c) Contracts pertaining to the use of any equipment, technology, data, or services for intelligence or classified purposes, or to the acquisition or lease thereof, in the interest of national security.

**225.7604 Waivers.**

The Secretary of Defense may waive this restriction on the basis of national security interests. To request a waiver, follow the procedures at [PGI 225.7604](#).

**225.7605 Solicitation provision.**

Unless an exception applies or a waiver has been granted in accordance with 225.7604, use the provision at 252.225-7031, Secondary Arab Boycott of Israel, in all solicitations.

**SUBPART 225.77—ACQUISITIONS IN SUPPORT OF OPERATIONS IN IRAQ OR AFGHANISTAN**

*(Added September 15, 2008)*

**225.7700 Scope.**

This subpart implements Section 886 and Section 892 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110-181).

**225.7701 Definitions.**

As used in this subpart—

“Product from Iraq or Afghanistan” means a product that is mined, produced, or manufactured in Iraq or Afghanistan.

“Service from Iraq or Afghanistan” means a service that is performed in Iraq or Afghanistan predominantly by citizens or permanent resident aliens of Iraq or Afghanistan.

“Small arms” means pistols and other weapons less than 0.50 caliber.

“Source from Iraq or Afghanistan” means a source that—

- (1) Is located in Iraq or Afghanistan; and
- (2) Offers products or services from Iraq or Afghanistan.

**225.7702 Acquisition of small arms.**

(a) Except as provided in paragraph (b) of this section, when acquiring small arms for assistance to the Army of Iraq, the Army of Afghanistan, the Iraqi Police Forces, the Afghani Police Forces, or other Iraqi or Afghani security organizations—

(1) Use full and open competition to the maximum extent practicable, consistent with the provisions of 10 U.S.C. 2304;

(2) If use of other than full and open competition is justified in accordance with FAR Subpart 6.3, ensure that—

(i) No responsible U.S. manufacturer is excluded from competing for the acquisition; and

(ii) Products manufactured in the United States are not excluded from the competition; and

(3) If the exception at FAR 6.302-2 (unusual and compelling urgency) applies, do not exclude responsible U.S. manufacturers or products manufactured in the United States from the competition for the purpose of administrative expediency. However, such an offer may be rejected if it does not meet delivery schedule requirements.

(b) Paragraph (a)(2) of this section does not apply when—

(1) The exception at FAR 6.302-1 (only one or a limited number of responsible sources) applies, and the only responsible source or sources are not U.S. manufacturers or are not offering products manufactured in the United States; or

(2) The exception at FAR 6.302-4 (international agreement) applies, and United States manufacturers or products manufactured in the United States are not the source(s) specified in the written directions of the foreign government reimbursing the agency for the cost of the acquisition of the property or services for such government.

**225.7703 Acquisition of products or services other than small arms.**

**225.7703-1 Acquisition procedures.**

- (a) Subject to the requirements of 225.7703-2, a product or service (including construction), other than small arms, in support of operations in Iraq or Afghanistan, may be acquired by—
  - (1) Providing a preference for products or services from Iraq or Afghanistan in accordance with the evaluation procedures at 225.7703-3;
  - (2) Limiting competition to products or services from Iraq or Afghanistan; or
  - (3) Using procedures other than competitive procedures to award a contract to a particular source or sources from Iraq or Afghanistan. When other than competitive procedures are used, the contracting officer shall document the contract file with the rationale for selecting the particular source(s).
- (b) For acquisitions conducted using a procedure specified in paragraph (a) of this subsection, the justification and approval addressed in FAR Subpart 6.3 is not required.

**225.7703-2 Determination requirements.**

Before use of a procedure specified in 225.7703-1(a), a written determination must be prepared and executed as follows:

- (a) For products or services to be used only by the military forces, police, or other security personnel of Iraq or Afghanistan, the contracting officer shall—
  - (1) Determine in writing that the product or service is to be used only by the military forces, police, or other security personnel of Iraq or Afghanistan; and
  - (2) Include the written determination in the contract file.
- (b) For products or services not limited to use by the military forces, police, or other security personnel of Iraq or Afghanistan, the following requirements apply:

(1) The appropriate official specified in paragraph (b)(2) of this subsection must determine in writing that it is in the national security interest of the United States to use a procedure specified in 225.7703-1(a), because—

- (i) The procedure is necessary to provide a stable source of jobs in Iraq or Afghanistan; and
- (ii) Use of the procedure will not adversely affect—
  - (A) Operations in Iraq or Afghanistan (including security, transition, reconstruction, and humanitarian relief activities); or
  - (B) The U.S. industrial base. The authorizing official generally may presume that there will not be an adverse effect on the U.S. industrial base. However, when in doubt, the authorizing official should coordinate with the applicable subject matter expert specified in [PGI 225.7703-2\(b\)](#).

(2) Determinations may be made for an individual acquisition or a class of acquisitions meeting the criteria in paragraph (b)(1) of this subsection as follows:

- (i) The head of the contacting activity is authorized to make a determination that applies to an individual acquisition with a value of less than \$78.5 million.
- (ii) The Director, Defense Procurement, Acquisition Policy, and Strategic Sourcing, and the following officials, without power of redelegation, are authorized to make a determination that applies to an individual acquisition with a value of \$78.5 million or more or to a class of acquisitions:
  - (A) Defense Logistics Agency Component Acquisition Executive.
  - (B) Army Acquisition Executive.
  - (C) Navy Acquisition Executive.
  - (D) Air Force Acquisition Executive.

(3) The contracting officer—

(i) Shall include the applicable written determination in the contract file; and

(ii) Shall ensure that each contract action taken pursuant to the authority of a class determination is within the scope of the class determination, and shall document the contract file for each action accordingly.

(c) See [PGI 225.7703-2\(c\)](#) for formats for use in preparation of the determinations required by this subsection.

**225.7703-3 Evaluating offers.**

(a) Evaluate offers submitted in response to solicitations that include the provision at 252.225-7023, Preference for Products or Services from Iraq or Afghanistan, as follows:

(1) If the low offer is an offer of a product or service from Iraq or Afghanistan, award on that offer.

(2) If there are no offers of a product or service from Iraq or Afghanistan, award on the low offer.

(3) Otherwise, apply the evaluation factor specified in the solicitation to the low offer.

(i) If the price of the low offer of a product or service from Iraq or Afghanistan is less than the evaluated price of the low offer, award on the low offer of a product or service from Iraq or Afghanistan.

(ii) If the evaluated price of the low offer remains less than the low offer of a product or service from Iraq or Afghanistan, award on the low offer.

(b) If the provision at 252.225-7023 is modified to provide a preference exclusively for products or services from Iraq or Afghanistan, also modify the evaluation procedures in paragraph (a) of this subsection to remove “or Afghanistan” or “Iraq or”, respectively, wherever the phrase appears.

**225.7703-4 Reporting requirement.**

The following organizations shall submit periodic reports to the Deputy Director, Program Acquisition and Contingency Contracting, Defense Procurement, Acquisition Policy, and Strategic Sourcing, in accordance with [PGI 225.7703-4](#), to address the organization's use of the procedures authorized by this section:

- (a) The Joint Contracting Command (Iraq/Afghanistan).
- (b) The Department of the Army, except for contract actions reported by the Joint Contracting Command.
- (c) The Department of the Navy.
- (d) The Department of the Air Force.
- (e) The Defense Logistics Agency.
- (f) The other defense agencies and other DoD components that execute reportable contract actions.

**225.7703-5 Solicitation provisions and contract clauses.**

- (a) Use the provision at 252.225-7023, Preference for Products or Services from Iraq or Afghanistan, in solicitations that provide a preference for products or services from Iraq or Afghanistan in accordance with 225.7703-1(a)(1). The contracting officer—
  - (1) May modify the provision to provide a preference exclusively for products or services from Iraq or exclusively for products or services from Afghanistan by removing “or Afghanistan” or “Iraq or”, respectively, wherever the phrase appears in the provision. If this provision is so modified, the clause at 252.225-7024 shall be modified accordingly; and
  - (2) May modify the 50 percent evaluation factor in accordance with contracting office procedures.
- (b) Use the clause at 252.225-7024, Requirement for Products or Services from Iraq or Afghanistan, in solicitations that include the provision at 252.225-7023, Preference for Products or Services from Iraq or Afghanistan, and in the resulting contract. If the provision at 252.225-7023 has been modified to provide a preference exclusively for Iraq or exclusively for Afghanistan, in accordance with paragraph (a)(1) of this subsection, the clause at 252.225-7024 shall be modified accordingly.

(c)(1) Use the clause at 252.225-7026, Acquisition Restricted to Products or Services from Iraq or Afghanistan, in solicitations and contracts that—

(i) Are restricted to the acquisition of products or services from Iraq or Afghanistan in accordance with 225.7703-1(a)(2); or

(ii) Will be directed to a particular source or sources from Iraq or Afghanistan in accordance with 225.7703-1(a)(3).

(2) The contracting officer may modify the clause to restrict the acquisition to products or services from Iraq, or to restrict the acquisition to products or services from Afghanistan, by removing “or Afghanistan” or “Iraq or”, respectively, wherever the phrase appears in the clause.

(d) When the Trade Agreements Act applies to the acquisition, use the appropriate clause and provision as prescribed at 225.1101(6) and (7).

(e) Do not use any of the following provisions or clauses in solicitations or contracts that include the provision at 252.225-7023, the clause at 252.225-7024, or the clause at 252.225-7026:

- (1) 252.225-7000, Buy American Act--Balance of Payments Program Certificate.
- (2) 252.225-7001, Buy American Act and Balance of Payments Program.
- (3) 252.225-7002, Qualifying Country Sources as Subcontractors.
- (4) 252.225-7020, Trade Agreements Certificate.
- (5) 252.225-7035, Buy American Act--Free Trade Agreements--Balance of Payments Program Certificate.
- (6) 252.225-7036, Buy American Act--Free Trade Agreements--Balance of Payments Program.
- (7) 252.225-7044, Balance of Payments Program--Construction Material.
- (8) 252.225-7045, Balance of Payments Program--Construction Material Under Trade Agreements.

**AF FAR**

## **AFARS -- Part 5125**

### **Foreign Acquisition**

#### **5125.000 -- Waivers.**

All approvals, exceptions, and waivers from the requirements of FAR Part 25 or [DFARS Part 225](#) must be documented in a determination and findings (D&F). An example is shown in 5153.9003. See also 5101.707.

#### **Subpart 5125.2 -- Buy American Act -- Construction Materials**

#### **5125.202 -- Exceptions.**

(a) (1) The Assistant Secretary of the Army (Acquisition, Logistics and Technology (ASA(ALT)) has delegated to the Deputy Assistant Secretary of the Army (Policy and Procurement (DASA(P&P)) and the Head of the Contracting Activity (HCA), United States Army Corps of Engineers (USACE), authority to determine that the use of a particular domestic construction material is impracticable.

(2) The ASA(ALT) has delegated to the DASA(P&P) and the HCA, USACE, authority to make agency head determinations that the construction material is not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality. The delegation to the HCA, USACE, is non-delegable.

*[AFARS Revision #21, dated May 22, 2007]*

#### **Subpart 5125.8 – Other International Agreements and Coordination**

#### **5125.871 -- North Atlantic Treaty Organization (NATO) Cooperative Projects.**

#### **5125.871-7 -- Congressional notification.**

(a) Send the notification at least 30 days prior to award directly to the Deputy Assistant Secretary of the Army for Defense Exports and Cooperation (DASA (DE&C)), ATTN: SAAL-NI, 1777 N. Kent St., Arlington, VA 22209. *[AFARS Revision #21, dated May 22, 2007]*

(b) See 5125.871-7(a).

#### **5125.890 -- Disclosure of information and visits and accreditation of foreign representatives.**

- (a) All visits by foreign representatives to organizations, agencies, activities, installations, and facilities over which the Army exercises administrative control or security cognizance and to commercial firms performing work under contract to the Army must be cleared in accordance with the Department of Defense (DoD) 5220.22-R and Army Regulation (AR) 380-10.
- (b) AR 380-10 prescribes procedures for accreditation of foreign personnel. See AR 70-66 for release of classified military information to foreign representatives. Classified military information that may not otherwise be released may be released if the release is approved in writing by the Deputy Chief of Staff for Intelligence, Department of the Army (G2).

### **Subpart 5125.9 -- Customs and Duties**

#### **5125.903 -- Exempted supplies.**

- (b) When no administrative contracting officer has been assigned, the contracting officer must execute duty-free entry certificates. *[AFARS Revision #21, dated May 22, 2007]*

### **Subpart 5125.70 -- Authorization Acts, Appropriations Acts, and Other Statutory Restrictions on Foreign Acquisitions**

#### **5125.7002 -- Restrictions on food, clothing, fabrics, specialty metals, and hand or measuring tools.**

##### **5125.7002-2 -- Exceptions.**

- (b) (1) (i) All determinations to waive the Berry Amendment (10 U.S.C. 2533a) require prior approval by the Secretary of the Army. The authority to make such determinations may not be redelegated.
  - (ii) All requests for waiver under the Berry Amendment shall be submitted through procurement channels to the Deputy Assistant Secretary of the Army (Policy and Procurement), (DASA (P&P)), Attn: SAAL-PP. Requests shall be submitted so as to be received by the DASA (P&P) no later than 60 business days prior to the planned release of the solicitation. All requests shall fully explain why the item(s) in question cannot be procured as and when needed in a satisfactory quality and sufficient quantity at U.S. market prices. The request shall include information on whether item(s) in question are managed by the Defense Logistics Agency (DLA) and written confirmation from the DLA that said item(s) are not available from the DLA in the time needed to meet Army requirements. In addition, all requests shall include a written certification signed by the General Officer/Senior Executive Service-level head of the requiring activity that addresses, with specificity, why alternatives that would not require a waiver under the Berry Amendment are unacceptable.

(2) See 5153.9003 for a Sample Memorandum for Waiver of the Berry Amendment.

(S-90) Army Program Executive Offices and Program Management Offices and other requiring activities that utilize a non-Army contracting activity to fulfill a requirement for a covered item are responsible for ensuring compliance with the above prior approval requirement. *[AFARS Revision #14, dated January 6, 2005] [AFARS Revision #21, dated May 22, 2007]*

**Subpart 5125.75 -- Balance of Payments Program**

**5125.7500 – Scope of subpart.**

See the Department of the Army Pamphlet (DA PAM) 25-30, AR 415-15, and AR 420-10 for projects for construction, repair, and maintenance of real property outside the United States.

# **NG FAR**

## **Nothing.... It goes from 24 to 26...see below:**

### **PART 24 - PROTECTION OF PRIVACY AND FREEDOM OF INFORMATION**

#### **SUBPART 24.2 - FREEDOM OF INFORMATION      ACT**

##### **24.203 Policy.**

###### **(S-100) Non-Release of Acquisition Information**

(1) All requests for information under The Freedom of Information Act (FOIA) require a review by a Federal Judge Advocate. If, after coordination with the Federal Judge Advocate, it is decided that any or all of the request should be denied, the recommendation for denial must be submitted to NGB-ZC-PARC for review and approval at the address in NGFARS 1.201(S-100)(C).

(2) Reference Army Regulation 25-55 for information/guidance on the handling of FOIA requests.

(3) The most recent guidance issued by the U.S. Department of Justice (DOJ), Office of Information and Policy is contained in the DOJ FOIA Reference Guide, March 2007. Reference publications are available on the Department of Justice's FOIA web site at <http://www.usdoj.gov/oip/index.html> or [http://www.usdoj.gov/oip/04\\_7.html](http://www.usdoj.gov/oip/04_7.html) or the FY 07 guidance at [http://www.usdoj.gov/oip/foia\\_guide07.htm](http://www.usdoj.gov/oip/foia_guide07.htm). The complex Exemption 4 requirements are discussed in Section IX of the Guide. DOJ's guidance stresses the importance of creating an adequate administrative record of the decision making process in responding to FOIA requests because both releases and denials of information/records can be appealed by the contractor and/or the requester.

(4) In accordance with DOJ's guidance, contract FOIA requests should be processed in the following manner. When contract records are requested under FOIA, the contracting officer should contact the contractor in writing and give the contractor an opportunity to opine on whether the contract records should be released to the requester. The contracting officer should evaluate the contractor's response and propose a release or denial of the requested records. The contracting officer will then send the contractor's response and the proposed response to

the contractor's position to NGB-JA (ATTN: Mr. Monachino) for review. NGB-JA will issue a written legal opinion regarding the release/denial issue as a subject matter legal expert. The administrative record would then be reviewed by Mr. Robert Brown, and he will staff the proposed release/initial denial with proposed redactions on behalf of the Initial Denial Authority (IDA). NGB-JA (Mr. McGrath) reviews the final draft of IDA decision letter and the complete record and issue a written legal opinion to IDA.

## **PART 26 – OTHER SOCIOECONOMIC PROGRAMS**

### **SUBPART 26.1 Indian Incentive Program**

#### **26.102 Policy**