

Authority: 41 U.S.C. 421 and 48 CFR Chapter 1.

PART 225—FOREIGN ACQUISITION

225.1101 [Amended]

2. Section 225.1101 is amended in paragraph (13)(i)(A) in the first sentence, and in paragraph (13)(i)(B), by removing “\$54,372” and adding in its place “\$56,190”.

[FR Doc. 02–10098 Filed 4–25–02; 8:45 am]

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DEPARTMENT OF DEFENSE

48 CFR Parts 225 and 252

[DFARS Case 2000–D020]

Defense Federal Acquisition Regulation Supplement; Balance of Payments Program

AGENCY: Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD has issued a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to add policy pertaining to the Balance of Payments Program. The DFARS policy replaces Federal Acquisition Regulation (FAR) policy on this subject that is being eliminated. The Balance of Payments Program provides a preference for the acquisition of domestic supplies and construction material for use outside the United States.

EFFECTIVE DATE: April 26, 2002.

FOR FURTHER INFORMATION CONTACT: Ms. Amy Williams, Defense Acquisition Regulations Council, OUSD(AT&L)DP(DAR), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301–3062. Telephone (703) 602–0328; facsimile (703) 602–0350. Please cite DFARS Case 2000–D020.

SUPPLEMENTARY INFORMATION:

A. Background

This DFARS rule provides policy pertaining to the Balance of Payments Program to replace FAR policy on this subject that has been proposed for elimination (65 FR 54936, September 11, 2000). The Balance of Payments Program applies to contracts for supplies to be used, and construction to be performed, outside the United States. Although the DFARS already contained policy that implemented the Balance of Payments Program for acquisition of supplies for use outside the United States, DoD used the FAR policy for construction contracts performed outside the United States. This final rule adds DFARS policy for application of

the Balance of Payments Program to construction contracts.

DoD published a proposed rule with request for comments at 66 FR 47155 on September 11, 2001. DoD also requested comments on the advisability of discontinuing application of the Balance of Payments Program to DoD construction contracts.

Seven sources submitted comments on the proposed rule. Four of the respondents expressed concerns regarding the potential impact of the rule on the American maritime industry. A summary of these comments and the DoD response is provided below:

- *Comment:* The Balance of Payments Program should be applied to purchases at or below the simplified acquisition threshold.

DoD Response: Do not concur. The exception for purchases at or below the simplified acquisition threshold represents a continuation of the policy at FAR 25.303(a). DoD is not aware of any significant negative impact to domestic sources that has resulted from use of this exception.

- *Comment:* DoD should eliminate the policy that permits a contracting officer to make a pre-solicitation determination that a requirement can be filled only by a foreign product.

DoD Response: Do not concur. The DFARS policy sufficiently identifies the situations where such a determination would be appropriate and, therefore, should not arbitrarily or adversely affect domestic sources.

- *Comment:* The rule grants wide discretionary authority to contracting officers and agency heads to avoid implementing the Balance of Payments Program.

DoD Response: Do not concur. The authorities provided to contracting officers and agency heads are sufficiently defined to maintain proper compliance with the Balance of Payments Program.

- *Comment:* The rule exempts “petroleum products” and “end items acquired for commissary resale” from the Balance of Payments Program. These product descriptions are too generic and should be considered for deletion.

DoD Response: Do not concur. These exemptions represent a continuation of the policy at FAR 25.303(d). DoD is not aware of any significant negative impact to domestic sources that has resulted from use of these exemptions.

Three respondents submitted comments regarding administrative aspects of the rule. A summary of these comments and the DoD response is provided below:

- *Comment:* Any determination made by the contracting officer, that a

requirement can best be filled by a foreign end product or construction material, and any determination made by the head of the agency, that it is not in the public interest to apply the restrictions of the Balance of Payments Program to an end product or construction material, should be in writing.

DoD Response: Do not concur.

Although such determinations are frequently in writing, DoD does not consider it necessary to specify a requirement for a written determination. The policy at FAR 25.303, pertaining to similar determinations, does not specify that the determinations be in writing. DoD is not aware of any implementation problems that have resulted from use of the FAR policy.

- *Comment:* The rule should clarify who has the authority to make the determination at 225.7501(a)(2)(ii), that a product or material can best be acquired in the geographic area concerned.

DoD Response: Concur. This paragraph has been moved to 225.7501(5)(ii) to clarify that the contracting officer has the authority to make this determination.

- *Comment:* The contracting officer's determination made in accordance with 225.7501(a)(1), that a particular construction material is at or below the simplified acquisition threshold, will be reflected in the contract clause at 252.225–7044(b)(2), in the list of excepted construction materials. This could cause a conflict if the contracting officer determines the construction material to be above the simplified acquisition threshold, but the offeror determines the material to be at or below the threshold.

DoD Response: Do not concur.

Exclusion of a particular construction material from the list of excepted materials at 252.225–7044(b)(2) does not necessarily mean the contracting officer has determined the material to be above the simplified acquisition threshold. Materials at or below the simplified acquisition threshold are covered by the blanket exception at 252.225–7044(b)(1). Materials excepted for other reasons would be listed at 252.225–7044(b)(2).

DoD also received comments on the advisability of eliminating the Balance of Payments Program for DoD construction contracts. Several respondents expressed concerns regarding the impact that elimination of the program would have on the American maritime industry. Others favored elimination of the program, stating that the program has resulted in higher costs and longer lead times. DoD is continuing to study this issue.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

B. Regulatory Flexibility Act

DoD certifies that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the Balance of Payments Program requirements in this rule are transferred from existing FAR requirements, with administrative changes that are not expected to have a significant effect outside of the Government.

C. Paperwork Reduction Act

This rule does not impose any additional information collection requirements that require the approval of the Office of Management and Budget (OMB) under 44 U.S.C. 3501, *et seq.* The information collection requirements associated with the clause at 252.225-7005, Identification of Expenditures in the United States, are approved under OMB Clearance Number 0704-0229 for use through March 31, 2004.

List of Subjects in 48 CFR Parts 225 and 252

Government procurement.

Michele P. Peterson,
Executive Editor, Defense Acquisition Regulations Council.

Therefore, 48 CFR parts 225 and 252 are amended as follows:

1. The authority citation for 48 CFR parts 225 and 252 continues to read as follows:

Authority: 41 U.S.C. 421 and 48 CFR Chapter 1.

PART 225—FOREIGN ACQUISITION

2. Section 225.003 is amended by revising paragraph (3) to read as follows:

225.003 Definitions.

* * * * *

(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.

* * * * *

Subpart 225.3 [Removed]

3. Subpart 225.3 is removed.

225.1101 [Amended]

4. Section 225.1101 is amended by removing the phrase “—Balance of Payments Program” in the following places:

- a. In paragraph (1), in the first sentence, the second time it appears;
- b. In paragraph (2) introductory text;
- c. In paragraph (12) introductory text the second time it appears; and
- d. In paragraph (13) introductory text, in the first sentence, the second time it appears.

5. Section 225.1103 is amended by revising paragraph (1) to read as follows:

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.

* * * * *

6. Subpart 225.75 is added to read as follows:

Subpart 225.75—Balance of Payments Program

Sec.

- 225.7500 Scope of subpart.
- 225.7501 Policy.
- 225.7502 Procedures.
- 225.7503 Contract clauses.

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 in accordance with DoD standardization policy (see DoD Directive 4120.3, Defense Standardization and Specification Program);

(iv) An industrial gas; or

(v) A brand drug specified by the Defense Medical Materiel Board;

(3) The acquisition of foreign end products or construction material is required by a treaty or executive agreement between governments;

(4) The end product is acquired for commissary resale; or

(5) 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 subject to the Trade Agreements Act or NAFTA;

(iii) For acquisitions subject to the Trade Agreements Act, is an information technology product in Federal Supply Group 70 or 74 that is substantially transformed in the United States; or

(iv) 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 designated country construction material or NAFTA country construction material, and the acquisition is subject to the Trade Agreements Act or NAFTA respectively; 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.

(a) *Solicitation of offers.* Identify, in the solicitation, supplies and construction material known in advance to be exempt from the Balance of Payments Program.

(b) *Evaluation of offers.* (1) *Supplies.* Unless the entire acquisition is exempt from the Balance of Payments Program, evaluate offers for supplies that are subject to the Balance of Payments Program using the evaluation procedures in subpart 225.5. However, treatment of duty may differ when delivery is overseas.

(i) Duty may not be applicable to nonqualifying country offers.

(ii) The U.S. Government cannot guarantee the exemption of duty for components or end products imported into foreign countries.

(iii) Foreign governments may impose duties. Evaluate offers including such duties as offered.

(2) *Construction.* Because the contracting officer evaluates the estimated cost of foreign and domestic construction material in accordance with 225.7501(a)(5)(iv) before issuing the solicitation, no special procedures are required for evaluation of construction offers.

(c) *Postaward.* For construction contracts, the procedures at FAR 25.206, for noncompliance under the Buy American Act, also apply to noncompliance under the Balance of Payments Program.

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 \$6,806,000.

(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 \$6,806,000 or more. For acquisitions with a value of \$6,806,000 or more, but less than \$7,068,419, use the clause with its Alternate I.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

7. Section 252.225–7005 is revised to read as follows:

252.225–7005 Identification of Expenditures in the United States.

As prescribed in 225.1103(1), use the following clause:

Identification of Expenditures in the United States (Apr 2002)

(a) This clause applies only if the Contractor is—

(1) A concern incorporated in the United States (including a subsidiary that is incorporated in the United States, even if the parent corporation is not incorporated in the United States); or

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

(b) On each invoice, voucher, or other request for payment under this contract, the Contractor shall identify that part of the requested payment that represents estimated expenditures in the United States. The identification—

(1) May be expressed either as dollar amounts or as percentages of the total amount of the request for payment;

(2) Should be based on reasonable estimates; and

(3) Shall state the full amount of the payment requested, subdivided into the following categories:

(i) U.S. products—expenditures for material and equipment manufactured or produced in the United States, including end products, components, or construction material, but excluding transportation;

(ii) U.S. services—expenditures for services performed in the United States, including all charges for overhead, other indirect costs, and profit under construction or service contracts;

(iii) Transportation on U.S. carriers—expenditures for transportation furnished by U.S. flag, ocean, surface, and air carriers; and

(iv) Expenditures not identified under paragraphs (b)(3)(i) through (iii) of this clause.

(c) Nothing in this clause requires the establishment or maintenance of detailed accounting records or gives the U.S. Government any right to audit the Contractor's books or records.

(End of clause)

8. Sections 252.225–7044 and 252.225–7045 are added to read as follows:

252.225–7044 Balance of Payments Program—Construction Material.

As prescribed in 225.7503(a), use the following clause:

Balance of Payments Program—Construction Material (Apr 2002)

(a) *Definitions.* As used in this clause “Component” means any article, material, or supply incorporated directly into construction material.

“Construction material” means an article, material, or supply brought to the construction site by the Contractor or a 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 (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.

“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.

“United States” means the 50 States and the District of Columbia, U.S. territories and possessions, Puerto Rico, the Northern Mariana Islands, and any other place subject to U.S. jurisdiction, but does not include leased bases.

(b) *Domestic preference.* This clause implements the Balance of Payments Program by providing a preference for domestic construction material. The Contractor shall use only domestic construction material in performing this contract, except for—

(1) Construction material valued at or below the simplified acquisition threshold in part 2 of the Federal Acquisition Regulation; or

(2) The construction material or components listed by the Government as follows:

[Contracting Officer to list applicable excepted materials or indicate "none"]
(End of clause)

252.225-7045 Balance of Payments Program—Construction Material Under Trade Agreements.

As prescribed in 225.7503(b), use the following clause:

Balance of Payments Program—Construction Material Under Trade Agreements (Apr 2002)

(a) *Definitions.* As used in this clause—

"Component" means any article, material, or supply incorporated directly into construction material.

"Construction material" means an article, material, or supply brought to the construction site by the Contractor or a 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 (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:

Aruba
Austria
Bangladesh
Belgium
Benin
Bhutan
Botswana
Burkina Faso
Burundi
Canada
Cape Verde
Central African Republic
Chad
Comoros
Denmark
Djibouti
Equatorial Guinea
Finland
France
Gambia
Germany
Greece

Guinea
Guinea-Bissau
Haiti
Hong Kong
Iceland
Ireland
Israel
Italy
Japan
Kiribati
Korea, Republic of
Lesotho
Liechtenstein
Luxembourg
Malawi
Maldives
Mali
Mozambique
Nepal
Netherlands
Niger
Norway
Portugal
Rwanda
Sao Tome and Principe
Sierra Leone
Singapore
Somalia
Spain
Sweden
Switzerland
Tanzania U.R.
Togo
Tuvalu
Uganda
United Kingdom
Vanuatu
Western Samoa
Yemen

"Designated country construction material" means a construction material that—

(1) Is wholly the growth, product, or manufacture of a designated country; or

(2) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in a designated country into a new and different construction material distinct from the material from which it was transformed.

"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.

"North American Free Trade Agreement (NAFTA) country" means Canada or Mexico.

"North American Free Trade Agreement (NAFTA) country construction material" means a construction material that—

(1) Is wholly the growth, product, or manufacture of a NAFTA country; or

(2) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in a NAFTA country into a new and different construction material distinct

from the material from which it was transformed.

"United States" means the 50 States and the District of Columbia, U.S. territories and possessions, Puerto Rico, the Northern Mariana Islands, and any other place subject to U.S. jurisdiction, but does not include leased bases.

(b) This clause implements the Balance of Payments Program by providing a preference for domestic construction material. In addition, the Contracting Officer has determined that the Trade Agreements Act and the North American Free Trade Agreement (NAFTA) apply to this acquisition. Therefore, the Buy American Act and Balance of Payments Program restrictions are waived for designated country and NAFTA country construction materials.

(c) The Contractor shall use only domestic, designated country, or NAFTA country construction material in performing this contract, except for—

(1) Construction material valued at or below the simplified acquisition threshold in part 2 of the Federal Acquisition Regulation; or

(2) The construction material or components listed by the Government as follows:

[Contracting Officer to list applicable excepted materials or indicate "none".]

(End of clause)

Alternate I (APR 2002). As prescribed in 225.7503(b), delete the definitions of "North American Free Trade Agreement country" and "North American Free Trade Agreement country construction material" from the definitions in paragraph (a) of the basic clause and substitute the following paragraphs (b) and (c) for paragraphs (b) and (c) of the basic clause:

(b) This clause implements the Balance of Payments Program by providing a preference for domestic construction material. In addition, the Contracting Officer has determined that the Trade Agreements Act applies to this acquisition. Therefore, the Balance of Payments Program restrictions are waived for designated country construction material.

(c) The Contractor shall use only domestic or designated country construction material in performing this contract, except for—

(1) Construction material valued at or below the simplified acquisition threshold in part 2 of the Federal Acquisition Regulation; or

(2) The construction material or components listed by the Government as follows:

[Contracting Officer to list applicable excepted materials or indicate "none".]

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