

**DEPARTMENT OF DEFENSE****GENERAL SERVICES  
ADMINISTRATION****NATIONAL AERONAUTICS AND  
SPACE ADMINISTRATION**

**48 CFR Parts 1, 5, 6, 9, 12, 13, 14, 15,  
17, 25, and 52**

**[FAR Case 97-024]**

**RIN 9000-AH30**

**Federal Acquisition Regulation;  
Foreign Acquisition (Part 25 Rewrite)**

**AGENCIES:** Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Proposed rule.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council are proposing to amend the Federal Acquisition Regulation (FAR) to rewrite guidance and clauses on foreign acquisition. This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993. This is not a major rule under 5 U.S.C. 804.

**DATES:** Comments should be submitted on or before November 27, 1998 to be considered in the formulation of a final rule.

**ADDRESSES:** Interested parties should submit written comments to: General Services Administration, FAR Secretariat (MVRs), Attn: Ms. Laurie Durate, 1800 F Street, NW, Room 4035, Washington, DC 20405, E-mail comments submitted over Internet should be addressed to: farcase.97-024@gsa.gov.

Please cite FAR case 97-024 in all correspondence related to this case.

**FOR FURTHER INFORMATION CONTACT:** The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405 (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Mr. Paul Linfield, Procurement Analyst, at (202) 501-1757. Please cite FAR case 97-024.

**SUPPLEMENTARY INFORMATION:****A. Background**

This rule constitutes a rewrite of FAR Part 25 and the associated clauses in Part 52. Part 25 implements a number of statutes and executive orders that use different terminology that have specific definitions. These statutes and executive orders provide different exceptions and may exempt certain

departments or agencies. The effort to rewrite FAR Part 25 was undertaken to make the various policies and procedures that implement these statutes and executive orders in acquisitions of foreign supplies, services, and construction materials clearer and more understandable to the reader. In addition to numerous editorial changes, some policies and procedures were clarified to eliminate potential conflict or inconsistency with other parts of the FAR. Several changes were made to provide either new or more consistent and uniform direction to agencies. One of the more significant of these changes, discussed below, addresses the treatment of U.S. made end products for acquisitions subject to the Trade Agreements Act.

To qualify as a domestic end product under the Buy American Act, the end product must be manufactured in the United States and the cost of the components manufactured in the United States must exceed 50% of the cost of all components. Under the Trade Agreements Act, the country of origin of an end product that is not wholly the growth, product or manufacture of a country, is the country in which the end product is substantially transformed into a new and different article, without regard to the source of the components. The proposed rule defines U.S. made end products as products that are manufactured or substantially transformed in the United States, regardless of the source of the components. Therefore, U.S. made end products pass the Trade Agreements Act country of origin test, but do not necessarily qualify as domestic end products under the Buy American Act.

The Trade Agreements Act prohibits the purchase of foreign end products, except for the products of countries that are eligible under the Trade Agreements Act, the North American Free Trade Agreement, the Caribbean Basin Economic Recovery Initiative, or some other agreement. These eligible products compete on an equal basis with domestic end products, without application of a Buy American Act or Balance of Payments Program evaluation factor.

The Trade Agreements Act does not specifically address the treatment of U.S. made end products that do not qualify as domestic end products under the Buy American Act. Because these other U.S. made end products are foreign end products under the Buy American Act and are not the products of an eligible country, the current FAR prohibits a contractor from supplying these other U.S. made end products

when the Trade Agreements Act applies.

In 1990, the GSBGA Board of Contract Appeals ruled that the Trade Agreements Act does not prohibit the purchase of U.S. products. See *International Business Machines Corp.*, GSBGA No. 10532-P, May 18, 1990, 90-2 BCA. U.S. made end products that do not meet the definition of domestic end product under the Buy American Act are not foreign end products included in the Trade Agreements Act procurement prohibition. Until now, the GSBGA decision has been separately implemented by each agency. This proposed rule revises the FAR to permit the purchase of all U.S. made end products, whether or not they are domestic end products. All such products compete equally with eligible end products. Agencies that previously needed to deviate from the FAR to conform their acquisitions to the GSBGA decision will no longer need a deviation, since that decision is implemented in the proposed rule.

However, the Board did not rule on the application of the Buy American Act when a U.S. made end product that is not a domestic end product competes with a domestic end product. As a result, an agency may handle this evaluation differently. As a matter of policy, agencies generally apply the Balance of Payments Program to overseas acquisitions in the same way they apply the Buy American Act to acquisitions in the United States. For example, GSA and the Department of Commerce do not apply the Buy American Act or Balance of Payments Program to provide a preference for domestic end products over other U.S. made end products that do not qualify as domestic end products when the Trade Agreements Act applies, *i.e.*, all U.S. made end products are treated the same. On the other hand, unless a waiver of the Buy American Act has been specifically granted, DoD does provide an evaluation preference to domestic end products, when such products are competing with other U.S. made end products that do not qualify as domestic end products. DoD has waived application of the Buy American Act/Balance of Payments Program for all U.S. made information technology end products, when the Trade Agreements Act applies.

The evaluation procedures at FAR 25.502(b)(2) are appropriate for those agencies that provide the same treatment to all U.S. made end products. The proposed rule does not require a determination as to whether a U.S. made end product is domestic through an assessment of the source and value

of the components. Agencies, such as DoD, that in some cases apply the Buy American Act or Balance of Payments Program evaluation preference to domestic end products in competition with other U.S. made end products in acquisitions subject to the Trade Agreements Act, may provide alternative evaluation procedures in agency FAR supplements.

Numerous structural and editorial changes are proposed. Revisions include—(1) adding an overview to help readers understand the part (25.001, General); (2) adding 25.002, Applicability of subparts; (3) adding definitions of “cost of components,” “eligible offer,” “noneligible product,” “Israeli end product,” “nondesignated country end product,” and “U.S. made end product;” eliminating unnecessary definitions; and relocating all definitions to 25.003; and (4) adding text and examples for evaluating offers under the Buy American Act and trade agreements for supply contracts.

In this proposed rule, the clauses prescribed in Part 25 have been renumbered, revised, and sometimes both. In order to better understand the revisions to Part 52, the following list is provided:

Current FAR section	New FAR section
52.225-1 and -6 .....	52.225-2
52.225-2 .....	52.225-7
52.225-3 and -7 .....	52.225-1
52.225-4 .....	52.225-17
52.225-5 .....	52.225-9
52.225-8 .....	52.225-6
52.225-9 .....	52.225-5
52.225-10 .....	52.225-8
52.225-11 .....	52.225-13
52.225-12 .....	52.225-10
52.225-13 .....	52.225-12
52.225-14 .....	52.225-14
52.225-15 and -22 .....	52.225-11
52.225-18 .....	52.225-15
52.225-19 .....	52.225-16
52.225-20 .....	52.225-4
52.225-21 .....	52.225-3

## B. Regulatory Flexibility Act

This proposed rule is not expected to 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 it primarily clarifies existing guidance pertaining to acquisition of foreign supplies, services, and construction. An Initial Regulatory Flexibility Analysis has, therefore, not been performed. Comments are invited from small businesses and other interested parties. Comments from small entities concerning the affected FAR subpart will be considered in accordance with 5 U.S.C. 610 of the Act. Such comments must be submitted separately and should cite 5 U.S.C. 601, *et seq.* (FAR case 97-024), in correspondence.

## C. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. 3501, *et seq.*) is deemed to apply because the proposed rule contains information collection requirements. These information collection requirements were submitted and cleared by the Office of Management and Budget (OMB) under 44 U.S.C. 3501, *et seq.* The OMB control numbers are 9000-0022, 9000-0023, 9000-0024, 9000-0025, 9000-0130, and 9000-0141.

The existing provisions at 52.225-1, Buy American Certificate, and 52.225-6, Balance of Payments Program Certificate (OMB Control Numbers 9000-0024 and 9000-0023, respectively), are now combined into a new provision at 52.225-2, Buy American Act—Balance of Payments Program Certificate, with no change in paperwork burden. The existing provision at 52.225-8, Buy American Act—Trade Agreements—Balance of Payments Program Certificate (OMB Control Number 9000-0025) is replaced by the provision at 52.225-6, Trade Agreements Certificate. The existing provision at 52.225-20, Buy American Act—North American Free Trade Agreement Implementation Act—Balance of Payments Program Certificate (OMB Control Number 9000-0130) is replaced by the provision at 52.225-4, Buy American Act—North American Free Trade Agreement—Israeli Trade Act—Balance of Payments Program Certificate. These replacement provisions eliminate redundancies in required listing of foreign end products and country of origin. The provisions and clauses at 52.225-5, Buy American Act—Construction Materials; 52.225-15,

Buy American Act—Construction Materials under Trade Agreements Act and North American Free Trade Agreement; 52.225-12, Notice of Buy American Act Requirement—Construction Materials; 52.225-13, Notice of Buy American Act Requirement—Construction Materials under Trade Agreements Act and North American Free Trade Agreement (OMB Clearance 9000-0141); and 52.225-22, Balance of Payments Program—Construction Materials—NAFTA, are replaced by the provisions and clauses at 52.225-9, Buy American Act—Balance of Payments Program—Construction Materials; 52.225-10, Notice of Buy American Act/Balance of Payments Program Requirement—Construction Materials; 52.225-11, Buy American Act—Balance of Payments Program—Construction Materials under Trade Agreements; and 52.225-12, Notice of Buy American Act/Balance of Payments Program Requirement—Construction Materials under Trade Agreements. There is no change in burden relating to the renumbered clause at 52.225-8 entitled “Duty-Free Entry,” currently 52.225-10 (OMB Clearance 9000-0022).

## List of Subjects in 48 CFR Parts 1, 5, 6, 9, 12, 13, 14, 15, 17, 25, and 52

Government procurement.

Dated: September 18, 1998.

**Edward C. Loeb,**

*Director, Federal Acquisition Policy Division.*

Therefore, it is proposed that 48 CFR Parts 1, 5, 6, 9, 12, 13, 14, 15, 17, 25, and 52 be amended as set forth below:

1. The authority citation for 48 CFR Parts 1, 5, 6, 9, 12, 13, 14, 15, 17, 25, and 52 continues to read as follows:

**Authority:** 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

## PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

2. Section 1.106 is amended in the table following the introductory paragraph by removing the FAR Segment and OMB Control number in the left columns and inserting the FAR Segment and OMB Control Number listed in the right columns as follows:

Remove		Insert	
FAR segment	OMB control No.	FAR segment	OMB control No.
52.225-1	9000-0024	52.225-2	9000-0023 and 9000-0024
52.225-6	9000-0023	52.225-4	9000-0130
52.225-8	9000-0025	52.225-6	9000-0025
52.225-10	9000-0022	52.225-8	9000-0022
52.225-20	9000-0130	52.225-9	9000-0141
		52.225-11	9000-0141

## PART 5—PUBLICIZING CONTRACT ACTIONS

### 5.301 [Amended]

3. Section 5.301 is amended in the parenthetical in paragraph (a)(1) by removing “(see 25.402 and 25.403)” and inserting “(see subpart 25.4)”.

## PART 6—COMPETITION REQUIREMENTS

4. Section 6.303-1 is amended by revising the first sentence of paragraph (d) to read as follows:

### 6.303-1 Requirements.

\* \* \* \* \*

(d) Contract actions subject to the Trade Agreements Act (see subpart 25.4) may be made without providing for full and open competition only when permitted and justified pursuant to this subpart. \* \* \*

\* \* \* \* \*

## PART 9—CONTRACTOR QUALIFICATIONS

5. Section 9.205 is amended by revising paragraph (b) to read as follows:

### 9.205 Opportunity for qualification before award.

\* \* \* \* \*

(b) The activity responsible for establishing a qualification requirement shall keep any list maintained of those already qualified open for inclusion of additional products, manufacturer, or other potential sources, including eligible products from designated countries under the terms of the Trade Agreements Act (see subpart 25.4).

## PART 12—ACQUISITION OF COMMERCIAL ITEMS

6. Section 12.205 is amended by revising paragraph (c) to read as follows:

### 12.205 Offers.

\* \* \* \* \*

(c) Consistent with the requirements at 5.203(b), the contracting officer may allow fewer than 30 days response time for receipt of offers for commercial items, unless the acquisition is subject to NAFTA or the Trade Agreements Act (see 5.203(h)).

### 12.504 [Amended]

7. Section 12.504 is amended by removing paragraphs (a)(2) through

(a)(4) and redesignating (a)(5) through (a)(15) as (a)(2) through (a)(12), respectively.

## PART 13—SIMPLIFIED ACQUISITION PROCEDURES

### 13.101 [Amended]

8. Section 13.101 is amended by removing paragraph (a)(3) and redesignating (a)(4) as (a)(3).

## PART 14—SEALED BIDDING

9. Section 14.201-6 is amended by revising paragraphs (x) and (y) to read as follows:

### 14.201-6 Solicitation provisions.

\* \* \* \* \*

(x) The provision at 52.214-34, Submission of Offers in the English Language, is required in solicitations that include any of the clauses prescribed in 25.1101 or 25.1102. It may be included in other solicitations when the contracting officer decides that it is necessary.

(y) The provision at 52.214-35, Submission of Offers in U.S. Currency, is required in solicitations that include any of the clauses prescribed in 25.1101 or 25.1102, unless the clause at 52.225-17, Evaluation of Foreign Currency Offers, prescribed in 25.1103(d) is included. It may be included in other solicitations when the contracting officer decides that it is necessary.

### 14.409-1 [Amended]

10. Section 14.409-1 is amended in paragraph (a)(2) by removing the reference “25.405(e)” and inserting “25.408(a)(5)”.

## PART 15—CONTRACTING BY NEGOTIATION

### 15.209 [Amended]

11. Section 15.209 is amended by removing the reference “25.901” and inserting “25.1001” in paragraph (b)(4).

## PART 17—SPECIAL CONTRACTING METHODS

12. Section 17.203 is amended by revising paragraph (h) to read as follows:

### 17.203 Solicitations.

\* \* \* \* \*

(h) Include the value of options in determining if the acquisition will

exceed the Trade Agreements Act and North American Free Trade Agreement thresholds.

13. Part 25 is revised to read as follows:

## PART 25—FOREIGN ACQUISITION

- 25.000 Scope of part.
- 25.001 General.
- 25.002 Applicability of subparts.
- 25.003 Definitions.

### Subpart 25.1—Buy American Act—Supplies

- 25.100 Scope of subpart.
- 25.101 General.
- 25.102 Policy.
- 25.103 Exceptions.
- 25.104 Nonavailable articles.
- 25.105 Determining reasonableness of cost.

### Subpart 25.2—Buy American Act—Construction Materials

- 25.200 Scope of subpart.
- 25.201 Policy.
- 25.202 Exceptions.
- 25.203 Preaward determinations.
- 25.204 Evaluating offers of foreign construction material.
- 25.205 Postaward determinations.
- 25.206 Noncompliance.

### Subpart 25.3—Balance of Payments Program

- 25.300 Scope of subpart.
- 25.301 General.
- 25.302 Policy.
- 25.303 Exceptions.
- 25.304 Procedures.

### Subpart 25.4—Trade Agreements

- 25.400 Scope of subpart.
- 25.401 Exceptions.
- 25.402 General.
- 25.403 Trade Agreements Act.
- 25.404 Caribbean Basin Trade Initiative.
- 25.405 North American Free Trade Agreement (NAFTA).
- 25.406 Israeli Trade Act.
- 25.407 Agreement on Trade in Civil Aircraft.
- 25.408 Procedures.

### Subpart 25.5—Evaluating Foreign Offers—Supply Contracts

- 25.501 General.
- 25.502 Application.
- 25.503 Group offers.
- 25.504 Evaluation examples.
- 25.504-1 Buy American Act/Balance of Payments Program.
- 25.504-2 Trade Agreements Act/Caribbean Basin Trade Initiative/NAFTA.
- 25.504-3 Other trade agreements.
- 25.504-4 Group award basis.

**Subpart 25.6—Trade Sanctions**

- 25.600 Scope of subpart.  
 25.601 Policy.  
 25.602 Exceptions.

**Subpart 25.7—Prohibited Sources**

- 25.701 Restrictions.  
 25.702 Source of further information.

**Subpart 25.8—Other International Agreements and Coordination**

- 25.801 General.  
 25.802 Procedures.

**Subpart 25.9—Customs and Duties**

- 25.900 Scope of subpart.  
 25.901 Policy.  
 25.902 Procedures.  
 25.903 Exempted supplies.

**Subpart 25.10—Additional Foreign Acquisition Regulations**

- 25.1001 Waiver of right to examination of records.  
 25.1002 Use of foreign currency.

**Subpart 25.11—Solicitation Provisions and Contract Clauses**

- 25.1101 Acquisition of supplies.  
 25.1102 Acquisition of construction.  
 25.1103 Other provisions and clauses.

**Authority:** 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

**PART 25—FOREIGN ACQUISITION****25.000 Scope of part.**

This part provides policies and procedures for acquiring foreign supplies, services, and construction

materials. It implements the Buy American Act, the Balance of Payments Program, 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 it is determined that the price of the lowest domestic offer is unreasonable, or if another exception applies (see subpart 25.1); and

(2) Requires that, with some exceptions, only domestic construction materials be used in contracts for construction in the United States (see subpart 25.2).

(b) The Balance of Payments Program (see subpart 25.3) is similar to the Buy American Act in its implementation except that it applies to the purchase of supplies for use outside the United States, and construction materials for construction contracts performed outside the United States.

(c) The restrictions in the Buy American Act and the Balance of Payments Program are waived 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 will determine which of the trade agreements applies. Exceptions to the applicability of the trade agreements are described in subpart 25.4.

(d) The test used to determine the country of origin for an end product under the trade agreements is different from the test used to determine the country of origin for an end product under the Buy American Act (see definitions of “end product” in 25.003). 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). 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.

(e) Sanctions have been imposed against some European Union countries for discriminating against U.S. products and services (see subpart 25.6).

**25.002 Applicability of subparts.**

The applicability of the subparts is shown in the following table. Comprehensive procedures for offer evaluation, and examples, are provided in subpart 25.5.

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 Balance of Payments Program .....	.....	X	.....	X	.....	.....
25.4 Trade Agreements .....	X	X	X	X	X	X
25.5 Evaluating Foreign Offers—Supply Contracts .....	X	X	.....	.....	.....	.....
25.6 Trade Sanctions .....	X	X	X	X	X	X
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 Contract Clauses .....	X	X	X	X	X	X

**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, Dominican Republic, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Montserrat, Netherlands Antilles, Nicaragua,

Panama, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Tobago and Trinidad.

*Caribbean Basin country end product* means an article that—

- (1) Is wholly the growth, product, or manufacture of a Caribbean Basin 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 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. 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. The term excludes products that are excluded from duty-free treatment for Caribbean countries under 19 U.S.C. 2703(b), which presently are—

- (i) Textiles and apparel articles that are subject to textile agreements;
- (ii) Footwear, handbags, luggage, flat goods, work gloves, and leather wearing apparel not designated as eligible articles for the purpose of the Generalized System of Preferences under Title V of the Trade Act of 1974;
- (iii) Tuna, prepared or preserved in any manner in airtight containers;
- (iv) Petroleum, or any product derived from petroleum; and
- (v) 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.

*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.

*Components* means those articles, materials, and supplies incorporated directly into the end products.

*Construction* means construction, alteration, or repair of any public building or public work.

*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, shall be evaluated as a single and distinct construction material regardless of when or how the individual parts or components of such 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.

*Customs territory of the United States* means the States, the District of Columbia, and Puerto Rico.

*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  
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 end product* means an article that—

- (1) Is wholly the growth, product, or manufacture of a designated 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 designated 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.

*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 that is not subject to the discriminatory treatment of the Buy American Act or the Balance of Payments Program due to the applicability of a trade agreement to a particular acquisition.

**End product** means those articles, materials, and supplies to be acquired under the contract 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, its territories, or possessions.

**Foreign end product** means an end product other than a domestic end product.

**Foreign offer** means any offer other than a domestic offer.

**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.

**Mexican end product** means an article that—

(1) Is wholly the growth, product, or manufacture of Mexico; 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 Mexico 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 product** means a foreign end product that is not an eligible product.

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

**NAFTA country end product** means an article that—

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

**Sanctioned European Union (EU) country construction** means construction to be performed in a sanctioned EU member state.

**Sanctioned EU country end product** means an article that—

(1) Is wholly the growth, product, or manufacture of a sanctioned EU member state; 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 sanctioned EU member state 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.

**Sanctioned EU country services** means services to be performed in a sanctioned EU member state.

**Sanctioned EU member state** means Austria, Belgium, Denmark, Finland, France, Ireland, Italy, Luxembourg, the Netherlands, Sweden, or the United Kingdom.

**United States** means the 50 states and the District of Columbia, its possessions, the Commonwealth of Puerto Rico, and any other place subject to its jurisdiction, but does not include leased bases or trust territories.

**U.S. made end product** means an article that has been manufactured in the United States or that has been 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.

## 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 (as amended). 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. The product of a small business concern (see subpart 19.5) 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 (see 25.003). 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 section 25.103, only domestic end products shall be acquired for public use inside the United States.

#### 25.103 Exceptions.

When one of the following exceptions applies, a foreign end product may be acquired 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.* A determination may be made 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.

(1) A nonavailability determination has been made for the articles listed in 25.104.

(2)(i) Unless agency regulation prescribes otherwise, a nonavailability determination may be made by the head of the contracting activity under any circumstances, or by the contracting officer if all of the following conditions are present:

(A) The acquisition was conducted through use of full and open competition.

(B) The acquisition was synopsisized in accordance with 5.201.

(C) No offer for a domestic end product was received.

(ii) A copy of each determination and supporting documentation shall be submitted to the appropriate council identified in 1.201-1 in accordance with agency procedures, for possible addition to the list in 25.104.

(c) *Unreasonable cost.* A decision may be made that the cost of an end product from a domestic source would be unreasonable, in accordance with 25.105 and subpart 25.5.

(d) *Resale.* Foreign end products may be purchased specifically for commissary resale.

#### 25.104 Nonavailable articles.

(a) The following articles have been determined to be nonavailable in accordance with 25.103(b):

Acetylene, black.  
Agar, bulk.  
Anise.

Antimony, as metal or oxide.  
Asbestos, amosite, chrysotile, and crocidolite.  
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.  
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).  
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.  
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) The determination in paragraph (a) of this section does not apply if the contracting officer learns before the time designated for receipt of offers or final proposal revisions that an article on the list has become available domestically in sufficient and reasonably available quantities of a satisfactory quality. The contracting officer shall amend the solicitation if purchasing the article, or if purchasing an end product that could contain such an article as a component, and shall specify in all new solicitations that the article has been found to be available and that offerors and contractors may not treat foreign components of the same class or kind as domestic components. In addition, a copy of supporting documentation shall be submitted to the appropriate council identified in 1.201-1 in accordance with agency procedures, for possible removal of the article from the list.

**25.105 Determining reasonableness of cost.**

(a) The contracting officer—

(1) Shall 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 will be applicable to all agency acquisitions, the agency evaluation factors shall be published in agency regulations.

(2) Shall 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 shall 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.

(2) 12 percent, if the lowest domestic offer is from a small business concern. The contracting officer shall 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.

**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 (as amended). 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, only domestic construction materials shall be used in construction contracts performed in the United States.

**25.202 Exceptions.**

(a) When one of the following exceptions applies, foreign construction materials may be acquired 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 determination of nonavailability of the articles listed at 25.104(a) and the procedures at 25.104(b) also apply if any such articles are acquired as construction materials.

(3) *Unreasonable cost.* The cost of domestic construction material is unreasonable if it exceeds the cost of foreign construction material by more than 6 percent, unless the head of the agency determines that a higher percentage is appropriate (see Executive Order 10582).

(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 shall list the excepted materials in the contract. The agency shall make the findings justifying the exception available for public inspection.

(c) *Acquisitions under trade agreements.* For construction contracts with an estimated acquisition value of \$6,909,500 or more, see 25.405. If the acquisition value is \$7,143,000 or more, also see 25.403.

**25.203 Preaward determinations.**

(a) The contracting officer shall consider an offeror's request for a determination concerning the inapplicability of the Buy American Act for specifically identified construction materials if the request is received either before the time set for receipt of offers or submitted with the offer.

(b) The contracting officer shall evaluate any request for a determination regarding the inapplicability of the Buy American Act made before award, based on the information requested in the applicable clause at 52.225–9, Buy American Act—Balance of Payments Program—Construction Materials, paragraphs (c) and (d), or 52.225–11, Buy American Act—Balance of Payments Program—Construction Materials under Trade Agreements, paragraphs (c) and (d). The contracting

officer may supplement this information with other readily available information.

(c) If the appropriate authority determines before award that an exception to the Buy American Act applies (other than a general exception based on the Trade Agreements Act or NAFTA), the contracting officer shall identify the excepted material in paragraph (b)(2) of the clause at 52.225–9 or paragraph (b)(3) of the clause at 52.225–11.

**25.204 Evaluating offers of foreign construction material.**

(a) Offerors proposing to use foreign construction material other than that listed by the Government in paragraph (b)(2) of the applicable clause at 52.225–9, or paragraph (b)(3) of 52.225–11, or excepted under the Trade Agreements Act or NAFTA (paragraph (b)(2) of 52.225–11), must provide the information required by paragraphs (c) and (d) of the respective clauses.

(b) Unless agency regulations specify a higher percentage, the contracting officer shall 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 shall give preference to an offer that does not include foreign construction material excepted at the request of the offeror 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 award is made to an offeror that proposed foreign construction material not included 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 shall add these 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 shall explain why the determination could not have been requested before contract award or why the need for such determination otherwise was not reasonably foreseeable. If the contracting officer concludes that the request should have been made before



contract award, the request may be denied.

(b) Evaluation of any request for a determination regarding the inapplicability of the Buy American Act made after contract award shall be based on information required by paragraphs (c) and (d) of the applicable clause at 52.225-9 or 52.225-11 and/or other information readily available to the contracting officer.

(c) If a determination is made after contract award that an exception to the Buy American Act applies, adequate consideration shall be negotiated and the contract shall be modified to allow use of the foreign construction material. When the basis for the exception is the unreasonable price of a domestic construction material, adequate consideration shall be at least the differential established in 25.202(a) or in accordance with agency procedures.

#### **25.206 Noncompliance.**

(a) The contracting officer is responsible for conducting Buy American Act investigations when available information indicates such action is warranted.

(b) Unless fraud is suspected, the contracting officer shall notify the contractor of the apparent unauthorized use of foreign construction material and shall request a reply, to include proposed corrective action.

(c) If an investigation reveals that a contractor or subcontractor has used foreign construction material without authorization, the contracting officer shall take appropriate action, including one or more of the following:

(1) Process a determination with regard to 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. Such 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 so stated in the determination. Further, such 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—Balance of Payments Program**

#### **25.300 Scope of subpart.**

This subpart provides policies and procedures implementing the Balance of Payments Program. It applies to contracts for the purchase of supplies for use outside the United States and contracts for construction, alteration, or repair of any public building or public work outside the United States.

#### **25.301 General.**

The Balance of Payments Program restricts the purchase of supplies that are not domestic end products, for use outside the United States, and restricts the use of construction materials that are not domestic, for performance of construction contracts outside the United States. Its restrictions are similar to those of the Buy American Act. It uses the same definitions and evaluation procedures, except that a 50 percent factor is used to determine unreasonable cost. Exceptions to the Balance of Payments Program, especially for construction materials, are generally determined prior to solicitation and assignment of contracting responsibility. Excepted supplies and construction materials shall be identified in the contract.

#### **25.302 Policy.**

Except as provided in 25.303, only domestic end products shall be acquired for use outside the United States and only domestic construction materials shall be used for construction, repair, or maintenance of real property outside the United States.

#### **25.303 Exceptions.**

A foreign end product may be acquired for use outside the United States, or a foreign construction material may be used in construction outside the United States without regard to the restrictions of the Balance of Payments Program if—

(a) The estimated cost of the end product does not exceed the simplified acquisition threshold;

(b) The end product or construction material is listed at 25.104, or the head of the contracting activity determines that a requirement—

(1) Can only be filled by a foreign end product or construction material (see 25.103(b));

(2) Is for end products or construction materials that, by their nature or as a practical matter, can only be acquired in the geographic area concerned, *e.g.*, ice, books, or bulk material, such as sand, gravel, or other soil material, stone, concrete masonry units, or fired brick; or

(3) Is for perishable subsistence products and delivery from the United States would significantly impair their quality at the point of consumption;

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

(d) The end products are—

(1) Petroleum products; or

(2) For commissary resale;

(e) The end products are eligible products subject to the Trade

Agreements Act, NAFTA, or the Israeli Trade Act, or the construction material is subject to the Trade Agreements Act or NAFTA;

(f) The cost of the domestic end product or construction material (including transportation and handling costs) exceeds the cost of the foreign end product or construction material by more than 50 percent. A differential greater than 50 percent may be used when specifically authorized by the head of the agency; or

(g) The agency has determined 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 or that it is impracticable to apply the restrictions of the Balance of Payments Program to the construction material.

#### **25.304 Procedures.**

(a) *Solicitation of offers.* The contracting officer shall identify, in the solicitation, supplies and construction materials known in advance to be excepted from the procedures of this subpart.

(b) *Evaluation of offers.* The contracting officer shall—

(1) Evaluate offers for supplies in accordance with subpart 25.5; and

(2) Evaluate offers proposing foreign construction material by using the procedures at 25.204, except that a factor of 50 percent shall be applied to foreign construction material proposed

for exception from the requirements of the Balance of Payments Program on the basis of unreasonable cost of domestic construction materials.

(c) *Other procedures for construction.* For construction contracts, the procedures at 25.203, 25.205, and 25.206, for determinations and noncompliance under the Buy American Act, are also applicable to determinations and noncompliance under the Balance of Payments Program.

#### Subpart 25.4—Trade Agreements

##### 25.400 Scope of subpart.

(a) This subpart provides policies and procedures applicable to acquisitions with a value greater than \$25,000 that are subject to—

(1) The Agreement on Government Procurement, as approved by Congress in the Trade Agreements Act of 1979 (19 U.S.C. 2501 *et seq.*) (Trade Agreements Act) and as amended by the Uruguay Round Agreements Act (Pub. L. 103-465), including the Agreement on Trade in Civil Aircraft (19 U.S.C. 2513);

(2) The determination of the U.S. Trade Representative that end products granted duty-free entry under the Caribbean Basin Economic Recovery Act (19 U.S.C. 2701, *et seq.*) shall be treated as eligible products under the Trade Agreements Act (Caribbean Basin Trade Initiative);

(3) 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) (NAFTA); and

(4) 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) (Israeli Trade Act).

(b) For application of the trade agreements that are unique to individual agencies (Department of Defense, National Aeronautics and Space Administration, Department of Energy (Power Marketing Administration), and Department of the Interior (Bureau of Reclamation)), see agency regulations.

##### 25.401 Exceptions.

This subpart does not apply to—

(a) Purchases under small business set-asides;

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

(c) Research and development contracts;

(d) Purchases of end products for resale;

(e) Purchases under subpart 8.6, Acquisition from Federal Prison

Industries, Inc., and subpart 8.7, Acquisition from Nonprofit Agencies Employing People Who Are Blind or Severely Disabled; and

(f) Purchases not open to competition, when justified in accordance with subpart 6.3 (but see 25.408(b)).

##### 25.402 General.

The trade agreements waive the applicability of the Buy American Act or the Balance of Payments Program for some foreign supplies and construction materials from certain countries. The value of the acquisition is a determining factor in the applicability of the trade agreements. When the restrictions of the Buy American Act or the Balance of Payments Program are waived for eligible products, offers of such products (eligible offers) receive equal consideration with domestic offers. However, eligible offers will not be given preference over a low acceptable foreign offer. Under the Trade Agreements Act, only U.S. made end products or eligible products may be acquired (also see 25.403(d)). See subpart 25.5 for evaluation procedures for supply contracts subject to trade agreements.

##### 25.403 Trade Agreements Act.

(a) *General.* The Trade Agreements Act—

(1) Waives application of the Buy American Act and the Balance of Payments Program to the end products and construction materials of designated countries;

(2) Prohibits discriminatory practices on the basis of foreign ownership (see 25.403(c));

(3) Restricts purchases to end products identified in 25.403(d);

(4) Provides a specific waiver with regard to purchase of civil aircraft from countries that are party to the Agreement on Trade in Civil Aircraft (see 25.407); and

(5) Requires certain procurement procedures designed to ensure fair and open competition (see 25.408).

(b) *Applicability.* (1) The Trade Agreements Act applies to an acquisition for supplies or services if the estimated value of the acquisition is \$186,000 or more; the Trade Agreements Act applies to an acquisition for construction if the estimated value of the acquisition is \$7,143,000 or more. These dollar thresholds became effective January 1, 1998, and are subject to revision by the U.S. Trade Representative approximately every 2 years (see Executive Order 12260).

(2) To determine whether the Trade Agreements Act applies to the acquisition of products by lease, rental,

or lease-purchase contract (including lease-to-ownership, or lease-with-option-to purchase), 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.

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

(4) 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 Trade Agreements Act applies. No acquisition shall be divided with the intent of reducing the estimated value of the acquisition below the dollar threshold of the Trade Agreements Act.

(c) *Nondiscrimination.* Subject to the provisions of U.S. law and regulation, a supplier established in a designated country or a Caribbean Basin country shall not be accorded less favorable treatment than is accorded to another supplier established in that country on the basis of—

(1) Foreign ownership or affiliation; or

(2) The place of production of the articles to be supplied; *provided* that the country of production is a designated country or a Caribbean Basin country.

(d) *Purchase restriction.* (1) In acquisitions subject to the Trade Agreements Act, only U.S. made end products or eligible products (designated, Caribbean Basin, or NAFTA country end products) shall be acquired unless offers for such end products are either not received or are insufficient to fulfill the requirements.

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

##### 25.404 Caribbean Basin Trade Initiative.

Under the Caribbean Basin Trade Initiative, the U.S. Trade Representative has determined that for acquisitions

subject to the Trade Agreements Act, Caribbean Basin country end products shall be treated as eligible products. This determination is effective until September 30, 1998.

#### **25.405 North American Free Trade Agreement (NAFTA).**

(a) An acquisition of supplies is not subject to NAFTA if the estimated value of the acquisition is \$25,000 or less. For acquisitions subject to NAFTA, the contracting officer shall evaluate offers of NAFTA country end products without regard to the restrictions of the Buy American Act or the Balance of Payments Program, except that for acquisitions with an estimated value of less than \$53,150, only Canadian end products are eligible products. Eligible products from NAFTA countries are entitled to the nondiscriminatory treatment of the Trade Agreements Act (see 25.403(c)). NAFTA does not prohibit the purchase of other foreign end products.

(b) NAFTA applies to construction materials if the estimated value of the construction contract is \$6,909,500 or more.

(c) The procedures in 25.408 apply to the acquisition of NAFTA country services. These are services provided by a firm established in a NAFTA country under service contracts with an estimated acquisition value of \$53,150 or more (\$6,909,500 or more for construction), except for the following excluded services (Federal Service Code or Category from the Federal Procurement Data System Product/Service Code Manual indicated in parentheses):

(1) Information processing and related telecommunications services.

(i) ADP telecommunications and transmission services (D304).

(ii) ADP teleprocessing and timesharing services (D305).

(iii) Telecommunication network management services (D316).

(iv) Automated news services, data services, or other information services (D317).

(v) Other ADP and telecommunications services (D399).

(2) Maintenance, repair, modification, rebuilding, and installation of equipment.

(i) Maintenance, repair, modification, rebuilding, and installation of equipment related to ships (J019).

(ii) Non-nuclear ship repair (J998).

(3) Operation of Government-owned facilities.

(i) All facilities operated by the Department of Defense, Department of Energy, and the National Aeronautics and Space Administration.

(ii) Research and development facilities (M180).

(4) Utilities—All classes (S).

(5) Transportation, travel, and relocation services (V), except travel agent services (V302).

(6) All services purchased in support of military forces overseas.

(7) Construction dredging services.

#### **25.406 Israeli Trade Act.**

Acquisitions of supplies by most agencies are subject to the Israeli Trade Act, if the estimated value of the acquisition is \$50,000 or more, but does not exceed the Trade Agreements Act threshold for supplies (see 25.403(b)(1)). 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 shall evaluate offers of Israeli end products without regard to the restrictions of the Buy American Act or the Balance of Payments Program. 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 for countries that are parties to the Agreement on Trade in Civil Aircraft. Those countries are Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Japan, Luxembourg, the Netherlands, Norway, Portugal, Romania, Spain, Sweden, Switzerland, and the United Kingdom.

#### **25.408 Procedures.**

(a) When the Trade Agreements Act or NAFTA applies, the contracting officer shall—

(1) Comply with the requirements of 5.203, Publicizing and response time;

(2) Not include technical requirements in solicitations solely to preclude the acquisition of eligible products;

(3) Specify in solicitations that offers shall be submitted 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);

(4) Open offers in the presence of an impartial witness and record this

individual's name in the contract file, if anticipating competitive negotiations; and

(5) Provide unsuccessful offerors from designated or NAFTA countries written notice within 3 days after award of a contract for an eligible product, in accordance with 14.409–1 and 15.503. “Day,” for purposes of the notification process, means calendar day, except that if the last day of the period is a Saturday, Sunday, or legal holiday, the period will be extended until the first subsequent day that is not a Saturday, Sunday, or legal holiday.

(b) Acquisitions under the Trade Agreements Act are subject to the competition requirements of part 6 (see 6.303–1(d)).

(c) See subpart 25.5 for evaluation procedures and examples.

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

#### **25.501 General.**

The contracting officer—

(a) Shall 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) Shall identify and reject offers of end products that are prohibited or sanctioned in accordance with subparts 25.6 and 25.7.

(d) Shall not use the Buy American Act and Balance of Payments Program 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, sanctioned (see subpart 25.6), or a prohibited source (see subpart 25.7).

(2) Rank the remaining offers by price.

(b) For acquisitions subject to the Trade Agreements Act (see 25.401 and 25.403(b))—

(1) Consider only offers of U.S. made, designated country, Caribbean Basin country, or NAFTA 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, designated country, Caribbean Basin country, or NAFTA country end products, make a nonavailability determination (see 25.103(b)(2)) and award on the low offer (see 25.403(d)).

(c) For acquisitions not subject to the Trade Agreements Act—

(1) If the low offer is a domestic offer or an eligible offer under a trade agreement other than the Trade Agreements Act, award on that offer.

(2) If the low offer is a noneligible offer and there were no domestic offers, make a nonavailability determination (see 25.103(b)(2)) and 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 and the Balance of Payments Program provide an evaluation preference only for domestic offers.

(4) Otherwise, apply the appropriate evaluation factor provided in 25.105 or 25.301 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.

(ii) 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) When 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.

(e) *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 or Balance of Payments Program), 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 and Balance of Payments Program, 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 sanctioned or prohibited end products (see subparts 25.6 and 25.7); or

(2) If the Trade Agreements Act applies and part of the offer consists of items restricted under 25.403(d).

(b) Where an offeror restricts award to a group of line items or to all line items contained in its offer, determine for each line item whether to apply an evaluation factor (see 25.504-4, Example 7):

(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 on each line item the offer with the lowest evaluated price.

(2) Evaluate an offer that specifies an award restriction against the proposed 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 8).

(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 the 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)). Although these examples are generally constructed in terms of the Buy American Act, the same evaluation procedures would apply under the Balance of Payments Program. The evaluation factor may change as provided in agency regulations.

#### 25.504-1 Buy American Act/Balance of Payments Program.

(a) *Example 1.*

Offer A .....	\$11,000	Domestic end product, small business.
Offer B .....	10,700	Domestic end product, large business.
Offer C .....	10,000	Foreign end product (noneligible).

*Analysis:* This acquisition is for end products for use in the United States. The Buy American Act applies. Therefore, all foreign end products are noneligible. Perform the steps in 25.502(a). Since the low domestic offer, Offer B, is from a large business, apply the 6 percent factor to Offer C. The resulting evaluated price of \$10,600 remains lower than Offer B. The cost of Offer B is; therefore, unreasonable. Award on Offer C at \$10,000 (see 25.502(c)(4)(i)).

(b) *Example 2.*

Offer A .....	\$11,000	Domestic end product, small business.
Offer B .....	10,700	Domestic end product, large business.
Offer C .....	10,200	Foreign end product (noneligible).

*Analysis:* This acquisition is for end products for use outside the United States. Therefore, the Balance of Payments Program applies and the Buy American Act does not. Apply the 50 percent factor to Offer C. The evaluated price of \$15,300 exceeds the price of Offer B. Award on Offer B (see 25.502(c)(4)(ii)).

**25.504-2 Trade Agreements Act/Caribbean Basin Trade Initiative/NAFTA.**(c) *Example 3.*

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

*Analysis:* Eliminate Offer D because the Trade Agreements Act applies 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 whether 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 Other trade agreements.**(a) *Example 4.*

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

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

(b) *Example 5.*

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

*Analysis:* Since the acquisition is not subject to the Trade Agreements Act, the noneligible offer can be considered. Since no domestic offer was received, make a nonavailability determination and award on Offer B (see 25.502(c)(2)).

(c) *Example 6.*

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 subject to the Trade Agreements Act, the noneligible offer can be considered. 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 7.*

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=18,000	NEL=10,000	DO=14,000
	121,500	116,000	109,000

*Problem:* Offeror C specifies all-or-none award. Assume all offerors are large businesses. The Trade Agreements Act does not apply.

*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 6% 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 6% 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 patterns 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 subject to the Trade Agreements Act. 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%). The remaining items are evaluated 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 8.

Item	Offers		
	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=10,500	DO=10,300	DO=10,400
	91,200	91,800	90,800

**Problem:** The solicitation specifies award on a group basis. Assume the Buy American Act applies and 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 percent	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 percent	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%). 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—Trade Sanctions

### 25.600 Scope of subpart.

This subpart implements sanctions imposed by the President (58 FR 3116, May 28, 1993) pursuant to Section 305(g)(1) of the Trade Agreements Act of 1979, as amended (19 U.S.C. 2515(g)(1)), on European Union (EU) states (sanctioned EU member states) that discriminate against U.S. products or services. This subpart does not apply to contracts for supplies or services awarded and performed outside of the United States or its territories, or to the Department of Defense. For thresholds

unique to individual agencies (e.g., the Power Marketing Administration of the Department of Energy), see agency regulations.

### 25.601 Policy.

(a) Except as provided in 25.602, agencies shall not award contracts for—

(1) Sanctioned EU country end products with an estimated acquisition value less than \$186,000;

(2) Sanctioned EU country construction with an estimated acquisition value less than \$7,143,000; or

(3) Sanctioned EU country services as follows (Federal Service Code or Category from the Federal Procurement Data System Product/Service Code Manual is indicated in parentheses):

(i) Service contracts regardless of acquisition value for—

(A) All transportation services, including launching services (all V codes, J019, J998, J999, K019);

(B) Dredging (Y216, Z216);

(C) Management and operation of certain Government or privately-owned facilities used for Government purposes, including Federally Funded Research and Development Centers (all M codes);

(D) Development, production or coproduction of program material for broadcasting, such as motion pictures (T006, T016);

(E) Research and development (all A codes);

(F) Airport concessions (S203);

(G) Legal services (R418);

(H) Hotel and restaurant services (S203);

(I) Placement and supply of personnel services (V241, V251);

(J) Investigation and security services (S206, S211, R423);

(K) Education and training services (all U codes, R419);

(L) Health and social services (all O codes, all G codes);

(M) Recreational, cultural, and sporting services (G003); or

(N) Telecommunication services (encompassing only voice telephony, telex, radio telephony, paging, and satellite services) (S1, D304, D305, D316, D317, and D399).

(ii) All other service contracts with an estimated acquisition value less than \$186,000.

(b) Determine the applicability of sanction thresholds in the manner provided at 25.403(b).

#### **25.602 Exceptions.**

(a) The sanctions in 25.601 do not apply to—

(1) Purchases at or below the simplified acquisition threshold awarded by simplified acquisition procedures;

(2) Total small business set-asides in accordance with 19.502-2;

(3) Contracts in support of U.S. national security interests; or

(4) Contracts for essential spare, repair, or replacement parts not otherwise available from nonsanctioned countries.

(b)(1) The head of the agency, without power of redelegation, may authorize the award of a contract or class of contracts for sanctioned EU country end products, services, and construction, the purchase of which is otherwise

prohibited by 25.601(a), if the head of the agency determines that such action is necessary—

(i) In the public interest;

(ii) To avoid the restriction of competition in a manner that would limit the acquisition in question to, or would establish a preference for, the services, articles, materials, or supplies of a single manufacturer or supplier; or

(iii) Because there would be or are an insufficient number of potential or actual offerors to ensure the acquisition of services, articles, materials, or supplies of requisite quality at competitive prices.

(2) When a determination is made in accordance with paragraph (b)(1) of this section, the agency shall notify the U.S. Trade Representative within 30 days after contract award.

### **Subpart 25.7—Prohibited Sources**

#### **25.701 Restrictions.**

(a) The Government does not acquire supplies or services that cannot be imported lawfully into the United States. Therefore, agencies and their contractors and subcontractors shall not acquire any supplies or services originating from sources within, or that were located in or transported from or through—

(1) Cuba (31 CFR part 515);

(2) Iran (31 CFR part 560);

(3) Iraq (31 CFR part 575);

(4) Libya (31 CFR part 550);

(5) North Korea (31 CFR part 500); or

(6) Sudan (Executive Order 13067).

(b) Agencies and their contractors and subcontractors shall not acquire any supplies or services from entities controlled by the Government of Iraq (Executive Orders 12722 and 12724).

#### **25.702 Source of further information.**

Questions concerning the restrictions in 25.701 should be referred to the Department of the Treasury, Office of Foreign Assets Control, Washington, D.C. 20220 (Telephone (202) 622-2520).

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

#### **25.801 General.**

Treaties and agreements between the United States and foreign governments affect the manner in which offers from foreign entities are evaluated 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 shall—

(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) Many international agreements are compiled in the "United States Treaties and Other International Agreements" series published by the Department of State. Copies of this publication are normally available in overseas legal offices and U.S. diplomatic missions.

(c) Contracting officers shall 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 shall 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 through 10.104, 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 shall cite this authority on the appropriate customs form when making such purchases (see 19 CFR 10.59 through 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), implements 10 U.S.C. 2313 and 41 U.S.C. 254d. The basic clause authorizes examination of records by the Comptroller General.

(1) The contracting officer shall use the basic clause, whenever possible, in negotiated contracts with foreign contractors.

(2) The contracting officer may use the clause with its Alternate III in contracts with foreign contractors 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 shall—

(1) Identify the contract and its purpose, and whether it is a contract with a foreign contractor or with a foreign government or agency thereof;

(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 clause with its Alternate III.

##### **25.1002 Use of foreign currency.**

(a) Unless a specific currency is required by international agreement or by the Trade Agreements Act (see 25.408(a)(3)), contracting officers shall 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 submission of offers in other than a specified currency is permitted, the contracting officer shall convert the offered prices to U.S. currency for evaluation purposes. The contracting officer shall 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; or

(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 shall 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 the acquisition of services involving the furnishing of supplies.

(a) The contracting officer shall—

(1) Insert the clause at 52.225–1, Buy American Act—Balance of Payments Program—Supplies, in solicitations and contracts with a value exceeding \$2,500 but not exceeding \$25,000, and in solicitations and contracts with a value exceeding \$25,000, when none of the clauses prescribed in paragraphs (b) and (c) of this section apply, except when—

(i) The solicitation is restricted to domestic end products in accordance with subpart 6.3;

(ii) The acquisition is for supplies to be used within the United States and an exception to the Buy American Act applies (e.g., nonavailability or public interest); or

(iii) The acquisition is for supplies to be used outside the United States and an exception to the Balance of Payments Program applies.

(2) Insert the provision at 52.225–2, Buy American Act—Balance of Payments Program Certificate, in solicitations containing the clause at 52.225–1.

(b) The contracting officer shall—

(1)(i) Insert the clause at 52.225–3, Buy American Act—North American Free Trade Agreement—Israeli Trade Act—Balance of Payments Program, in solicitations and contracts with a value exceeding \$25,000 but less than \$186,000, unless the acquisition is exempt from the North American Free Trade Agreement and the Israeli Trade Act (see 25.401). For acquisitions of agencies not subject to the Israeli Trade Act (25.406), see agency regulations.

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

(iii) If the acquisition value is \$50,000 or more but less than \$53,150, use the clause with its Alternate II.

(2)(i) Insert the provision at 52.225–4, Buy American Act—North American Free Trade Agreement—Israeli Trade Act—Balance of Payments Program Certificate, in solicitations containing the clause at 52.225–3.

(ii) If the acquisition value exceeds \$25,000 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 \$53,150, use the provision with its Alternate II.

(c) The contracting officer shall—

(1) Insert the clause at 52.225–5, Trade Agreements, in solicitations and contracts valued at \$186,000 or more, if the Trade Agreements Act applies (see 25.401 and 25.403) and the agency has determined that the restrictions of the Buy American Act or Balance of Payments Program are not applicable to U.S. made end products. If the agency has not made such a determination, the contracting officer shall follow agency procedures.

(2) Insert the provision at 52.225–6, Trade Agreements Certificate, in solicitations containing the clause at 52.225–5.

(d) The contracting officer shall 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).

(e) The contracting officer shall 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 \$100,000; or
- (2) Is \$100,000 or less, but the savings from waiving the duty is anticipated to be more than the administrative cost of waiving the duty. When used for acquisitions valued at \$100,000 or less, paragraphs (b)(1) and (i)(2) of the clause may be modified to reduce the dollar figure.

#### 25.1102 Acquisition of construction.

The contracting officer shall—

- (a) Insert the clause at 52.225-9, Buy American Act—Balance of Payments Program—Construction Materials, in solicitations and contracts for construction valued at less than \$6,909,500. If specified in agency regulations, substitute a 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/Balance of Payments Program 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 or Balance of Payments Program before receipt of offers, use the provision with its Alternate I.

- (c)(1) Insert the clause at 52.225-11, Buy American Act—Balance of Payments Program—Construction Materials Under Trade Agreements, in solicitations and contracts valued at \$6,909,500 or more. If specified in agency regulations, substitute a higher evaluation percentage in paragraph (b)(4)(i) of the clause.

- (2) For acquisitions valued at \$6,909,500 or more, but less than \$7,143,000, use the clause with its Alternate I.

- (d)(1) Insert the provision at 52.225-12, Notice of Buy American Act/Balance of Payments Program 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 or Balance of Payments Program before receipt of offers, use the provision with its Alternate I.

#### 25.1103 Other provisions and clauses.

- (a) *Restrictions on certain foreign purchases.* The contracting officer shall insert the clause at 52.225-13, Restrictions on Certain Foreign Purchases, in solicitations and contracts with a value exceeding \$2,500.

- (b) *Translations.* The contracting officer shall insert the clause at 52.225-

14, Inconsistency Between English Version and Translation of Contract, in solicitations and contracts where translation into another language is anticipated.

- (c) *Sanctions.* (1) Except as provided in paragraph (c)(2) of this section, the contracting officer shall insert the clause at—

- (i) 52.225-15, Sanctioned European Union Country End Products, in solicitations and contracts for supplies valued at less than \$186,000; or

- (ii) 52.225-16, Sanctioned European Union Country Services, in solicitations and contracts for services—

- (A) Listed in 25.601(a)(3)(i); or

- (B) Valued at less than \$186,000.

- (2) The clauses in paragraph (c)(1) of this section shall not be used in—

- (i) Solicitations issued and contracts awarded by a contracting activity located outside of the United States or its territories, provided the supplies will be used or the services performed outside of the United States or its territories;

- (ii) Purchases at or below simplified acquisition threshold awarded using simplified acquisition procedures;

- (iii) Total small business set-asides;

- (iv) Contracts in support of U.S. national security interests;

- (v) Contracts for essential spare, repair, or replacement parts available only from sanctioned EU member states; or

- (vi) Contracts where the head of the agency has made a determination in accordance with 25.602(b).

- (d) *Foreign currency offers.* The contracting officer shall—

- (1) Insert the provision at 52.225-17, Evaluation of Foreign Currency Offers, in solicitations that permit the use of other than a specified currency; and

- (2) Insert in the provision the source of the rate to be used in the evaluation of offers.

### PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

14. Section 52.212-3 is amended by revising the date of the provision and paragraphs (f) and (g) to read as follows:

#### 52.212-3 Offeror Representations and Certifications—Commercial Items.

\* \* \* \* \*

Offeror Representations and Certifications—Commercial Items (Date)

\* \* \* \* \*

(f) *Buy American Act—Balance of Payments Program Certificate.* (Applies only if the clause at Federal Acquisition Regulation (FAR) 52.225-1, Buy American Act—Balance of Payments Program—Supplies, is included in this solicitation.)

- (1) The offeror certifies that each end product, except those listed in paragraph

(f)(2) of this provision, is a domestic end product as defined in the clause entitled “Buy American Act—Balance of Payments Program—Supplies” and that components of unknown origin have been considered to have been mined, produced, or manufactured outside the United States. The offeror shall list as foreign end products those end products manufactured in the United States that do not qualify as domestic end products.

- (2) Foreign End Products:

*Line Item No.*

*Country of Origin*

(List as necessary)

- (3) Offers will be evaluated in accordance with the policies and procedures of FAR Part 25.

(g)(1) *Buy American Act—North American Free Trade Agreement—Israeli Trade Act—Balance of Payments Program Certificate.* (Applies only if the clause at FAR 52.225-3, Buy American Act—North American Free Trade Agreement—Israeli Trade Act—Balance of Payments Program, is included in this solicitation.)

(i) The offeror certifies that each end product, except those listed in paragraph (g)(1)(ii) or (g)(1)(iii) of this provision, is a domestic end product (as defined in the clause of this solicitation entitled “Buy American Act—North American Free Trade Agreement Implementation Act—Israeli Trade Act—Balance of Payments Program,” and that components of unknown origin have been considered to have been mined, produced, or manufactured outside the United States.

(ii) The offeror certifies that the following supplies are NAFTA country end products or Israeli end products as defined in the clause of this solicitation entitled “Buy American Act—North American Free Trade Agreement—Israeli Trade Act—Balance of Payments Program.”

NAFTA Country or Israeli End Products:

*Line Item No.*

*Country of Origin*

(List as necessary)

(iii) The offeror shall list those supplies that are foreign end products (other than those listed in paragraph (g)(1)(ii) of this provision) as defined in the clause of this solicitation entitled “Buy American Act—North American Free Trade Agreement—Israeli Trade Act—Balance of Payments Program.” The offeror shall list as other foreign end products those end products

manufactured in the United States that do not qualify as domestic end products.

Other Foreign End Products:

Line Item No.

Country of Origin

(List as necessary)

(iv) Offers will be evaluated in accordance with the policies and procedures of FAR Part 25.

(2) *Buy American Act—North American Free Trade Agreements—Israeli Trade Act—Balance of Payments Program Certificate, Alternate I (DATE)*. If Alternate I to the clause at FAR 52.225-3 is included in this solicitation, substitute the following paragraph (g)(1)(ii) for paragraph (g)(1)(ii) of the basic provision:

(g)(1)(ii) The offeror certifies that the following supplies are Canadian end products as defined in the clause of this solicitation entitled "Buy American Act—North American Free Trade Agreement—Israeli Trade Act—Balance of Payments Program."

Canadian End Products:

Line Item No.

(List as necessary)

(3) *Buy American Act—North American Free Trade Agreements—Israeli Trade Act—Balance of Payments Program Certificate, Alternate II (DATE)*. If Alternate II to the clause at FAR 52.225-3 is included in this solicitation, substitute the following paragraph (g)(1)(ii) for paragraph (g)(1)(ii) of the basic provision:

(g)(1)(ii) The offeror certifies that the following supplies are Canadian end products or Israeli end products as defined in the clause of this solicitation entitled "Buy American Act—North American Free Trade Agreement—Israeli Trade Act—Balance of Payments Program."

Canadian or Israeli End Products:

Line Item No.

Country of Origin

(List as necessary)

(4) *Trade Agreements Certificate*. (Applies only if the clause at FAR 52.225-5, *Trade Agreements*, is included in this solicitation.)

(i) The offeror certifies that each end product, except those listed in paragraph (g)(4)(ii) of this provision, is a U.S. made, designated country, Caribbean Basin country,

or NAFTA country end product, as defined in the clause of this solicitation entitled "Trade Agreements."

(ii) The offeror shall list as other end products those supplies that are not U.S. made, designated country, Caribbean Basin country, or NAFTA country end products.

Other end products:

Line Item No.

Country of Origin

(List as necessary)

(iii) Offers will be evaluated in accordance with the policies and procedures of FAR Part 25. For line items subject to the Trade Agreements Act, offers of U.S. made, designated country, Caribbean Basin country, or NAFTA country end products will be evaluated without regard to the restrictions of the Buy American Act or the Balance of Payments Program. Only offers of U.S. made, designated country, Caribbean Basin country, or NAFTA country end products will be considered for award unless the Contracting Officer determines that there are no offers for such products or that the offers for such products are insufficient to fulfill the requirements of this solicitation.

15. Section 52.212-5 is amended by revising the clause date; at the end of paragraph (a)(1) by removing "and"; at the end of paragraph (a)(2) by removing the period and inserting "and"; by adding paragraph (a)(3); and by revising paragraphs (b)(11) through (b)(16) to read as follows:

**52.212-5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.**

Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items (Date)

(a) \* \* \*

(3) 52.225-13, Restrictions on Certain Foreign Purchases (E.O.'s 12722, 12724, 13059, and 13067).

(b) \* \* \*

(11) 52.225-1, Buy American Act—Balance of Payment Program—Supplies (41 U.S.C. 10a-10d).

(12)(i) 52.225-3, Buy American Act—North American Free Trade Agreement—Israeli Trade Act—Balance of Payments Program (41 U.S.C. 10a-10d, 19 U.S.C. 3301 note, 19 U.S.C. 2112 note).

(ii) Alternate I of 52.225-3.

(iii) Alternate II of 52.225-3.

(13) 52.225-5, Trade Agreements (19 U.S.C. 2501 *et seq.*, 19 U.S.C. 3301 note).

(14) 52.225-15, Sanctioned European Union Country End Products (E.O. 12849).

(15) 52.225-16, Sanctioned European Union Country Services (E.O. 12849).

\_\_\_\_ (16) [Reserved]

\* \* \* \* \*

16. Section 52.213-4 is amended by revising the date of the clause; and paragraph (a)(2)(i) and paragraph (b)(1)(viii) to read as follows:

**52.213-4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items).**

\* \* \* \* \*

Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items) (Date)

(a) \* \* \*

(2) \* \* \*

(i) 52.225-13, Restrictions on Certain Foreign Purchases (DATE).

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \*

(viii) 52.225-1, Buy American Act—Balance of Payments Program—Supplies (DATE) (41 U.S.C. 10a-10d) (Applies to supplies, and services involving the furnishing of supplies, if the contract—

(A) Does not exceed \$25,000; or

(B) Is set aside for small business concerns, regardless of dollar value).

\* \* \* \* \*

17. Section 52.214-34 is amended by revising the introductory paragraph to read as follows:

**52.214-34 Submission of Offers in the English Language.**

As prescribed in 14.201-6(x), insert the following provision:

\* \* \* \* \*

18. Section 52.214-35 is amended by revising the introductory text to read as follows:

**52.214-35 Submission of Offers in U.S. Currency.**

As prescribed in 14.201-6(y), insert the following provision:

\* \* \* \* \*

19. Section 52.215-1 is amended by revising the date of the provision and paragraph (c)(5) to read as follows:

**52.215-1 Instructions to Offerors—Competitive Acquisitions.**

\* \* \* \* \*

(c) \* \* \*

(5) Proposals submitted in response to this solicitation shall be in English unless otherwise permitted by the solicitation and shall be in U.S. dollars, unless the provision at FAR 52.225-17, Evaluation of Foreign Currency Offers, is included in the solicitation.

\* \* \* \* \*

20. Sections 52.225-1 through 52.225-17 are revised to read as follows:

**Subpart 52.2—Text of Provisions and Clauses**

Sec.

\* \* \* \* \*

- 52.225-1 Buy American Act—Balance of Payments Program—Supplies.
- 52.225-2 Buy American Act—Balance of Payments Program Certificate.
- 52.225-3 Buy American Act—North American Free Trade Agreement—Israeli Trade Act—Balance of Payments Program.
- 52.225-4 Buy American Act—North American Free Trade Agreement—Israeli Trade Act—Balance of Payments Program Certificate.
- 52.225-5 Trade Agreements.
- 52.225-6 Trade Agreements Certificate.
- 52.225-7 Waiver of Buy American Act for Civil Aircraft and Related Articles.
- 52.225-8 Duty-Free Entry.
- 52.225-9 Buy American Act—Balance of Payments Program—Construction Materials.
- 52.225-10 Notice of Buy American Act/Balance of Payments Program Requirement—Construction Materials.
- 52.225-11 Buy American Act—Balance of Payments Program—Construction Materials Under Trade Agreements.
- 52.225-12 Notice of Buy American Act/Balance of Payments Program Requirement—Construction Materials Under Trade Agreements.
- 52.225-13 Restrictions on Certain Foreign Purchases.
- 52.225-14 Inconsistency Between English Version and Translation of Contract.
- 52.225-15 Sanctioned European Union Country End Products.
- 52.225-16 Sanctioned European Union Country Services.
- 52.225-17 Evaluation of Foreign Currency Offers.

\* \* \* \* \*

**Subpart 52.2—Text of Provisions and Clauses****52.225-1 Buy American Act—Balance of Payments Program—Supplies.**

As prescribed in 25.1101(a)(1), insert the following clause:

Buy American Act—Balance of Payments Program—Supplies (Date)

(a) *Definitions.* As used in this clause—  
*Components* means those articles, materials, and supplies incorporated directly into the end products.

*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 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.

*End product* means those articles, materials, and supplies to be acquired under the contract for public use.

*Foreign end product* means an end product other than a domestic end product.

(b) The Buy American Act (41 U.S.C. 10a-10d) provides a preference for domestic end products for supplies acquired for use in the United States. The Balance of Payments Program provides a preference for domestic end products for supplies acquired for use outside the United States.

(c) Offerors may obtain from the Contracting Officer a list of foreign articles that will be treated as domestic for this contract.

(d) The Contractor shall deliver only domestic end products except to the extent that it specified delivery of foreign end products in the provision of the solicitation entitled "Buy American Act—Balance of Payments Program Certificate."

(End of clause)

**52.225-2 Buy American Act—Balance of Payments Program Certificate.**

As prescribed in 25.1101(a)(2), insert the following provision:

Buy American Act—Balance of Payments Program Certificate (Date)

(a) The offeror certifies that each end product, except those listed in paragraph (b) of this provision, is a domestic end product as defined in the clause of this solicitation entitled "Buy American Act—Balance of Payments Program—Supplies" and that components of unknown origin have been considered to have been mined, produced, or manufactured outside the United States. The offeror shall list as foreign end products those end products manufactured in the United States that do not qualify as domestic end products.

(b) Foreign End Products:

Line Item No.

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

Country of Origin

\_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_

(List as necessary)

(c) Offers will be evaluated in accordance with the policies and procedures of Part 25 of the Federal Acquisition Regulation.

(End of provision)

**52.225-3 Buy American Act—North American Free Trade Agreement—Israeli Trade Act—Balance of Payments Program.**

As prescribed in 25.1101(b)(1)(i), insert the following clause:

Buy American Act—North American Free Trade Agreement—Israeli Trade Act—Balance of Payments Program (Date)

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

*Components* means those articles, materials, and supplies incorporated directly into the end products.

*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 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.

*End product* means those articles, materials, and supplies to be acquired under the contract for public use.

*Foreign end product* means an end product other than a domestic end product.

*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.

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

*NAFTA country end product* means an article that—

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

(b) *Components of foreign origin.* Offerors may obtain from the Contracting Officer a list of foreign articles that will be treated as domestic for this contract.

(c) *Implementation.* This clause implements the Buy American Act (41 U.S.C. 10a–10d), the North American Free Trade Agreement Implementation Act (NAFTA) (19 U.S.C. 3301 note), the Israeli Free Trade Area Implementation Act of 1985 (Israeli Trade Act) (19 U.S.C. 2112 note), and the Balance of Payments Program by providing a preference for domestic end products, except for certain foreign end products that are NAFTA country end products or Israeli end products.

(d) *Delivery of end products.* The Contracting Officer has determined that NAFTA and the Israeli Trade Act apply to this acquisition. Unless otherwise specified, these trade agreements apply to all items in the Schedule. The Contractor shall deliver under this contract only domestic end products except to the extent that, in its offer, it specified delivery of foreign end products in the provision entitled “Buy American Act—North American Free Trade Agreement—Israeli Trade Act—Balance of Payments Program Certificate.” An offer specifying that a NAFTA country end product or an Israeli end product will be supplied requires the Contractor to supply a NAFTA country end product, an Israeli end product or, at the Contractor's option, a domestic end product.

(End of clause)

*Alternate I (DATE).* As prescribed in 25.1101(b)(1)(ii), add the following definition to paragraph (a) of the basic clause, and substitute the following paragraph (d) for paragraph (d) of the basic clause:

*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.

(d) *Delivery of end products.* The Contracting Officer has determined that NAFTA applies to this acquisition. Unless otherwise specified, NAFTA applies to all items in the Schedule. The Contractor shall deliver under this contract only domestic end

products except to the extent that, in its offer, it specified delivery of foreign end products in the provision entitled “Buy American Act—North American Free Trade Agreement—Israeli Trade Act—Balance of Payments Program Certificate.” An offer specifying that a Canadian end product will be supplied requires the Contractor to supply a Canadian end product or, at the Contractor's option, a domestic end product.

*Alternate II (DATE).* As prescribed in 25.1101(b)(1)(iii), add the following definition to paragraph (a) of the basic clause, and substitute the following paragraph (d) for paragraph (d) of the basic clause:

*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.

(d) *Delivery of end products.* The Contracting Officer has determined that NAFTA and the Israeli Trade Act apply to this acquisition. Unless otherwise specified, these trade agreements apply to all items in the Schedule. The Contractor shall deliver under this contract only domestic end products except to the extent that, in its offer, it specified delivery of foreign end products in the provision entitled “Buy American Act—North American Free Trade Agreement—Israeli Trade Act—Balance of Payments Program Certificate.” An offer specifying that a Canadian end product or an Israeli end product will be supplied requires the Contractor to supply a Canadian end product, an Israeli end product or, at the Contractor's option, a domestic end product.

**52.225–4 Buy American Act—North American Free Trade Agreement—Israeli Trade Act—Balance of Payments Program Certificate.**

As prescribed in 25.1101(b)(2)(i), insert the following provision:

Buy American Act—North American Free Trade Agreement—Israeli Trade Act—Balance of Payments Program Certificate (Date)

(a) The offeror certifies that each end product, except those listed in paragraph (b) or (c) of this provision, is a domestic end product (as defined in the clause of this solicitation entitled “Buy American Act—North American Free Trade Agreement—Israeli Trade Act—Balance of Payments Program”) and that components of unknown origin have been considered to have been mined, produced, or manufactured outside the United States.

(b) The offeror certifies that the following supplies are NAFTA country end products or

Israeli end products as defined in the clause of this solicitation entitled “Buy American Act—North American Free Trade Agreement—Israeli Trade Act—Balance of Payments Program.”

NAFTA Country or Israeli End Products:

*Line Item No.*

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*Country of Origin*

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(List as necessary)

(c) The offeror shall list those supplies that are foreign end products (other than those listed in paragraph (b) of this provision) as defined in the clause of this solicitation entitled “Buy American Act—North American Free Trade Agreement—Israeli Trade Act—Balance of Payments Program.” The offeror shall list as other foreign end products those end products manufactured in the United States that do not qualify as domestic end products.

Other Foreign End Products:

*Line Item No.*

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*Country of Origin*

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(List as necessary)

(d) Offers will be evaluated in accordance with the policies and procedures of Part 25 of the Federal Acquisition Regulation.

(End of provision)

*Alternate I (DATE).* As prescribed in 25.1101(b)(2)(ii), substitute the following paragraph (b) for paragraph (b) of the basic provision:

(b) The offeror certifies that the following supplies are Canadian end products as defined in the clause of this solicitation entitled “Buy American Act—North American Free Trade Agreement—Israeli Trade Act—Balance of Payments Program.” Canadian End Products:

*Line Item No.*

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(List as necessary)

*Alternate II (DATE).* As prescribed in 25.1101(b)(2)(iii), substitute the following paragraph (b) for paragraph (b) of the basic provision:

(b) The offeror certifies that the following supplies are Canadian end products or Israeli end products as defined in the clause of this solicitation entitled “Buy American Act—North American Free Trade Agreement—Israeli Trade Act—Balance of Payments Program.”

Canadian or Israeli End Products:

Line Item No.

Country of Origin

(List as necessary)

## 52.225-5 Trade Agreements.

As prescribed in 25.1101(c)(1), insert the following clause:

Trade Agreements (Date)

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

*Caribbean Basin country* means any of the following countries: Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, British Virgin Islands, Costa Rica, Dominica, Dominican Republic, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Montserrat, Netherlands Antilles, Nicaragua, Panama, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Trinidad and Tobago.

*Caribbean Basin country end product* means an article that—

(1) Is wholly the growth, product, or manufacture of a Caribbean Basin 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 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. 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. The term excludes products that are excluded from duty-free treatment for Caribbean countries under 19 U.S.C. 2703(b), which presently are—

(i) Textiles and apparel articles that are subject to textile agreements;

(ii) Footwear, handbags, luggage, flat goods, work gloves, and leather wearing apparel not designated as eligible articles for the purpose of the Generalized System of Preferences under Title V of the Trade Act of 1974;

(iii) Tuna, prepared or preserved in any manner in airtight containers;

(iv) Petroleum, or any product derived from petroleum; and

(v) 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.

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  
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 end product* means an article that—

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

*End product* means those articles, materials, and supplies to be acquired under the contract for public use.

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

*NAFTA country end product* means an article that—

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

*U.S. made end product* means an article that has been manufactured in the United States or that has been 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.

(b) *Implementation.* This clause implements the Trade Agreements Act (19 U.S.C. 2501 *et seq.*) and the North American Free Trade Agreement Implementation Act of 1993 (NAFTA) (19 U.S.C. 3301 note), by restricting the acquisition of end products that are not U.S. made, designated country, Caribbean Basin country, or NAFTA country end products.

(c) *Delivery of end products.* The Contracting Officer has determined that the Trade Agreements Act and NAFTA apply to this acquisition. Unless otherwise specified, these trade agreements apply to all items in the Schedule. The Contractor shall deliver under this contract only U.S. made, designated country, Caribbean Basin country, or NAFTA country end products except to the extent that, in its offer, it specified delivery of other end products in the provision entitled "Trade Agreements Certificate."

(End of clause)

## 52.225-6 Trade Agreements Certificate.

As prescribed in 25.1101(c)(2), insert the following provision:

Trade Agreements Certificate (Date)

(a) The offeror certifies that each end product, except those listed in paragraph (b) of this provision, is a U.S. made, designated country, Caribbean Basin country, or NAFTA country end product, as defined in the clause of this solicitation entitled "Trade Agreements."

(b) The offeror shall list as other end products those supplies that are not U.S. made, designated country, Caribbean Basin country, or NAFTA country end products.

Other End Products:

Line Item No.

*Country of Origin*

(List as necessary)

(c) Offers will be evaluated in accordance with the policies and procedures of Part 25 of the Federal Acquisition Regulation. For line items subject to the Trade Agreements Act, offers of U.S. made, designated country, Caribbean Basin country, or NAFTA country end products will be evaluated without regard to the restrictions of the Buy American Act or the Balance of Payments Program. Only offers of U.S. made, designated country, Caribbean Basin country, or NAFTA country end products will be considered for award unless the Contracting Officer determines that there are no offers for such products or that the offers for such products are insufficient to fulfill the requirements of this solicitation.

(End of provision)

**52.225-7 Waiver of Buy American Act for Civil Aircraft and Related Articles.**

As prescribed in 25.1101(d), insert the following provision:

**Waiver of Buy American Act for Civil Aircraft and Related Articles (Date)**

(a) *Civil aircraft and related articles*, as used in this provision, 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.

(b) The U.S. Trade Representative has waived the Buy American Act for acquisitions of civil aircraft and related articles from countries that are parties to the Agreement on Trade in Civil Aircraft. Those countries are Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Japan, Luxembourg, the Netherlands, Norway, Portugal, Romania, Spain, Sweden, Switzerland, and the United Kingdom.

(c) For the purpose of this waiver, an article is a product of a country only if—

(1) It is wholly the growth, product, or manufacture of that country; or

(2) In the case of an article that consists in whole or in part of materials from another country, it has been substantially transformed 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.

(d) The waiver is subject to modification or withdrawal by the U.S. Trade Representative.

(End of provision)

**52.225-8 Duty-Free Entry.**

As prescribed in 25.1101(e), insert the following clause:

**Duty-Free Entry (Date)**

(a) Except as otherwise approved by the Contracting Officer, the Contractor shall not include in the contract price any amount for duties on supplies specifically identified in the Schedule to be accorded duty-free entry.

(b) Except as provided in paragraph (c) of this clause, or elsewhere in this contract, the following procedures apply to supplies not identified in the Schedule to be accorded duty-free entry:

(1) The Contractor shall notify the Contracting Officer, in writing, of any purchase of foreign supplies (including, without limitation, raw materials, components, and intermediate assemblies) in excess of \$10,000 that are to be imported into the customs territory of the United States for delivery to the Government under this contract, either as end products for incorporation into end products. The notice shall be furnished to the Contracting Officer at least 20 calendar days before the importation and shall identify the—

- (i) Foreign supplies;
- (ii) Estimated amount of duty; and
- (iii) Country of origin.

(2) The Contracting Officer shall determine whether any of these supplies should be accorded duty-free entry and shall notify the Contractor within 10 calendar days after receipt of the Contractor's notification.

(3) Except as otherwise approved by the Contracting Officer, the contract price shall be reduced by (or the allowable cost shall not include) the amount of duty that would be payable if the supplies were not entered duty-free.

(c) Notification under paragraph (b) of this clause is not required for purchases of foreign supplies if—

(1) The supplies are identical in nature to items purchased by the Contractor or any subcontractor in connection with its commercial business; and

(2) Segregation of these supplies to ensure use only on Government contracts containing duty-free entry provisions is not economical or feasible.

(d) The Contractor shall claim duty-free entry only for supplies to be delivered to the Government under this contract, either as end products or incorporated into end products, and shall pay duty on supplies, or any portion of them, other than scrap, salvage, or competitive sale authorized by the Contracting Officer, diverted to non-Governmental use.

(e) The Government shall execute any required duty-free entry certificates for supplies to be accorded duty-free entry and shall assist the Contractor in obtaining duty-free entry for these supplies.

(f) Shipping documents for supplies to be accorded duty-free entry shall consign the shipments to the contracting agency in care of the Contractor and shall include the—

(1) Delivery address of the Contractor (or contracting agency, if appropriate);

(2) Government prime contract number;

(3) Identification of carrier;

(4) Notation "UNITED STATES

GOVERNMENT, \_\_\_\_\_ agency \_\_\_\_\_.

Duty-free entry to be claimed pursuant to Item No(s) \_\_\_\_\_ from Tariff Schedules \_\_\_\_\_, Harmonized Tariff Schedules of the United States. Upon arrival of shipment at port of entry, District Director of Customs, please release shipment under 19 CFR 142 and notify [cognizant contract administration office] for execution of Customs Forms 7501 and 7501-A and any required duty-free entry certificates;"

(5) Gross weight in pounds (if freight is based on space tonnage, state cubic feet in addition to gross shipping weight); and

(6) Estimated value in United States dollars.

(g) The Contractor shall instruct the foreign supplier to—

(1) Consign the shipment as specified in paragraph (f) of this clause;

(2) Mark all packages with the words "UNITED STATES GOVERNMENT" and the title of the contracting agency; and

(3) Include with the shipment at least two copies of the bill of lading (or other shipping document) for use by the District Director of Customs at the port of entry.

(h) The Contractor shall provide written notice to the cognizant contract administration office immediately after notification by the Contracting Officer that duty-free entry will be accorded foreign supplies or, for duty-free supplies identified in the Schedule, upon award by the Contractor to the overseas supplier. The notice shall identify the—

- (1) Foreign supplies;
- (2) Country of origin;
- (3) Contract number; and
- (4) Scheduled delivery date(s).

(i) The Contractor shall include the substance of this clause in any subcontract if—

(1) Supplies identified in the Schedule to be accorded duty-free entry will be imported into the customs territory of the United States; or

(2) Other foreign supplies in excess of \$10,000 may be imported into the customs territory of the United States.

(End of clause)

**52.225-9 Buy American Act—Balance of Payments Program—Construction Materials.**

As prescribed in 25.1102(a), insert the following clause:

**Buy American Act—Balance of Payments Program—Construction Materials (Date)**

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

*Components* means those articles, materials, and supplies incorporated directly into construction materials.

*Construction material* means an article, material, or supply brought to the construction site by the 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, shall be evaluated as a single and distinct construction material regardless of when or how the individual parts or components of such systems are delivered to the construction site.

*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.

*Foreign construction material* means a construction material other than a domestic construction material.

(b) *Domestic preference.* (1) This clause implements the Buy American Act (41 U.S.C. 10a–10d) and the Balance of Payments Program by providing a preference for domestic construction material. Only

domestic construction material shall be used in performing this contract, except as provided in paragraphs (b)(2) and (b)(3) of this clause.

(2) This requirement does not apply to the construction material or components listed by the Government as follows:

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

(3) Other foreign construction material may be added to the list in paragraph (b)(2) of this clause if the Government determines that—

(i) The cost of domestic construction material would be unreasonable. The cost of a particular domestic construction material subject to the requirements of the Buy American Act shall be determined to be unreasonable when the cost of such material exceeds the cost of foreign material by more than 6 percent. For determination of unreasonable cost under the Balance of Payments Program, a factor of 50 percent shall be used;

(ii) The application of the restriction of the Buy American Act or Balance of Payments Program to a particular construction material would be impracticable or inconsistent with the public interest; or

(iii) The construction material is not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality.

(c) *Request for determination of inapplicability of the Buy American Act or Balance of Payments Program.* (1)(i) Any Contractor request to use foreign construction material in accordance with paragraph (b)(3) of this clause shall include adequate information for Government evaluation of the request, including a description of the foreign and domestic construction materials, unit of measure, quantity, price, time of delivery or availability, location of the construction project, name and address of the proposed supplier, and a detailed justification of the

reason for use of foreign construction materials cited in accordance with paragraph (b)(3) of this clause. A request based on unreasonable cost shall include a reasonable survey of the market and a completed price comparison table in the format in paragraph (d) of this clause. The price of construction material shall include all delivery costs to the construction site and any applicable duty (whether or not a duty-free certificate may be issued).

(ii) Any Contractor request for a determination submitted after contract award shall explain why the determination could not have been requested before contract award or why the need for such determination otherwise was not reasonably foreseeable. If the Contractor does not submit a satisfactory explanation, the Government need not make a determination.

(2) If the Government determines after contract award that an exception to the Buy American Act or Balance of Payments Program applies, the contract shall be modified to allow use of the foreign construction material, and adequate consideration shall be negotiated. However, when the basis for the exception is the unreasonable price of a domestic construction material, adequate consideration shall not be less than the differential established in paragraph (b)(3)(i) of this clause.

(3) Unless the Government determines that an exception to the Buy American Act or Balance of Payments Program applies, use of foreign construction material shall be considered noncompliant with the Buy American Act or Balance of Payments Program.

(d) *Data to be supplied.* To permit evaluation of requests under paragraph (c) of this clause based on unreasonable cost, the Contractor shall include the following information and any applicable supporting data based on the survey of suppliers:

#### FOREIGN AND DOMESTIC CONSTRUCTION MATERIALS PRICE COMPARISON

Construction material description	Unit of measure	Quantity	Price (dollars)*
Item 1:			
Foreign construction material .....	.....	.....	.....
Domestic construction material .....	.....	.....	.....
Item 2:			
Foreign construction material .....	.....	.....	.....
Domestic construction material .....	.....	.....	.....

List name, address, telephone number, and contact for suppliers surveyed. Attach copy of response; if oral, attach summary.

Include other applicable supporting information.

\* Include all delivery costs to the construction site and any applicable duty (whether or not a duty-free entry certificate is issued).

(End of clause)

#### 52.225–10 Notice of Buy American Act/ Balance of Payments Program Requirement—Construction Materials.

As prescribed in 25.1102(b)(1), insert the following provision:

Notice of Buy American Act/Balance of Payments Program Requirement—Construction Materials (Date)

(a) *Definitions.* Construction material, domestic construction material, and foreign construction material, as used in this provision, are defined in the clause of this solicitation entitled "Buy American Act—Balance of Payments Program—Construction Materials" (Federal Acquisition Regulation (FAR) clause 52.225–9).

(b) *Requests for determinations of inapplicability.* An offeror requesting a determination regarding the inapplicability of the Buy American Act or Balance of Payments Program should submit the request to the Contracting Officer in time to allow a determination before submission of offers. The information and applicable supporting data required by paragraphs (c) and (d) of the clause at FAR 52.225–9 shall be included in the request. If an offeror has not requested a

determination regarding the inapplicability of the Buy American Act or Balance of Payments Program before submitting its offer, or has not received a response to a previous request, the information and supporting data shall be included in the offer.

(c) *Evaluation of offers.* (1) The Government will evaluate an offer requesting exception to the requirements of the Buy American Act or Balance of Payments Program, based on claimed unreasonable cost of domestic construction material, by adding to the offered price the appropriate percentage of the cost of such foreign construction material, as specified in paragraph (b)(3)(i) of the clause at FAR 52.225-9.

(2) If evaluation results in a tie between an offeror that has requested the substitution of foreign construction material based on unreasonable cost and an offeror that has not requested such an exception, the Contracting Officer shall award to the offeror that has not requested an exception based on unreasonable cost.

(d) *Alternate offers.* (1) When an offer includes foreign construction material not listed by the Government in this solicitation in paragraph (b)(2) of the clause at FAR 52.225-9, the offeror also may submit an alternate offer based on use of equivalent domestic construction material.

(2) If an alternate offer is submitted, the offeror shall submit a separate Standard Form 1442 for the alternate offer, and a separate price comparison table prepared in accordance with paragraphs (c) and (d) of the clause at FAR 52.225-9 for the offer that is based on the use of any foreign construction material for which the Government has not yet determined an exception to apply.

(3) If the Government determines that a particular exception requested in accordance with paragraph (c) of the clause at FAR 52.225-9 does not apply, the Government will evaluate only those offers based on use of the equivalent domestic construction material, and the offeror shall be required to furnish such domestic construction material. An offer based on use of the foreign construction material for which an exception was requested—

(i) Shall be rejected as nonresponsive if this acquisition is conducted by sealed bidding; or

(ii) May be accepted if revised during negotiations.

(End of provision)

*Alternate I (DATE).* As prescribed in 25.1102(b)(2), substitute the following paragraph (b) for paragraph (b) of the basic provision:

(b) *Requests for determinations of inapplicability.* An offeror requesting a determination regarding the inapplicability of the Buy American Act or Balance of Payments Program shall submit the request with its offer, including the information and applicable supporting data required by paragraphs (c) and (d) of the clause at FAR 52.225-9.

## **52.225-11 Buy American Act—Balance of Payments Program—Construction Materials Under Trade Agreements.**

As prescribed in 25.1102(c)(1), insert the following clause:

Buy American Act—Balance of Payments Program—Construction Materials Under Trade Agreements (Date)

(a) *Definitions.* As used in this clause—  
*Components* means those articles, materials, and supplies incorporated directly into construction materials.

*Construction material* means an article, material, or supply brought to the construction site by the 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, shall be evaluated as a single and distinct construction material regardless of when or how the individual parts or components of such systems are delivered to the construction site.

*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  
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 materials 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.

*Foreign construction material* means a construction material other than a domestic construction material.

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

*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 materials from which it was transformed.

(b) *Construction materials.* (1) This clause implements the Buy American Act (41 U.S.C.



10a–10d) and 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.

(2) Only domestic, designated country, or NAFTA country construction material shall be used in performing this contract, except as provided in paragraphs (b)(3) and (b)(4) of this clause.

(3) The requirement in paragraph (b)(2) of this clause does not apply to the construction materials or components listed by the Government as follows:

**Contract**

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

(4) Other foreign construction material may be added to the list in paragraph (b)(3) of this clause if the Government determines that—

(i) The cost of domestic construction material would be unreasonable. The cost of a particular domestic construction material subject to the restrictions of the Buy American Act shall be determined to be unreasonable when the cost of such material exceeds the cost of foreign material by more than 6 percent. For determination of unreasonable cost under the Balance of

Payments Program, a factor of 50 percent shall be used;

(ii) The application of the restriction of the Buy American Act or Balance of Payments Program to a particular construction material would be impracticable or inconsistent with the public interest; or

(iii) The construction material is not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality.

(c) *Request for determination of inapplicability of the Buy American Act or Balance of Payments Program.* (1)(i) Any Contractor request to use foreign construction material in accordance with paragraph (b)(4) of this clause shall include adequate information for Government evaluation of the request, including a description of the foreign and domestic construction materials, unit of measure, quantity, price, time of delivery or availability, location of the construction project, name and address of the proposed supplier, and a detailed justification of the reason for use of foreign construction materials cited in accordance with paragraph (b)(4) of this clause. A request based on unreasonable cost shall include a reasonable survey of the market and a completed price comparison table in the format in paragraph (d) of this clause. The price of construction material shall include all delivery costs to the construction site and any applicable duty (whether or not a duty-free certificate may be issued).

(ii) Any Contractor request for a determination submitted after contract award shall explain why the determination could not have been requested before contract award or why the need for such determination otherwise was not reasonably foreseeable. If the Contractor does not submit a satisfactory explanation, the Government need not make a determination.

(2) If the Government determines after contract award that an exception to the Buy American Act or Balance of Payments Program applies, the contract shall be modified to allow use of the foreign construction material, and adequate consideration shall be negotiated. However, when the basis for the exception is the unreasonable price of a domestic construction material, adequate consideration shall not be less than the differential established in paragraph (b)(4)(i) of this clause.

(3) Unless the Government determines that an exception to the Buy American Act or Balance of Payments Program applies, use of foreign construction material shall be considered noncompliant with the Buy American Act or Balance of Payments Program.

(d) *Data to be supplied.* To permit evaluation of requests under paragraph (c) of this clause based on unreasonable cost, the Contractor shall include the following information and any applicable supporting data based on the survey of suppliers:

#### FOREIGN AND DOMESTIC CONSTRUCTION MATERIALS PRICE COMPARISON

Construction material description	Unit of measure	Quantity	Price (dollars)*
Item 1:			
Foreign construction material .....	.....	.....	.....
Domestic construction material .....	.....	.....	.....
Item 2:			
Foreign construction material .....	.....	.....	.....
Domestic construction material .....	.....	.....	.....

List name, address, telephone number, and contact for suppliers surveyed. Attach copy of response; if oral, attach summary.

Include other applicable supporting information.

\*Include all delivery costs to the construction site and any applicable duty (whether or not a duty-free entry certificate is issued).

(End of clause)

*Alternate I (DATE).* As prescribed in 25.1102(c)(2), substitute the following paragraphs (b)(1) and (b)(2) for paragraphs (b)(1) and (b)(2) of the basic clause:

(b) *Construction materials.* (1) This clause implements the Buy American Act (41 U.S.C. 10a–10d) and the Balance of Payments Program by providing a preference for domestic construction material. In addition, the Contracting Officer has determined that the North American Free Trade Agreement (NAFTA) applies to this acquisition. Therefore, the Buy American Act and Balance of Payments Program restrictions are waived for NAFTA country construction materials.

(2) Only domestic or NAFTA country construction material shall be used in performing this contract, except as provided in paragraphs (b)(3) and (b)(4) of this clause.

#### 52.225–12 Notice of Buy American Act/ Balance of Payments Program Requirement—Construction Materials Under Trade Agreements.

As prescribed in 25.1102(d)(1), insert the following provision:

Notice of Buy American Act/Balance of Payments Program Requirement—Construction Materials Under Trade Agreements (Date)

(a) *Definitions.* *Construction material, designated country construction material, domestic construction material, foreign construction material, and NAFTA country construction material*, as used in this provision, are defined in the clause of this solicitation entitled “Buy American Act—Balance of Payments Program—Construction Materials Under Trade Agreements” (Federal Acquisition Regulation (FAR) clause 52.225–11).

(b) *Requests for determination of inapplicability.* An offeror requesting a determination regarding the inapplicability of the Buy American Act or Balance of Payments Program should submit the request to the Contracting Officer in time to allow a determination before submission of offers. The information and applicable supporting data required by paragraphs (c) and (d) of the clause at FAR 52.225–11 shall be included in the request. If an offeror has not requested a determination regarding the inapplicability of the Buy American Act or Balance of Payments Program before submitting its offer, or has not received a response to a previous request, the information and supporting data shall be included in the offer.

(c) *Evaluation of offers.* (1) The Government will evaluate an offer requesting exception to the requirements of the Buy American Act or Balance of Payments Program, based on claimed unreasonable cost of domestic construction material, by adding

to the offered price the appropriate percentage of the cost of such foreign construction material, as specified in paragraph (b)(4)(i) of the clause at FAR 52.225-11.

(2) If evaluation results in a tie between an offeror that has requested the substitution of foreign construction material based on unreasonable cost and an offeror that has not requested such an exception, the Contracting Officer shall award to the offeror that has not requested an exception based on unreasonable cost.

(d) *Alternate offers.* (1) When an offer includes foreign construction material, other than designated country or NAFTA country construction material, that is not listed by the Government in this solicitation in paragraph (b)(3) of the clause at FAR 52.225-11, the offeror also may submit an alternate offer based on use of equivalent domestic, designated country, or NAFTA country construction material.

(2) If an alternate offer is submitted, the offeror shall submit a separate Standard Form 1442 for the alternate offer, and a separate price comparison table prepared in accordance with paragraphs (c) and (d) of the clause at FAR 52.225-11 for the offer that is based on the use of any foreign construction material for which the Government has not yet determined an exception to apply.

(3) If the Government determines that a particular exception requested in accordance with paragraph (c) of the clause at FAR 52.225-11 does not apply, the Government will evaluate only those offers based on use of the equivalent domestic, designated country, or NAFTA country construction material, and the offeror shall be required to furnish such domestic, designated country, or NAFTA country construction material. An offer based on use of the foreign construction material for which an exception was requested—

(i) Shall be rejected as nonresponsive if this acquisition is conducted by sealed bidding; or

(ii) May be accepted if revised during negotiations.

(End of provision)

*Alternate I (DATE).* As prescribed in 25.1102(d)(2), substitute the following paragraph (b) for paragraph (b) of the basic provision:

(b) *Requests for determinations of inapplicability.* An offeror requesting a determination regarding the inapplicability of the Buy American Act or Balance of Payments Program shall submit the request with its offer, including the information and applicable supporting data required by paragraphs (c) and (d) of the clause at FAR 52.225-11.

#### **52.225-13 Restrictions on Certain Foreign Purchases.**

As prescribed in 25.1103(a), insert the following clause:

Restrictions on Certain Foreign Purchases (Date)

(a) The Contractor shall not acquire, for use in the performance of this contract, any supplies or services originating from sources within, or that were located in or transported from or through countries, whose products are banned from importation into the United States under regulations of the Office of Foreign Assets Control, Department of the Treasury. Those countries are Cuba, Iran, Iraq, Libya, North Korea, and Sudan.

(b) The Contractor shall not acquire for use in the performance of this contract any supplies or services from entities controlled by the Government of Iraq.

(c) The Contractor shall insert this clause, including this paragraph (c), in all subcontracts.

(End of clause)

#### **52.225-14 Inconsistency Between English Version and Translation of Contract.**

As prescribed in 25.1103(b), insert the following clause:

Inconsistency Between English Version and Translation of Contract (Date)

In the event of inconsistency between any terms of this contract and any translation thereof into another language, the English language meaning shall control.

(End of clause)

#### **52.225-15 Sanctioned European Union Country End Products.**

As prescribed in 25.1103(c)(1)(i), insert the following clause:

Sanctioned European Union Country End Products (Date)

(a) *Definitions.* As used in this clause—  
*Sanctioned European Union (EU) country end product* means an article that—

(1) Is wholly the growth, product, or manufacture of a sanctioned EU member state; 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 sanctioned EU member state 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.

*Sanctioned EU member state* means Austria, Belgium, Denmark, Finland, France, Ireland, Italy, Luxembourg, the Netherlands, Sweden, or the United Kingdom.

(b) The Contractor shall not deliver any sanctioned EU country end products under this contract.

(End of clause)

#### **52.225-16 Sanctioned European Union Country Services.**

As prescribed in 25.1103(c)(1)(ii), insert the following clause:

Sanctioned European Union Country Services (Date)

(a) *Definition.* *Sanctioned European Union (EU) member state* means Austria, Belgium, Denmark, Finland, France, Ireland, Italy, Luxembourg, the Netherlands, Sweden, or the United Kingdom.

(b) The Contractor shall not perform services under this contract in a sanctioned EU member state. This prohibition does not apply to subcontracts.

(End of clause)

#### **52.225-17 Evaluation of Foreign Currency Offers.**

As prescribed in 25.1103(d), insert the following provision:

Evaluation of Foreign Currency Offers (Date)

If offers are received in more than one currency, offers shall be evaluated by converting the foreign currency to United States currency using [Contracting Officer to insert source of rate] in effect as follows:

(a) For acquisitions conducted using sealed bidding procedures, on the date of bid opening; or

(b) For acquisitions conducted using negotiation procedures—

(1) On the date specified for receipt of offers, if award is based on initial offers; otherwise

(2) On the date specified for receipt of final proposal revisions.

(End of provision)

#### **52.225-18 52.225-22 [Removed]**

21. Sections 52.225-18 through 52.225-22 are removed.

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