Program Office. It should be noted that reporting non-appropriated funds may impact certain reports generated using FPDS data regarding appropriated funds. FAR language remains unchanged.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because contract reporting is not accomplished by the vendor community, only by Government contracting entities.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 1, 2, 4, 12, and 52

Government procurement.

Dated: December 24, 2008

Edward Loeb,

Acting Director, Office of Acquisition Policy.

■ Accordingly, DoD, GSA, and NASA adopt the interim rule amending 48 CFR parts 1, 2, 4, 12, and 52, which was published in the **Federal Register** at 73 FR 21773, April 22, 2008, as a final rule with the following change:

PART 4—ADMINISTRATIVE MATTERS

■ 1. The authority citation for 48 CFR part 4 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

4.601 [Amended]

■ 2. Amend section 4.601 by removing from the introductory paragraph of the definition ''Indefinite delivery vehicle (IDV)'' the word ''contract'' and adding ''contract or agreement'' in its place.

[FR Doc. E9–556 Filed 1–14–09; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 3, 12, 23, 25, and 52

[FAC 2005–30; FAR Case 2000–305; Item II; Docket 2009-0001; Sequence 1]

RIN 9000–AJ55

Federal Acquisition Regulation; FAR Case 2000–305, Commercially Available Off-the-Shelf (COTS) Items

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

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to implement Section 4203 of the Clinger-Cohen Act of 1996 (41 U.S.C. 431) (the Act) with respect to the inapplicability of certain laws to contracts and subcontracts for the acquisition of commercially available off-the-shelf (COTS) items.

DATES: *Effective Date*: February 17, 2009.

FOR FURTHER INFORMATION CONTACT: Mr. Michael Jackson, Procurement Analyst, at (202) 208–4949 for clarification of content. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501–4755. Please cite FAC 2005–30, FAR case 2000–305.

SUPPLEMENTARY INFORMATION:

A. Background

Section 35 of the Office of Federal Procurement Policy (OFPP) Act (41 U.S.C. 431) requires that the Federal Acquisition Regulation (FAR) include a list of provisions of law that are inapplicable to contracts for the acquisition of commercially available off-the-shelf (COTS) items. Certain laws cannot be exempt from the acquisition of COTS and they include laws that—

- Provide for criminal or civil penalties;
- Specifically refer to 41 U.S.C. 431 and the laws state that it applies to COTS;
- Provide for a bid protest procedure or small business preference listed at 41 U.S.C. 431(a)(3); or
- Are applicable because the Administrator of OFPP makes a written determination that it would not be in the best interest of the United States to exempt such COTS contracts from the applicability of the laws.

In order to implement section 4203 of the Clinger-Cohen Act of 1996, DoD, GSA, and NASA published an advanced notice of proposed rule (ANPR) in the **Federal Register** at 68 FR 4874, January 30, 2003. The ANPR listed provisions that may be inapplicable to the acquisition of COTS items, and requested public comment. (A prior ANPR had been issued under FAR Case 96–308.) The Councils published a proposed rule at 69 FR 2448, January 15, 2004. The comment period closed on March 15, 2004. The Councils received comments from 56 respondents, of which 3 were duplicates. The comments were thoroughly examined by the FAR Acquisition Law Team, Civilian Agency Acquisition Council (CAAC), and Defense Acquisition Regulations Council (DARC).

B. Definition of COTS.

The Councils received several comments on the definition of COTS.

1. Include services/IT in the definition. One respondent suggested that the definition of COTS item should delete the words ''of supply'' from the definition. The respondent states that this is not part of the statutory definition. Further, three respondents commented that definition of COTS should specifically include services. Another respondent suggested additional language in the definition of COTS to address software and other information technology products.

Response: The statute defines ''COTS item'' as an item that ''Is a commercial item as described in section 4(12)(A).'' ''Commercial item'' is defined at 41 U.S.C. 403(12). Paragraph (A) of that definition reads as follows:

''Any item, other than real property, that is of a type customarily used by the general public or by non-governmental purposes, and that—

(i) Has been sold, leased, or licensed to the general public; or

(ii) Has been offered for sale, lease or license to the general public.''

Paragraphs (F) and (G) of the definition deal with commercial services. These paragraphs were not referenced in the statutory definition of a COTS item. Services are therefore necessarily excluded from the definition. To make the definition clearer, the reference to the definition of commercial item has been revised to point to the first paragraph of the definition of commercial item.

The Councils have clarified that the words ''of supply'' include

''construction material''. Although the definition of ''construction materials'' states that they are ''supplies'', FAR Part 25 distinguishes between Buy American Act—Supplies (FAR Subpart 25.1) and Buy American Act—Construction materials (FAR Subpart 25.2). Therefore, this clarification is beneficial. The OFPP memorandum, dated February 14, 2008, specifically mentions waiver of the component test at 41 U.S.C. 10a (supply) and 10b (construction.)

Since the only laws waived are the component test of the Buy American Act and the recycled material estimate and certification, and no laws relating to FAR Part 27 have been waived, it is unnecessary to specifically mention information technology (IT) or software in the definition of COTS item.

2. ''Without modification''. One respondent considers the phrase ''without modification'' to be too restrictive. Some COTS products may require some type of modification to suit the intended use of the product.

Response: The phrase ''without modification'' is required by statute. However, the Councils have added ''under a contract or subcontract at any tier'' to clarify that whether an item is a COTS item is determined at the point of sale to the next higher tier subcontractor. This is consistent with the DoD definition of ''COTS item'' as applied to the waiver of specialty metals restrictions when acquiring COTS items. If a COTS item is accepted by the next high tier without modification, then any waiver applicable to COTS items is applicable to this item at the time of acceptance, even if it is subsequently modified. Although this distinction is not necessary in this particular rule, because both laws being waived apply only at the level of the prime contract, it is beneficial to keep this definition clear and consistent, in case a law is waived in the future that applies at the subcontract level. This intent to address COTS items at the subcontract level is demonstrated in section 804 of the National Defense Authorization Act for Fiscal Year 2008 (Pub. L. 110–181), which states in paragraph (b) (10 U.S.C. 2533b(h)) that ''This section does not apply to contracts or subcontracts for the acquisition of commercially available off-the-shelf items, as defined in section 35(c) of the Office of Federal Procurement Policy Act (41 U.S.C. 431(c))…''.

3. ''Sold in substantial quantities.'' One respondent requests that this should be clarified, that it is not necessary that the contractor itself sells substantial quantities. Multiple vendors may sell the item in substantial quantities in the commercial marketplace.

Response: This definition is statutory. There is nothing in the definition that implies that it is the contractor that must sell the item in substantial quantities in the commercial marketplace. The way the definition reads, the substantial quantities test does apply to the item, as suggested by the respondent.

4. Incorporate definition of COTS into FAR 52.202–1, Definitions. One respondent recommended that the definition of COTS item should be incorporated into FAR 52.202–1, Definitions, because the proposed rule added a cross reference in FAR 52.244–6 to the definition of COTS item at FAR 52.202–1.

Response: This comment was correct at the time, but has been overtaken by events. First, the final rule does not make the proposed change to FAR 52.244–6. In addition, the clause at FAR 52.202–1 was rewritten under another case, so that it no longer contains a list of definitions. Rather, it refers to where definitions can be found and provides guidance as to which definitions apply, when a term is defined in more than one place.

5. Subset of commercial items. The proposed rule included in the definition of COTS item the statement that COTS items are a subset of commercial items. Although no public comments were received on this issue, the Councils decided that it is redundant to state that COTS items are a subset of commercial items when the definition itself requires that COTS items meet the definition of the first paragraph of the definition of commercial item. This information that COTS items are a subset of commercial items is now provided at FAR 12.505, rather than in the definition.

C. Implementation of COTS in FAR Part 12.

The draft final rule modifies FAR Subparts 12.1, 12.3, and 12.5 as proposed, to address COTS items, and adds the section 12.505. However, because only 2 laws are being waived, section 12.505 has been modified to include only those 2 laws, while stating that all laws waived for contracts or subcontracts for the acquisition of commercial items are also waived for COTS (because it is a subset). This more clearly identifies the differences that apply to COTS items.

The rule does not make any change to FAR 12.504, based on the recommendation of SBA. An extraneous proposal to delete 15 U.S.C. 644(d), not directly related to this case, has been removed. SBA states that, although FASA attempted to eliminate labor surplus areas for purposes of subcontracting, the drafters of FASA missed the reference to subcontracting in 15(d) of the Small Business Act. Therefore, until this error is corrected, it is better to leave it on the list of laws that are inapplicable to subcontracts for the acquisition of COTS items.

D. Determination by OFPP.

After considering the analysis and recommendations as to laws that should be waived for the acquisition of COTS items, the Administrator for the Office of Federal Procurement Policy, made a determination on February 14, 2008, of the laws applicable and laws inapplicable to the acquisition of COTS items.

1. Laws Waived. The Administrator of OFPP exercised the authority to wholly or partially waive the following laws:

a. Buy American Act. A partial waiver of the Buy American Act (BAA)(41 U.S.C. 10a and 10b), limited to the Act's domestic components test was granted.

b. Estimate of Percentage of Recovered Material Act. The Estimate of Percentage of Recovered Material Act (42 U.S.C. 6962(c)(3)(A)) was waived in its entirety.

2. Waiver still under consideration. A partial waiver of the following law is under consideration and a determination and findings will be made on this law at a later date:

Rights in Technical Data (41 U.S.C. 418a and 10 U.S.C. 2520), specifically waiver of—

•Unlimited Government rights in data for operation, maintenance, installation, or training; and

• The Government's right to make unlimited copies.

3. Laws already inapplicable or modified for the acquisition of commercial items. No further modification was made to any of the following laws, which have already been determined inapplicable or modified for the acquisition of commercial items:

a. Walsh-Healey, 41 U.S.C. 43.

b. Contingent Fees, 41 U.S.C. 254(a) and 10 U.S.C. 2306(b).

c. Minimum response time, 41 U.S.C. 416(a) (3) and (6).

d. Drug Free Workplace, 41 U.S.C. 701.

e. Limitation on the use of appropriated funds, 31 U.S.C. 1354(a).

f. Contract Work Hours and Safety Standards Act, 40 U.S.C. 3701.

g. Anti-Kickback Act of 1986, 41 U.S.C. 57 (a) and (b), and 58.

h. Truth in Negotiations Act, 41 U.S.C. 254(d) and 10 U.S.C. 2306a.

i. Cost Accounting Standards, 41 U.S.C. 422.

4. Law not subject to waiver.

Limitation on appropriated funds to influence certain Federal contracting and financial transactions (31 U.S.C. 1352).

5. Laws that will not be waived because it is not in the best interest of the Government. A determination was made that the following laws will not be waived for the acquisition of COTS because it is not in the best interest of the Government:

a. Trade Agreements Act (19 U.S.C. 2501 and 19 U.S.C. 2512);

b. Restrictions on Advance Payments (31 U.S.C. 3324).

c. Employment Reports for Veterans (38 U.S.C. 4212(d)(l)).

d. Validation of Proprietary Data Restrictions (41 U.S.C. 253d and 10 U.S.C. 2321).

e. Prohibition on Limiting Subcontractor Direct Sales (41 U.S.C. 253g and 10 U.S.C. 2402).

f. Cargo Preference, 10 U.S.C. 2631(a) and 46 U.S.C. 1241(b).

g. Affirmative Action for Workers with Disabilities, 29 U.S.C. 793.

h. Equal opportunity for Special Disabled Veterans, 38 U.S.C. 4212.

i. Examination of records by the Comptroller General, 41 U.S.C. 254d(c) and 10 U.S.C. 2313(c).

j. Fly American Act, 49 U.S.C. 40118 (but see 12.503).

E. Discussion and analysis of laws considered for waiver.

1. Laws Waived.

a. Buy American Act (41 U.S.C. 10a and 10b), component test. Ten respondents specifically endorse waiver of the application of the Buy American Act (BAA) to COTS and 4 respondents endorse the waiver as part of a broad endorsement of the waivers in general, without specific identification or comment. Two respondents oppose the waiver of the BAA as a whole.

Some respondents state that the BAA makes it increasingly difficult for U.S. companies to compete for Federal business. These laws are out of place in the contemporary international market for commercial items. Companies must source products globally in order to be competitive in the worldwide marketplace. Therefore, companies must choose between being competitive in the global market and being competitive in the Government market. The BAA usually does not influence COTS manufacturers because revenue derived from Government sales is typically a very small percentage of overall revenue for COTS.

• Therefore, Federal agencies are often denied access to the most productive, cost-effective technology.

• BAA restrictions may also hamper the Government's ability to fully implement federal policies. It may hinder Government access to technology compliant with Section 508 of the Rehabilitation Act of 1973 (accessible to employees with disabilities) and the most energy-efficient products, as required by E.O. 13101 and 13123.

Some respondents are concerned that the Government-unique requirement to track where components are being manufactured imposes a severe administrative burden, especially on small business. It requires contractors to establish and maintain costly and labor intensive management systems. Tracking the place of manufacture and component value is not necessary for the general origin labeling requirements applicable generally in the U.S. commercial market place. BAA compliance is a major procurement requirement that adds complexity and cost to the delivery of goods to the Government. The increased cost of ensuring compliance with the BAA keeps some firms out of the market completely and affects the price of products sold to the Government.

Another issue for respondents is that application of the regulations relating to the BAA is very complex and difficult. The certification requirements potentially expose manufacturers to civil false claims and other legal sanctions, even when they have taken extraordinary steps to comply with the BAA.

Some respondents contend that Congress mandates the elimination, where possible, of barriers to the Government's ability to procure commercial items.

Federal agencies contend that it is difficult and causes delay to try to obtain case-by-case waivers of the BAA.

On the other hand, two respondents were concerned that a permanent waiver of the BAA should not be granted without reciprocity. These respondents believed that the Government needs these provisions to stay in general effect so that possibility of waiver will provide incentive to encourage other countries to provide reciprocal access. Agencies can waive the BAA on a case-by-case basis or for a class of items when it is in the public interest to do so.

Response: The Councils concur with the respondents on the especially burdensome nature of the component test. Today's markets are globally integrated with foreign components often indistinguishable from domestic components. Manufacturers' component purchasing decisions are based on factors such as cost, quality, availability, and maintaining the state of the art, not the country of origin, making it much more difficult in today's market for a manufacturer to guarantee the source of its components over the term of a contract. It is even more difficult for a dealer to determine and guarantee the source of the components included in products on the shelf. The difficulty in tracking the country of origin of components is a disincentive for firms to become defense contractors, limiting the ability of the Government to purchase products already in the commercial distribution systems. In today's globally integrated market, it is expensive for manufacturers to distinguish between foreign and domestic components. Requiring them to do so results in increased costs of procurements and impedes the ability to obtain the latest advances in commercial technology.

The rationale provided against waiver of the BAA as a whole is resolved by waiving only the component test of the BAA. The component test of the BAA has already been waived for all acquisitions subject to the World Trade Organization Government Procurement Agreement (WTO GPA). By waiving only the component test of the BAA for COTS items, but still requiring manufacture in the United States, the Government can preserve an incentive to encourage other countries to provide reciprocal access, while reducing the significant administrative burden on contractors and the associated increased cost to the Government.

A determination was made that a waiver of the components test would allow a COTS item to be treated as a domestic end product if it is manufactured in the U.S., without tracking the origin of the components. Waiving only the component test of the BAA for COTS items and still requiring the end product to be manufactured in the U.S., reduces significantly the administrative burden on contractors and the associated cost to the Government. The U.S. Trade Representative's Office was consulted and did not oppose the partial waiver of the BAA. The component test of the BAA was waived because it is in the best interest of the U.S. to do so.

The draft final rule modifies FAR Part 25 and associated clauses to implement waiver of the component test of the BAA:

• Indication of the new waiver at FAR 25.101 (Buy American Act—Supplies, General) and FAR 25.201, (Buy

American Act—Construction Materials, Policy).

• Changes to the definition of ''domestic end product'' and ''domestic construction material'' at FAR 25.003 and in the associated clauses, to include COTS end products or construction materials manufactured in the United States for which the component test of the Buy American Act has been waived; and

• The following FAR provisions and clauses need only minor modifications, to incorporate the new definitions, make discussions of components applicable only to items other than COTS items, and clarify that now a United States end product that does not qualify as a domestic end product is an end product that is not a COTS item and does not meet the component test in paragraph (2) of the definition of ''domestic end product'':

• 52.225–1 Buy American Act—Supplies.

• 52.225–2 Buy American Act Certificate.

• 52.225–3 Buy American Act—Free Trade Agreements—Israeli Trade Act.

• 52.225–4 Buy American Act—Free Trade Agreements—Israeli Trade Act Certificate.

• 52.225–9 Buy American Act—Construction Materials.

• 52.225–10 Notice of Buy American Act Requirement—Construction Materials.

• 52.225–11 Buy American Act—Construction Materials under Trade Agreements, and Alternate I.

• 52.225–12 Notice of Buy American Act Requirement—Construction Materials Under Trade Agreements.

Conforming changes are also required for—

• 52.212–3 Offeror Representations and Certifications—Commercial Items;

• 52.212–5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items; and

• 52.213–4 Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items).

b. Certification and Estimate of Percentage of Recovered Material (42 U.S.C. 6962 (c)(3)(A)). There were no specific comments supporting waiver of the Estimate of Percentage of Recovered Materials. However, ten respondents supported waiver as part of broad general support for the proposed rule. One respondent specifically opposed to waiver of 42 U.S.C. 6962(c)(3)(A), Estimate of Percentage of Recovered Material, because the respondent feels that it may preclude contractors from having to indicate on their products the percent of recycled materials contained therein. Information on the recovered material content is necessary in order for agencies to carry out the intent of the Resource Conservation and Recovery Act (RCRA) and Executive order (E.O.) 13101.

Response: Both the Environmental Protection Agency (EPA) and the Office of the Federal Environmental Executive (OFEE) agree that requiring pre-award certification from offerors and a written estimate of percentage of recovered materials from the contractor after contract completion are unnecessary requirements for COTS. These requirements are a paperwork exercise and are not consistent with buying COTS items from the commercial market place. The recycled content statement on the product packaging serves as the certification and the estimate. The Chief Acquisition Officer and Senior Procurement Executive at EPA and the OFEE were not opposed to waiving the requirement for certification and estimation for COTS items. This does not waive any of the other RCRA requirements. The Government will still acquire competitively, in a cost-effective manner, products that meet reasonable performance requirements and that are composed of the highest percentage of recovered materials practicable.

A determination was made that waiver of this law is in the best interest of the Government because the law's requirements are not consistent with the acquisition of COTS items in the commercial marketplace.

The only necessary changes to implement this waiver are—

i. Modification of the clause prescription at FAR 23.406 to exclude application to COTS items (as proposed); and

ii. Modification of FAR 52.212–5(b)(25)(i) and (ii), to indicate that FAR 52.223–9 is not applicable to the acquisition of COTS items.

2. Waiver still under consideration. Rights in Technical Data (41 U.S.C. § 418a and 10 U.S.C. § 2320).

Ten respondents supported waiver as part of broad general support for the proposed rule (Respondents No. 9, 11, 19, 20, 26, 28, 32, 34, 38, and 40). No respondents opposed the waiver. However, the Councils did not reach consensus on this waiver. The Department of the Treasury opposed waiver of this provision. The proposed waiver of the data rights statutes is based on the premise that, because COTS items are developed at private expense, there would be no Government rights in technical data associated therewith. The Councils do not agree entirely with this premise. For example, FAR 52.227–14 provides for unlimited rights in form, fit and function data; and in manuals and training materials necessary for installation, operation, maintenance, and repair; regardless of whether such data is developed at Government expense. The fact that items delivered under a contract are COTS does not diminish the Government's need to operate and repair them, and form, fit, and function data could be critical if a COTS item is integrated into a Government system and must subsequently be replaced.

The Councils agree that the relevant statutes do not focus only on data related to technologies developed exclusively at the Government's expense - they also cover development in whole or in part at private expense, including commercial item technologies (this is especially clear in the DoD statute, 10 U.S.C. 2320). Further, it is not accurate to conclude that the possibility of Government funding for (elements of) COTS technologies is always ''irrelevant.'' The statutory schemes have numerous elements that are designed to protect important rights and proprietary interests of contractors (and subcontractors), especially in cases of privately developed or commercial technologies.

For example, the Government is prohibited from requiring contractors to provide the Government with detailed design data, and from requiring the contractors to relinquish proprietary rights in data related to proprietary or commercial technologies, as a condition of contract award (see 418a(a), and 2320(a)(2)(F)). Additionally, the DoD scheme specifically and expressly addresses the rights in data related to technologies developed in whole or in part at private expense (2320(a)(2)(B) & (C)), and the civilian statutes requires the regulations to address these funding scenarios (418a(c)(1)). Both statutory schemes also recognize the special requirements under the Small Business Innovation Research (SBIR) program, which allow the small business to treat even 100 percent Government-funded technologies as proprietary for certain periods.

Similarly, the schemes identify and protect the interests of the Government in acquiring and using data for certain important purposes, such as operation and maintenance, or emergency repair and overhaul, of the item. These protections of interests, both for the contractors/subcontractors and the Government, are equally applicable to COTS items as for other commercial items or noncommercial items (as the Department of Treasury notes).

All of these considerations demonstrate that the statutory schemes

are designed to balance Government and private interests in all such acquisitions, and thus should not be waived in their entirety for COTS item acquisitions.

3. Laws already inapplicable or modified for the acquisition of commercial items. None of the respondents commented specifically on any of these laws that are already inapplicable or modified for the acquisition of commercial items, as identified in section C.3. of this notice.

4. Law not subject to waiver.

Limitation on appropriated funds to influence certain Federal contracting and financial transactions (31 U.S.C. 1352). After publication of the proposed rule, the Councils determined that this statute is not eligible for waiver because it provides for criminal or civil penalties.

5. Laws that will not be waived because it is not in the best interest of the Government.

a. Trade Agreements Act (TAA)(19 U.S.C. 2501 and 19 U.S.C. 2512). Many of the respondents (21) endorse waiver of the application of the trade agreements prohibitions to COTS.

On the other hand, 4 respondents (including the United States Trade Representative (USTR) and the Department of Commerce) opposed the waiver.

The proponents of waiver of the purchase restrictions of the Trade Agreements Act (TAA) contend that—

i. The TAA makes it increasingly difficult for U.S. companies to compete for Federal business. These laws are out of place in the contemporary international market for commercial items. Companies must source products globally in order to be competitive in the worldwide marketplace. Therefore, companies must choose between being competitive in the global market and being competitive in the Government market. The trade agreements procurement restriction usually does not influence COTS manufacturers because revenue derived from Government sales is typically a very small percentage of overall revenue for COTS.

• Therefore, Federal agencies are often denied access to the most productive, cost-effective technology.

• TAA restrictions may also hamper the Government's ability to fully implement Federal policies. It may hinder Government access to technology compliant with Section 508 of the Rehabilitation Act of 1973 (accessible to employees with disabilities) and the most energy-efficient products, as required by E.O. 13101 and 13123.

• Although most IT and electronics manufacturing now occurs in Asia, only 4 Asian countries have signed the GPA – Hong Kong, Japan, Singapore, and the Republic of Korea. Asian countries not signatories include China, Indonesia, Malaysia, the Philippines, and Taiwan.

ii. The Government-unique requirement to track where products are being manufactured imposes a severe administrative burden. It requires contractors to establish and maintain costly and labor intensive management systems. TAA compliance is a major procurement requirement that adds complexity and cost to the delivery of goods to the Government. The increased cost of ensuring compliance with the TAA keeps some firms out of the market completely.

iii. Application of the regulations relating to trade agreements is very complex and difficult. It is often difficult to determine ''substantial transformation'' for purposes of the TAA. The certification requirements potentially expose manufacturers to civil False Claims and other legal sanctions, even when they have taken extraordinary steps to comply with the TAA.

iv. Congress mandates the elimination, where possible, of barriers to the Government's ability to procure commercial items.

v. Barring access to the U.S. Government market has not provided the leverage to open foreign government markets that U.S. trade negotiators may have envisioned when the TAA was passed. Several commenters state that of the 145 WTO member countries, only 28 countries have signed the GPA in 25 years, 23 of the signatories being original signatories.

vi. The restrictions of the TAA are not required by any treaty of international agreement, including the GPA. The commenters believe that the U.S. is the only GPA signatory to enact such market restrictions.

vii. It is difficult and causes delay to try to obtain case-by-case waivers of the trade agreements.

The opponents of waiver of the purchase restrictions of the TAA contend that—

i. A permanent waiver would significantly disadvantage U.S. suppliers, especially small businesses, without providing reciprocal market access for them. China, Malaysia, and the Philippines have not joined the GPA or provided benefits in a bilateral agreement.

ii. USTR's ability to waive the TAA purchasing restriction on a case-by-case basis has been a key element in its ability to negotiate reciprocal market access for U.S. suppliers in the government procurement markets of foreign countries, through bilateral FTAs, as well as accession to the GPA. In recent years, USTR has concluded new FTAs with Chile, Australia, Morocco, and more agreements are pending. A permanent waiver for COTS would severely undermine leverage that is critical to USTR's ability to negotiate such agreements.

iii. There is no need for a permanent waiver, because waivers can be granted on a case-by-case basis when in the national interest.

Response: The TAA essentially outlines a process for approval of trade agreements, and the relationship of trade agreements to U.S. law. A determination was made that a waiver of the prohibition on acquisitions of products from countries that have not entered into trade agreements with the United States would put U.S. suppliers, especially small businesses, at a significant disadvantage without providing reciprocal market access for them. China, Malaysia, and the Philippines have not joined the GPA or provided benefits in a bilateral agreement. USTR's ability to waive the TAA purchasing restriction on a case-by-case basis has been a key element in its ability to negotiate reciprocal market access for U.S. suppliers in the government procurement markets of foreign countries, through bilateral Free Trade Agreements (FTA), as well as consent to the GPA. In recent years, USTR has concluded new FTAs with Chile, Australia, Morocco, Bahrain, Dominican Republic-Central America, and more agreements are pending. Therefore, a permanent waiver is not in the best interests of the Government because it would severely undermine leverage that is critical to USTR's ability to negotiate such agreements. USTR can grant waivers on a case-by-case basis when in the national interest.

b. Restrictions on Advance Payments (31 U.S.C. 3324). The Councils received 10 comments that supported waiver as part of broad general support for the proposed rule and two comments specifically supporting the waiver of the restriction on advance payments, whereas one respondent specifically opposed the waiver of the restriction on advance payments.

One respondent supported waiving the restriction on the basis that it would permit the Government to follow the common business practice of ''payment due upon receipt.'' Another respondent supported waiving the restriction because it also believes that it is common business practice to make payment for IT support packages at the beginning of the term. The respondent that opposed the waiver of the statute

was concerned that contracting officers will be faced with demands for advance payments for routine COTS purchases.

Response: In addition to permitting invoicing upon delivery to the ''point of first receipt by the Government,'' the proposed rule would also have allowed invoicing upon delivery of supplies to a post office or common carrier. Consequently, the Government might be obligated to make payment before receipt.

This statute prohibits, except in certain circumstances, payment in excess of the value of supplies or services already delivered or provided. 31 U.S.C. 3324(b) provides that an advance of public money may be made only if it is authorized by a specific appropriation or other law or as authorized by the President in some circumstances. 41 U.S.C. 255(f) and 10 U.S.C. 2307(f) provide some authority for advance payments for commercial items, but treat this as Government financing and require the Government to obtain adequate security. It was determined that a permanent waiver is not necessary because 41 U.S.C. § 255(f) (as implemented by FAR 32.2, Commercial Item Purchase Financing, specifically FAR 32.202–4(a)(2)) already authorizes advance payments for commercial item acquisitions, and agencies have the authority to waive, if it is in the best of the Government.

c. Employment Reports for Veterans (38 U.S.C. 4212(d)(l)). The Councils received one comment specifically in favor of waiving the statute and 10 respondents supported waiver as part of broad general support for the proposed rule. The Councils also received 2 responses specifically opposed to the waiver.

The respondents who favored waiver contended that waiving the statute only affects the submission of a report and data gathering. By waiving the statute, an administrative function would be eliminated but the intent to continue with the regulations to promote veteran employment would remain unchanged.

Respondents who objected to waiver of the statute feared that veteran programs would be impacted.

Response: This statute requires that each contractor that enters into a contract in excess of $100,000 for personal property and non-personal services, including construction, provide an annual report to the Secretary of Labor that includes specific information about their contractor workforce. The report requires Federal contractors and subcontractors to ''take affirmative action'' to hire and promote qualified special disabled veterans, veterans of the Vietnam-era and any veteran who served on active duty during a war or in a campaign or expedition for which a campaign badge has been authorized. Congress has taken a keen interest in the VETS 100 Report, as evidenced by Section 1354 of Public Law 105–339, Veterans Employment Opportunities Act of 1998, which supports this reporting requirement. A determination was made not to waive the requirement for contractors to file employment reports because it is not in the best interest of the Government to do so.

d. Validation of Proprietary Data Restrictions (41 U.S.C. 253d and 10 U.S.C. 2321). 10 respondents supported waiver as part of broad general support for the proposed rule. No respondents opposed the waiver.

Response: This statute provides an extensive procedure for due process for a Government contractor when the Government has a suspicion that technical data the contractor is claiming to be proprietary was, in fact, produced under a Government contract and was not produced at private expense. The validation scheme is also carefully structured to balance the interest of all parties, and create a uniform mechanism to determine the appropriate allocation of rights in the data. These statutes establish procedures, rights, and legal remedies regarding the validation of the asserted proprietary restrictions. A determination was made that these statutes should be available to balance the interest of all parties involved in an acquisition, including COTS.

e. Prohibition on Limiting Subcontractor Direct Sales (41 U.S.C. 253g and 10 U.S.C. 2402). Nine respondents supported waiver as part of broad general support for the proposed rule. One respondent opposed the waiver.This respondent stated that this exemption has some potential for harming small business and the Federal Government itself.

Response: This statute was enacted as part of Pub. L. 98–577, which was intended by Congress as a comprehensive solution to ''$600 toilet seats and $400 hammers.'' This provision answered the practice of major defense contractors prohibiting their subcontractors from selling directly to the Government. In the past, when the prime contractor wanted to be the source to the Government, they would charge at least a material overhead to any cost or price from the subcontractor/supplier. Waiving this Act would allow prime contractors to restrict their subcontractors from selling directly to the Government and limit opportunities for small businesses, including women-owned and minority-owned businesses. A determination was made not to waive this Act so as to ensure competition is preserved for all sectors of the economy.

f. Cargo Preference, 10 U.S.C. 2631(a) and 46 U.S.C. 1241(b). The Councils did not receive any comments specifically supporting waiver of the cargo preference laws for acquisition of COTS. 10 respondents supported waiver as part of broad general support for the proposed rule. 14 respondents specifically opposed a waiver of Cargo Preference laws for COTS, including the following Government agencies:

- U.S. Maritime Administration (MARAD)(Department of Transportation)
- MARAD, Division of Maritime Programs
- Under Secretary of Defense (Acquisition, Technology, and Logistics)
- United States Transportation Command (Department of Defense)

Opponents of the waiver of Cargo Preference laws when acquiring COTS items present the following rationale:

i. The Cargo Preference laws are vital to maintaining a viable merchant marine, including both vessels and mariners.

ii. The proposed waiver is contrary to the Government's maritime policy. The Secretary of Transportation stated in March 2004 that ''cargo preference laws are essential elements of America's national maritime policy.''

iii. Many respondents state that the COTS category represents the vast preponderance of cargo that is carried for or sponsored by the U.S. Government. The MARAD Administrator states that waiver could result in the potential loss of nearly $1.2 billion in revenue to U.S. flag vessel operators and further loss to the economy through job loss. The American Maritime Congress believes that finalization of this waiver will eventually result in more than 100 U.S.-flag vessels in the international trades leaving the U.S. flag, and points out further adverse impact on foreign exchange, and reduced Federal tax revenues.

iv. Weakening of the U.S. maritime industry will adversely impact our country's ability to respond to international crises. We need U.S.-flag vessels to transport troops, machinery, and medical and other critical supplies throughout the world during contingencies or war.

v. The waiver will put at risk two DoD programs (the Voluntary Intermodal Sealift Agreement and the Maritime Security Program) that are essential to U.S. security interests. Through these

programs, DoD has immediate access to reliable commercial maritime assets at a fraction of the cost it would incur if it had to replicate those assets (Transportation Institute). Shippers cannot dedicate valuable assets to the defense and other governmental needs of the United States unless they can rely on a steady flow of cargoes.

vi. DoD needs a viable merchant marine to provide a pool of trained mariners from which DoD crews Defense reserve ships.

vii. U.S.-flag commercial vessels are forced to operate in an international shipping arena that is dominated by state owned and controlled merchant fleets. They are financially disadvantaged due to higher labor costs, vessel standards, and tax disadvantages. Therefore, the U.S.-flag vessels require the help of the U.S. Government to compete.

viii. Waiving the Cargo Preference laws at this time would be inequitable, because shipping companies have relied upon the present laws to take irrevocable business actions.

ix. The American Shipbuilding Association is further concerned that this waiver would adversely impact the defense shipbuilding industry, which in turn, will threaten America's ability to build a Navy and impact the national security of the United States.

x. The FAR Council already made the determination that waiver of Cargo Preference laws for all commercial subcontracts was not in the best interest of the Government. 41 U.S.C. 430 requires that provisions of law described in 41 U.S.C. 430(c) shall be included on the list of inapplicable provisions of law to subcontracts for the procurement of commercial items unless the FAR Council makes a written determination that such exemption would not be in the best interest of the Government. On May 1, 1996, the Administrator of OFPP signed a memorandum stating the policy that the waiver of Cargo preference for commercial subcontracts ''is not intended to waive compliance with the Cargo Preference Laws for ocean cargos clearly destined for eventual military or Government use.'' This memorandum was the result of extensive negotiations between representatives from the national Economic Council, OFPP, DoD, MARAD, and the maritime industry. In 2002, a formal determination was signed by all members of the FAR Council that it would be in the best interest of the Government to limit the waiver of the Cargo preference laws, in accordance with the OFPP memorandum, dated May 1, 1996, as implemented in the FAR through FAR Case 1999–024.

Response: 10 U.S.C. 2631(a), Transportation of Supplies by Sea (The Cargo Preference Act of 1904), requires the use of only U.S.-flag vessels for ocean transportation of supplies owned by, or destined for use by for the Army, Navy, Air Force, or Marine Corps unless those vessels are not available at fair and reasonable rates. 46 U.S.C. 1241(b), Transportation in American Vessels of Government Personnel and Certain Cargo (The Cargo Preference Act of 1954), requires that Government agencies acquiring, either within or outside the United States, supplies that may require ocean transportation shall ensure that at least 50 percent of the gross tonnage of these supplies (computed separately for dry bulk carriers, dry cargo liners, and tankers) is transported on privately owned U.S.-flag commercial vessels to the extent that such vessels are available at rates that are fair and reasonable for U.S.-flag commercial vessels. The Cargo Preference laws are vital to maintaining a viable merchant marine, including both vessels and mariners and are essential elements of America's national maritime policy. Therefore, a determination was made that it is not in the best interest of the Government to waive this Act.

g. Affirmative Action for Workers with Disabilities, 29 U.S.C. 793. The Councils did not receive any specific comments in favor of waiving the statute. 10 respondents supported waiver as part of broad general support for the proposed rule. The Councils received 2 responses specifically opposed to waiver, *i.e.*—

•Department of Veterans Affairs

• U.S. Department of Labor

ANALYSIS: The Department of Veterans Affairs (VA) objected to waiver on the grounds that, in meeting its mission to support veterans, including those who with service related disabilities, the VA purchases mostly COTS items and would consider it unfair for the VA to purchase supplies from companies that would not be required to comply with the statute.

The Department of Labor stated that ''The relatively minor burdens imposed on contractors by Section 503 of the Rehabilitation Act of 1973, (29 U.S.C. § 793) are justified by the significant benefits the law provides for disabled job applicants and workers. The Census Bureau estimates that approximately 18.6 million American workers have disabilities. Section 503 requires, for example, that contractors recruit qualified applicants with disabilities for job openings, develop anti-disability harassment policies, and refrain from discriminating against qualified individuals with disabilities. Reducing protections for qualified job applicants and workers with disabilities would not be consistent with the President's *New Freedom Initiative*, designed to ensure that Americans with disabilities have the opportunity to learn and develop skills and to engage in productive work.''

Response: A determination was made that the requirements of the affirmative action provision are justified by the significant benefits the law provides for disabled job applicants and workers. Reducing protections for qualified job applicants and workers with disabilities would not be consistent with the President's New Freedom Initiative.

h. Equal opportunity for Special Disabled Veterans, 38 U.S.C. 4212. The Councils did not receive any specific comments in favor of waiving the statute. 10 respondents supported waiver as part of broad general support for the proposed rule. The Councils received 3 responses specifically opposed to waiver, including—

• Department of Veterans Affairs

• U.S. Department of Labor

The Department of Veterans Affairs raised objections to waiver on the grounds that, in meeting its mission to support veterans, including those with service related disabilities, the VA purchases mostly COTS items and would consider it unfair for the VA to purchase supplies from companies that would not be required to comply with the statute.

The Department of Labor objects to waiving the statute on the basis that the relatively minor burdens imposed by the affirmative action provision are justified by the significant direct benefits for individual protected veterans. Waiving the law would reduce possible job opportunities for veterans.

Another respondent stated that ''At a time when our nation is at war and our veterans are returning home…every effort should be made to ensure their employment rather than limit their opportunities''.

Response : It was determined that the affirmative action provision is justified by the significant direct benefits for individual protected veterans, and we must make every effort to ensure their employment.

i. Examination of records by the Comptroller General, 41 U.S.C. 254d(c) and 10 U.S.C. 2313(c). The Councils did not receive any comments specifically supporting waiver of the examination of records by the Comptroller General for acquisition of COTS. 10 respondents supported waiver as part of broad general support for the proposed rule.

The Councils received comments from 2 respondents opposed the waiver.

One respondent objected to waiver of the examination of records by the Comptroller General because this is the last remaining general contractual audit authority applicable to commercial items. If this authority is removed, the Government will have no routine audit authority. The respondent cites legislative history that Congress did not intend to eliminate this authority.

Another respondent also strongly objects to waiver of this authority, stating that removal would improperly restrict the authority of the Comptroller General's ability to review and examine contractor records related to the expenditure of public funds.

Response: This is the only general contractual audit authority applicable to commercial items. Thus it was determined that although access to contractor records will not generally be necessary because of the protection provided by competitive procedures of the marketplace, the Comptroller General should have the ability to examine records if the need arises.

j. Fly American Act, 49 U.S.C. 40118. The Councils did not receive any comments specifically supporting waiver of the cargo preference laws for acquisition of COTS. 10 respondents supported waiver as part of broad general support for the proposed rule. The Councils received 2 responses specifically opposed to the waiver of the Fly American Act for acquisition of COTS, *i.e.*—

• United States Transportation Command

• Under Secretary of Defense (Acquisition, Technology, and Logistics)

Opponents of the waiver of the Fly American Act when acquiring COTS items present the following rationale:

i. The Fly American Act is vital to maintaining a viable U.S. air carrier industry, which is heavily relied on by DoD during contingencies or war.

ii. Weakening of the U.S. air industry will adversely impact our country's ability to move forces and equipment during contingencies or war.

Response: The Fly American Act is not applicable to subcontracts for the acquisition of commercial items. The requirement for use of a clause is not applicable to prime contracts for the acquisition of commercial items, but the requirements of the Act still apply. A determination was made that the Fly American Act is vital for maintaining a viable U.S. air carrier industry, which is heavily relied upon by DoD during contingencies or war.

F. Other public comments.

1. Recommend an Alternate I to proposed clause 52.212–XX, for paperless writing systems. DoD uses a process called Automatic Clause Selection, rather than having the contracting officer check off applicable clauses from the list.

Response: The final rule will not include the new clause 52.212–XX, but will continue to use FAR clause 52.212–5. Furthermore, DoD already has a deviation in place for this clause that meets the needs of a paperless system.

2. Limit the imposition of non-commercial terms and conditions. Multiple respondents were concerned about the proliferation of Government-unique clauses in contracts for the acquisition of COTS items, and want limitations imposed on the authority of the contracting officer to include clauses that are not commonly used with COTS items being procured in the marketplace.

Response: This suggestion is outside the scope of the case.

3. DFARS 212.504 still applies for DoD procurements. This respondent wants to ensure that for DoD COTS procurement, 10 U.S.C. 2320 and 2321 (dealing with technical data rights), which are listed at DFARS 212.504, are still waived.

Response: This is outside the scope of this case.

4. Use of ''et seq.''. Several respondents were concerned that in some cases the statutory references followed by ''*et seq.*'' were too broad.

Response: This issue has been resolved in the final rule. The term ''*et seq.*'' is not used in the statutory references for laws to be waived in the final rule.

5. Significant rule. Several respondents were concerned that the proposed rule would satisfy the economic impact threshold for a major rule and clearly meets the threshold requirements to be classified as a significant rule.

Response: The statutes that were of particular concern to these respondents (Cargo Preference) have not been waived. Therefore, the comments are no longer relevant.

6. Comments no longer applicable. There are several comments not specifically addressed in this **Federal Register** notice, because they are no longer applicable, due to other changes in the final rule.

7. E-verify. The councils note that the FAR 2.101 definition of ''Commercially available off the shelf (COTS) item'' differs from the COTS definition in 22.1801. Pursuant to the FAR treatment of definitions, the COTS definition is 22.1801 is solely applicable to issues arising under Subpart 22.18 and associated clause (FAR case 2007–013).

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

G. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because this rule relieves burdens rather than imposes burdens. Only 2 laws have been waived, and the relief to small business is not considered to be of significant economic impact.

H. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. Chapter 35) applies because the final rule will result in reduced burdens under OMB Control number 9000–0024 (52.225–2), 9000–0130 (52.225–4), 9000–0134 (52.223–9), and 9000–0141 (52.225–9 and 52.225–11). The Councils anticipate the following reductions:

OMB Control No.	Current respondents	Current responses	Current hours	Revised respondents	Revised responses	Revised hours
9000–0024	3,707 x 15 =	55,605 x 0.109 =	6,061	3,521 x 15	52,815 x .109	5,757 hrs
9000–0130	1,140 x 5 =	5,700 x .117 =	667	1083 x 5 =	5415 x .117 =	634 hrs
9000–0134	64,350 x 1 =	64,350 x .325 =	20,913	64 x 1	64 x .325	21 hrs
9000–0141	500 x 2 =	1,000 x 2.5 =	2,500	450 x 2 =	900 x 2.5 =	2,250 hrs

A Paperwork Burden Act Change to pertinent existing burdens has been submitted to the Office of Management and Budget under 44 U.S.C. Chapter 35, *et seq.*

List of Subjects in 48 CFR Parts 2, 3, 12, 23, 25, and 52

Government procurement.

Dated: December 24, 2008

Edward Loeb,

Acting Director, Office of Acquisition Policy.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 3, 12, 23, 25, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 3, 12, 23, 25, and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 2—DEFINITIONS OF WORDS AND TERMS

■ 2. Amend section 2.101 in paragraph (b)(2) by adding, in alphabetical order, the definition ''Commercially available off-the-shelf (COTS) item'' to read as follows:

2.101 Definitions.

* * * * *

(b) * * *

(2) * * *

Commercially available off-the-shelf (COTS) item (1) Means any item of supply (including construction material) that is—

(i) A commercial item (as defined in paragraph (1) of the definition in this section);

(ii) Sold in substantial quantities in the commercial marketplace; and

(iii) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and

(2) Does not include bulk cargo, as defined in section 3 of the Shipping Act of 1984 (46 U.S.C. App. 1702), such as agricultural products and petroleum products.

* * * * *

PART 3—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

■ 3. Revise section 3.503–2 to read as follows:

3.503–2 Contract clause.

The contracting officer shall insert the clause at 52.203–6, Restrictions on Subcontractor Sales to the Government, in solicitations and contracts exceeding the simplified acquisition threshold, except when contracts are for the acquisition of commercially available off-the-shelf items. For the acquisition of commercial items, the contracting officer shall use the clause with its Alternate I.

PART 12—ACQUISITION OF COMMERCIAL ITEMS

■ 4. Add section 12.103 to read as follows:

12.103 Commercially available off-the-shelf (COTS) items.

COTS items are defined in 2.101. Unless indicated otherwise, all of the policies that apply to commercial items also apply to COTS. Section 12.505 lists the laws that are not applicable to COTS (in addition to 12.503 and 12.504); the components test of the Buy American Act, and the two recovered materials certifications in Subpart 23.4, do not apply to COTS.

12.301 [Amended]

■ 5. Amend section 12.301 in the first sentence of paragraph (b)(4) by removing ''executive orders'' and adding ''Executive orders'' in its place;

■ 6. Revise the heading of Subpart 12.5 to read as follows.

Subpart 12.5—Applicability of Certain Laws to the Acquisition of Commercial Items and Commercially Available Off-The-Shelf Items

■ 7. Revise section 12.500 to read as follows:

12.500 Scope of subpart.

(a) As required by sections 34 and 35 of the Office of Federal Procurement Policy Act (41 U.S.C. 430 and 431), this subpart lists provisions of law that are not applicable to—

(1) Contracts for the acquisition of commercial items;

(2) Subcontracts, at any tier, for the acquisition of commercial items; and

(3) Contracts and subcontracts, at any tier, for the acquisition of COTS items.

(b) This subpart also lists provisions of law that have been amended to eliminate or modify their applicability to either contracts or subcontracts for the acquisition of commercial items.

■ 8. Amend section 12.502 by adding paragraph (c) to read as follows:

12.502 Procedures.

* * * * *

(c) The FAR prescription for the provision or clause for each of the laws listed in 12.505 has been revised in the appropriate part to reflect its proper application to contracts and subcontracts for the acquisition of COTS items.

■ 9. Add section 12.505 to read as follows:

12.505 Applicability of certain laws to contracts for the acquisition of COTS items.

COTS items are a subset of commercial items. Therefore, any laws listed in sections 12.503 and 12.504 are also inapplicable or modified in their applicability to contracts or subcontracts for the acquisition of COTS items. In addition, the following laws are not applicable to contracts for the acquisition of COTS items:

(a)(1) 41 U.S.C. 10a, portion of first sentence that reads ''substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States,'' Buy American Act—Supplies, component test (see 52.225–1 and 52.225–3).

(2) 41 U.S.C. 10b, portion of first sentence that reads ''substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States,'' Buy American Act—Construction Materials, component test (see 52.225–9 and 52.225–11).

(b) 42 U.S.C. 6962(c)(3)(A), Certification and Estimate of Percentage of Recovered Material.

PART 23—ENVIRONMENT, ENERGY AND WATER EFFICIENCY, RENEWABLE ENERGY TECHNOLOGIES, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE

■ 10. Amend section 23.406 by revising the introductory text of paragraph (c); and removing from paragraph (d) ''Insert'' and adding ''Except for the acquisition of commercially available off-the-shelf items, insert'', in its place. The revised text reads as follows:

23.406 Solicitation provisions and contract clauses.

* * * * *

(c) Except for the acquisition of commercially available off-the-shelf items, insert the provision at 52.223–4, Recovered Material Certification, in solicitations that—

* * * * *

PART 25—FOREIGN ACQUISITION

■ 11. Amend section 25.003 by revising the definitions ''Domestic construction material'' and ''Domestic end product'' to read as follows:

25.003 Definitions.

* * * * *

Domestic construction material means—

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

(2) A construction material manufactured in the United States, if—

(i) 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; or

(ii) The construction material is a COTS item.

Domestic end product means—

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

(2) An end product manufactured in the United States, if—

(i) 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; or

(ii) The end product is a COTS item.

* * * * *

■ 12. Revise section 25.100 to read as follows:

25.100 Scope of subpart.

(a) This subpart implements—

(1) The Buy American Act (41 U.S.C. 10a - 10d);

(2) Executive Order 10582, December 17, 1954; and

(3) Waiver of the component test of the Buy American Act for acquisitions of commercially available off-the-shelf (COTS) items in accordance with 41 U.S.C 431.

(b) It applies to supplies acquired for use in the United States, including supplies acquired under contracts set aside for small business concerns, if—

(1) The supply contract exceeds the micro-purchase threshold; or

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

■ 13. Amend section 25.101 by revising paragraph (a)(2) to read as follows:

25.101 General.

(a) * * *

(2) The cost of domestic components must exceed 50 percent of the cost of all the components. In accordance with 41 U.S.C. 431, this component test of the Buy American Act has been waived for acquisitions of COTS items (see 12.505(a)).

* * * * *

■ 14. Revise section 25.200 to read as follows:

25.200 Scope of subpart.

(a) This subpart implements—

(1) The Buy American Act (41 U.S.C. 10a - 10d);

(2) Executive Order 10582, December 17, 1954; and

(3) Waiver of the component test of the Buy American Act for acquisitions of commercially available off-the-shelf (COTS) items in accordance with 41 U.S.C. 431.

(b) It applies to contracts for the construction, alteration, or repair of any public building or public work in the United States.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 15. Amend section 52.212–3 by—

■ a. Revising the date of clause;

■ b. Revising paragraph (f)(1); and

■ c. Revising paragraph (g)(1)(i) and the last sentence of paragraph (g)(1)(iii).

The revised text reads as follows:

52.212–3 Offeror Representations and Certifications—Commercial Items.

* * * * *

OFFEROR REPRESENTATIONS AND CERTIFICATIONS—COMMERCIAL ITEMS (FEB 2009)

* * * * *

(f) * * *

(1) The offeror certifies that each end product, except those listed in paragraph (f)(2) of this provision, is a domestic end product and that for other than COTS items, the offeror has considered components of unknown origin 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, *i.e.*, an end product that is not a COTS item and does not meet the component test in paragraph (2) of the definition of ''domestic end product.'' The terms ''commercially available off-the-shelf (COTS) item,'' ''component,'' ''domestic end product,'' ''end product,'' ''foreign end product,'' and ''United States'' are defined in the clause of this solicitation entitled ''Buy American Act—Supplies.''

* * * * *

(g)(1) * * *

(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 and that for other than COTS items, the offeror has considered components of unknown origin to have been mined, produced, or manufactured outside the United States. The terms ''Bahrainian or Moroccan end product,'' ''commercially available off-the-shelf (COTS) item,'' ''component,'' ''domestic end product,'' ''end product,'' ''foreign end product,'' ''Free Trade Agreement country,'' ''Free Trade Agreement country end product,'' ''Israeli end product,'' and ''United States'' are defined in the clause of this solicitation entitled ''Buy American Act-Free Trade Agreements-Israeli Trade Act.''

* * * * *

(iii) * * * 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, *i.e.*, an end product that is not a COTS item and does not meet the component test in paragraph (2) of the definition of ''domestic end product.''

* * * * *

(End of provision)

■ 16. Amend section 52.212–5 by revising the date of the clause and paragraph (b)(27); by removing from paragraph (b)(30) ''(June 2003)'' and adding ''(FEB 2009)'' in its place; and by removing from paragraph (b)(31)(i) ''(Aug 2007)'' and adding ''(FEB 2009)'' in its place. The revised text reads 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 (FEB 2009)

* * * * *

____ (b)(27)(i) 52.223–9, Estimate of Percentage of Recovered Material Content for EPA-Designated Items (May 2008) (42 U.S.C. 6962(c)(3)(A)(ii)). (Not applicable to the acquisition of commercially available off-the-shelf items.)

____ (ii) Alternate I (May 2008) of 52.223–9 (42 U.S.C. 6962(i)(2)(C)). (Not applicable to the acquisition of commercially available off-the-shelf items.)

* * * * *

(End of clause)

52.213–4 [Amended]

■ 17. Amend section 52.213–4 by removing from the clause heading ''(Dec 2008)'' and adding ''(FEB 2009)'' in its place; and by removing from paragraph (b)(1)(ix) ''(June 2003)'' and adding ''(FEB 2009)'' in its place.

■ 18. Amend section 52.225–1 by revising the date of the clause; by adding in paragraph (a), in alphabetical order, the definition ''Commercially available off-the-shelf (COTS) item'' and revising the definition ''Domestic end product''; and by revising paragraph (b) to read as follows:

52.225–1 Buy American Act—Supplies.

* * * * *

BUY AMERICAN ACT—SUPPLIES (FEB 2009)

(a) *Definitions.* * * *

Commercially available off-the-shelf (COTS) item— (1) Means any item of supply (including construction material) that is—

(i) A commercial item (as defined in paragraph (1) of the definition at FAR 2.101);

(ii) Sold in substantial quantities in the commercial marketplace; and

(iii) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and

(2) Does not include bulk cargo, as defined in section 3 of the Shipping Act of 1984 (46 U.S.C. App. 1702), such as agricultural products and petroleum products.

* * * * *

Domestic end product means—

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

(2) An end product manufactured in the United States, if—

(i) 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; or

(ii) The end product is a COTS item.

* * * * *

(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. In accordance with 41 U.S.C. 431, the component test of the Buy American Act is waived for an end product that is a COTS item (See 12.505(a)(1)).

* * * * *

(End of clause)

■ 19. Amend section 52.225–2 by revising the date of the provision and paragraph (a) to read as follows:

52.225–2 Buy American Act Certificate.

* * * * *

BUY AMERICAN ACT CERTIFICATE (FEB 2009)

(a) The offeror certifies that each end product, except those listed in paragraph (b) of this provision, is a domestic end product and that for other than COTS items, the offeror has considered components of unknown origin 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, *i.e.*, an end product that is not a COTS item and does not meet the component test in paragraph (2) of the definition of ''domestic end product.'' The terms ''commercially available off-the-shelf (COTS) item, '' ''component,'' ''domestic end product,'' ''end product,'' ''foreign end product,'' and ''United States'' are defined in the clause of this solicitation entitled ''Buy American Act—Supplies.''

* * * * *

(End of provision)

■ 20. Amend section 52.225–3 by revising the date of the clause; in paragraph (a), by adding, in alphabetical order, the definition ''Commercially available off-the-shelf (COTS) item'' and revising the definition ''Domestic end product''; and by revising paragraph (c) to read as follows:

52.225–3 Buy American Act—Free Trade Agreements—Israeli Trade Act.

* * * * *

BUY AMERICAN ACT—FREE TRADE AGREEMENTS—ISRAELI TRADE ACT (FEB 2009)

(a) *Definitions.* * * *

* * * * *

Commercially available off-the-shelf (COTS) item— (1) Means any item of supply (including construction material) that is—

(i) A commercial item (as defined in paragraph (1) of the definition at FAR 2.101);

(ii) Sold in substantial quantities in the commercial marketplace; and

(iii) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and

(2) Does not include bulk cargo, as defined in section 3 of the Shipping Act of 1984 (46 U.S.C. App. 1702), such as agricultural products and petroleum products.

* * * * *

Domestic end product means—

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

(2) An end product manufactured in the United States, if—

(i) 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; or

(ii) The end product is a COTS item.

* * * * *

(c) *Delivery of end products.* 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. In accordance with 41 U.S.C. 431, the component test of the Buy American Act is waived for an end product that is a COTS item (See 12.505(a)(1)). In addition, the Contracting Officer has determined that FTAs (except the Bahrain and Morocco FTAs) 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—Free Trade Agreements—Israeli Trade Act Certificate.'' If the Contractor specified in its offer that the Contractor would supply a Free Trade Agreement country end product (other than a Bahrainian or Moroccan end product) or an Israeli end product, then the Contractor shall supply a Free Trade Agreement country end product (other than a Bahrainian or Moroccan end product), an Israeli end product or, at the Contractor's option, a domestic end product.

* * * * *

(End of clause)

■ 21. Amend section 52.225–4 by revising the date of the provision and paragraphs (a) and (c) to read as follows:

52.225–4 Buy American Act—Free Trade Agreements—Israeli Trade Act Certificate.

* * * * *

BUY AMERICAN ACT—FREE TRADE AGREEMENTS—ISRAELI TRADE ACT CERTIFICATE (FEB 2009)

(a) The offeror certifies that each end product, except those listed in paragraph (b) or (c) of this provision, is a domestic end product and that for other than COTS items, the offeror has considered components of unknown origin to have been mined, produced, or manufactured outside the United States. The terms ''Bahrainian or Moroccan end product,'' ''commercially available off-the-shelf (COTS) item,'' ''component,'' ''domestic end product,'' ''end product,'' ''foreign end product,'' ''Free Trade Agreement country,'' ''Free Trade Agreement country end product,'' ''Israeli end product,'' and ''United States'' are defined in the clause of this solicitation entitled ''Buy American Act—Free Trade Agreements—Israeli Trade Act.''

* * * * *

(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—Free Trade Agreements—Israeli Trade Act.'' 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, *i.e.*, an end product that is not a COTS item and does not meet the component test in paragraph (2) of the definition of ''domestic end product.''

Other Foreign End Products:

LINE ITEM NO. COUNTRY OF ORIGIN

_____ _____

_____ _____

_____ _____

[List as necessary]

* * * * *

(End of provision)

■ 22. Amend section 52.225–9 by revising the date of the clause; in paragraph (a), by adding, in alphabetical order, the definition ''Commercially available off-the-shelf (COTS) item'' and revising the definition ''Domestic construction material''; and by revising paragraph (b)(1) to read as follows:

52.225–9 Buy American Act—Construction Materials.

* * * * *

BUY AMERICAN ACT—CONSTRUCTION MATERIALS (FEB 2009)

(a) *Definitions.* * * *

Commercially available off-the-shelf (COTS) item— (1) Means any item of supply (including construction material) that is—

(i) A commercial item (as defined in paragraph (1) of the definition at FAR 2.101);

(ii) Sold in substantial quantities in the commercial marketplace; and

(iii) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and

(2) Does not include bulk cargo, as defined in section 3 of the Shipping Act of 1984 (46 U.S.C. App. 1702), such as agricultural products and petroleum products.

* * * * *

Domestic construction material means—

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

(2) A construction material manufactured in the United States, if—

(i) 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; or

(ii) The construction material is a COTS item.

* * * * *

(b) *Domestic preference.* (1) This clause implements the Buy American Act (41 U.S.C. 10a–10d) by providing a preference for domestic construction material. In accordance with 41 U.S.C. 431, the component test of the Buy American Act is waived for construction material that is a COTS item (See FAR 12.505(a)(2)). The Contractor shall use only domestic construction material in performing this contract, except as provided in paragraphs (b)(2) and (b)(3) of this clause.

* * * * *

(End of clause)

■ 23. Amend section 52.225–10 by revising the date of the provision and paragraph (a) to read as follows:

52.225–10 Notice of Buy American Act Requirement—Construction Materials.

* * * * *

NOTICE OF BUY AMERICAN ACT REQUIREMENT—CONSTRUCTION MATERIALS (FEB 2009)

(a) *Definitions.* ''Commercially available off-the-shelf (COTS) item,'' ''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—Construction Materials'' (Federal Acquisition Regulation (FAR) clause 52.225–9).

* * * * *

(End of provision)

■ 24. Amend section 52.225–11 by—

■ a. Revising the date of the clause;

■ b. In paragraph (a), by adding, in alphabetical order, the definition ''Commercially available off-the-shelf (COTS) item'' and revising the definition ''Domestic construction material'';

■ c. Revising paragraph (b)(1); and

■ d. Revising the date of Alternate I and in paragraph (b)(1) adding a new second sentence to read as follows:

52.225–11 Buy American Act—Construction Materials Under Trade Agreements.

* * * * *

BUY AMERICAN ACT—CONSTRUCTION MATERIALS UNDER TRADE AGREEMENTS (FEB 2009)

(a) *Definitions.* * * *

* * * * *

Commercially available off-the-shelf (COTS) item— (1) Means any item of supply (including construction material) that is—

(i) A commercial item (as defined in paragraph (1) of the definition at FAR 2.101);

(ii) Sold in substantial quantities in the commercial marketplace; and

(iii) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and

(2) Does not include bulk cargo, as defined in section 3 of the Shipping Act of 1984 (46 U.S.C. App. 1702), such as agricultural products and petroleum products.

* * * * *

Domestic construction material means—

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

(2) A construction material manufactured in the United States, if—

(i) 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; or

(ii) The construction material is a COTS item.

* * * * *

(b) *Construction materials.* (1) This clause implements the Buy American Act (41 U.S.C. 10a–10d) by providing a preference for domestic construction material. In accordance with 41 U.S.C. 431, the component test of the Buy American Act is waived for construction material that is a COTS item (See FAR 12.505(a)(2)). In addition, the Contracting Officer has determined that the WTO GPA and Free Trade Agreements (FTAs) apply to this acquisition. Therefore, the Buy American Act restrictions are waived for designated county construction materials.

* * * * *

Alternate I (FEB 2009). * * *

* * * * *

(b) *Construction materials.* (1) * * * In accordance with 41 U.S.C. 431, the component test of the Buy American Act is waived for construction material that is a COTS item (See FAR 12.505(a)(2)). * * *

* * * * *

■ 25. Amend section 52.225–12 by revising the date of the provision and revising paragraph (a) to read as follows:

52.225–12 Notice of Buy American Act Requirement—Construction Materials Under Trade Agreements.

* * * * *

NOTICE OF BUY AMERICAN ACT REQUIREMENT—CONSTRUCTION MATERIALS UNDER TRADE AGREEMENTS (FEB 2009)

(a) *Definitions.* ''Commercially available off-the-shelf (COTS) item,'' ''construction material,'' ''designated country 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—Construction Materials Under Trade Agreements'' (Federal Acquisition Regulation (FAR) clause 52.225–11).

* * * * *

(End of provision)

[FR Doc. E9–551 Filed 1–14–09; 8:45 am]

BILLING CODE 6820–EP–S

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 4, 15, 17, 22, and 52

[FAC 2005–30; FAR Case 2001–004; Item III; Docket 2007–0001, Sequence 6]

RIN 9000–AK82

Federal Acquisition Regulation; FAR Case 2001–004, Exemption of Certain Service Contracts from the Service Contract Act (SCA)

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

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have adopted as final, with changes, the interim rule which amended the Federal Acquisition Regulation (FAR) to revise the current SCA exemption and to add an SCA exemption for contracts for certain