

## PART 25—FOREIGN ACQUISITION

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### **25.000 Scope of part.**

Except as provided in agency regulations, this part provides policies and procedures to implement the Buy American Act, the Balance of Payments Program, purchases under the Trade Agreements Act of 1979, and other laws and regulations that pertain to acquiring foreign supplies, services, and construction materials. This part also provides policies and procedures pertaining to international agreements, customs and duties, the clause at 52.215-2, Audit and Records—Negotiation, and use of local currency for payment.

### **Subpart 25.1—Buy American Act—Supplies**

#### **25.100 Scope of subpart.**

This subpart implements the Buy American Act (41 U.S.C. 10) and Executive Order 10582, December 17, 1954 (as amended). It applies to—

- (a) Supply contracts exceeding the micro-purchase threshold; and
- (b) Contracts for services that involve the furnishing of supplies when the supply portion of the contract exceeds the micro-purchase threshold.

#### **25.101 Definitions.**

“Civil aircraft and related articles,” as used in this subpart, means—

(a) All aircraft other than aircraft to be purchased for use by the Department of Defense or the U.S. Coast Guard;

(b) The engines (and parts and components for incorporation into the engines) of these aircraft;

(c) Any other parts, components, and subassemblies for incorporation into the aircraft; and

(d) 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 of 1979.

“Components,” as used in this subpart, means those articles, materials, and supplies incorporated directly into the end products.

“Domestic end product,” as used in this subpart, means (a) an unmanufactured end product mined or produced in the United States, or (b) 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. (In determining if an end product is domestic, only the end product and its components shall be considered.) The cost of each component includes transportation costs to the place of incorporation into the end product and any applicable duty (whether or not a duty-free entry certificate is issued). Components of foreign origin of the same class or kind for which determinations have been made in accordance with 25.102(a)(3) and (4) are treated as domestic. Scrap generated, collected, and prepared for processing in the United States is considered domestic.

“Domestic offer,” as used in this subpart, means an offered price for a domestic end product, including transportation to destination.

“End product,” as used in this subpart, means those articles, materials, and supplies to be acquired for public use under the contract.

“Foreign end product,” as used in this subpart, means an end product other than a domestic end product.

“Foreign offer,” as used in this subpart, means an offered price for a foreign end product, including transportation to destination and duty (whether or not a duty-free entry certificate is issued).

“Instrumentality,” as used in this subpart, does not include an agency or division of the government of a country, but may be construed to include arrangements such as the European Union.

“United States,” as used in this subpart, means the United States, its possessions, Puerto Rico, and any other place subject to its jurisdiction, but does not include leased bases or trust territories.

### **25.102 Policy.**

(a) The Buy American Act requires that only domestic end products be acquired for public use, except articles, materials, and supplies—

(1) For use outside the United States;

(2) For which the cost would be unreasonable, as determined in accordance with 25.105;

(3) For which the agency head determines that domestic preference would be inconsistent with the public interest;

(4) That are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities, of a satisfactory quality (see 25.108); or

(5) Purchased specifically for commissary resale.

(b) Unless agency regulation prescribes otherwise—

(1) The contracting officer may make a nonavailability determination under 25.102(a)(4) for an acquisition if—

(i) The acquisition was conducted by full and open competition;

(ii) The acquisition was synopsized under 5.201;

and,

(iii) No offer for a domestic end product was received; or

(2) The head of the contracting activity or designee may make a nonavailability determination under 25.102(a)(4) for any circumstance other than that specified in paragraph (b)(1) of this section.

### **25.103 Agreements with certain foreign governments.**

The Department of Defense and the National Aeronautics and Space Administration (NASA) have determined that it is inconsistent with the public interest to apply the restrictions of the Buy American Act to their acquisitions for public use of certain supplies mined, produced, or manufactured in certain foreign countries. Detailed procedures implementing these determinations are in the Department of Defense (DoD) Federal Acquisition Regulation Supplement and the NASA Federal Acquisition Regulation Supplement.

### **25.104 Acquiring civil aircraft and related articles.**

(a) The U.S. Trade Representative, on February 19, 1980 (45 FR 12349, February 25, 1980), waived applying the Buy American Act to the acquisition of civil aircraft and related articles of countries or instrumentalities that are parties to the Agreement on Civil Aircraft. The representative acted under the authority of section 303 of the Trade Agreements Act of 1979 (19 U.S.C. 2513). Countries and Instrumentalities that are parties to the agreement (as of January 1, 1996) are Canada, the European Union (Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal,

Spain, Sweden, and the United Kingdom), Japan, Norway, Romania, and Switzerland.

The Office of the U.S. Trade Representative  
Washington, DC 20506

can provide information on changes to the list of parties to the agreement made since January 1, 1996.

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

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

(2) In the case of an article that consists in whole or in part of materials from another country or instrumentality, 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 so transformed.

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

#### **25.105 Evaluating offers.**

(a) Unless the agency head determines otherwise, the offered price of a domestic end product is unreasonable when the lowest acceptable domestic offer exceeds the lowest acceptable foreign offer (see 25.101), inclusive of duty, by—

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

(2) More than 12 percent, if the domestic offer is from a small business concern.

(b) The evaluation in paragraph (a) of this section shall be applied on an item-by-item basis or to any group of items on which award may be made as specifically provided by the solicitation.

(c) If an award of more than \$250,000 would be made to a domestic concern if the 12-percent factor were applied, but not if the 6-percent factor were applied, the agency head shall decide whether award to the domestic concern would involve unreasonable cost.

(d) The evaluation in paragraph (a) of this section shall not be applied to offers of Israeli end products at or above \$50,000 (see 25.402(a)(2)).

(e) The evaluation in paragraph (a) of this section shall not be applied to offers of Canadian end products above \$25,000 (see 25.402(a)(3)). For the definition of “Canadian end product,” see 25.401.

#### **25.106 [Reserved]**

#### **25.107 Acquisition from or through other Government agencies.**

The General Services Administration is responsible for compliance with the Buy American Act for—

(a) Foreign end products acquired for stock in GSA stores depots;

(b) Direct purchases for other agencies; and

(c) Establishing mandatory Federal Supply Schedules that do not include a domestic end product.

#### **25.108 Excepted articles, materials, and supplies.**

(a) One or more agencies have determined that the articles, materials, and supplies listed in paragraph (d) of this section are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality. The list in paragraph (d) of this section is furnished for information only; an article, material or supply listed therein may be treated as domestic only when the agency concerned has made a determination that it is not mined, produced, or manufactured in the United States in sufficient and reasonably available quantities of a satisfactory quality.

(b) Agencies making determinations under 25.102(a)(4) or 25.202(a)(2) for unlisted articles, materials, or supplies shall submit a copy of these determinations to the appropriate FAR Council for possible addition of items to the list.

(c) Agencies shall provide detailed information to the appropriate FAR Council if any item on the list becomes reasonably available in sufficient commercial quantities of a satisfactory quality.

(d)(1) The excepted articles, materials, and supplies are as follows:

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.	Platinum and related group metals, refined, as sponge, powder, ingots, or cast bars.
Cobalt, in cathodes, rondelles, or other primary ore and metal forms.	Pyrethrum flowers.
Cocoa beans.	Quartz crystals.
Coconut and coconut meat, unsweetened, in shredded, desiccated, or similarly prepared form.	Quebracho.
Coffee, raw or green bean.	Quinidine.
Colchicine alkaloid, raw.	Quinine.
Copra.	Rabbit fur felt.
Cork, wood or bark and waste.	Radium salts, source and special nuclear materials.
Cover glass, microscope slide.	Rosettes.
Crane rail (85-pound per foot).	Rubber, crude and latex.
Cryolite, natural.	Rutile.
Dammar gum.	Santonin, crude.
Diamonds, industrial, stones and abrasives.	Secretin.
Emetine, bulk.	Shellac.
Ergot, crude.	Silk, raw and unmanufactured.
Erythrityl tetranitrate.	Spare and replacement parts for equipment of foreign manufacture, and for which domestic parts are not available.
Fair linen, altar.	Spices and herbs, in bulk.
Fibers of the following types: abaca, abace, agave, coir, flax, jute, jute burlaps, palmyra, and sisal.	Sugars, raw.
Goat and kidskins.	Swords and scabbards.
Graphite, natural, crystalline, crucible grade.	Talc, block, steatite.
Hand file sets (Swiss pattern).	Tantalum.
Handsewing needles.	Tapioca flour and cassava.
Hemp yarn.	Tartar, crude; tartaric acid and cream of tartar in bulk.
Hog bristles for brushes.	Tea in bulk.
Hyoscine, bulk.	Thread, metallic (gold).
Ipecac, root.	Thyme oil.
Iodine, crude.	Tin in bars, blocks, and pigs.
Kaurigum.	Triprolidine hydrochloride.
Lac.	Tungsten.
Leather, sheepskin, hair type.	Vanilla beans.
Lavender oil.	Venom, cobra.
Manganese.	Wax, carnauba.
Menthol, natural bulk.	Wire glass
Mica.	Woods; logs, veneer, and lumber of the following species: Alaskan yellow cedar, angelique, balsa, ekki, greenheart, lignum vitae, mahogany, and teak.
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).	Yarn, 50 Denier rayon.
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 (see definitions of petroleum terms in subparagraph (d)(2) of this section).	
Pine needle oil.	

(2) As used in subparagraph (d)(1) of this section, petroleum terms are defined as follows:

(i) "Crude oil" means crude petroleum, as it is produced at the wellhead, and liquids (under atmospheric conditions) that have been recovered from mixtures of hydrocarbons that existed in a vaporous phase in a reservoir and that are not natural gas products.

(ii) "Finished products" means any one or more of the following petroleum oils, or a mixture or combination of these oils, to be used without further processing except blending by mechanical means:

(A) "Asphalt"—a solid or semi-solid cementitious material that—

(1) Gradually liquefies when heated;  
 (2) Has bitumens as its predominating constituents; and

(3) Is obtained in refining crude oil.

(B) “Fuel oil”—a liquid or liquefiable petroleum product burned for lighting or for the generation of heat or power and derived directly or indirectly from crude oil, such as kerosene, range oil, distillate fuel oils, gas oil, diesel fuel, topped crude oil, or residues.

(C) “Gasoline”—a refined petroleum distillate that, by its composition, is suitable for use as a carburant in internal combustion engines.

(D) “Jet fuel”—a refined petroleum distillate used to fuel jet propulsion engines.

(E) “Liquefied gases”—hydrocarbon gases recovered from natural gas or produced from petroleum refining and kept under pressure to maintain a liquid state at ambient temperatures.

(F) “Lubricating oil”—a refined petroleum distillate or specially treated petroleum residue used to lessen friction between surfaces.

(G) “Naphtha”—a refined petroleum distillate falling within a distillation range overlapping the higher gasoline and the lower kerosenes.

(H) “Natural gas products”—liquids (under atmospheric conditions), including natural gasoline, that—

(1) Are recovered by a process of absorption, adsorption, compression, refrigeration, cycling, or a combination of these processes, from mixtures of hydrocarbons that existed in a vaporous phase in a reservoir, and

(2) When recovered and without processing in a refinery, definitions of products contained in (d)(2)(ii), (B), (C), (D), and (G) of this section.

(I) “Residual fuel oil”—a topped crude oil or viscous residuum that, as obtained in refining or after blending with other fuel oil, meets or is the equivalent of Military Specification Mil-F-859 for Navy Special Fuel Oil and any more viscous fuel oil, such as No. 5 or Bunker C.

(iii) “Unfinished oils” means one or more of the petroleum oils listed in subdivision (d)(2)(ii) of this section, or a mixture or combination of these oils, that are to be further processed other than by blending by mechanical means.

#### 25.109 Solicitation provisions and contract clauses.

(a) The contracting officer shall insert the provision at 52.225-1, Buy American Certificate, in solicitations where the clause at 52.225-3 is used.

(b) When quotations are obtained orally (see Part 13), vendors shall be informed that only domestic end products, other than end products excepted on a blanket or individual basis (see 25.108 and Subpart 25.4), shall be acceptable, unless the price for an offered domestic end product is unreasonable (see 25.105).

(c) The contracting officer shall insert the provision at 52.225-2, Waiver of Buy American Act for Civil Aircraft and Related Articles, in solicitations for the acquisition of civil aircraft and related articles.

(d) Except as provided in paragraph (e) of this section, the contracting officer shall insert the clause at 52.225-3, Buy American Act—Supplies, in solicitations and contracts for the acquisition of supplies, or for services involving the furnishing of supplies, for use within the United States.

(e) Do not use the clause prescribed in paragraph (d) of this section when—

(1) The solicitation is restricted to domestic end products under Subpart 6.3;

(2) The acquisition is made under a trade agreement (see Subpart 25.4); or

(3) Another exception to the Buy American Act applies (*e.g.*, nonavailability or public interest).

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

#### 25.200 Scope of subpart.

This subpart implements the Buy American Act (41 U.S.C. 10) 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 Definitions.

“Components”, as used in this subpart, means those articles, materials, and supplies incorporated directly into construction materials.

“Construction”, as used in this subpart, means construction, alteration, or repair of any public building or public work in the United States.

“Construction material”, as used in this subpart, means an article, material, or supply brought to the construction site for incorporation into the building or work. Construction material also includes an item brought to the site pre-assembled from articles, materials, and supplies. However, emergency life safety systems, such as emergency lighting, fire alarm, and audio evacuation systems, which are discrete systems incorporated into a public building or work and which are produced as a complete system, 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.

“Domestic construction material”, as used in this subpart, means (a) an unmanufactured construction material mined or produced in the United States, or (b) 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 com-

ponents. (In determining whether a construction material is domestic, only the construction material and its components shall be considered.) The cost of each component includes transportation costs to the place of incorporation into the construction material and any applicable duty (whether or not a duty-free entry certificate is issued). Components of foreign origin of the same class or kind for which determinations have been made in accordance with 25.202(a)(2) are treated as domestic.

“Foreign construction material”, as used in this subpart, means a construction material other than a domestic construction material.

“United States” (see 25.101).

### **25.202 Policy.**

(a) The Buy American Act requires that only domestic construction materials be used in construction in the United States, except when—

(1) The cost would be unreasonable, *i.e.*, the cost of domestic construction material exceeds the cost of foreign construction material by more than 6 percent, unless the agency head determines a higher percentage to be appropriate (see Executive Order 10582);

(2) The head of the contracting activity or designee determines the construction material is not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality (see 25.108);

(3) The agency head determines that application of the restrictions of the Buy American Act to a particular construction material would be impracticable; or

(4) The agency head determines that application of the restrictions of the Buy American Act to a particular construction material would be inconsistent with the public interest. Under this authority, agencies may have agreements with foreign governments that provide blanket exceptions to the Buy American Act (*e.g.*, Trade Agreements Act and North American Free Trade Agreement (NAFTA)).

(b) Unless the contracting officer determines that insufficient time is available, offerors should request determinations regarding the inapplicability of the Buy American Act in time to allow determination before submission of offers.

(c) When it is determined for any of the reasons stated in this section that certain foreign construction materials may be used, the excepted materials shall be listed in the contract. Findings justifying the exception shall be available for public inspection.

(d) For construction contracts with an acquisition value of \$6,500,000 or more, but less than \$7,311,000, see 25.402(a)(3). If the acquisition value is \$7,311,000 or more, see 25.402(a)(1).

### **25.203 Determinations requested before submission of offers.**

(a) Any request for a determination regarding the inapplicability of the Buy American Act made before receipt of offers shall be evaluated based on the information requested in the applicable clause at 52.225-5, Buy American Act—Construction Materials, paragraphs (c) and (d), or 52.225-15, Buy American Act—Construction Materials under Trade Agreements Act and North American Free Trade Agreement, paragraphs (c) and (d), and may be supplemented by other information readily available to the contracting officer.

(b) If the Government determines before receipt of offers that an exception to the Buy American Act applies (other than a general exception based on the Trade Agreements Act or NAFTA), the excepted material shall be identified by the Government in the clause at 52.225-5(b)(2) or 52.225-15(b)(3).

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

(a) Offerors proposing to use foreign construction material other than that listed by the Government in the applicable clause at 52.225-5(b)(2) or 52.225-15(b)(3) or excepted under the Trade Agreements Act or NAFTA (52.225-15(b)(2)) must provide the information required by paragraphs (c) and (d) of the respective clauses.

(b) Unless agency regulations specify a higher percentage, the Government will 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. If the evaluation of offers results in a tie between an offer including foreign construction material excepted on the basis of unreasonable cost, as evaluated, and an offer including solely domestic construction material or other foreign construction material that is excepted by the Government in the solicitation under the clause at 52.225-5(b)(2) or 52.225-15(b)(2) or (3) or subsequently excepted on a basis other than unreasonable cost, award shall be made to the offeror that submitted the latter offer.

(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, upon evaluation of an offer, the Government determines that an exception to the Buy American Act applies, and the Government accepts that offer, the excepted material shall be listed in the contract at 52.225-5(b)(2) or 52.225-15(b)(3).

**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 contractor does not submit a satisfactory explanation, the Government need not make a determination regarding the inapplicability of the Buy American Act.

(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 similar to that required before award by the applicable clause at 52.225-5(c) and (d) or 52.225-15(c) and (d) 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, the contract shall be modified to allow use of 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 25.202(a)(1) or 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 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 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 and/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 for suspension and/or debarment, including findings and supporting evidence in accordance with Subpart 9.4, Debarment, Suspension, and Ineligibility. If the noncompliance appears to be fraudulent, consider referring the matter to other appropriate agency officials, such as the officer responsible for criminal investigation and prosecution.

**25.207 Solicitation provisions and contract clauses.**

(a) The contracting officer shall insert the clause at 52.225-5, Buy American Act—Construction Materials, in solicitations and contracts for construction inside the United States, except when the clause at 52.225-15, Buy American Act—Construction Materials under Trade Agreements Act and North American Free Trade Agreement, is prescribed.

(b)(1) The contracting officer shall insert the provision at 52.225-12, Notice of Buy American Act Requirement—Construction Materials, in solicitations for construction that contain the clause at 52.225-5, Buy American Act—Construction Materials.

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

(c)(1) The contracting officer shall insert the provision at 52.225-13, Notice of Buy American Act Requirement—Construction Materials under Trade Agreements Act and North American Free Trade Agreement, in solicitations for construction that contain the clause at 52.225-15, Buy American Act—Construction Materials under Trade Agreements Act and North American Free Trade Agreement.

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

(d)(1) The contracting officer shall insert the clause at 52.225-15, Buy American Act—Construction Materials under Trade Agreements Act and North American Free Trade Agreement, in solicitations and contracts for construction inside the United States with an estimated acquisition value of \$7,311,000 or more.

(2) For solicitations and contracts for construction inside the United States with an estimated acquisition value

of \$6,500,000 or more, but less than \$7,311,000, the contracting officer shall use the clause with its Alternate I.

### Subpart 25.3—Balance of Payments Program

#### 25.300 Scope of subpart.

This subpart provides policies and procedures applicable to contracting for supplies, services, or construction for use outside the United States and provides for the use of excess or near-excess foreign currency. The Balance of Payments Program restrictions have been waived with respect to the acquisition, in accordance with Subpart 25.4, of certain products under the Trade Agreements Act of 1979 and the North American Free Trade Agreement (NAFTA) Implementation Act.

#### 25.301 Definitions.

“Components” (see 25.101).

“Domestic end product” (see 25.101).

“Domestic offer” (see 25.101).

“Domestic services”, as used in this subpart, means services performed in the United States. If services provided under a single contract are performed both inside and outside the United States, they shall be considered domestic if 25 percent or less of their total cost is attributable to services (including incidental supplies used in connection with these services) performed outside the United States.

“End product” (see 25.101).

“Foreign end product” (see 25.101).

“Foreign offer” (see 25.101).

“Foreign services”, as used in this subpart, means services other than domestic services.

“United States” (see 25.101).

#### 25.302 Policy.

(a) The Balance of Payments Program is an interim measure imposed to alleviate the impact of Government expenditures on the Nation’s balance of international payments. The Balance of Payments Program differs from the Buy American Act in that the Buy American Act applies only to acquisitions for use inside the United States, while the Balance of Payments Program applies to acquisitions for use outside the United States.

(b) Foreign end products or services may be acquired for use outside the United States if any of the following conditions are met:

(1) The estimated cost of the product or service is at or below the simplified acquisition threshold.

(2) Perishable subsistence items are required and the agency head, or a designee, determines that delivery from the United States would significantly impair their quality at the point of consumption.

(3) The agency head, or a designee, determines that a requirement can only be filled by a foreign end product or service, and that it is not feasible to forgo filling it or to provide a domestic substitute (see 25.108).

(4) The acquisition is for ice, books, utilities, communications, and other materials or services that, by their nature or as a practical matter, can only be acquired or performed in the country concerned and a U.S. Government capability does not exist.

(5) Subsistence items are required specifically for resale in overseas commissary stores.

(6) The acquisition of foreign end products or services is required by a treaty or executive agreement between governments.

(7) Petroleum supplies and their by-products as listed and defined in 25.108 are required.

(8) The end products or services are paid for with excess or near-excess foreign currencies (see 25.304).

(9) The end products or services are mined, produced, or manufactured in Panama and are required by and of the use of United States Forces in Panama.

(c) Contracts shall require use of domestic construction materials (see 25.201) for construction, repair, or maintenance of real property outside the United States, except when the cost of these materials (including transportation and handling costs) exceeds the cost of foreign construction materials by more than 50 percent. A differential greater than 50 percent may be used when specifically authorized by the agency head or a designee.

#### 25.303 Procedures.

(a) *Solicitation of offers.* The procedures in this section apply to contracts for supplies and services when the exceptions in 25.302(b) do not apply. Solicitations shall state that information regarding articles, materials, supplies, and services excepted from these procedures is available to prospective contractors upon request. When quotations are obtained orally (see Part 13), vendors shall be informed that only domestic end products or services will be acceptable, except for those items that have been excepted or when the price for the foreign end products or services meets the evaluation criteria in paragraph (b) of this section.

(b) *Evaluation.* For purposes of evaluation, each foreign offer shall be adjusted by increasing it by 50 percent. If this procedure results in a tie between a foreign offer as evaluated and a domestic offer, the domestic offer shall be considered the successful offer. When this procedure results in the acquisition of foreign end products or services, the acquisition of domestic end products or services is thereby considered unreasonable in cost or inconsistent with the public interest.



**25.304 Excess and near-excess foreign currencies.**

(a) The United States holds currencies of certain countries in amounts determined annually by the Secretary of the Treasury to be excess to the normal, or above the immediate (near excess) requirements of the Government. These countries are identified in Bulletins issued by the Office of Management and Budget which will be distributed through agency procedures on an expedited basis. Additional information may also be obtained from the Department of the Treasury, Office of the Assistant Secretary for International Affairs, Office of Development Policy. Acquisitions of foreign end products, services, or construction paid for in excess or near-excess foreign currencies are an exception to the balance of payments restrictions in this subpart (see 25.302(b)(8)).

(b) Excess and near-excess foreign currencies shall be used whenever feasible in payment of contracts over \$1 million performed wholly or partly in any of the listed countries. In some cases, award may be made to an offeror willing to accept payment, in whole or part, in excess or near-excess foreign currency, even though the offer, when compared to offers in United States dollars, is not the lowest received. Price differentials may be funded from excess or near-excess foreign currencies available without charge to agency appropriations, subject to Office of Management and Budget (OMB) Circular No. A-20, May 21, 1966.

(c) Before issuing solicitations for contracts to be performed wholly or partly in the listed countries, the contracting officer shall obtain a determination from the agency head, or a designee no lower than the head of the contracting activity, as to the feasibility of using excess or near-excess foreign currency. Agency officials shall consult with the Budget Review Division, Office of Management and Budget, and verify—

(1) The availability of excess or near-excess foreign currency;

(2) The feasibility of using that currency in payment of the contract;

(3) The price differential, if any, that will be considered acceptable; and

(4) Procedures for obtaining excess or near-excess foreign currency requirements.

(d) When use of excess or near-excess foreign currency is determined feasible, the contracting officer shall, in the solicitation—

(1) Require that offers be stated in U.S. dollars;

(2) Request that offers also be stated, in whole or in part, in excess or near-excess foreign currency; and

(3) Reserve the right to make the award to the responsive offeror—

(i) That is willing to accept payment, in whole or in part, in excess or near-excess foreign currency; and

(ii) Whose offer is most advantageous to the Government, even though the total price may be higher than offers in U.S. dollars.

**25.305 Solicitation provision and contract clauses.**

(a) *Solicitation provision.* The contracting officer shall insert the provision at 52.225-6, Balance of Payments Program Certificate, in solicitations for supplies or services for use outside the United States, unless one or more of the exceptions in 25.302(b) applies or the acquisition is made under the Trade Agreements Act of 1979 or NAFTA (see Subpart 25.4).

(b) *Oral quotations.* When quotations are obtained orally, vendors shall be informed that only domestic end products or services will be acceptable, except for those items that have been excepted or when the price for the foreign end products or services meets the evaluation criteria in 25.303(b).

(c) *Contract clauses.* (1) The contracting officer shall insert the clause at 52.225-7, Balance of Payments Program, in solicitations and contracts for acquiring supplies or services for use outside the United States, unless one or more of the exceptions in 25.302(b) applies or the acquisition is made under the Trade Agreements Act of 1979 or NAFTA (see Subpart 25.4).

(2) For construction contracts outside the United States, with an estimated value of \$6,500,000 or more, insert the clause at 52.225-22, Balance of Payments Program—Construction Materials—NAFTA.

**Subpart 25.4—Trade Agreements****25.400 Scope of subpart.**

(a) This subpart provides policies and procedures for acquisitions subject to the Agreement on Government Procurement, as approved by Congress in the Trade Agreements Act of 1979 (19 U.S.C. 2501-2582), and as amended by the Uruguay Round Agreements Act (Pub. L. 103-465), and other trade agreements including—

(1) Acquisitions from countries designated under the Caribbean Basin Economic Recovery Act (19 U.S.C. 2701, *et seq.*);

(2) Acquisitions involving offers of Israeli end products under 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);

(3) Acquisitions involving offers of Canadian or Mexican end products under the North American Free Trade Agreement (NAFTA), as approved by Congress in the NAFTA Implementation Act (Pub. L. 103-182, 107 Stat. 2057); and

(4) The Agreement on Civil Aircraft (19 U.S.C. 2513).

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

#### 25.401 Definitions.

“Canadian end product,” as used in this subpart, means an article that (a) is wholly the growth, product, or manufacture of Canada, or (b) in the case of an article which consists in whole or in part of materials from another country or instrumentality, 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 its supply; provided, that the value of those incidental services does not exceed that of the product itself.

“Caribbean Basin country,” as used in this subpart, means a country designated by the President as a beneficiary under the Caribbean Basin Economic Recovery Act (19 U.S.C. 2701, *et seq.*) and listed as follows:

Antigua and Barbuda	Haiti
Aruba	Honduras
Bahamas	Jamaica
Barbados	Montserrat
Belize	Netherlands Antilles
British Virgin Islands	Nicaragua
Costa Rica	Panama
Dominica	St. Kitts and Nevis
Dominican Republic	St. Lucia
El Salvador	St. Vincent and the Grenadines
Grenada	
Guatemala	Trinidad and Tobago
Guyana	

“Caribbean Basin country end product,” as used in this subpart, means an article that (a) is wholly the growth, product, or manufacture of the Caribbean Basin country, or (b) in the case of an article which consists in whole or in part of materials from another country or instrumentality, 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 so 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 its supply; provided, that the value of those incidental services does not exceed that of the product

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—

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

(2) 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;

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

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

(5) 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 Tariff Schedule of the United States (TSUS) column 2 rates of duty apply.

“Designated country,” as used in this subpart, means a country or instrumentality designated under the Trade Agreements Act of 1979 and listed as follows:

Aruba	Lesotho
Austria	Liechtenstein
Bangladesh	Luxembourg
Belgium	Malawi
Benin	Maldives
Bhutan	Mali
Botswana	Mozambique
Burkina	Nepal
Burundi	Netherlands
Canada	Niger
Cape Verde	Norway
Central African Republic	Portugal
Chad	Republic of Korea
Comoros	Rwanda
Denmark	Sao Tome and Principe
Djibouti	Sierra Leone
Equatorial Guinea	Singapore
Finland	Somalia
France	Spain
Gambia	Sweden
Germany	Switzerland
Greece.	Tanzania U.R.
Guinea	Togo
Guinea-Bissau	Tuvalu
Haiti	Uganda
Ireland	United Kingdom
Israel	Vanuatu
Italy	Western Samoa
Japan	Yemen
Kiribati	

“Designated country construction material,” as used in this subpart, means construction material that—

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

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

“Designated country end product,” as used in this subpart, means an article that (a) is wholly the growth, product, or manufacture of the designated country, or (b) in the case of an article which consists in whole or in part of materials from another country or instrumentality, 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 so 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 its supply; provided, that the value of those incidental services does not exceed that of the product itself.

“Eligible product”, as used in this subpart, means a designated, North American Free Trade Agreement (NAFTA), or Caribbean Basin country end product.

“Mexican end product,” as used in this subpart, means an article that (a) is wholly the growth, product, or manufacture of Mexico, or (b) in the case of an article which consists in whole or in part of materials from another country or instrumentality, 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 its supply; provided, that the value of those incidental services does not exceed that of the product itself.

“North American Free Trade Agreement (NAFTA) country”, as used in this subpart, means Canada or Mexico.

“NAFTA country construction material”, means a construction material that—

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

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

“NAFTA country end product”, as used in this subpart, means a Canadian end product or a Mexican end product.

#### **25.402 Policy.**

(a)(1) Executive Order 12260 requires the U.S. Trade Representative to set the dollar threshold for application of the Trade Agreements Act. The current threshold is \$190,000 for supply and services contracts and \$7,311,000 for construction contracts. The thresholds will be published in the *Federal Register* and will be distributed through agency procedures on an expedited basis. When the value of the proposed acquisition of an eligible product is estimated to be at or over the dollar threshold, agencies shall evaluate offers for an eligible product without regard to the restrictions of the Buy American Act (see Subpart 25.1) or the Balance of Payments Program (see Subpart 25.3). When the value of the proposed construction contract is estimated to be at or over the dollar threshold, agencies shall evaluate offers of designated country construction materials without regard to the restrictions of the Buy American Act (see Subpart 25.2) or the Balance of Payments Program (see Subpart 25.3). When the value of the proposed acquisition is estimated to be below the Trade Agreements Act threshold, the restrictions of the Buy American Act or the Balance of Payments Program shall be applied to foreign offers, except as noted in paragraphs (a)(2) and (a)(3) of this section (see 25.105).

(2) As required by Article 15 of the U.S.-Israel Free Trade Area Agreement, agencies other than the Department of Defense, Department of Energy, 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 at or above \$50,000 in amount without regard to the restrictions of the Buy American Act (see Subpart 25.1) or the Balance of Payments Program (see Subpart 25.3).

(3) As required by the North American Free Trade Agreement (NAFTA) Implementation Act (Pub. L. 103-182, 107 Stat. 2057), agencies shall evaluate offers of the following NAFTA country end products without regard to the restrictions of the Buy American Act (see Subpart 25.1) or the Balance of Payments Program (see Subpart 25.3):

(i) NAFTA country construction materials under construction contracts with an estimated acquisition value of \$6,500,000 or more.

(ii) Canadian end products under supply contracts with an estimated value above \$25,000 and Mexican end products under supply contracts with an estimated value of \$50,000 or more.

(4) To determine whether the Trade Agreements Act or NAFTA applies to the acquisition of products by lease, rental, or lease-purchase contract (including lease-to-own-

ership, or lease-with-option-to purchase), the contracting officer shall 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 this 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 48.

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

(5) If a contemplated acquisition includes an option clause (see Subpart 17.2), when calculating the threshold for application of Trade Agreements Act or NAFTA provisions, include the value of all options.

(b) The U.S. Trade Representative has determined that in order to promote further economic recovery of the Caribbean Basin countries (as defined in 25.401), products originating in those countries which are eligible for duty-free treatment under the Caribbean Basin Economic Recovery Act shall be treated as eligible products for the purposes of this subpart. Except for products of Panama, this determination is effective until September 30, 1997. For products of Panama, this determination is effective until September 30, 1998. These dates may be extended by the U.S. Trade Representative by means of a notice in the *Federal Register*.

(c)(1) There shall be no acquisition of foreign end products subject to the Trade Agreements Act unless the foreign end products are eligible products, except as provided in paragraphs (c)(2) and (c)(3) of this section.

(2) The prohibition in paragraph (c)(1) of this section does not apply if offers of domestic end products or of eligible products are either not received or are insufficient to fulfill the requirements.

(3) A waiver may be granted under section 302(b)(2) of the Trade Agreements Act (19 U.S.C. 2512(b)(2)).

(d) No requirement for the acquisition of eligible products shall be divided with the intent of reducing the estimated value of the acquisition below the dollar threshold addressed in paragraph (a) of this section.

(e) Acquisitions of eligible products are subject to the requirements of Part 6. The use of the authorities cited in 6.302-3(a)(2)(i) or 6.302-7 requires compliance with 6.303-1(d).

(f) Subject to the provisions of U.S. law and regulation, a supplier established in a designated, North American Free Trade Agreement, 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) Where the goods being supplied were produced, provided that the country of production is a designated, North American Free Trade Agreement, or a Caribbean Basin country.

(g) The procedures in 25.405 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 \$50,000 or more (\$6,500,000 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 is indicated in parentheses):

(1) Information processing and related telecommunications services (D):

(i) Automated data processing (ADP) telecommunications and transmission services (D304).

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

(iii) Telecommunications 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 (J):

(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 (M):

(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—all classes except V503 travel agent services (V).

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

(7) Construction dredging services.

### 25.403 Exceptions.

This subpart does not apply to—

(a) Acquisitions below the dollar thresholds in 25.402(a)(1) through (3), respectively;

(b) Purchases under small or small disadvantaged business preference programs;

(c)(1) Purchases of arms, ammunition or war materials, or purchases indispensable for national security or for

national defense purposes, by the Department of Defense, as provided in departmental regulations;

(2) Purchases indispensable for national security or for national defense purposes, subject to policies established by the U.S. Trade Representative.

(d) Research and development contracts;

(e) Purchases of items for resale;

(f) 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; or

(g) Purchases of products that are excluded from duty-free treatment for Caribbean countries under 19 U.S.C. 2703 (b); which presently are—

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

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

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

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

(5) 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 Tariff Schedule of the United States (TSUS) column two rates of duty apply.

#### **25.404 [Reserved]**

#### **25.405 Procedures.**

When the Trade Agreements Act or North American Free Trade Agreement (NAFTA) applies, the following procedures shall be used:

(a) Contracting officers shall comply with the requirements of 5.203, Publicizing and response time.

(b) Agencies shall not impose technical requirements solely to preclude the acquisition of eligible products.

(c) Offers received in response to solicitations anticipating competitive negotiations shall be opened in the presence of an impartial witness, whose name shall be recorded in the contract file.

(d) Solicitations shall specify that offers involving eligible products from designated, NAFTA, or Caribbean Basin countries shall be submitted in the English language and in U.S. dollars.

(e) Within three days after a contract award for an eligible product, agencies shall give unsuccessful offerors from designated or NAFTA countries notice in accordance with 14.409-1 and 15.1003. “Day,” for purposes of the notifica-

tion process, means calendar day, except that the period will run until a day which is not a Saturday, Sunday, or legal holiday.

#### **25.406—25.407 [Reserved]**

#### **25.408 Solicitation provisions and contract clauses.**

(a) The contracting officer shall insert—

(1) The provision at 52.225-8, Buy American Act—Trade Agreements—Balance of Payments Program Certificate, in solicitations containing the clause at 52.225-9;

(2) The clause at 52.225-9, Buy American Act—Trade Agreements—Balance of Payments Program, in solicitations and contracts for supplies where the contracting officer has determined that the acquisition is subject to the Trade Agreements Act;

(3) The provision at 52.225-20, Buy American Act—North American Free Trade Agreement Implementation Act—Balance of Payments Program Certificate, in solicitations containing the clause at 52.225-21. Use the provision with its Alternate I if the acquisition value is between \$25,000 and \$50,000; and

(4) The clause at 52.225-21, Buy American Act—North American Free Trade Agreement Implementation Act—Balance of Payments Program, in solicitations and contracts for supplies where the contracting officer has determined that the acquisition is not subject to the Trade Agreements Act but is subject to NAFTA. Use the clause with its Alternate I if the acquisition value is between \$25,000 and \$50,000.

(b) The contracting officer shall rely on the offeror’s certification as submitted.

(c) The clause prescriptions at paragraph (a) of this section shall apply where any item under a multiple item solicitation is determined to be subject to the Trade Agreements Act or North American Free Trade Agreement Implementation Act. If the Acts do not apply to all of the items being solicited, the contracting officer shall indicate, in the schedule, those items that are exempt.

(d) The contracting officer shall insert the provisions at 52.214-34, Submission of Offers in the English Language, and 52.214-35, Submission of Offers in U.S. Currency, in all solicitations subject to the Trade Agreements Act or NAFTA.

### **Subpart 25.5—Use of Foreign Currency**

#### **25.501 Policy.**

(a) Unless a specific currency is required by international agreement or by the Trade Agreements Act (see 25.405(d)), contracting officers shall determine whether solicitations for contracts to be entered into and performed outside the

United States will require submission of offers either in U.S. currency or in 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 should generally 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 of best and final offers, for other negotiated acquisitions effect on the—

- (1) Date of bid opening for sealed bid acquisitions;
- (2) Closing date for negotiated acquisitions when award is based on initial offers; or
- (3) Due date for receipt.

(c) If contracts are priced in foreign currency, agencies must ensure that adequate funds are available to cover currency fluctuations in order to avoid a violation of the Anti-Deficiency Act.

#### **25.502 Solicitation provision.**

The contracting officer shall insert the provision at 52.225-4, Evaluation of Foreign Currency Offers, in solicitations if the use of other than a specified currency is permitted. The contracting officer shall insert the source of the rate to be used in the evaluation of offers.

### **Subpart 25.6—Customs and Duties**

#### **25.600 Scope of subpart.**

This subpart provides policies and procedures for exempting from import duties certain supplies purchased under Government contracts. Regulations governing importations and duties are contained in the “Customs Regulations” issued by the U.S. Customs Service, Department of the Treasury (Chapter 1, Title 19 of the *Code of Federal Regulations*).

#### **25.601 Definition.**

“Customs territory of the United States,” as used in this subpart, means the States, the District of Columbia, and Puerto Rico.

#### **25.602 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 whenever the anticipated savings to appropriated funds will outweigh the administrative costs associated with processing required documentation.

#### **25.603 Procedures.**

(a) *General.* 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 25.604), those shipments are also subject to duty.

(b) *Formal entry and release.* (1) Upon receipt of a notice from a Government contractor or customs office of the arrival, or pending arrival, of a shipment of supplies entitled to duty-free entry, the contracting officer normally shall execute—

(i) Customs Form 7501, Consumption Entry, which shall serve as both the entry and the entry summary (see 19 CFR Parts 141-142) (two copies to be forwarded to the District Director of Customs at port of entry);

(ii) Customs Form 7501-A, Consumption Entry Permit (one copy to be forwarded to the District Director of Customs at port of entry); and

(iii) Either a duty-free entry certificate when required in accordance with 25.604 (two copies to be forwarded to the District Director of Customs at port of entry) or Customs Form 7506, Warehouse Withdrawal Conditionally Free of Duty, and Permit (two copies to be forwarded to the District Director of Customs at warehouse location).

(2) Customs forms are available from any District Director of Customs Office or United States Customs port. Data for completing customs forms shall be obtained from the contractor.

(c) *Immediate entry and release.* Imported supplies purchased under Government contracts are regarded as shipments, the immediate delivery of which is necessary under the provisions of 19 U.S.C. 1448(b). Request for their release from Customs custody before formal entry and release shall normally be made by the contracting officer by filing Customs Form 3461, Immediate Delivery Application, with the District Director of Customs at port of entry. Forms for formal entry and release must be filed within a reasonable time thereafter. Applications for immediate delivery may be limited to particular shipments or may cover all shipments under a Government contract. They may be approved for specific or indefinite periods of time (see 19 CFR 10.101 and 19 CFR Part 142, Subpart A, for requirements).

#### **25.604 Exempted supplies.**

(a) Schedule 8 of the Tariff Schedules of the United States (19 U.S.C. 1202) lists 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 Tariff Schedule (see 19 CFR 10.102-104, 10.110, 10.114-119, 10.121, and 15 CFR 301 for requirements and formats).

(b) Supplies (as opposed to 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(a). The contracting activity shall cite this authority on the appropriate customs form when making such purchases (see 19 CFR 10.59(a)).

#### **25.605 Contract clause.**

(a) The contracting officer shall insert the clause at 52.225-10, Duty-Free Entry, in solicitations and contracts over \$100,000 that provide for, or anticipate furnishing to the Government, supplies to be imported into the customs territory of the United States.

(b) The clause may be used in solicitations and contracts of \$100,000 or less, if such action is consistent with the policy in 25.602.

(c) If the contracting officer knows before award that the contract includes specific supplies that will be accorded duty-free entry, a list of these supplies shall be inserted in the contract Schedule. The list shall include item numbers from Schedule 8, Tariff Schedules of the United States, and a description of the supplies.

### **Subpart 25.7—Restrictions on Certain Foreign Purchases**

#### **25.701 Restrictions.**

(a) The Government does not acquire supplies or services from foreign governments or their organizations when these supplies or services 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); or
- (5) North Korea (31 CFR Part 500).

(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).

(c) Questions concerning these restrictions should be referred to the—

Department of the Treasury  
Office of Foreign Assets Control

Washington, DC 20220  
(202) 622-2520

#### **25.702 Contract clause.**

The contracting officer shall insert the clause at 52.225-11, Restrictions on Certain Foreign Purchases, in solicitations and contracts over \$2,500.

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

#### **25.801 International agreements.**

Treaties and agreements between the United States and foreign governments may affect contracting within foreign countries. Contracting officers should give particular attention to the provisions in those agreements that pertain to purchase procedures, contract forms and clauses, taxes, patents, technical information, facilities, and other matters related to contracting.

#### **25.802 Procedures.**

(a) When placing contracts with contractors outside the United States, for performance outside the United States, contracting officers shall—

(1) Determine the existence and applicability of any international agreements to contracts being planned or processed, and ensure compliance with these agreements; and

(2) Conduct the necessary advance acquisition planning and coordination between the appropriate United States 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 United States diplomatic missions.

### **Subpart 25.9—Additional Foreign Acquisition Clauses**

#### **25.901 Omission of audit clause.**

(a) *Definition.* “Foreign contractor,” as used in this subpart, means a contractor or subcontractor organized or existing under the laws of a country other than the United States, its territories, or possessions.

(b) *Policy.* As required by 10 U.S.C. 2313, 41 U.S.C. 254d, and 15.106(b), the contracting officer shall consider for use in negotiated contracts with foreign contractors, whenever possible, the basic clause at 52.215-2, Audit and Records—Negotiation, which authorizes examination of records by the Comptroller General. Use of the clause with

Alternate III should be approved only after the contracting agency, having considered such factors as alternate sources of supply, additional cost, and time of delivery, has made all reasonable efforts to include the basic clause.

(c) *Conditions for use of Alternate III.* The contracting officer may use the clause at 52.215-2, Audit and Records—Negotiation, with its Alternate III in contracts with foreign contractors—

(1) If the agency head, or designee, determines, with the concurrence of the Comptroller General, that waiver of the right to examination of records by the Comptroller General will serve the public interest; or

(2) If the contractor is a foreign government or agency thereof or is precluded by the laws of the country involved from making its records, as defined at 4.703(a), available for examination, and the agency head, or designee, determines, after taking into account the price and availability of the property or services from United States sources, that waiver of the right to examination of records by the Comptroller General best serves the public interest.

(d) *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 property or services from the United States and other sources; and

(5) Determine that it will serve the interest of the United States to use the clause with its Alternate III.

### **25.902 Inconsistency between English version and translation of contract.**

The contracting officer shall insert the clause at 52.225-14, Inconsistency Between English Version and Translation of Contract, in solicitations and contracts whenever translation into another language is anticipated.

### **Subpart 25.10—Implementation of Sanctions Against Countries that Discriminate Against United States Products or Services in Government Procurement**

#### **25.1000 Scope of subpart.**

This subpart implements section 305(d)(1) of the Trade Agreements Act of 1979, as amended (19 U.S.C. 2515(d)(1)), which requires the President to identify a country which discriminates against U.S. products or services in Government procurement and to impose sanctions on that country's products and services. This subpart does not apply to the Department of Defense. For thresholds which

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

#### **25.1001 Definitions.**

As used in this subpart—

“Sanctioned European Union (EU) construction” means construction to be performed in a sanctioned member state of the EU and the contract is awarded by a contracting activity located in the United States or its territories.

“Sanctioned EU end product” means an article that (a) is wholly the growth product or manufacture of a sanctioned member state of the EU or (b) in the case of an article which consists in whole or in part of materials from another country or instrumentality, has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that from which it was so transformed in a sanctioned member state of the EU. 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 its supply; provided, that the value of these incidental services does not exceed that of the product itself.

“Sanctioned EU services” means services to be performed in a sanctioned member state of the EU when the contract is awarded by a contracting activity located in the United States or its territories.

“Sanctioned member state of the EU” means Austria, Belgium, Denmark, Finland, France, Ireland, Italy, Luxembourg, the Netherlands, Sweden, and the United Kingdom.

#### **25.1002 Trade sanctions.**

(a) Subject to the exceptions in paragraph (b) of this section, executive agencies shall not award contracts for—

(1) Sanctioned EU end products with an estimated acquisition value less than \$190,000.

(2) Sanctioned EU construction with an estimated acquisition value less than \$7,311,000.

(3) Sanctioned EU services as follows:

(i) Service contracts with an estimated acquisition value less than \$190,000.

(ii) Regardless of dollar value, contracts for—

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

(B) Dredging (Y216, Z216);

(C) Management and operation contracts 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 co-production 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); and
- (N) Telecommunications services (encompassing only voice telephony, telex, radio telephony, paging, and satellite services) (S1, D304, D305, D316, D317, D399).

(b) The sanctions in paragraph (a) of this section do not apply to the following:

- (1) Purchases awarded by simplified procedures in accordance with Part 13.
- (2) Total small business set asides under 19.502-2.
- (3) Contracts in support of the U.S. national security interests.
- (4) Contracts for goods or services awarded outside the United States and its territories where the goods or services are to be used outside the United States.
- (5) Contracts for essential spare, repair, or replacement parts not otherwise available from non-sanctioned countries.

(c) *Authority to exempt certain procurements.* (1) The head of an agency, without power of redelegation, may authorize the award of a contract or class of contracts for sanctioned EU end products, services, and construction, the purchase of which is otherwise prohibited under paragraph (a) of this section if the agency head determines that such action is necessary—

- (i) In the public interest;

(ii) To avoid the restriction of competition in a manner which would limit the procurement 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 bidders to assure the procurement of services, articles, materials or supplies of requisite quality at competitive prices.

(2) When a determination is made according to this paragraph (c), the head of the agency shall notify the Chairman of the Committee on Banking, Finance and Urban Affairs and the Chairman of the Committee on Governmental Affairs of the United States Senate; the Chairman of the Committee on Ways and Means and the Chairman of the Committee on Government Operations of the United States House of Representatives—

(i) Not less than 30 days prior to the date of award of a contract or the date of authorization of the award of a class of contracts; or

(ii) Not more than 90 days after the award of a contract or authorization where the agency's need for the service, article, material or supply is of such urgency that the United States would be seriously injured by a delay.

(3) A copy of the notification required in paragraph (c)(2) of this section shall be sent to the United States Trade Representative.

#### 25.1003 Contract clauses.

Except as provided in 25.1002(b) and (c)—

(a) Insert the clause at 52.225-18, European Union Sanctions for End Products, in solicitations and contracts for supplies with an estimated acquisition value less than \$190,000.

(b) Insert the clause at 52.225-19, European Union Sanction for Services, in solicitations and contracts for—

(1) Services with an estimated acquisition value less than \$190,000; and

(2) All services listed in FAR 25.1002(a)(3)(ii).

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