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(2) Evaluate offers proposing foreign construction material by using the procedures at 25.204, except that a factor of 50 percent or a higher percentage (see 25.303(f)) must be applied to foreign construction material proposed for exception from the requirements of the Balance of Payments Program on the basis of unreasonable cost of domestic construction materials.

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

Subpart 25.4—Trade Agreements

25.400 Scope of subpart.

(a) This subpart provides policies and procedures applicable to acquisitions that are subject to—

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

(2) The Caribbean Basin Trade Initiative (the determination of the U.S. Trade Representative that end products granted duty-free entry from countries designated by the President as beneficiaries under the Caribbean Basin Economic Recovery Act (19 U.S.C. 2701, *et seq.*), with the exception of the Dominican Republic and Honduras, must be treated as eligible products under the Trade Agreements Act);

(3) NAFTA (the North American Free Trade Agreement, as approved by Congress in the North American Free Trade Agreement Implementation Act of 1993 (19 U.S.C. 3301 note));

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

(5) The Agreement on Trade in Civil Aircraft (U.S. Trade Representative waiver of the Buy American Act for signatories of the Agreement on Trade in Civil Aircraft, as implemented in

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the Trade Agreements Act of 1979 (19 U.S.C. 2513)).

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

[64 FR 72419, Dec. 27, 1999, as amended at 65 FR 24322, Apr. 25, 2000]

25.401 Exceptions.

(a) This subpart does not apply to—

(1) Acquisitions set aside for small businesses;

(2) Acquisitions of arms, ammunition, or war materials, or purchases indispensable for national security or for national defense purposes, including all services purchased in support of military forces located overseas;

(3) Acquisitions of end products for resale;

(4) Acquisitions 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;

(5) Other acquisitions not using full and open competition, if authorized by Subpart 6.2 or 6.3, when the limitation of competition would preclude use of the procedures of this subpart (but see 6.303-1(d)); or sole source acquisitions justified in accordance with 13.501(a); and

(6) Acquisitions of the following excluded services:

(i) Automatic data processing (ADP) telecommunications and transmission services, except enhanced (*i.e.*, value-added) telecommunications services.

(ii) Research and development.

(iii) Transportation services (including launching services, but not including travel agent services).

(iv) Utility services.

(b)(1) Other services not covered by the Trade Agreements Act are—

(i) Dredging; and

(ii) Management and operation contracts to certain Government or privately owned facilities used for Government purposes, including Federally Funded Research and Development Centers (FFRDCs).

(2) Other services not covered by NAFTA are—

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(i) ADP teleprocessing and timesharing services (D305), telecommunications network management services (D316), automated news services, data services or other information services (D317), and other ADP and telecommunications services (D399) (Federal Service Code from the Federal Procurement Data System Product/Service Code Manual indicated in parentheses);

(ii) Operation of all facilities by the Department of Defense, Department of Energy, or the National Aeronautics and Space Administration; and all Government-owned research and development facilities or Government-owned environmental laboratories;

(iii) Maintenance, repair, modification, rebuilding and installation of equipment related to ships; and

(iv) Nonnuclear ship repair.

25.402 General.

The trade agreements waive the applicability of the Buy American Act or the Balance of Payments Program for some foreign supplies and construction materials from certain countries. The Trade Agreements Act and NAFTA specify procurement procedures designed to ensure fairness. The value of the acquisition is a determining factor in the applicability of the trade agreements. When the restrictions of the Buy American Act or the Balance of Payments Program are waived for eligible products, offers of such products (eligible offers) receive equal consideration with domestic offers. Under the Trade Agreements Act, only U.S.-made end products or eligible products may be acquired (also see 25.403(c)). See Subpart 25.5 for evaluation procedures for supply contracts subject to trade agreements.

25.403 Trade Agreements Act.

(a) *General.* The Agreement on Government Procurement of the Trade Agreements Act—

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

(2) Prohibits discriminatory practices based on foreign ownership;

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

(4) Requires certain procurement procedures designed to ensure fairness (see 25.408).

(b) *Thresholds.* (1) Except as provided in 25.401, the Trade Agreements Act applies to an acquisition for supplies or services if the estimated value of the acquisition is \$177,000 or more; the Trade Agreements Act applies to an acquisition for construction if the estimated value of the acquisition is \$6,806,000 or more. These dollar thresholds are subject to revision by the U.S. Trade Representative approximately every 2 years (see Executive Order 12260).

(2) To determine whether the Trade Agreements Act applies to the acquisition of products by lease, rental, or lease-purchase contract (including lease-to-ownership, or lease-with-option-to purchase), calculate the estimated acquisition value as follows:

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

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

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

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

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

(4) If, in any 12-month period, recurring or multiple awards for the same type of product or products are anticipated, use the total estimated value of these projected awards to determine whether the Trade Agreements Act applies. Do not divide any acquisition with the intent of reducing the estimated value of the acquisition below

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the dollar threshold of the Trade Agreements Act.

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

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

[64 FR 72419, Dec. 27, 1999, as amended at 65 FR 36026, June 6, 2000]

25.404 Caribbean Basin Trade Initiative.

Under the Caribbean Basin Trade Initiative, the United States Trade Representative has determined that, for acquisitions subject to the Trade Agreements Act, Caribbean Basin country end products must be treated as eligible products. This determination is effective until September 30, 2000. The U.S. Trade Representative may extend these dates through a document in the FEDERAL REGISTER.

[65 FR 24322, Apr. 25, 2000]

25.405 North American Free Trade Agreement (NAFTA).

(a) An acquisition of supplies is not subject to NAFTA if the estimated value of the acquisition is \$25,000 or less. For acquisitions subject to NAFTA, evaluate offers of NAFTA country end products without regard to the restrictions of the Buy American Act or the Balance of Payments Program, except that for acquisitions with an estimated value of less than \$54,372, only Canadian end products are eligible products. Eligible products from NAFTA countries are entitled to the nondiscriminatory treatment of the Trade Agreements Act. NAFTA does not prohibit the purchase of other foreign end products.

(b) NAFTA applies to construction materials if the estimated value of the construction contract is \$7,068,419 or more.

(c) The procedures in 25.408 apply to the acquisition of NAFTA country

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services, other than services identified in 25.401. NAFTA country services are services provided by a firm established in a NAFTA country under service contracts with an estimated acquisition value of \$54,372 or more (\$7,068,419 or more for construction).

[64 FR 72419, Dec. 27, 1999, as amended at 65 FR 36026, June 6, 2000]

25.406 Israeli Trade Act.

Acquisitions of supplies by most agencies are subject to the Israeli Trade Act, if the estimated value of the acquisition is \$50,000 or more but does not exceed the Trade Agreements Act threshold for supplies (see 25.403(b)(1)). Agencies other than the Department of Defense, the Department of Energy, the Department of Transportation, the Bureau of Reclamation of the Department of the Interior, the Federal Housing Finance Board, and the Office of Thrift Supervision must evaluate offers of Israeli end products without regard to the restrictions of the Buy American Act or the Balance of Payments Program. The Israeli Trade Act does not prohibit the purchase of other foreign end products.

25.407 Agreement on Trade in Civil Aircraft.

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

25.408 Procedures.

(a) If the Trade Agreements Act or NAFTA applies (see 25.401), the contracting officer must—

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

(2) Comply with the requirements of 5.207, Preparation and Transmittal of Synopses, including the appropriate

“Numbered Note” (5.207(e)(2)) for contracts that are subject to the Trade Agreements Act;

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

(4) Specify in solicitations that offerors must submit offers in the English language and in U.S. dollars (see 52.214-34, Submission of Offers in the English Language, and 52.214-35, Submission of Offers in U.S. Currency, or paragraph (c)(5) of 52.215-1, Instruction to Offerors—Competitive Acquisitions); and

(5) Provide unsuccessful offerors from designated or NAFTA countries notice in accordance with 14.409-1 or 15.503.

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

Subpart 25.5—Evaluating Foreign Offers—Supply Contracts

25.501 General.

The contracting officer—

(a) Must apply the evaluation procedures of this subpart to each line item of an offer unless either the offer or the solicitation specifies evaluation on a group basis (see 25.503);

(b) May rely on the offeror’s certification of end product origin when evaluating a foreign offer;

(c) Must identify and reject offers of end products that are prohibited or sanctioned in accordance with Subparts 25.6 and 25.7; and

(d) Must not use the Buy American Act and Balance of Payments Program evaluation factors prescribed in this subpart to provide a preference for one foreign offer over another foreign offer.

25.502 Application.

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

(1) Eliminate all offers or offerors that are unacceptable for reasons other than price; *e.g.*, nonresponsive, debarred or suspended, sanctioned (see Subpart 25.6), or a prohibited source (see Subpart 25.7).

(2) Rank the remaining offers by price.

(3) If the solicitation specifies award on the basis of factors in addition to

cost or price, apply the evaluation factors as specified in this section and use the evaluated cost or price in determining the offer that represents the best value to the Government.

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

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

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

(3) If there were no offers of U.S.-made, designated country, Caribbean Basin country, or NAFTA country end products, make a nonavailability determination (see 25.103(b)(2)) and award on the low offer (see 25.403(c)).

(c) For acquisitions not subject to the Trade Agreements Act, but subject to the Buy American Act or the Balance of Payments Program (NAFTA or the Israeli Trade Act also may apply), the following applies:

(1) If the low offer is a domestic offer or an eligible offer under NAFTA or the Israeli Trade Act, award on that offer.

(2) If the low offer is a noneligible offer and there were no domestic offers (see 25.103(b)(3)), award on the low offer.

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

(4) Otherwise, apply the appropriate evaluation factor provided in 25.105 or 25.304 to the low offer.

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

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

(d) *Ties.* (1) If application of an evaluation factor results in a tie between a