

DEPARTMENT OF DEFENSE**48 CFR Parts 225 and 252****[DFARS Case 2000–D020]****Defense Federal Acquisition Regulation Supplement; Balance of Payments Program****AGENCY:** Department of Defense (DoD).**ACTION:** Proposed rule with request for comments.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to add policy pertaining to the Balance of Payments Program. The DFARS policy would replace Federal Acquisition Regulation (FAR) policy on this subject that has been proposed for elimination.

DATES: Comments on the proposed rule should be submitted to the address shown below on or before November 13, 2001, to be considered in the formation of the final rule.

ADDRESSES: Respondents may submit comments directly on the World Wide Web at <http://emissary.acq.osd.mil/dar/dfars.nsf/pubcom>. As an alternative, respondents may e-mail comments to: dfars@acq.osd.mil. Please cite DFARS Case 2000–D020 in the subject line of e-mail comments.

Respondents that cannot submit comments using either of the above methods may submit comments to: Defense Acquisition Regulations Council, Attn: Ms. Amy Williams, OUSD (AT&L) DP(DAR), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301–3062; facsimile (703) 602–0350. Please cite DFARS Case 2000–D020.

At the end of the comment period, interested parties may view public comments on the World Wide Web at <http://emissary.acq.osd.mil/dar/dfars.nsf>.

FOR FURTHER INFORMATION CONTACT: Ms. Amy Williams, (703) 602–0288.

SUPPLEMENTARY INFORMATION:**A. Background**

The proposed rule published at 65 FR 54936 on September 11, 2000, requested comments on the removal of all FAR policy pertaining to the Balance of Payments Program. This program applies to contracts for supplies to be used, and construction to be performed, outside the United States. Although the DFARS already contains policy that implements the Balance of Payments Program for acquisition of supplies for use outside the United States, DoD presently uses the FAR policy for construction contracts performed outside the United States. This DFARS

rule proposes to add policy for application of the Balance of Payments Program to construction contracts that would replace the existing FAR policy for DoD.

DoD is also considering discontinuation of application of the Balance of Payments Program to construction contracts. Therefore, in addition to the request for comments on this proposed rule, DoD invites comments on the advisability of discontinuing application of the Balance of Payments Program to DoD construction contracts.

This proposed rule would streamline application of the Balance of Payments Program to DoD construction contracts by—

- (1) Exempting any particular construction material that is at or below the simplified acquisition threshold;
- (2) Authorizing the contracting officer to make pre-solicitation determinations as to whether a requirement can best be filled by a foreign end product or construction material; and
- (3) Specifically authorizing an assessment, prior to issuance of a solicitation, as to whether an exemption to the Balance of Payments Program applies on the basis of the entire project.

In addition, this proposed rule updates the clause at DFARS 252.225–7005, Identification of Expenditures in the United States, to implement the applicable requirements of the DoD Financial Management Regulations, Vol. 6A, Chapter 13, International Balance of Payments Reporting and Estimating.

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

B. Regulatory Flexibility Act

The proposed rule is not expected to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because the Balance of Payments Program requirements in this rule are transferred from existing FAR requirements, with streamlining changes that are not expected to have a significant effect outside the Government. Therefore, DoD has not performed an initial regulatory flexibility analysis. DoD invites comments from small businesses and other interested parties. DoD also will consider comments from small entities concerning the affected DFARS subparts in accordance with 5 U.S.C. 610. Such comments should be submitted separately and should cite DFARS Case 2000–D020.

C. Paperwork Reduction Act

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

List of Subjects in 48 CFR Parts 225 and 252

Government procurement.

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

Therefore, DoD proposes to amend 48 CFR Parts 225 and 252 as follows:

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

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

PART 225—FOREIGN ACQUISITION

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

225.003 Definitions.

* * * * *

(3) “Domestic concern” means—

- (i) A concern incorporated in the United States (including a subsidiary that is incorporated in the United States, even if the parent corporation is a foreign concern); or
- (ii) An unincorporated concern having its principal place of business in the United States.

* * * * *

Subpart 225.3—[Removed]

3. Subpart 225.3 is removed.

225.1101 [Amended]

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

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

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

225.1103 Other provisions and clauses.

(1) Unless the contracting officer knows that the prospective contractor is not a domestic concern, use the clause

at 252.225-7005, Identification of Expenditures in the United States, in solicitations and contracts that—

(i) Exceed the simplified acquisition threshold; and

(ii) Are for the acquisition of—

(A) Supplies for use outside the United States;

(B) Construction to be performed outside the United States; or

(C) Services to be performed primarily outside the United States.

6. Subpart 225.75 is added to read as follows:

Subpart 225.75—Balance of Payments Program

Sec.

225.7500 Scope of subpart.

225.7501 Policy.

225.7502 Procedures.

225.7503 Contract clauses.

225.7500 Scope of subpart.

This subpart provides policies and procedures implementing the Balance of Payments Program. It applies to contracts for the acquisition of—

(a) Supplies for use outside the United States; and

(b) Construction to be performed outside the United States.

225.7501 Policy.

Acquire only domestic end products for use outside the United States, and use only domestic construction material for construction to be performed outside the United States, including end products and construction material for foreign military sales, unless—

(a) Before issuing the solicitation—

(1) The estimated cost of the acquisition or the value of a particular construction material is at or below the simplified acquisition threshold;

(2) The end product or particular construction material is—

(i) Listed in FAR 25.104 or 225.104(a)(iii);

(ii) An end product or construction material that, by its nature or as a practical matter, can best be acquired in the geographic area concerned, e.g., ice or books; or bulk material, such as sand, gravel, or other soil material, stone, concrete masonry units, or fired brick;

(iii) A petroleum product;

(iv) A spare part for foreign-manufactured vehicles, equipment, machinery, or systems, provided the acquisition is restricted to the original manufacturer or its supplier in accordance with DoD standardization policy (see DoD Directive 4120.3, Defense Standardization and Specification Program);

(v) An industrial gas; or

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

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

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

(5) The contracting officer determines that a requirement can best be filled by a foreign end product or construction material, including determinations that—

(i) A subsistence product is perishable and delivery from the United States would significantly impair the quality at the point of consumption;

(ii) A particular domestic construction material is not available;

(iii) The cost of domestic construction material would exceed the cost of foreign construction material by more than 50 percent, calculated on the basis of—

(A) A particular construction material; or

(B) The comparative cost of application of the Balance of Payments to the total acquisition; or

(iv) Use of a particular domestic construction material is impracticable.

(b) After receipt of offers—

(1) The evaluated low offer (see subpart 225.5) is an offer of an end product that—

(i) Is a qualifying country end product;

(ii) Is an eligible product subject to the Trade Agreements Act, NAFTA, or the Israeli Trade Act;

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

(iv) Is a nonqualifying country end product, but application of the Balance of Payments Program evaluation factor would not result in award on a domestic offer; or

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

(c) At any time during the acquisition process, the head of the agency determines that it is not in the public interest to apply the restrictions of the Balance of Payments Program to the end product or construction material.

225.7502 Procedures.

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

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

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

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

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

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

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

225.7503 Contract clauses.

Unless the entire acquisition is exempt from the Balance of Payments Program under 225.7501(a)(3), 225.7501(a)(5)(iii), or 225.7501(c)—

(a) Use the clause at 252.225-70XX, Balance of Payments Program—Construction Material, in solicitations and contracts for construction to be performed outside the United States with a value greater than the simplified acquisition threshold but less than \$6,806,000.

(b) Use the clause at 252.225-70YY, Balance of Payments Program—Construction Material Under Trade Agreements, in solicitations and contracts for construction to be performed outside the United States with a value of \$6,806,000 or more. For acquisitions with a value of \$6,806,000 or more, but less than \$7,068,419, use the clause with its Alternate I.

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

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

252.225-7005 Identification of Expenditures in the United States.

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

Identification of Expenditures in the United States (XXX 2001)

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

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

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

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

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

(2) Should be based on reasonable estimates; and

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

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

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

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

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

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

(End of clause)

8. Sections 252.225–70XX and 252.225–70YY are added to read as follows:

252.225–70XX Balance of Payments Program—Construction Material.

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

Balance of Payments Program—Construction Material (XXX 2001)

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

“Construction material” means an article, material, or supply brought to the construction site by the Contractor or a subcontractor for incorporation into the building or work. The term also includes an item brought to the site preassembled from articles, materials, or supplies. However, emergency life safety systems, such as emergency lighting, fire alarm, and audio evacuation systems, that are discrete systems incorporated into a public building or work and that are produced as complete systems,

are evaluated as a single and distinct construction material regardless of when or how the individual parts or components of those systems are delivered to the construction site. Materials purchased directly by the Government are supplies, not construction material.

“Cost of components” means—

(1) For components purchased by the Contractor, the acquisition cost, including transportation costs to the place of incorporation into the end product (whether or not such costs are paid to a domestic firm), and any applicable duty (whether or not a duty-free entry certificate is issued); or

(2) For components manufactured by the Contractor, all costs associated with the manufactured of the component, including transportation costs as described in paragraph (1) of this definition, plus allocable overhead costs, but excluding profit. Cost of components does not include any costs associated with the manufacture of the end product.

“Domestic construction material” means—

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

(2) A construction material manufactured in the United States, if the cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. Components of foreign origin of the same class or kind for which nonavailability determinations have been made are treated as domestic.

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

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

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

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

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

(End of clause)

252.225–70YY Balance of Payments Program—Construction Materials Under Trade Agreements.

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

Balance of Payments Program—Construction Material Under Trade Agreements (XXX 2001)

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

“Construction material” means an article, material, or supply brought to the construction site by the Contractor or a subcontractor for incorporation into the building or work. The term also includes an item brought to the site preassembled from articles, materials, or supplies. However, emergency life safety systems, such as emergency lighting, fire alarm, and audio evacuation systems, that are discrete systems incorporated into a public building or work and that are produced as complete systems, are evaluated as a single and distinct construction material regardless of when or how the individual parts or components of those systems are delivered to the construction site. Materials purchased directly by the Government are supplies, not construction material.

“Cost of components” means—

(1) For components purchased by the Contractor, the acquisition cost, including transportation costs to the place of incorporation into the end product (whether or not such costs are paid to a domestic firm), and any applicable duty (whether or not a duty-free entry certificate is issued); or

(2) For components manufactured by the Contractor, all costs associated with the manufactured of the component, including transportation costs as described in paragraph (1) of this definition, plus allocable overhead costs, but excluding profit. Cost of components does not include any costs associated with the manufacture of the end product.

“Designated country” means any of the following countries:

Aruba
Austria
Bangladesh
Belgium
Benin
Bhutan
Botswana
Burkina Faso
Burundi
Canada
Cape Verde
Central African Republic
Chad
Comoros
Denmark
Djibouti
Equatorial Guinea
Finland
France
Gambia
Germany
Greece
Guinea
Guinea-Bissau
Haiti
Hong Kong
Iceland
Ireland
Israel
Italy
Japan
Kiribati
Korea, Republic of
Lesotho
Liechtenstein
Luxembourg
Malawi
Maldives

Mali
Mozambique
Nepal
Netherlands
Niger
Norway
Portugal
Rwanda
Sao Tome and Principe
Sierra Leone
Singapore
Somalia
Spain
Sweden
Switzerland
Tanzania U.R.
Togo
Tuvalu
Uganda
United Kingdom
Vanuatu
Western Samoa
Yemen

“Designated country construction material” means a construction material that—

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

“Domestic construction material” means—

- (1) An unmanufactured construction material mined or produced in the United States; or
(2) A construction material manufactured in the United States, if the cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. Components of foreign origin of the same class or kind for which nonavailability determinations have been made are treated as domestic.

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

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

- (1) Is wholly the growth, product, or manufacture of a NAFTA country; or
(2) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in a NAFTA country into a new and different construction material distinct from the material distinct from which it was transformed.

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

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

and Balance of Payments Program restrictions are waived for designated country and NAFTA country construction materials.

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

- (1) Construction material valued at or below the simplified acquisition threshold in part 2 of the Federal Acquisition Regulation; or
(2) The construction materials or components listed by the Government as follows:

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

Alternate I (XXX 2001)

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

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

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

- (1) Construction material valued at or below the simplified acquisition threshold in part 2 of the Federal Acquisition Regulation; or
(2) The construction materials or components listed by the Government as follows:

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

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DEPARTMENT OF DEFENSE

48 CFR Part 226

[DFARS Case 2001-D007]

Defense Federal Acquisition Regulation Supplement; Preference for Local 8(a) Contractors—Base Closure or Realignment

AGENCY: Department of Defense (DoD).

ACTION: Proposed rule with request for comments.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to clarify policy pertaining to preferences for local businesses in acquisitions that

support a base closure or realignment. The rule clarifies that both competitive and noncompetitive acquisitions under the Section 8(a) Program are permitted if an 8(a) contractor is located in the vicinity of the base to be closed or realigned.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before November 13, 2001, to be considered in the formation of the final rule.

ADDRESSES: Respondents may submit comments directly on the World Wide Web at <http://emissary.acq.osd.mil/dar/dfars.nsf/pubcomm>. As an alternative, respondents may e-mail comments to: dfars@acq.osd.mil. Please cite DFARS Case 2001-D007 in the subject line of e-mailed comments.

Respondents that cannot submit comments using either of the above methods may submit comments to: Defense Acquisition Regulations Council, Attn: Ms. Angelena Moy, OUSD(AT&L)DP(DAR), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301-3062; facsimile (703) 602-0350. Please cite DFARS Case 2001-D007.

At the end of the comment period, interested parties may view public comments on the World Wide Web at <http://emissary.acq.osd.mil/dar/dfars.nsf>.

FOR FURTHER INFORMATION CONTACT: Ms. Angelena Moy, (703) 602-1302.

SUPPLEMENTARY INFORMATION:

A. Background

This proposed rule amends DFARS 226.7103 to clarify policy pertaining to preferences for local businesses in acquisitions that support a base closure or realignment. The present policy permits award under the Section 8(a) Program if “the 8(a) contractor” is located in the vicinity of the base to be closed or realigned. This proposed rule amends the text to permit use of 8(a) procedures if “at least one eligible 8(a) contractor” is located in the vicinity. This change clarifies the intent of the policy, which is to permit both competitive and noncompetitive 8(a) acquisitions in support of a base closure or realignment. A similar clarifying amendment is made to the text pertaining to set-asides for small business concerns.

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

B. Regulatory Flexibility Act

The proposed rule is not expected to have a significant economic impact on a substantial number of small entities