

2. Amend section 7.105 by adding a sentence to the end of paragraph (b)(4) to read as follows:

7.105 Contents of written acquisition plans.

* * * * *

(b) * * *

(4) * * * Provide rationale if a performance-based contract will not be used or if a performance-based contract for services is contemplated on other than a firm-fixed price basis (see 37.102(a) and 16.505(a)(3)).

* * * * *

[FR Doc. 02-10369 Filed 4-29-02; 8:45 am]

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DEPARTMENT OF DEFENSE

**GENERAL SERVICES
ADMINISTRATION**

**NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION**

48 CFR Parts 13, 25, and 52

[FAC 2001-07; FAR Case 1999-616; Item II]

RIN 9000-AI90

**Federal Acquisition Regulation;
Revisions to Balance of Payments
Program**

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

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to remove the language pertaining to the Balance of Payments Program.

DATES: Effective Date: May 15, 2002.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington DC, 20405, (202) 501-4755, for information pertaining to status or publication schedules. For clarification of content, contact Ms. Cecelia L. Davis, Procurement Analyst, at (202) 219-0202. Please cite FAC 2001-07, FAR case 1999-616.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule amends FAR part 25, Foreign Acquisition, to remove subpart 25.3, Balance of Payments Program, and makes conforming changes to FAR parts 13 and 52. This revision will reduce the

administrative burdens on both the Government and the public, without significant impact on our international balance of payments.

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 65 FR 54936, September 11, 2000. One public comment was received. The commenter raised three specific issues: (1) This rule is a significant rule under E.O. 12866 and represents a major rule; (2) concern that no effort was made to coordinate the proposed changes and elimination of the Balance of Payments Program with the Department of Commerce; and (3) industry would be adversely impacted by the elimination of the Balance of Payments Program by the deletion of FAR 25.3. In response to these concerns, this rule is not deemed a significant rule nor a major rule and not subject to review under section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule applies primarily to civilian agency acquisitions of supplies valued at more than \$100,000, but not more than \$186,000, for use outside the United States. Few acquisitions meet all of these limitations. In reference to the coordination issue with the Department of Commerce, the Department of Commerce has a representative on the Civilian Agency Acquisition Council and raised no objection when the proposed rule was discussed and agreed upon. In addressing the commenter's economic concerns, it appears the commenter is unaware that the Balance of Payments Program will be continued within the Department of Defense, and is unaware of the DFARS case that has been opened to address this program.

Civilian agencies have limited overseas purchases and given the small range of products and services to which the Balance of Payments Program applies, the benefits derived from applying the Balance of Payments Program to Civilian agency procurements does not equal the time and effort expended. The Councils, with the recommendations of the International Acquisition Committee, thoroughly considered this comment before agreeing to convert the proposed rule to a final rule without change.

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

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space

Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule applies primarily to civilian agency acquisitions of supplies valued at more than \$100,000, but not more than \$186,000, for use outside the United States. Few acquisitions meet all of these limitations.

C. Paperwork Reduction Act

The Paperwork Reduction Act does apply; however, these changes to the FAR will reduce information collection requirements to the paperwork burden previously approved under OMB Control Numbers 9000-0023, 9000-0130, and 9000-0141 by approximately 1,121 hours.

List of Subjects in 48 CFR Parts 13, 25, and 52

Government procurement.

Dated: April 23, 2002.

Al Matera,

Director, Acquisition Policy Division.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 13, 25, and 52 as set forth below:

1. The authority citation for 48 CFR parts 13, 25, and 52 continues to read as follows:

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

PART 13—SIMPLIFIED ACQUISITION PROCEDURES

2. Amend section 13.302-5 by revising paragraph (d)(3)(i) to read as follows:

13.302-5 Clauses.

* * * * *

(d) * * *

(3)(i) When an acquisition for supplies for use within the United States cannot be set aside for small business concerns and trade agreements apply (see Subpart 25.4), substitute the clause at FAR 52.225-3, Buy American Act—North American Free Trade Agreement—Israeli Trade Act, used with Alternate I or Alternate II, if appropriate, instead of the clause at FAR 52.225-1, Buy American Act—Supplies.

* * * * *

PART 25—FOREIGN ACQUISITION

25.000 [Amended]

3. Amend section 25.000 by removing "the Balance of Payments Program,".

25.001 [Amended]

4. Amend section 25.001 by removing paragraph (b) and redesignating paragraphs (c), (d), and (e) as paragraphs (b), (c), and (d), respectively; and by removing “and the Balance of Payments Program” from the first sentence of newly redesignated paragraph (b).

25.002 [Amended]

5. Amend the table in section 25.002 as follows:

- a. In the first column by removing “25.3 Balance of Payments Program” and adding, in its place, “25.3 [Reserved]”; and
- b. In the third and fifth columns by removing “X” and adding, in their place, “—”.

6. Amend section 25.003 by revising the definition “Eligible product” to read as follows:

25.003 Definitions.

* * * * *

Eligible product means a foreign end product that is not subject to discriminatory treatment under the Buy American Act due to applicability of a trade agreement to a particular acquisition.

* * * * *

Subpart 25.3—[Reserved]

7. Remove and reserve subpart 25.3.

25.402 [Amended]

8. Amend section 25.402 in the first and fourth sentences by removing “or the Balance of Payments Program”; and in the fourth sentence by removing the word “such” and inserting “those” in its place.

25.403 [Amended]

9. Amend section 25.403 in paragraph (a)(1) by removing “and the Balance of Payments Program”.

25.405 [Amended]

10. Amend section 25.405 in the second sentence of paragraph (a) by removing “or the Balance of Payments Program”.

25.406 [Amended]

11. Amend section 25.406 by removing “or the Balance of Payments Program”.

25.501 [Amended]

12. Amend section 25.501 in paragraph (d) by removing “and Balance of Payments Program”.

25.502 [Amended]

13. Amend section 25.502—
a. In the introductory text of paragraph (c) by removing “or the Balance of Payments Program”;

b. In paragraph (c)(3) by removing “and the Balance of Payments Program provide” and adding “provides” in its place;

c. In the introductory text of paragraph (c)(4) by removing “or 25.304”;

d. In paragraph (d)(2) by removing “or Balance of Payments Program”; and

e. In paragraph (d)(3) by removing “and Balance of Payments Program”.

14. Revise section 25.504 to read as follows:

25.504 Evaluation Examples.

The following examples illustrate the application of the evaluation procedures in 25.502 and 25.503. The examples assume that the contracting officer has eliminated all offers that are unacceptable for reasons other than price or a trade agreement (see 25.502(a)(1)). The evaluation factor may change as provided in agency regulations.

15. Amend section 25.504–1 by revising the section heading and paragraphs (b)(1) and (b)(2) to read as follows:

25.504–1 Buy American Act.

* * * * *

(b)(1) *Example 2.*

Offer A	\$11,000	Domestic end product, small business
Offer B	\$10,700	Domestic end product, small business
Offer C	\$10,200	U.S.-made end product (not domestic), small business

(2) *Analysis:* This acquisition is for end products for use in the United States and is set aside for small business concerns. The Buy American Act applies. Perform the steps in 25.502(a). Offer C is evaluated as a foreign end product because it is the product of a small business but is not a domestic end product (see 25.502(c)(4)). After applying the 12 percent factor, the evaluated price of Offer C is \$11,424. Award on Offer B at \$10,700 (see 25.502(c)(4)(ii)).

16. Amend section 25.1101 by revising paragraphs (a), (b), and (c)(1) to read as follows:

25.1101 Acquisition of supplies.

* * * * *

(a)(1) Insert the clause at 52.225–1, Buy American Act—

Supplies, in solicitations and contracts with a value exceeding \$2,500 but not exceeding \$25,000; and in solicitations and contracts with a value exceeding \$25,000, if none of the

clauses prescribed in paragraphs (b) and (c) of this section apply, except if—

- (i) The solicitation is restricted to domestic end products in accordance with Subpart 6.3;
- (ii) The acquisition is for supplies for use within the United States and an exception to the Buy American Act applies (*e.g.*, nonavailability or public interest); or
- (iii) The acquisition is for supplies for use outside the United States.

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

(b)(1)(i) Insert the clause at 52.225–3, Buy American Act—North American Free Trade Agreement—Israeli Trade Act, in solicitations and contracts if—

(A) The acquisition is for supplies, or for services involving the furnishing of supplies, for use within the United States, and the value of the acquisition is more than \$25,000, but is less than \$177,000; and

(B) No exception in 25.401 applies. For acquisitions of agencies not subject to the Israeli Trade Act (see 25.406), see agency regulations.

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

(iii) If the acquisition value is \$50,000 or more but is less than \$54,372, use the clause with its Alternate II.

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

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

(iii) If the acquisition value is \$50,000 or more but is less than \$54,372, use the provision with its Alternate II.

(c)(1) Insert the clause at 52.225–5, Trade Agreements, in solicitations and contracts valued at \$177,000 or more, if the Trade Agreements Act applies (see 25.401 and 25.403) and the agency has determined that the restrictions of the

Buy American Act are not applicable to U.S.-made end products. If the agency has not made such a determination, the contracting officer must follow agency procedures.

17. Amend section 25.1102 by revising the introductory text of paragraph (a), paragraph (b), the introductory text of paragraph (c), and paragraphs (d)(1) and (d)(2) to read as follows:

25.1102 Acquisition of construction.

(a) Insert the clause at 52.225-9, Buy American Act—Construction Materials, in solicitations and contracts for construction that is performed in the United States valued at less than \$6,806,000.

(b)(1) Insert the provision at 52.225-10, Notice of Buy American Act Requirement—Construction Materials, in solicitations containing the clause at 52.225-9.

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

(c) Insert the clause at 52.225-11, Buy American Act—Construction Materials under Trade Agreements, in solicitations and contracts for construction that is performed in the United States valued at \$6,806,000 or more.

(d)(1) Insert the provision at 52.225-12, Notice of Buy American Act Requirement—Construction Materials under Trade Agreements, in solicitations containing the clause at 52.225-11.

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

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

- 18. Amend section 52.212-3 by—
a. Revising the date of the provision;
b. Removing “—Balance of Payments Program” from the introductory text of paragraph (f) (twice), and from paragraph (f)(1);
c. Removing “—Balance of Payments Program” from the introductory text of paragraph (g)(1) (twice), paragraphs (g)(1)(i), (g)(1)(ii), and (g)(1)(iii);
d. Revising paragraphs (g)(2) and (g)(3); and
e. Removing “or the Balance of Payments Program” from the second

sentence of paragraph (g)(4)(iii). The revised text reads as follows:

52.212-3 Offeror Representations and Certifications—Commercial Items.

Offeror Representations and Certifications—Commercial Items (May 2002)

(g) * * *
(2) Buy American Act—North American Free Trade Agreements—Israeli Trade Act Certificate, Alternate I (May 2002). If Alternate I to the clause at FAR 52.225-3 is included in this solicitation, substitute the following paragraph (g)(1)(ii) for paragraph (g)(1)(ii) of the basic provision:

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

Canadian End Products:

Line Item No.

(List as necessary)

(3) Buy American Act—North American Free Trade Agreements—Israeli Trade Act Certificate, Alternate II (May 2002). If Alternate II to the clause at FAR 52.225-3 is included in this solicitation, substitute the following paragraph (g)(1)(ii) for paragraph (g)(1)(ii) of the basic provision:

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

Canadian or Israeli End Products:

Line Item No.

Country of Origin

(List as necessary)

19. Amend section 52.212-5 by revising the date of the clause and paragraphs (b)(18) and (b)(19)(i) to read as follows:

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

Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items (May 2002)

(b) * * *
(18) 52.225-1, Buy American Act—Supplies (41 U.S.C. 10a-10d).
(19)(i) 52.225-3, Buy American Act—North American Free Trade Agreement—Israeli Trade Act (41 U.S.C. 10a-10d, 19 U.S.C. 3301 note, 19 U.S.C. 2112 note).

52.213-4 [Amended]

20. Amend section 52.213-4 in the clause heading by removing “(APR 2002)” and adding “(May 2002)” in its place; and in paragraph (b)(1)(viii) by removing “—Balance of Payments Program”, and by removing “(Feb 2000)” and adding “(May 2002)” in its place.

21. Amend section 52.225-1 by revising the section and clause headings; by revising paragraph (b); and by removing “—Balance of Payments Program” from paragraph (d). The revised text reads as follows:

52.225-1 Buy American Act—Supplies.

Buy American Act—Supplies (May 2002)

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

22. Amend section 52.225-2 by revising the section and provision headings; and in paragraph (a) by removing “—Balance of Payments Program”. The revised text reads as follows:

52.225-2 Buy American Act Certificate.

Buy American Act Certificate (May 2002)

- 23. Amend section 52.225-3 by—
a. Revising the section and clause headings;
b. Revising paragraph (c);
c. Removing “—Balance of Payments Program” from the third sentence of paragraph (d); and
d. Removing from Alternates I and II “(Feb 2000)” and adding “(May 2002)” in their place; and removing “—Balance of Payment Program” from paragraph (d). The revised text reads as follows:

52.225-3 Buy American Act—North American Free Trade Agreement—Israeli Trade Act.

Buy American Act—North American Free Trade Agreement—Israeli Trade Act (May 2002)

* * * * *

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

* * * * *

52.225–4 [Amended]

24. Amend section 52.225–4 by removing “—Balance of Payments Program” from the section and provision headings, paragraphs (a), (b), and (c), and Alternates I and II; and by revising the dates of the provision heading and Alternates I and II to read “(MAY 2002)”.

25. Amend section 52.225–6 by revising the date of the provision and paragraph (c) to read as follows:

52.225–6 Trade Agreements Certificate.

* * * * *

Trade Agreements Certificate (May 2002)

* * * * *

(c) The Government will evaluate offers in accordance with the policies and procedures of Part 25 of the Federal Acquisition Regulation. For line items subject to the Trade Agreements Act, the Government will evaluate offers of U.S.-made, designated country, Caribbean Basin country, or NAFTA country end products without regard to the restrictions of the Buy American Act. The Government will consider for award only offers of U.S.-made, designated country, Caribbean Basin country, or NAFTA country end products unless the Contracting Officer determines that there are no offers for those products or that the offers for those products are insufficient to fulfill the requirements of this solicitation.

(End of provision)

26. Amend section 52.225–9 by—

a. Revising the section and clause headings;

b. Removing “and the Balance of Payments Program” from paragraph (b)(1);

c. Revising paragraph (b)(3)(i); and

d. Removing the words “or Balance of Payments Program” from paragraph (b)(3)(ii), the introductory text of paragraph (c), the first sentence of paragraph (c)(2), and in paragraph (c)(3) (twice). The revised text reads as follows:

52.225–9 Buy American Act—Construction Materials.

* * * * *

Buy American Act—Construction Materials (May 2002)

* * * * *

(b) * * *

(3) * * *

(i) The cost of domestic construction material would be unreasonable. The cost of a particular domestic construction material subject to the requirements of the Buy American Act is unreasonable when the cost of such material exceeds the cost of foreign material by more than 6 percent;

* * * * *

(End of clause)

27. Amend section 52.225–10 by—

a. Revising the section and provision headings;

b. Removing “Balance of Payments Program—” from paragraph (a);

c. In the first and third sentences of paragraph (b) of the provision by removing “or Balance of Payments Program”;

d. In paragraph (c)(1) of the provision by removing “or Balance of Payments Program”; and

e. In Alternate I by removing “(Feb 2000)” and adding “(May 2002)” in its place; and by removing from paragraph (b) of the Alternate “or Balance of Payments Program”. The revised text reads as follows:

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

* * * * *

Notice of Buy American Act Requirement— Construction Materials (May 2002)

* * * * *

(End of provision)

28. Amend section 52.225–11 by—

a. Revising the section and clause headings;

b. Removing the words “and the Balance of Payments Program” from paragraph (b)(1);

c. Revising paragraph (b)(4)(i) of the clause;

d. Removing the words “or Balance of Payments Program” from paragraph (b)(4)(ii), the introductory text of paragraph (c), the first sentence of paragraph (c)(2), and paragraph (c)(3) (twice); and

e. Revising the date and paragraph (b)(1) of Alternate I. The revised text reads as follows:

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

* * * * *

Buy American Act—Construction Materials Under Trade Agreements (May 2002)

* * * * *

(b) * * *

(4) * * *

(i) The cost of domestic construction material would be unreasonable. The cost of

a particular domestic construction material subject to the restrictions of the Buy American Act is unreasonable when the cost of such material exceeds the cost of foreign material by more than 6 percent;

* * * * *

(End of clause)

Alternate I (May 2002)

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

* * * * *

29. Amend section 52.225–12 by—

a. Revising the section and provision headings;

b. Removing “Balance of Payments Program—” from paragraph (a) of the provision;

c. Removing “or Balance of Payments Program” from the first and third sentences of paragraph (b) of the provision;

d. Removing “or Balance of Payments Program” from paragraph (c)(1) of the provision;

e. Removing “(Feb 2000)” from Alternate I and adding “(May 2002)” in its place, and by removing “or Balance of Payments Program” from paragraph (b) of the Alternate; and

f. Removing “(June 2000)” from Alternate II and adding “(May 2002)” in its place, and by removing “Balance of Payments Program—” from paragraph (a) of the Alternate. The revised text reads as follows:

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

* * * * *

Notice of Buy American Act Requirement— Construction Materials Under Trade Agreements (May 2002)

* * * * *

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