

publication for public comment under 41 U.S.C. 418b is not required. However, DoD will consider comments from small entities concerning the affected DFARS subpart in accordance with 5 U.S.C. 610. Such comments should cite DFARS Case 2008–D036.

### C. Paperwork Reduction Act

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

#### List of Subjects in 48 CFR Part 252

Government procurement.

#### Michele P. Peterson,

Editor, Defense Acquisition Regulations System.

■ Therefore, 48 CFR part 252 is amended as follows:

#### PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 1. The authority citation for 48 CFR Part 252 continues to read as follows:

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

#### 252.209–7001 [Amended]

■ 2. Section 252.209–7001 is amended as follows:

- a. By revising the clause date to read “(JAN 2009)”; and
- b. In paragraph (a)(2), in the second sentence, by removing “North Korea.”.

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## DEPARTMENT OF DEFENSE

### Defense Acquisition Regulations System

#### 48 CFR Part 252

RIN 0750–AG12

#### Defense Federal Acquisition Regulation Supplement; Statutory Waiver for Commercially Available Off-the-Shelf Items (DFARS Case 2008–D009)

**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).

**ACTION:** Interim rule with request for comments.

**SUMMARY:** DoD has issued an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a determination

made by the Administrator for Federal Procurement Policy, that the Buy American Act “component test” is inapplicable to acquisitions of commercially available off-the-shelf items. The rule is consistent with changes made to the Federal Acquisition Regulation.

**DATES:** *Effective date:* January 15, 2009.

*Comment date:* Comments on the interim rule should be submitted in writing to the address shown below on or before March 16, 2009, to be considered in the formation of the final rule.

**ADDRESSES:** You may submit comments, identified by DFARS Case 2008–D009, using any of the following methods:

- **Federal eRulemaking Portal:** <http://www.regulations.gov>. Follow the instructions for submitting comments.
- **E-mail:** [dfars@osd.mil](mailto:dfars@osd.mil). Include DFARS Case 2008–D009 in the subject line of the message.
- **Fax:** 703–602–7887.
- **Mail:** Defense Acquisition Regulations System, Attn: Ms. Amy Williams, OUSD (AT&L) DPAP (DARS), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301–3062.
- **Hand Delivery/Courier:** Defense Acquisition Regulations System, Crystal Square 4, Suite 200A, 241 18th Street, Arlington, VA 22202–3402.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided.

**FOR FURTHER INFORMATION CONTACT:** Ms. Amy Williams, 703–602–0328.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

This interim rule amends DFARS provisions and clauses addressing the Buy American Act/Balance of Payments Program to implement a determination made by the Administrator for Federal Procurement Policy, on February 14, 2008, regarding laws applicable to the acquisition of commercially available off-the-shelf (COTS) items. The determination included a partial waiver of the Buy American Act (41 U.S.C. 10a and 10b), limited to the Act’s domestic component test. The waiver allows a COTS item to be treated as a domestic end product if it is manufactured in the United States, without tracking the origin of the item’s components. Changes were made to the Federal Acquisition Regulation in Federal Acquisition Circular 2005–30 to implement the Administrator’s determination. This interim rule makes corresponding changes to the DFARS.

This rule was not subject to Office of Management and Budget review under

Executive Order 12866, dated September 30, 1993.

##### B. Regulatory Flexibility Act

DoD does not expect this rule 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.* Although the rule eliminates requirements for suppliers of U.S.-made items to track the origin of the item’s components, the economic impact is not expected to be substantial. DoD has already waived the component test for U.S.-made items in acquisitions that are subject to the World Trade Organization Government Procurement Agreement (DFARS 225.103(a)(i)(B)). Additionally, contractors generally pass on the costs of such administrative requirements to 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 2008–D009.

##### C. Paperwork Reduction Act

This rule will result in a reduction of the information collection requirements previously approved under Office of Management and Budget Control Number 0704–0229, DFARS part 225 and associated clauses. DoD anticipates a 5 percent reduction in the burden hours associated with the provisions at DFARS 252.225–7000 and 252.225–7035, from 34,875 to 33,130 hours, because offerors of U.S.-made items with foreign components will no longer need to respond to these provisions.

##### D. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense that urgent and compelling reasons exist to publish an interim rule prior to affording the public an opportunity to comment. This interim rule implements a determination made by the Administrator for Federal Procurement Policy on February 14, 2008, in accordance with 41 U.S.C. 431, that the Buy American Act domestic component test is inapplicable to acquisitions of COTS items. The rule will permit a COTS item to be treated as a domestic end product if it is manufactured in the United States, without the need to track the origin of the item’s components. The rule will reduce administrative burdens for suppliers of COTS items and is

consistent with changes made to the Federal Acquisition Regulation. Comments received in response to this interim rule will be considered in the formation of the final rule.

List of Subjects in 48 CFR Part 252

Government procurement.

Michele P. Peterson,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR part 252 is amended as follows:

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

1. The authority citation for 48 CFR part 252 continues to read as follows:

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

2. Section 252.225-7000 is amended by revising the clause date and paragraphs (a), (c)(1)(ii), and (c)(3) to read as follows:

252.225-7000 Buy American Act—Balance of Payments Program Certificate.

\* \* \* \* \*

BUY AMERICAN ACT—BALANCE OF PAYMENTS PROGRAM CERTIFICATE (JAN 2009)

(a) Definitions. Commercially available off-the-shelf (COTS) item, domestic end product, foreign end product, qualifying country, qualifying country end product, and United States have the meanings given in the Buy American Act and Balance of Payments Program clause of this solicitation.

\* \* \* \* \*

(c) \* \* \*

(1) \* \* \*

(ii) For end products other than COTS items, components of unknown origin are considered to have been mined, produced, or manufactured outside the United States or a qualifying country.

\* \* \* \* \*

(3) The following end products are other foreign end products, including end products manufactured in the United States that do not qualify as domestic end products, i.e., an end product that is not a COTS item and does not meet the component test in paragraph (ii) of the definition of "domestic end product":

(Line Item Number) \_\_\_\_\_

(Country of Origin (If known)) \_\_\_\_\_

3. Section 252.225-7001 is amended as follows:

- a. By revising the clause date;
b. By redesignating paragraphs (a)(1) through (8) as paragraphs (a)(2) through (9) respectively;
c. By adding a new paragraph (a)(1);
d. By revising newly designated paragraph (a)(3)(ii); and

e. By revising paragraph (b) to read as follows:

252.225-7001 Buy American Act and Balance of Payments Program.

\* \* \* \* \*

BUY AMERICAN ACT AND BALANCE OF PAYMENTS PROGRAM (JAN 2009)

(a) \* \* \*

(1) Commercially available off-the-shelf (COTS) item—

(i) Means any item of supply (including construction material) that is—

(A) A commercial item (as defined in paragraph (1) of the definition of "commercial item" in section 2.101 of the Federal Acquisition Regulation);

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

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

(ii) Does not include bulk cargo, as defined in section 3 of the Shipping Act of 1984 (46 U.S.C. 40102), such as agricultural products and petroleum products.

\* \* \* \* \*

(3) \* \* \*

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

(A) The cost of its qualifying country components and its components that are mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. The cost of components includes transportation costs to the place of incorporation into the end product and U.S. duty (whether or not a duty-free entry certificate is issued). Scrap generated, collected, and prepared for processing in the United States is considered domestic. A component is considered to have been mined, produced, or manufactured in the United States (regardless of its source in fact) if the end product in which it is incorporated is manufactured in the United States and the component is of a class or kind for which the Government has determined that—

(1) Sufficient and reasonably available commercial quantities of a satisfactory quality are not mined, produced, or manufactured in the United States; or

(2) It is inconsistent with the public interest to apply the restrictions of the Buy American Act; or

(B) The end product is a COTS item.

\* \* \* \* \*

(b) This clause implements the Buy American Act (41 U.S.C. Section 10a-d). In accordance with 41 U.S.C. 431, the component test of the Buy American Act is waived for an end product that is a COTS item (see section 12.505(a)(1) of the Federal Acquisition Regulation). Unless otherwise specified, this clause applies to all line items in the contract.

\* \* \* \* \*

4. Section 252.225-7035 is amended by revising the clause date and paragraphs (a) and (c)(2)(iii) to read as follows:

252.225-7035 Buy American Act—Free Trade Agreements—Balance of Payments Program Certificate.

\* \* \* \* \*

BUY AMERICAN ACT—FREE TRADE AGREEMENTS—BALANCE OF PAYMENTS PROGRAM CERTIFICATE (JAN 2009)

(a) Definitions. Bahrainian end product, commercially available off-the-shelf (COTS) item, domestic end product, Free Trade Agreement country, Free Trade Agreement country end product, foreign end product, Moroccan end product, qualifying country end product, and United States have the meanings given in the Buy American Act—Free Trade Agreements—Balance of Payments Program clause of this solicitation.

\* \* \* \* \*

(c) \* \* \*

(2) \* \* \*

(iii) The following supplies are other foreign end products, including end products manufactured in the United States that do not qualify as domestic end products, i.e., an end product that is not a COTS item and does not meet the component test in paragraph (ii) of the definition of "domestic end product":

(Line Item Number) \_\_\_\_\_

(Country of Origin (If known)) \_\_\_\_\_

\* \* \* \* \*

5. Section 252.225-7036 is amended as follows:

- a. By revising the clause date;
b. By redesignating paragraphs (a)(2) through (12) as paragraphs (a)(3) through (13) respectively;
c. By adding a new paragraph (a)(2); and
d. By revising newly designated paragraph (a)(4)(ii) to read as follows:

252.225-7036 Buy American Act—Free Trade Agreements—Balance of Payments Program.

\* \* \* \* \*

BUY AMERICAN ACT—FREE TRADE AGREEMENTS—BALANCE OF PAYMENTS PROGRAM (JAN 2009)

(a) \* \* \*

(2) Commercially available off-the-shelf (COTS) item—

(i) Means any item of supply (including construction material) that is—

(A) A commercial item (as defined in paragraph (1) of the definition of "commercial item" in section 2.101 of the Federal Acquisition Regulation);

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

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

(ii) Does not include bulk cargo, as defined in section 3 of the Shipping Act of 1984 (46 U.S.C. 40102), such as agricultural products and petroleum products.

\* \* \* \* \*

(4) \* \* \*

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

(A) The cost of its qualifying country components and its components that are mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. The cost of components includes transportation costs to the place of incorporation into the end product and U.S. duty (whether or not a duty-free entry certificate is issued). Scrap generated, collected, and prepared for processing in the United States is considered domestic. A component is considered to have been mined, produced, or manufactured in the United States (regardless of its source in fact) if the end product in which it is incorporated is manufactured in the United States and the component is of a class or kind for which the Government has determined that—

- (1) Sufficient and reasonably available commercial quantities of a satisfactory quality are not mined, produced, or manufactured in the United States; or
  - (2) It is inconsistent with the public interest to apply the restrictions of the Buy American Act; or
- (B) The end product is a COTS item.

\* \* \* \* \*

■ 6. Section 252.225–7044 is amended as follows:

- a. By revising the clause date; and
- b. In paragraph (a), by adding, in alphabetical order, a definition of “Commercially available off-the-shelf (COTS) item”, and by revising the definition of “Domestic construction material” to read as follows:

**252.225–7044 Balance of Payments Program—Construction Material.**

\* \* \* \* \*

**BALANCE OF PAYMENTS PROGRAM—CONSTRUCTION MATERIAL (JAN 2009)**

- (a) \* \* \*
- Commercially available off-the-shelf (COTS) item—*
- (1) Means any item of supply (including construction material) that is—
    - (i) A commercial item (as defined in paragraph (1) of the definition of “commercial item” in section 2.101 of the Federal Acquisition Regulation);
    - (ii) Sold in substantial quantities in the commercial marketplace; and
    - (iii) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and
  - (2) Does not include bulk cargo, as defined in section 3 of the Shipping Act of 1984 (46 U.S.C. 40102), such as agricultural products and petroleum products.

\* \* \* \* \*

- 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—
    - (i) The cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. Components of foreign origin of the same class or kind for which nonavailability determinations have been made are treated as domestic; or
    - (ii) The construction material is a COTS item.

\* \* \* \* \*

■ 7. Section 252.225–7045 is amended as follows:

- a. By revising the clause date; and
- b. In paragraph (a), by adding, in alphabetical order, a definition of “Commercially available off-the-shelf (COTS) item”, and by revising the definition of “Domestic construction material” to read as follows:

**252.225–7045 Balance of Payments Program—Construction Material Under Trade Agreements.**

\* \* \* \* \*

**BALANCE OF PAYMENTS PROGRAM—CONSTRUCTION MATERIAL UNDER TRADE AGREEMENTS (JAN 2009)**

- (a) \* \* \*
- Commercially available off-the-shelf (COTS) item—*
- (1) Means any item of supply (including construction material) that is—
    - (i) A commercial item (as defined in paragraph (1) of the definition of “commercial item” in section 2.101 of the Federal Acquisition Regulation);
    - (ii) Sold in substantial quantities in the commercial marketplace; and
    - (iii) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and
  - (2) Does not include bulk cargo, as defined in section 3 of the Shipping Act of 1984 (46 U.S.C. 40102), such as agricultural products and petroleum products.

\* \* \* \* \*

- 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—
    - (i) The cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. Components of foreign origin of the same class or kind for which nonavailability determinations have been made are treated as domestic; or
    - (ii) The construction material is a COTS item.

\* \* \* \* \*

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