

and include the rationale for using other than a fixed-price and/or competitive approach. Parts 8, 13, and 16 are amended to reflect the new posting requirements for orders at Subpart 5.7.

**Item IV—American Recovery and Reinvestment Act of 2009 (The Recovery Act)—Reporting Requirements (Interim) (FAR Case 2009–009)**

This interim rule implements section 1512 of Division A of the American Recovery and Reinvestment Act of 2009, which requires contractors to report on their use of Recovery Act funds. The rule adds a new subpart 4.15, and a new clause, 52.204–11. Contracting officers must include the new clause in solicitations and contracts funded in whole or in part with Recovery Act funds, except classified solicitations and contracts. This clause applies to Commercial item contracts and Commercially-Available-Off-The-Shelf (COTS) item contracts as well as actions under the Simplified Acquisition Threshold.

Contracting officers who wish to use Recovery Act funds on existing contracts should modify those contracts to add the clause.

Reports from contractors for all work funded, in whole or in part, by the Recovery Act, and for which an invoice is submitted prior to June 30, 2009, are due no later than July 10, 2009. Thereafter, reports shall be submitted no later than the 10th day after the end of each calendar quarter.

**Item V—American Recovery and Reinvestment Act of 2009 (The Recovery Act)—GAO/IG Access (Interim) (FAR Case 2009–011)**

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are issuing an interim rule amending the Federal Acquisition Regulation (FAR) to implement Sections 902, 1514, and 1515 of the American Recovery and Reinvestment Act of 2009. Collectively, these Sections provide for the audit and review of both contracts and subcontracts, and the ability to interview such contractor and subcontractor personnel under contracts containing Recovery Act funds.

These Recovery Act provisions are implemented in new alternate clauses to 52.212–5, “Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items”, 52–214–26, “Audit and Records—Sealed Bidding,” and 52.215–2, “Audit and Records—Negotiation”. For the Comptroller General these alternate clauses provide

specific authority to audit contracts and subcontracts and to interview contractor and subcontractor employees under contracts using Recovery Act funds. Agency inspector generals receive the same authorities, with the exception of interviewing subcontractor employees.

**Item VI—GAO Access to Contractor Employees (Interim) (FAR Case 2008–026)**

This interim rule amends the Federal Acquisition Regulation (FAR) Parts 12 and 52. Clauses 52.215–2, Audit and Records—Negotiation and 52.214–26, Audit and Records—Sealed Bidding are being modified to allow the Government Accountability Office to interview current contractor employees when conducting audits. The rule will not apply to the acquisition of commercial items; therefore, FAR 12.503 will be amended to add the exemption of this rule. This change implements Section 871 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (NDAA) (Pub. L. 110–417).

Dated: March 25, 2009.

**Al Matera,**

*Director, Office of Acquisition Policy.*

**Federal Acquisition Circular**

Federal Acquisition Circular (FAC) 2005–32 is issued under the authority of the Secretary of Defense, the Administrator of General Services, and the Administrator for the National Aeronautics and Space Administration.

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 2005–32 is effective March 31, 2009.

Dated: March 24, 2009.

Shay D. Assad,

*Director, Defense Procurement And Acquisition Policy.*

Dated: March 24, 2009.

Rodney P. Lantier,

*Acting Senior Procurement Executive & Acting Deputy Chief Acquisition Officer Office of the Chief Acquisition Officer U.S. General Services Administration.*

Dated: March 24, 2009.

William P. McNally,

*Assistant Administrator for Procurement, National Aeronautics and Space Administration.*

[FR Doc. E9–7027 Filed 3–30–09; 8:45 am]

**BILLING CODE 6820–EP–P**

**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Parts 1, 5, 25, and 52**

[FAC 2005–32; FAR Case 2009–008; Item I; Docket 2009–0008, Sequence 1]

RIN 9000–AL22

**Federal Acquisition Regulation; FAR Case 2009–008, American Recovery and Reinvestment Act of 2009 (the Recovery Act)—Buy American Requirements for Construction Material**

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

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

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on an interim rule amending the Federal Acquisition Regulation (FAR) to implement the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5) (Recovery Act) with respect to the Buy American provision, section 1605 in Division A. This rule does not cover procurements funded with Federal financial assistance such as Federal grants. Additional guidance will be provided by the Office of Management and Budget with respect to the application of section 1605 to procurements funded with Federal financial assistance.

**DATES:** *Effective Date:* March 31, 2009.

*Applicability Date:* The rule applies to solicitations issued and contracts awarded on or after the effective date of this rule. Contracting officers shall modify, on a bilateral basis, in accordance with FAR 1.108(d)(3), existing contracts to include the FAR clauses for future orders, if Recovery Act funds will be used. In the event that a contractor refuses to accept such a modification, the contractor will not be eligible for receipt of Recovery Act funds.

*Comment Date:* Interested parties should submit written comments to the FAR Secretariat on or before June 1, 2009 to be considered in the formulation of a final rule.

**ADDRESSES:** Submit comments identified by FAC 2005–32, FAR case 2009–008, by any of the following methods:

• *Regulations.gov*: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by inputting "FAR Case 2009-008" under the heading "Comment or Submission". Select the link "Send a Comment or Submission" that corresponds with FAR Case 2009-008. Follow the instructions provided to complete the "Public Comment and Submission Form". Please include your name, company name (if any), and "FAR Case 2009-008" on your attached document.

- *Fax*: 202-501-4067.
- *Mail*: General Services

Administration, FAR Secretariat (VPR), 1800 F Street, NW., Room 4041, Attn: Hada Flowers, Washington, DC 20405.

*Instructions*: Please submit comments only and cite FAC 2005-32, FAR case 2009-008, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

**FOR FURTHER INFORMATION CONTACT:** Ms. Meredith Murphy, Procurement Analyst, at (202) 208-6925 for clarification of content. Please cite FAC 2005-32, FAR case 2009-008. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501-4755.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

This interim rule implements the Recovery Act with respect to the unique Buy American provision, section 1605 of the Recovery Act, by adding a new Subpart 25.6, entitled "American Recovery and Reinvestment Act—Buy American Act—Construction Materials," and adding new provisions and clauses at Part 52, with conforming changes to Subparts 1.1, 5.2, 25.0, 25.2, and 25.11.

On February 17, 2009, the President signed Public Law 111-5, the American Recovery and Reinvestment Act of 2009, which includes a number of provisions to be implemented in Federal Government contracts. Among these provisions is section 1605, entitled "Buy American." It prohibits the use of funds appropriated or otherwise made available by the Act for any project for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States. The law requires that this prohibition be applied in a manner consistent with U.S. obligations under international agreements, and it provides for waiver under three circumstances:

1. Iron, steel, or manufactured goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality;

2. Inclusion of iron, steel, or manufactured goods produced in the United States will increase the cost of the contract by more than 25 percent; or

3. Applying the domestic preference would be inconsistent with the public interest.

The implementation of section 1605 is expected to stimulate the economy by increasing and maintaining jobs in the United States in the steel, iron, and manufactured construction materials industries and providing new opportunities to construction firms to win contracts for construction and public works projects.

**B. Discussion**

Because of the need to appropriately segregate the unique Buy-American provisions of the Recovery Act from the requirements of the Buy American Act and the Trade Agreements Act, the Councils have decided to include them in a separate subpart of FAR Part 25. Subpart 25.6, currently reserved, will be entitled "American Recovery and Reinvestment Act—Buy American Act—Construction Materials." A reference to Subpart 25.6 was added to the "Scope" section of Subpart 25.2, Buy American Act—Construction Materials.

Subpart 25.6 includes a policy statement at 25.602 that repeats the prohibition against using funds appropriated by the Recovery Act for U.S. construction projects to purchase iron, steel, or other manufactured goods that were not produced in the U.S. It also notes that unmanufactured construction materials remain covered by the provisions of the Buy American Act. The exceptions to this policy (see Background section above) are similar to those for the Buy American Act, but the Recovery Act requires publication in the **Federal Register** of the detailed written justification that the agency used to make an exception to the statute. The Councils welcome comments on additional steps that may enhance transparency consistent with the goals of the Recovery Act.

In order to enable implementation of the policy, the interim rule includes definitions of "steel," "manufactured construction material," "unmanufactured construction material," "domestic construction material," and "foreign construction material." These definitions are drawn from existing Federal domestic-sourcing laws and the longstanding interpretations that have evolved from them. It also includes a cross reference

to the definition of "public work" at FAR 22.401, which defines "public building or public work" to mean "uilding or work, the construction, prosecution, completion, or repair of which \* \* \* is carried on directly by authority of, or with funds of, a Federal agency to serve the interest of the general public regardless of whether title thereof is in a Federal agency."

Because section 1605 does not specify a requirement that significantly all the components of construction material must also be domestic, as does the Buy American Act, the definition of domestic construction material under this interim rule does not include a requirement relating to the origin of the components of domestic manufactured construction material. Unmanufactured construction material is not specifically addressed in section 1605 of the Recovery Act. However, the Recovery Act's purpose of creating jobs and stimulating domestic demand is well served by applying the Buy American Act to unmanufactured construction material.

The rules for preaward determination of the inapplicability of section 1605 and the Buy American Act are at FAR 25.604.

Section 25.605 addresses the evaluation of offers containing foreign construction material based on an approved exception for unreasonable cost. If the contracting officer determines that an exception based on unreasonable cost of domestic construction material applies, the contracting officer must evaluate the offer by adding to the offered price—

(1) 25 percent of the offered price, if foreign iron, steel, or other manufactured goods are used as construction material based on unreasonable cost of comparable manufactured domestic construction material; and

(2) 6 percent of the value of foreign unmanufactured construction material included in the offer based on unreasonable cost of comparable domestic unmanufactured construction material.

The text of Subpart 25.6 makes it clear that a determination to waive the applicability of section 1605 should be made prior to award. However, section 25.606 recognizes certain limited circumstances in which a postaward waiver could be made, but only with adequate consideration from the contractor. A contractor's noncompliance with section 1605 is addressed at FAR 25.607.

Prescriptions for the use of all of the solicitation provisions and contract clauses applicable to FAR Part 25 are

included in a single subpart, 25.11. The Councils have modified section 25.1102, entitled "Acquisition of Construction," to add a new paragraph that substitutes four new provisions and clauses (with appropriate alternates), to be used when contracting with funds appropriated by the Recovery Act, for the four clauses otherwise used in construction contracts to implement the Buy American Act and U.S. obligations under applicable trade agreements. Specifically, when using Recovery Act appropriated funds, contracting officers will use—

- 52.225–21, Required Use of American Iron, Steel, and Manufactured Goods—Buy American Act—Construction Materials, instead of 52.225–9, Buy American Act—Construction Materials;

- 52.225–22, Notice of Required Use of American Iron, Steel, and Other Manufactured Goods—Buy American Act—Construction Materials, instead of 52.225–10, Notice of Buy American Act Requirement—Construction Materials;

- 52.225–23, Required Use of American Iron, Steel, and Other Manufactured Goods and Buy American Act—Construction Materials Under Trade Agreements, instead of 52.225–11, Buy American Act—Construction Materials under Trade Agreements; and

- 52.225–24, Notice of Required Use of American Iron, Steel, and Other Manufactured Goods and Buy American Act—Construction Materials under Trade Agreements, instead of 52.225–12, Notice of Buy American Act Requirement—Construction Materials under Trade Agreements.

The clauses are unique in that, for Recovery Act-funded construction projects, the 25 percent price adjustment factor for non-U.S. iron, steel, and other foreign manufactured construction material excepted from the section 1605 requirement on the basis of unreasonable cost is applied to the entire price of the project, not only to the cost of the foreign materials. The 6 percent adjustment for the Buy American Act is retained and applied to the cost of foreign unmanufactured goods excepted from the requirements of the Buy American Act on the basis of unreasonable cost. Given the applicability of the Recovery Act to iron, steel, and manufactured goods, the definition of "component" is unnecessary in these clauses, because the definition of domestic construction material no longer includes a requirement relating to the origin of components.

However, if trade agreements apply to the acquisition, the use of the provision and clause 52.225–23 and 52.225–24, respectively, ensures that eligible

construction material from designated countries is treated in accordance with Subpart 25.4. No evaluation factor is applied to offers on the basis of using eligible construction material. This provision and clause retain the same basic processes that are used in the standard construction clauses, except for the specific changes that have been addressed relating to new requirements of section 1605 of the Recovery Act.

In the Recovery Act conference report, Congress expressed its intent that least developed countries be excepted from section 1605 and that they retain their status as designated countries. However, with respect to Caribbean Basin countries, Congress did not express a similar intent. Therefore, Caribbean Basin countries are not included as designated countries with respect to the Recovery Act.

### C. Applicability to Contracts at or Below the Simplified Acquisition Threshold

Section 4101 of Public Law 103–355, the Federal Acquisition Streamlining Act (FASA) (41 U.S.C. 429), governs the applicability of laws to contracts or subcontracts in amounts not greater than the simplified acquisition threshold. It is intended to limit the applicability of laws to them. FASA provides that if a provision of law contains criminal or civil penalties, or if the Federal Acquisition Regulatory Council makes a written determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the simplified acquisition threshold, the law will apply to them.

Therefore, given section 1605 of the Recovery Act, which establishes Buy American requirements for projects funded by the Recovery Act, the FAR Council has determined that this rule should apply to contracts or subcontracts at or below the simplified acquisition threshold, as defined at 2.101.

This is a significant regulatory action and, therefore, was subject to Office of Management and Budget (OMB) review under Section 6 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.

### D. Regulatory Flexibility Act

The Councils do not expect this interim 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.*, for the following reasons. This interim rule will only impact an offeror that wants to use

non-U.S. iron, steel, and other manufactured goods in a construction project in the United States. The Councils believe that there are adequate domestic sources for these materials, and the Office of Management and Budget (OMB) guidance M–09–10 issued February 18, 2009, entitled "Initial Implementing Guidance for the American Recovery and Reinvestment Act of 2009," provides a strong preference for using small businesses for Recovery Act projects wherever possible. Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils will consider comments from small entities concerning the affected FAR Parts 1, 5, 25, and 52 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAC 2005–32, FAR case 2009–008), in all correspondence.

### E. Paperwork Reduction Act

The Paperwork Reduction Act does apply; however, these changes to the FAR do not impose additional information collection requirements to the paperwork burden previously approved under OMB Control Number 9000–0141. However, the information collection requirements imposed by the provisions 52.225–22 and 52.225–24 are currently covered by the approved information collection requirements for provisions 52.225–9 and 52.225–11 (OMB Control number 9000–0141, entitled Buy American Act—Construction—FAR Sections Affected: Subpart 25.2; 52.225–9; and 52.225–11). While the Councils believe no changes will be needed to the collection due to the interim regulation, comments are welcome during the 60 day comment period with regard to the data elements, the burden, or any other part of the collection.

### F. Determination To Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because the American Recovery and Reinvestment Act of 2009 became effective upon enactment, and contracts using funds appropriated by the Recovery Act will soon be ready to award. However, pursuant to Public Law 98–577 and FAR 1.501, the Councils will consider public comments received in response to this

interim rule in the formation of the final rule.

### List of Subjects in 48 CFR Parts 1, 5, 25, and 52

Government procurement.

Dated: March 25, 2009.

#### Al Matera,

Director, Office of Acquisition Policy.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 1, 5, 25, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 1, 5, 25, and 52 continues to read as follows:

**Authority:** 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

### PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

#### 1.106 [Amended]

■ 2. Amend section 1.106, in the table following the introductory paragraph, by adding, in numerical sequence, FAR segments 52.225–21 and 52.225–23, and their corresponding OMB Control Number 9000–0141.

### PART 5—PUBLICIZING CONTRACT ACTIONS

■ 3. Amend section 5.207 by revising paragraph (c)(13)(iii) to read as follows:

#### 5.207 Preparation and transmittal of synopses.

\* \* \* \* \*

(c) \* \* \*

(13) \* \* \*

(iii) If the solicitation will include the FAR clause at 52.225–11, Buy American Act—Construction Materials under Trade Agreements, 52.225–23, Required Use of American Iron, Steel, and Other Manufactured Goods—Buy American Act—Construction Materials under Trade Agreements, or an equivalent agency clause, insert the following notice in the synopsis: “One or more of the items under this acquisition is subject to the World Trade Organization Government Procurement Agreement and Free Trade Agreements.”

\* \* \* \* \*

### PART 25—FOREIGN ACQUISITION

■ 4. Amend section 25.001 by revising paragraph (c)(1) and adding a new paragraph (c)(4) to read as follows:

#### 25.001 General.

\* \* \* \* \*

(c) \* \* \*

(1) The Buy American Act uses a two-part test to define a “domestic end product” or “domestic construction material” (manufactured in the United

States and a formula based on cost of domestic components). The component test has been waived for acquisition of commercially available off-the-shelf items.

\* \* \* \* \*

(4) When using funds appropriated under the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5), the definition of “domestic manufactured construction material” requires manufacture in the United States but does not include a requirement with regard to the origin of the components.

#### 25.002 [Amended]

■ 5. Amend the table in section 25.002, by removing from the sixth row “[Reserved]” and adding “American Recovery and Reinvestment Act—Buy American Act—Construction Materials” in its place, and in the fifth column adding “X”.

■ 6. Add Subpart 25.6 to read as follows:

#### Subpart 25.6—American Recovery and Reinvestment Act—Buy American Act—Construction Materials

Sec.

25.600 Scope of subpart.

25.601 Definitions.

25.602 Policy.

25.603 Exceptions.

25.604 Preaward determination concerning the inapplicability of section 1605 of the Recovery Act or the Buy American Act.

25.605 Evaluating offers of foreign construction material.

25.606 Postaward determinations.

25.607 Noncompliance.

#### Subpart 25.6—American Recovery and Reinvestment Act—Buy American Act—Construction Materials

##### 25.600 Scope of subpart.

This subpart implements section 1605 in Division A of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5) (Recovery Act) and the Buy American Act. It applies to construction projects that use funds appropriated or otherwise provided by the Recovery Act.

##### 25.601 Definitions.

As used in this subpart—  
*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.

*Foreign construction material* means a construction material other than a domestic construction material.

*Manufactured construction material* means any construction material that is not unmanufactured construction material.

*Recovery Act designated country* means a World Trade Organization Government Procurement Agreement country, a Free Trade Agreement country, or a least developed country.

*Steel* means an alloy that includes at least 50 percent iron, between .02 and 2 percent carbon, and may include other elements.

*Unmanufactured construction material* means raw material brought to the construction site for incorporation into the building or work that has not been—

(1) Processed into a specific form and shape; or

(2) Combined with other raw material to create a material that has different properties than the properties of the individual raw materials.

##### 25.602 Policy.

Except as provided in 25.603—

(a) None of the funds appropriated or otherwise made available by the Recovery Act may be used for a project for the construction, alteration, maintenance, or repair of a public building or public work (as defined at 22.401) unless—

(1) The public building or public work is located in the United States; and

(2) All of the iron, steel, and other manufactured goods used as construction material in the project are produced or manufactured in the United States.

(i) Production in the United States of the iron or steel used as construction material requires that all manufacturing processes must take place in the United States, except metallurgical processes involving refinement of steel additives. These requirements do not apply to steel or iron used as components or subcomponents of other manufactured construction material.

(ii) There is no requirement with regard to the origin of components or subcomponents in other manufactured construction material, as long as the manufacture of the construction material occurs in the United States.

(b) Use only domestic unmanufactured construction material, as required by the Buy American Act.

(b) Use only domestic unmanufactured construction material, as required by the Buy American Act.

##### 25.603 Exceptions.

(a) When one of the following exceptions applies, the contracting officer may allow the contractor to incorporate foreign construction materials without regard to the restrictions of section 1605 of the Recovery Act or the Buy American Act:

(1) *Nonavailability.* The head of the contracting activity may determine that a particular construction material is not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality. The determinations of nonavailability of the articles listed at 25.104(a) and the procedures at 25.103(b)(1) also apply if any of those articles are acquired as construction materials.

(2) *Unreasonable cost.* The contracting officer concludes that the cost of domestic construction material is unreasonable in accordance with 25.605.

(3) *Inconsistent with public interest.* The head of the agency may determine that application of the restrictions of section 1605 of the Recovery Act or the Buy American Act to a particular construction material would be inconsistent with the public interest.

(b) *Determinations.* When a determination is made, for any of the reasons stated in this section, that certain foreign construction materials may be used—

(1) The contracting officer shall list the excepted materials in the contract; and

(2) The head of the agency shall publish a notice in the **Federal Register** within two weeks after the determination is made, unless the construction material has already been determined in the FAR to be domestically nonavailable (see list at 25.104). The notice shall include—

(i) The title “Buy American Exception under the American Recovery and Reinvestment Act of 2009”;

(ii) The dollar value and brief description of the project; and

(iii) A detailed justification as to why the restriction is being waived.

(c) *Acquisitions under trade agreements.* (1) For construction contracts with an estimated acquisition value of \$7,443,000 or more, *also see* Subpart 25.4. Offers of products determined to be eligible products per Subpart 25.4 shall receive equal consideration with domestic offers per Subpart 25.4.

(2) For purposes of the Recovery Act, designated countries do not include the Caribbean Basin Countries.

**25.604 Preaward determination concerning the inapplicability of section 1605 of the Recovery Act or the Buy American Act.**

(a) For any acquisition, an offeror may request from the contracting officer a determination concerning the inapplicability of section 1605 of the Recovery Act or the Buy American Act

for specifically identified construction materials. The time for submitting the request is specified in the solicitation in paragraph (b) of either 52.225–22 or 52.225–24, whichever applies. The information and supporting data that must be included in the request are also specified in the solicitation in paragraphs (c) and (d) of either 52.225–21 or 52.225–23, whichever applies.

(b) Before award, the contracting officer must evaluate all requests based on the information provided and may supplement this information with other readily available information.

(c) Determination based on unreasonable cost of domestic construction material.

(1) *Iron, steel, and other manufactured construction material.*

The contracting officer must compare the offered price of the contract using foreign manufactured construction material to the estimated price if all domestic manufactured construction material were used. If use of domestic manufactured construction material would increase the overall offered price of the contract by more than 25 percent, then the contracting officer shall determine that the cost of the domestic manufactured construction material is unreasonable.

(2) *Unmanufactured construction material.* The contracting officer must compare the cost of each foreign unmanufactured construction material to the cost of domestic unmanufactured construction material. If the cost of the domestic unmanufactured construction material exceeds the cost of the foreign unmanufactured construction material by more than 6 percent, then the contracting officer shall determine that the cost of the unmanufactured construction material is unreasonable.

**25.605 Evaluating offers of foreign construction material.**

(a) If the contracting officer has determined that an exception applies because the cost of certain domestic construction material is unreasonable, in accordance with section 25.604, then the contracting officer shall apply evaluation factors to the offer incorporating the use of such foreign construction material as follows:

(1) Use an evaluation factor of 25 percent, applied to the total offered price of the contract, if foreign iron, steel, or other manufactured goods are incorporated in the offer as construction material based on an exception for unreasonable cost requested by the offeror.

(2) In addition, use an evaluation factor of 6 percent applied to the cost of foreign unmanufactured construction

material incorporated in the offer based on an exception for unreasonable cost requested by the offeror.

(3) Total evaluated price = offered price + (.25 × offered price, if (a)(1) applies) + (.06 × cost of foreign unmanufactured construction material, if (a)(2) applies).

(b) If two or more offers are equal in price, the contracting officer must give preference to an offer that does not include foreign construction material excepted at the request of the offeror on the basis of unreasonable cost.

(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 the contracting officer awards a contract to an offeror that proposed foreign construction material not listed in the applicable clause in the solicitation (paragraph (b)(3) of 52.225–21, or paragraph (b)(3) of 52.225–23), the contracting officer must add the excepted materials to the list in the contract clause.

**25.606 Postaward determinations.**

(a) If a contractor requests a determination regarding the inapplicability of section 1605 of the Recovery Act or the Buy American Act after contract award, the contractor must explain why it could not request the determination before contract award or why the need for such determination otherwise was not reasonably foreseeable. If the contracting officer concludes that the contractor should have made the request before contract award, the contracting officer may deny the request.

(b) The contracting officer must base evaluation of any request for a determination regarding the inapplicability of section 1605 of the Recovery Act or the Buy American Act made after contract award on information required by paragraphs (c) and (d) of the applicable clause at 52.225–21 or 52.225–23 and/or other readily available information.

(c) If a determination, under 25.603(a), is made after contract award that an exception to section 1605 of the Recovery Act or to the Buy American Act applies, the contracting officer must negotiate adequate consideration and modify the contract to allow use of the foreign construction material. When the basis for the exception is the unreasonable cost of a domestic construction material, adequate

consideration is at least the differential established in 25.605(a).

#### 25.607 Noncompliance.

The contracting officer must—

(a) Review allegations of violations of section 1605 of the Recovery Act or Buy American Act;

(b) Unless fraud is suspected, notify the contractor of the apparent unauthorized use of foreign construction material and request a reply, to include proposed corrective action; and

(c) If the review reveals that a contractor or subcontractor has used foreign construction material without authorization, take appropriate action, including one or more of the following:

(1) Process a determination concerning the inapplicability of section 1605 of the Recovery Act or the Buy American Act in accordance with 25.606.

(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. A determination to retain foreign construction material does not constitute a determination that an exception to section 1605 of the Recovery Act or the Buy American Act applies, and this should be stated in the determination. Further, a determination to retain foreign construction material does not affect the Government's right to suspend or debar a contractor, subcontractor, or supplier for violation of section 1605 of the Recovery Act or 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 to the agency suspension or debarment official in accordance with Subpart 9.4. If the noncompliance appears to be fraudulent, refer the matter to other appropriate agency officials, such as the officer responsible for criminal investigation.

■ 7. Amend section 25.1102 by adding an introductory paragraph; revising paragraph (c)(1); and adding paragraph (e) to read as follows:

#### 25.1102 Acquisition of construction.

When using funds other than those appropriated under the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5) (Recovery Act), follow the prescriptions in paragraphs (a) through (d) of this section. Otherwise, follow the prescription in paragraph (e).

\* \* \* \* \*

(c) \* \* \*

(1) List in paragraph (b)(3) of the clause all foreign construction material excepted from the requirements of the Buy American Act, other than designated country construction material.

\* \* \* \* \*

(e)(1) When using funds appropriated under the Recovery Act for construction, use provisions and clauses 52.225-21, 52.225-22, 52.225-23, or 52.225-24 (with appropriate Alternates) in lieu of the provisions and clauses 52.225-9, 52.225-10, 52.225-11, or 52.225-12 (with appropriate Alternates), respectively, that would be applicable as prescribed in paragraphs (a) through (d) of this section if Recovery Act funds were not used.

(2) When using clause 52.225-23, list foreign construction material in paragraph (b)(3) of the clause as follows:

(i) *Basic clause.* List all foreign construction material excepted from the requirements of the Buy American Act, other than Recovery Act designated country construction material.

(ii) *Alternate I—*List in paragraph (b)(3) of the clause all foreign construction material excepted from the requirements of the Buy American Act, unless the excepted foreign construction material is from a Recovery Act designated country other than Bahrain, Mexico, or Oman.

#### PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 8. Add section 52.225-21 through 52.225-24 to read as follows:

##### 52.225-21 Required Use of American Iron, Steel, and Other Manufactured Goods—Buy American Act—Construction Materials.

As prescribed in 25.1102(e), insert the following clause:

##### Required Use of American Iron, Steel, and Manufactured Goods—Buy American Act—Construction Materials (MAR 2009)

(a) *Definitions.* As used in this clause—

*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.

*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.

*Foreign construction material* means a construction material other than a domestic construction material.

*Manufactured construction material* means any construction material that is not unmanufactured construction material.

*Steel* means an alloy that includes at least 50 percent iron, between .02 and 2 percent carbon, and may include other elements.

*United States* means the 50 States, the District of Columbia, and outlying areas.

*Unmanufactured construction material* means raw material brought to the construction site for incorporation into the building or work that has not been—

(1) Processed into a specific form and shape; or

(2) Combined with other raw material to create a material that has different properties than the properties of the individual raw materials.

(b) *Domestic preference.* (1) This clause implements—

(i) Section 1605 of the American Recovery and Reinvestment Act of 2009 (Recovery Act) (Pub. L. 111-5), by requiring, unless an exception applies, that all iron, steel, and other manufactured goods used as construction material in the project are produced in the United States; and

(ii) The Buy American Act (41 U.S.C. 10a-10d) by providing a preference for unmanufactured domestic construction material.

(2) The Contractor shall use only domestic construction material in performing this contract, except as provided in paragraph (b)(3) and (b)(4) of this clause.

(3) This requirement does not apply to the construction material or components listed by the Government as follows:

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

(4) The Contracting Officer may add other foreign construction material to the list in paragraph (b)(3) of this clause if the Government determines that—

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

(A) The cost of domestic iron, steel, or other manufactured goods used as construction material is unreasonable when the cumulative cost of such material will increase the cost of the contract by more than 25 percent;

(B) The cost of unmanufactured construction material is unreasonable when the cost of such material exceeds the cost of foreign material by more than 6 percent;

(ii) The construction material is not mined, produced, or manufactured in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or

(iii) The application of the restriction of section 1605 of the Recovery Act or the Buy American Act to a particular construction material would be inconsistent with the public interest.

(c) *Request for determination of inapplicability of Section 1605 of the Recovery Act or the Buy American Act.*

(1)(i) Any Contractor request to use

foreign construction material in accordance with paragraph (b)(4) of this clause shall include adequate information for Government evaluation of the request, including—

(A) A description of the foreign and domestic construction materials;

(B) Unit of measure;

(C) Quantity;

(D) Cost;

(E) Time of delivery or availability;

(F) Location of the construction

project;

(G) Name and address of the proposed supplier; and

(H) A detailed justification of the reason for use of foreign construction materials cited in accordance with paragraph (b)(4) of this clause.

(ii) A request based on unreasonable cost shall include a reasonable survey of the market and a completed cost comparison table in the format in paragraph (d) of this clause.

(iii) The cost of construction material shall include all delivery costs to the construction site and any applicable duty.

(iv) Any Contractor request for a determination submitted after contract award shall explain why the Contractor could not reasonably foresee the need for such determination and could not have requested the determination before contract award. If the Contractor does

not submit a satisfactory explanation, the Contracting Officer need not make a determination.

(2) If the Government determines after contract award that an exception to section 1605 of the Recovery Act or the Buy American Act applies and the Contracting Officer and the Contractor negotiate adequate consideration, the Contracting Officer will modify the contract to allow use of the foreign construction material. However, when the basis for the exception is the unreasonable cost of a domestic construction material, adequate consideration is not less than the differential established in paragraph (b)(4)(i) of this clause.

(3) Unless the Government determines that an exception to section 1605 of the Recovery Act or the Buy American Act applies, use of foreign construction material is noncompliant with section 1605 of the American Recovery and Reinvestment Act or the Buy American Act.

(d) *Data.* To permit evaluation of requests under paragraph (c) of this clause based on unreasonable cost, the Contractor shall include the following information and any applicable supporting data based on the survey of suppliers:

FOREIGN AND DOMESTIC CONSTRUCTION MATERIALS COST COMPARISON

| Construction material description    | Unit of measure | Quantity | Cost (dollars) * |
|--------------------------------------|-----------------|----------|------------------|
| Item 1:                              |                 |          |                  |
| Foreign construction material .....  | _____           | _____    | _____            |
| Domestic construction material ..... | _____           | _____    | _____            |
| Item 2:                              |                 |          |                  |
| Foreign construction material .....  | _____           | _____    | _____            |
| Domestic construction material ..... | _____           | _____    | _____            |

[List name, address, telephone number, and contact for suppliers surveyed. Attach copy of response; if oral, attach summary.] [Include other applicable supporting information.]

\*Include all delivery costs to the construction site.]

(End of clause)

**52.225-22 Notice of Required Use of American Iron, Steel, and Other Manufactured Goods—Buy American Act—Construction Materials.**

As prescribed in 25.1102(e), insert the following provision:

**NOTICE OF REQUIRED USE OF AMERICAN IRON, STEEL, AND OTHER MANUFACTURED GOODS—BUY AMERICAN ACT—CONSTRUCTION MATERIALS (MAR 2009)**

(a) *Definitions.* “Construction material,” “domestic construction material,” “foreign construction material,” “manufactured construction

material,” “steel,” and “unmanufactured construction material,” as used in this provision, are defined in the clause of this solicitation entitled “Required Use of Iron, Steel, and Other Manufactured Goods—Buy American Act—Construction Materials” (Federal Acquisition Regulation (FAR) clause 52.225-21).

(b) *Requests for determinations of inapplicability.* An offeror requesting a determination regarding the inapplicability of section 1605 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5) (Recovery Act) or the Buy American Act should submit the request to the Contracting Officer in time to allow a determination

before submission of offers. The offeror shall include the information and applicable supporting data required by paragraphs (c) and (d) of the clause at FAR 52.225-21 in the request. If an offeror has not requested a determination regarding the inapplicability of 1605 of the Recovery Act or the Buy American Act before submitting its offer, or has not received a response to a previous request, the offeror shall include the information and supporting data in the offer.

(c) *Evaluation of offers.* (1) If the Government determines that an exception based on unreasonable cost of domestic construction material applies, the Government will evaluate an offer



requesting exception to the requirements of section 1605 of the Recovery Act or the Buy American Act by adding to the offered price of the contract—

(i) 25 percent of the offered price of the contract, if foreign iron, steel, or other manufactured goods are used as construction material based on unreasonable cost of comparable manufactured domestic construction material; and

(ii) 6 percent of the cost of foreign unmanufactured construction material included in the offer based on unreasonable cost of comparable domestic unmanufactured construction material.

(2) If two or more offers are equal in price, the Contracting Officer will give preference to an offer that does not include foreign construction material excepted at the request of the offeror on the basis of unreasonable cost.

(d) *Alternate offers.* (1) When an offer includes foreign construction material not listed by the Government in this solicitation in paragraph (b)(2) of the clause at FAR 52.225–21, the offeror also may submit an alternate offer based on use of equivalent domestic construction material.

(2) If an alternate offer is submitted, the offeror shall submit a separate Standard Form 1442 for the alternate offer and a separate cost comparison table prepared in accordance with paragraphs (c) and (d) of the clause at FAR 52.225–21 for the offer that is based on the use of any foreign construction material for which the Government has not yet determined an exception applies.

(3) If the Government determines that a particular exception requested in accordance with paragraph (c) of the clause at FAR 52.225–21 does not apply, the Government will evaluate only those offers based on use of the equivalent domestic construction material, and the offeror shall be required to furnish such domestic construction material. An offer based on use of the foreign construction material for which an exception was requested—

(i) Will be rejected as nonresponsive if this acquisition is conducted by sealed bidding; or

(ii) May be accepted if revised during negotiations.

(End of provision)

*Alternate I (MAR 2009).* As prescribed in 25.1102(e), substitute the following paragraph (b) for paragraph (b) of the basic provision:

(b) *Requests for determinations of inapplicability.* An offeror requesting a determination regarding the inapplicability of section 1605 of the

American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5) (Recovery Act) or the Buy American Act shall submit the request with its offer, including the information and applicable supporting data required by paragraphs (c) and (d) of the clause at FAR 52.225–21.

**52.225–23 Required Use of American Iron, Steel, and Other Manufactured Goods—Buy American Act—Construction Materials Under Trade Agreements.**

As prescribed in 25.1102(e), insert the following clause:

**Required Use of American Iron, Steel, and Other Manufactured Goods—Buy American Act—Construction Materials Under Trade Agreements MAR 2009)**

(a) *Definitions.* As used in this clause—

*Construction material* means an article, material, or supply brought to the construction site by the Contractor or 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.

*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.

*Foreign construction material* means a construction material other than a domestic construction material.

*Free trade agreement (FTA) country construction material* means a construction material that—

(1) Is wholly the growth, product, or manufacture of an FTA 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 an FTA country into a new and different construction material distinct from the materials from which it was transformed.

*Least developed country construction material* means a construction material that—

(1) Is wholly the growth, product, or manufacture of a least developed 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 least developed country into a new and different construction material distinct from the materials from which it was transformed.

*Manufactured construction material* means any construction material that is not unmanufactured construction material.

*Recovery Act designated country* means any of the following countries:

(1) A World Trade Organization Government Procurement Agreement (WTO GPA) country (Aruba, Austria, Belgium, Bulgaria, Canada, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea (Republic of), Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, or United Kingdom);

(2) A Free Trade Agreement country (FTA) (Australia, Bahrain, Canada, Chile, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Israel, Mexico, Morocco, Nicaragua, Oman, Peru, or Singapore); or

(3) A least developed country (Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Djibouti, East Timor, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, Laos, Lesotho, Liberia, Madagascar, Malawi, Maldives, Mali, Mauritania, Mozambique, Nepal, Niger, Rwanda, Samoa, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, Somalia, Tanzania, Togo, Tuvalu, Uganda, Vanuatu, Yemen, or Zambia).

*Recovery Act designated country construction material* means a construction material that is a WTO GPA country construction material, an FTA country construction material, or a least developed country construction material.

*Steel* means an alloy that includes at least 50 percent iron, between .02 and 2 percent carbon, and may include other elements.

*United States* means the 50 States, the District of Columbia, and outlying areas.

*Unmanufactured construction material* means raw material brought to the construction site for incorporation into the building or work that has not been—



(1) Processed into a specific form and shape; or

(2) Combined with other raw material to create a material that has different properties than the properties of the individual raw materials.

*WTO GPA country construction material* means a construction material that—

(1) Is wholly the growth, product, or manufacture of a WTO GPA 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 WTO GPA country into a new and different construction material distinct from the materials from which it was transformed.

(b) *Construction materials.* (1) The restrictions of section 1605 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5) (Recovery Act) and the Buy American Act (41 U.S.C. 10a–10d) do not apply to Recovery Act designated country construction material. Consistent with U.S. obligations under international agreements, this clause implements—

(i) Section 1605 of the Recovery Act by requiring, unless an exception applies, that all iron, steel, and other manufactured goods used as construction material in the project are produced in the United States; and

(ii) The Buy American Act by providing a preference for unmanufactured domestic construction material.

(2) The Contractor shall use only domestic or Recovery Act designated country construction material in performing this contract, except as provided in paragraphs (b)(3) and (b)(4) of this clause.

(3) The requirement in paragraph (b)(2) of this clause does not apply to the construction materials or components listed by the Government as follows:

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

(4) The Contracting Officer may add other construction material to the list in paragraph (b)(3) of this clause if the Government determines that—

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

(A) The cost of domestic iron, steel, or other manufactured goods used as construction material is unreasonable when the cumulative cost of such material will increase the overall cost of the contract by more than 25 percent;

(B) The cost of unmanufactured construction material is unreasonable when the cost of such material exceeds the cost of foreign material by more than 6 percent;

(ii) The construction material is not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality; or

(iii) The application of the restriction of section 1605 of the Recovery Act or the Buy American Act to a particular construction material would be inconsistent with the public interest.

(c) *Request for determination of inapplicability of section 1605 of the Recovery Act or the Buy American Act.*

(1)(i) Any Contractor request to use foreign construction material in accordance with paragraph (b)(4) of this clause shall include adequate information for Government evaluation of the request, including—

(A) A description of the foreign and domestic construction materials;

(B) Unit of measure;

(C) Quantity;

(D) Cost;

(E) Time of delivery or availability;

(F) Location of the construction project;

(G) Name and address of the proposed supplier; and

(H) A detailed justification of the reason for use of foreign construction

materials cited in accordance with paragraph (b)(4) of this clause.

(ii) A request based on unreasonable cost shall include a reasonable survey of the market and a completed cost comparison table in the format in paragraph (d) of this clause.

(iii) The cost of construction material shall include all delivery costs to the construction site and any applicable duty.

(iv) Any Contractor request for a determination submitted after contract award shall explain why the Contractor could not reasonably foresee the need for such determination and could not have requested the determination before contract award. If the Contractor does not submit a satisfactory explanation, the Contracting Officer need not make a determination.

(2) If the Government determines after contract award that an exception to section 1605 of the Recovery Act or the Buy American Act applies and the Contracting Officer and the Contractor negotiate adequate consideration, the Contracting Officer will modify the contract to allow use of the foreign construction material. However, when the basis for the exception is the unreasonable cost of a domestic construction material, adequate consideration is not less than the differential established in paragraph (b)(4)(i) of this clause.

(3) Unless the Government determines that an exception to the section 1605 of the Recovery Act or the Buy American Act applies, use of foreign construction material other than that covered by trade agreements is noncompliant with the applicable Act.

(d) *Data.* To permit evaluation of requests under paragraph (c) of this clause based on unreasonable cost, the Contractor shall include the following information and any applicable supporting data based on the survey of suppliers:

**FOREIGN AND DOMESTIC CONSTRUCTION MATERIALS COST COMPARISON**

| Construction material description    | Unit of measure | Quantity | Cost (dollars)* |
|--------------------------------------|-----------------|----------|-----------------|
| <i>Item 1:</i>                       |                 |          |                 |
| Foreign construction material .....  | _____           | _____    | _____           |
| Domestic construction material ..... | _____           | _____    | _____           |
| <i>Item 2:</i>                       |                 |          |                 |
| Foreign construction material .....  | _____           | _____    | _____           |
| Domestic construction material ..... | _____           | _____    | _____           |

*[List name, address, telephone number, and contact for suppliers surveyed. Attach copy of response; if oral, attach summary.][Include other applicable supporting information.]*

*[\* Include all delivery costs to the construction site.]*

(End of clause)

*Alternate I (MAR 2009).* As prescribed in 25.1102(e), add the following

definition of “Bahrainian, Mexican, or Omani construction material” to

paragraph (a) of the basic clause, and substitute the following paragraphs (b)(1) and (b)(2) for paragraphs (b)(1) and (b)(2) of the basic clause:

*Bahrainian, Mexican, or Omani construction material*” means a construction material that—

(1) Is wholly the growth, product, or manufacture of Bahrain, Mexico, or Oman; 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 Bahrain, Mexico, or Oman into a new and different construction material distinct from the materials from which it was transformed.

(b) *Construction materials.* (1) The restrictions of section 1605 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5) (Recovery Act) and the Buy American Act do not apply to Recovery Act designated country construction material. Consistent with U.S. obligations under international agreements, this clause implements—

(i) Section 1605 of the Recovery Act, by requiring, unless an exception applies, that all iron, steel, and other manufactured goods used as construction material in the project are produced in the United States; and

(ii) The Buy American Act providing a preference for unmanufactured domestic construction material.

(2) The Contractor shall use only domestic or Recovery Act designated country construction material other than Bahrainian, Mexican, or Omani construction material in performing this contract, except as provided in paragraphs (b)(3) and (b)(4) of this clause.

**52.225–24 Notice of Required Use of American Iron, Steel, and Other Manufactured Goods—Buy American Act—Construction Materials under Trade Agreements.**

As prescribed in 25.1102(e), insert the following provision:

**Notice of Required Use Of American Iron, Steel, and Other Manufactured Goods—Buy American Act—Construction Materials Under Trade Agreements (MAR 2009)**

(a) *Definitions.* “Construction material,” “domestic construction material,” “foreign construction material,” “manufactured construction material,” “Recovery Act designated country construction material,” “steel,” and “unmanufactured construction material,” as used in this provision, are defined in the clause of this solicitation entitled “Required Use of Iron, Steel,

and Other Manufactured Goods—Buy American Act—Construction Materials Under Trade Agreements” (Federal Acquisition Regulation (FAR) clause 52.225–23).

(b) *Requests for determination of inapplicability.* An offeror requesting a determination regarding the inapplicability of section 1605 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5) (Recovery Act) or the Buy American Act should submit the request to the Contracting Officer in time to allow a determination before submission of offers. The offeror shall include the information and applicable supporting data required by paragraphs (c) and (d) of FAR clause 52.225–23 in the request. If an offeror has not requested a determination regarding the inapplicability of section 1605 of the Recovery Act or the Buy American Act before submitting its offer, or has not received a response to a previous request, the offeror shall include the information and supporting data in the offer.

(c) *Evaluation of offers.* (1) If the Government determines that an exception based on unreasonable cost of domestic construction material applies, the Government will evaluate an offer requesting exception to the requirements of section 1605 of the Recovery Act or the Buy American Act by adding to the offered price of the contract—

(i) 25 percent of the offered price of the contract, if foreign iron, steel, or other manufactured goods are used as construction material based on unreasonable cost of comparable manufactured domestic construction material; and

(ii) 6 percent of the cost of foreign unmanufactured construction material included in the offer based on unreasonable cost of comparable domestic unmanufactured construction material.

(2) If two or more offers are equal in price, the Contracting Officer will give preference to an offer that does not include foreign construction material excepted at the request of the offeror on the basis of unreasonable cost.

(d) *Alternate offers.* (1) When an offer includes foreign construction material, other than Recovery Act designated country construction material, that is not listed by the Government in this solicitation in paragraph (b)(3) of FAR clause 52.225–23, the offeror also may submit an alternate offer based on use of equivalent domestic or Recovery Act designated country construction material.

(2) If an alternate offer is submitted, the offeror shall submit a separate

Standard Form 1442 for the alternate offer and a separate cost comparison table prepared in accordance with paragraphs (c) and (d) of FAR clause 52.225–23 for the offer that is based on the use of any foreign construction material for which the Government has not yet determined an exception applies.

(3) If the Government determines that a particular exception requested in accordance with paragraph (c) of FAR clause 52.225–23 does not apply, the Government will evaluate only those offers based on use of the equivalent domestic or Recovery Act designated country construction material, and the offeror shall be required to furnish such domestic or Recovery Act designated country construction material. An offer based on use of the foreign construction material for which an exception was requested—

(i) Will be rejected as nonresponsive if this acquisition is conducted by sealed bidding; or

(ii) May be accepted if revised during negotiations.

(End of provision)

*Alternate I (MAR 2009).* As prescribed in 25.1102(e), substitute the following paragraph (b) for paragraph (b) of the basic provision:

(b) *Requests for determination of inapplicability.* An offeror requesting a determination regarding the inapplicability of section 1605 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5) (Recovery Act) or the Buy American Act shall submit the request with its offer, including the information and applicable supporting data required by paragraphs (c) and (d) of FAR clause 52.225–23.

*Alternate II (MAR 2009).* As prescribed in 25.1102(e), add the definition of “Bahrainian, Mexican, or Omani construction material” to paragraph (a) and substitute the following paragraph (d) for paragraph (d) of the basic provision:

(d) *Alternate offers.* (1) When an offer includes foreign construction material, except foreign construction material from a Recovery Act designated country other than Bahrain, Mexico, or Oman that is not listed by the Government in this solicitation in paragraph (b)(3) of FAR clause 52.225–23, the offeror also may submit an alternate offer based on use of equivalent domestic or Recovery Act designated country construction material other than Bahrainian, Mexican, or Omani construction material.

(2) If an alternate offer is submitted, the offeror shall submit a separate Standard Form 1442 for the alternate

offer and a separate cost comparison table prepared in accordance with paragraphs (c) and (d) of FAR clause 52.225-23 for the offer that is based on the use of any foreign construction material for which the Government has not yet determined an exception applies.

(3) If the Government determines that a particular exception requested in accordance with paragraph (c) of FAR clause 52.225-23 does not apply, the Government will evaluate only those offers based on use of the equivalent domestic or Recovery Act designated country construction material other than Bahrainian, Mexican, or Omani construction material. An offer based on use of the foreign construction material for which an exception was requested—

(i) Will be rejected as nonresponsive if this acquisition is conducted by sealed bidding; or

(ii) May be accepted if revised during negotiations.

[FR Doc. E9-7031 Filed 3-30-09; 8:45 am]

BILLING CODE 6820-EP-P

## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

#### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Parts 3 and 52

[FAC 2005-32; FAR Case 2009-012; Item II; Docket 2009-0009, Sequence 1]

RIN 9000-AL19

#### Federal Acquisition Regulation; FAR Case 2009-012, American Recovery and Reinvestment Act of 2009 (the Recovery Act)—Whistleblower Protections

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

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

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on an interim rule amending the Federal Acquisition Regulation (FAR) to implement the American Recovery and Reinvestment Act of 2009 (the Recovery Act) with respect to section 1553 of Division A, Protecting State and Local Government and Contractor Whistleblowers. This rule prohibits non-Federal employers from discharging, demoting, or

discriminating against an employee as a reprisal for disclosing information.

**DATES:** *Effective Date:* March 31, 2009.

*Applicability Date:* The rule applies to solicitations issued and contracts awarded on or after the effective date of this rule. Contracting officers shall modify, on a bilateral basis, in accordance with FAR 1.108(d)(3), existing contracts to include the FAR clause for future orders, if the Recovery Act funds will be used. In the event that a contractor refuses to accept such a modification, the contractor will not be eligible for receipt of the Recovery Act funds.

*Comment Date:* Interested parties should submit written comments to the FAR Secretariat on or before June 1, 2009 to be considered in the formulation of a final rule.

**ADDRESSES:** Submit comments identified by FAC 2005-32, FAR case 2009-012, by any of the following methods:

- *Regulations.gov:* <http://www.regulations.gov>.

Submit comments via the Federal eRulemaking portal by inputting "FAR Case 2009-012" under the heading "Comment or Submission". Select the link "Send a Comment or Submission" that corresponds with FAR Case 2009-012. Follow the instructions provided to complete the "Public Comment and Submission Form". Please include your name, company name (if any), and "FAR Case 2009-012" on your attached document.

- *Fax:* 202-501-4067.
- *Mail:* General Services

Administration, FAR Secretariat (VPR), 1800 F Street, NW., Room 4041, ATTN: Hada Flowers, Washington, DC 20405.

*Instructions:* Please submit comments only and cite FAC 2005-32, FAR case 2009-012, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

**FOR FURTHER INFORMATION CONTACT:** For clarification of content, contact Ms. Jeritta Parnell, Procurement Analyst, at (202) 501-4082. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501-4755. Please cite FAC 2005-32, FAR case 2009-012.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

This interim rule implements section 1553 of the American Recovery and Reinvestment Act of 2009 (the Recovery Act) with respect to the protection of whistleblowers, by adding a new section

3.907, Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009 and a new clause at FAR 52.203-15, Whistleblower Protections Under the American Recovery and Reinvestment Act of 2009, and its prescription in FAR 3.907-7.

On February 17, 2009, the President signed Public Law 111-5, the American Recovery and Reinvestment Act of 2009, including a number of provisions to be implemented in Federal Government contracts. Among these provisions is Section 1553 of the Recovery Act, "Protecting State and Local Government and Contractor Whistleblowers". This requirement promotes transparency in Federal contracting.

##### B. Discussion

FAR 3.907 provides that non-Federal employers receiving funds under the Recovery Act are prohibited from discharging, demoting, or discriminating against employees as a reprisal for disclosing certain covered information to certain categories of Government officials or a person with supervisory authority over the employee. This section further provides definitions relevant to the statute; establishes time periods within which the Inspector General and the agency head must take action with regard to a complaint filed by a contractor employee; establishes procedures for access to investigative files of the Inspector General; and provides for remedies and enforcement authority. FAR 3.907-7 prescribes a new clause at 52.203-15.

##### C. Applicability to Contracts at or Below the Simplified Acquisition Threshold

Section 4101 of Public Law 103-355, the Federal Acquisition Streamlining Act (FASA) (41 U.S.C. 429), governs the applicability of laws to contracts or subcontracts in amounts not greater than the simplified acquisition threshold. It is intended to limit the applicability of laws to them. The FASA provides that if a provision of law contains criminal or civil penalties, or if the Federal Acquisition Regulatory Council (FAR Council) makes a written determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the simplified acquisition threshold, the law will apply to them.

Therefore, given section 1553 of the Recovery Act, which extends whistleblower protections to employees of contractors that receive contracts funded under the Recovery Act, and the initial implementing guidance for the Recovery Act issued on February 18,