

(c) "End product" is defined in the clause at 252.225-7012, Preference for Certain Domestic Commodities.

\* \* \* \* \*

■ 4. Section 225.7005-1 is revised to read as follows:

**225.7005-1 Restriction.**

In accordance with 10 U.S.C. 2534, do not acquire chemical weapons antidote contained in automatic injectors, or the components for such injectors, unless the chemical weapons antidote or component is manufactured in the United States or Canada by a company that—

(a) Has received all required regulatory approvals; and

(b) Has the plant, equipment, and personnel to perform the contract in the United States or Canada at the time of contract award.

■ 5. Section 225.7101 is revised to read as follows:

**225.7101 Definitions.**

"Component" and "domestic manufacture," as used in this subpart, are defined in the clause at 252.225-7025, Restriction on Acquisition of Forgings.

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

■ 6. Section 252.225-7000 is amended by revising the clause date and paragraph (a) to read as follows:

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

\* \* \* \* \*

Buy American Act—Balance of Payments Program Certificate (DEC 2009)

(a) *Definitions.* "Commercially available off-the-shelf (COTS) item," "component," "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.

\* \* \* \* \*

■ 7. Section 252.225-7013 is amended by:

■ a. Revising the clause date;

■ b. Redesignating paragraphs (a)(1) through (3) as paragraphs (a)(2) through (4) respectively; and

■ c. Adding a new paragraph (a)(1) to read as follows:

**252.225-7013 Duty-Free Entry.**

\* \* \* \* \*

**Duty-Free Entry (DEC 2009)**

(a) \* \* \*

(1) "Component" means any item supplied to the Government as part of an end product or of another component.

\* \* \* \* \*

■ 8. Section 252.225-7019 is amended by:

■ a. Revising the clause date;

■ b. Redesignating paragraphs (a) through (c) as paragraphs (b) through (d) respectively;

■ c. Adding a new paragraph (a);

■ d. Amending newly designated paragraph (c) by removing "paragraph (a) of this clause" and by adding "paragraph (b) of this clause" in its place; and

■ e. Revising newly designated paragraph (d) to read as follows:

**252.225-7019 Restriction on Acquisition of Anchor and Mooring Chain.**

\* \* \* \* \*

Restriction on Acquisition of Anchor and Mooring Chain (DEC 2009)

(a) *Definition.*

"Component," as used in this clause, means an article, material, or supply incorporated directly into an end product.

\* \* \* \* \*

(d) The Contractor shall insert the substance of this clause, including this paragraph (d), in all subcontracts for items containing welded shipboard anchor and mooring chain, four inches or less in diameter.

■ 9. Section 252.225-7025 is amended by:

■ a. Revising the clause date;

■ b. Redesignating paragraphs (a)(1) and (2) as paragraphs (a)(2) and (3) respectively;

■ c. Adding a new paragraph (a)(1); and

■ d. Revising newly designated paragraph (a)(2) and paragraph (b) to read as follows:

**252.225-7025 Restriction on Acquisition of Forgings.**

\* \* \* \* \*

Restriction on Acquisition of Forgings (DEC 2009)

(a) \* \* \*

(1) Component means any item supplied to the Government as part of an end product or of another component.

(2) Domestic manufacture means manufactured in the United States, its outlying areas, or Canada.

\* \* \* \* \*

(b) End products and their components delivered under this

contract shall contain forging items that are of domestic manufacture only.

\* \* \* \* \*

■ 10. Section 252.225-7035 is amended by revising the clause date and paragraph (a) 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 (DEC 2009)

(a) *Definitions.* "Bahrainian end product," "commercially available off-the-shelf (COTS) item," "component," "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," as used in this provision, have the meanings given in the Buy American Act—Free Trade Agreements—Balance of Payments Program clause of this solicitation.

\* \* \* \* \*

[FR Doc. E9-30296 Filed 12-23-09; 8:45 am]

BILLING CODE 5001-08-P

**DEPARTMENT OF DEFENSE**

**Defense Acquisition Regulations System**

**48 CFR Part 252**

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

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

**ACTION:** Final rule.

**SUMMARY:** DoD has adopted as final, without change, an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to conform to the FAR changes implementing the waiver of the component test of the Buy American Act to contracts and subcontracts. The Federal Acquisition Regulation (FAR) Case 2000-305 implemented 41 U.S.C. 431 with respect to the inapplicability of certain laws to contracts and subcontracts for the acquisition of commercially available off-the-shelf (COTS) items.

**DATES:** *Effective Date:* December 24, 2009.

**FOR FURTHER INFORMATION CONTACT:** Ms. Amy Williams, Defense Acquisition Regulations System, OUSD(AT&L) DPAP(DARS), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301-3062. Telephone 703-602-0328; facsimile 703-602-7887. Please cite DFARS Case 2008-D009.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

The Buy American Act (41 U.S.C. 10a-10b) uses a two-part test to define a “domestic end product” (manufactured in the United States and a formula based on cost of domestic components) (*see* FAR 25.001(c)(1) and definition of “domestic end products” at 25.003). The second part of this test is referred to as the “component test.”

DoD published an interim rule on January 15, 2009 (74 FR 2422), to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to conform to the FAR changes implementing the waiver of the component test of the Buy American Act for the acquisition of commercially available off-the-shelf (COTS) items (FAR Case 2000-305), published as a final rule in the **Federal Register** on January 15, 2009 (74 FR 2713), and effective February 17, 2009.

The comment period on the DFARS interim rule closed on March 16, 2009.

DoD received two responses, both representing the view of manufacturers of specialty metals.

1. The rule has been promulgated and justified based on circular logic.

One respondent objects that the final rule under FAR Case 2000-305 and the interim rule under DFARS Case 2008-D009 employ circular reasoning in changing the definition of COTS item. The respondent states that “each of the two rules is justified by pointing to the other.” The respondent objects that GSA and DoD have adopted a rule without meaningfully addressing comments on the new COTS definition submitted in response to DoD’s proposed rule 2008-D003.

*Response:* This case was not based on circular logic but on a progression from the DFARS proposed rule 2008-D003 to the FAR Case 2000-305 and to the interim rule under this DFARS Case 2008-D009. The comments submitted in response to the proposed rule were thoroughly reviewed and analyzed prior to the decision to incorporate this definition in the FAR rule and this DFARS rule and were then addressed in the **Federal Register** when the final rule 2008-D003 was subsequently published on July 29, 2009 (74 FR 52895).

2. Definition of COTS item should not allow modification to COTS items at higher tiers in the supply chain.

Both respondents opposed the definition of “commercially available off-the-shelf (COTS) item” because they consider it inconsistent with the statutory definition of COTS item (41 U.S.C. 431(c)) to allow modifications to occur at the next higher tier in the supply chain.

The respondents were concerned that an item could be substantially modified by downstream contractors prior to delivery to the Government.

- One respondent stated that under this definition, a COTS item can be modified in any way and still retain its character as a COTS item.

- The respondent further stated that this definition of COTS items results in the COTS exception applying to all commercial items.

- The respondent is concerned that contractors may opt to deconstruct major equipment end items such as green aircraft with the expectation that this approach would leave them with just a very small set of items requiring compliance. The respondent considered that the use of the commercial derivative military article exception would be more appropriate.

- The respondents cited language from the House Armed Services Committee report which stated that the exception for COTS items and components generally applies to items incorporated in non-commercial end items. The Committee also stated that if a contractor is using COTS items with more substantial modifications, it must use the de minimis or commercial derivative military article (CDMA) exceptions.

- The respondents requested that DoD allow only modifications that are incidental to installation, joining, or incorporation into the non-commercial end item.

*Response:* The arguments of these respondents are not pertinent to this DFARS rule and this DFARS rule has no impact on these respondents. This case implements a waiver of the component test under the Buy American Act for end items that are COTS items. The concern of these respondents relates to treatment of components containing specialty metals as COTS items. Their rationale is applicable to the restrictions of 10 U.S.C. 2533b on acquisition of specialty metals, but not to the Buy American Act.

The comments relating to the House Report that accompanied the FY-09 Duncan Hunter National Defense Authorization Act are inapplicable to this case, as are the comments regarding

exceptions for commercial derivative military articles and de minimis amounts of specialty metals, as these apply only to the specialty metals restriction at 10 U.S.C. 2533b.

The comments with regard to treatment of components as COTS items were addressed in more detail in the preamble to the final rule under DFARS Case 2008-D003 (74 FR 52895). However, the statement that, under this definition, COTS items that have been substantially modified are still considered to be COTS items is not accurate. The item must be provided to the next higher tier of the supply chain without modification. Whether it is a COTS item is determined at the time of transfer. DoD considers it reasonable to view COTS items that are provided from the global supply chain to the next higher tier supplier, without any modifications, to be “delivered to the Government” by those suppliers without modification. If DoD were not to view such items in this way, these COTS suppliers would not be able to provide globally available COTS items to the Government without burdensome investigations to track the eventual use of the COTS item to the end of the final assembly. Further, the COTS item definition, unlike the definition of “commercial item”, requires that the item must be sold in substantial quantities in the commercial marketplace.

This rule was subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

**B. Regulatory Flexibility Act**

DoD certifies 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.* Under the rule, all offerors and contractors (including small businesses) that provide U.S.-made items will no longer have to track the origin of the components in order to determine whether the items qualify as domestic end products or domestic construction material under the Buy American Act. While beneficial in acquisitions subject to the Buy American Act, the impact of this change is not considered to be a significant economic impact on small businesses, because 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 (WTO GPA), and contractors generally pass on to the Government the administrative costs incurred in complying with burdensome

Government regulations such as the component test under the Buy American Act, or decline to sell to the Government. No comments were received with regard to impact on small business.

**C. Paperwork Reduction Act**

The Paperwork Reduction Act (Pub. L. 104-13) applies, because this rule will result in some reduced burdens under OMB Control number 0704-0229, DFARS Part 225 and associated clauses. A Paperwork Burden Act Change to pertinent existing burdens has been submitted to the Office of Management and Budget under 44 U.S.C. 2502, *et seq.*

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

Government procurement.

**Amy G. Williams,**  
*Executive Editor, Defense Acquisition Regulations System.*

**PART 252—[AMENDED]**

**Interim Rule Adopted as Final Without Change**

■ Accordingly, the interim rule amending 48 CFR Part 252, which was published at 74 FR 2422 on January 15, 2009, is adopted as a final rule without change.

[FR Doc. E9-30294 Filed 12-23-09; 8:45 am]

**BILLING CODE 5001-08-P**

**DEPARTMENT OF THE INTERIOR**

**Fish and Wildlife Service**

**50 CFR Part 20**

[FWS-R9-MB-2008-0124; 91200-1231-9BPP-L2]

RIN 1018-AW31

**Migratory Bird Hunting; Late Seasons and Bag and Possession Limits for Certain Migratory Game Birds**

*Correction*

In rule document E9-22874 beginning on page 49244 in the issue of Friday, September 25, 2009 make the following corrections:

On pages 49247, 49253 through 49276, 49280, and 49281, the incorrect graphics published. These graphics are being reprinted to read as set forth below:

**BILLING CODE 1301-00-C**