

DEPARTMENT OF DEFENSE**Defense Acquisition Regulations System****48 CFR Part 252**

RIN 0750-AH21

Defense Federal Acquisition Regulation Supplement; Definition of "Qualifying Country End Product" (DFARS Case 2011-D028)

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

ACTION: Proposed rule.

SUMMARY: DoD is issuing a proposed rule to amend the definition of "qualifying country end product" by eliminating the component test for qualifying country end products that are commercially available off-the-shelf items.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before August 5, 2011, to be considered in the formation of the final rule.

ADDRESSES: Submit comments identified by DFARS Case 2011-D028, using any of the following methods:

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

Submit comments via the Federal eRulemaking portal by inputting "DFARS Case 2011-D028" under the heading "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "DFARS Case 2011-D028." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "DFARS Case 2011-D028" on your attached document.

○ *E-mail:* dfars@osd.mil. Include DFARS Case 2011-D028 in the subject line of the message.

○ *Fax:* 703-602-0350.

○ *Mail:* Defense Acquisition Regulations System, Attn: Amy G. Williams, OUSD (AT&L) DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check <http://www.regulations.gov> approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

SUPPLEMENTARY INFORMATION:**I. Background**

This rule proposes to amend the definition of "qualifying country end product" to remove the component test for qualifying country end products that are commercially available off-the-shelf items.

Under the Buy American Act, there is a two-part test to define a domestic end product. The product must be manufactured in the United States and there is a formula based on the cost of foreign components compared to the cost of all components. Under FAR Case 2000-305, the component test was waived for the acquisition of commercially available off-the-shelf (COTS) items (see FAR 25.001(c)(1)). Likewise, the component test for the DFARS definition of "domestic end product" was waived by the interim rule of DFARS Case 2008-D009 (74 FR 2422, January 15, 2009) and final rule published December 24, 2009 (74 FR 68384). These changes were based on a determination signed by the Administrator for Federal Procurement Policy on February 14, 2008, regarding laws applicable to the acquisition of COTS items. According to the determination, the component test of the Buy American Act (41 U.S.C. chapter 83) does not apply to COTS items.

The definition of "qualifying country end product" is not statutory, but it was modeled after the definition of "domestic end product" as a matter of policy. Therefore, it is within the authority of DoD to change this definition as a matter of policy, to waive the component test for qualifying country end products that are COTS items, so that it will not be necessary to try to track the origin of components of COTS items that are manufactured in a qualifying country, in order to determine that an end product is a qualifying country end product.

II. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and

Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

III. Regulatory Flexibility Act

DoD does not expect this rule to have a significant impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule only affects manufacturers of COTS items in qualifying countries, removing an administrative burden for the qualifying country manufacturer and the Government personnel acquiring the items. The Regulatory Flexibility Act is intended to protect small entities in the United States, not foreign entities, regardless of size. For the definition of "small business", the Regulatory Flexibility Act refers to the Small Business Act, which in turn allows the SBA Administrator to specify detailed definitions or standards. 5 U.S.C. 601(3) and 15 U.S.C. 632(a). The SBA regulations at 13 CFR 121.105 discuss who is a small business: "(a)(1) Except for small agricultural cooperatives, a business concern eligible for assistance from SBA as a small business is a business entity organized for profit, with a place of business located in the United States, and which operates primarily within the United States or which makes a significant contribution to the U.S. economy through payment of taxes or use of American products, materials or labor." The comparable change has already been enacted for the benefit of U.S. manufacturers of COTS items in the DFARS which aligns with the FAR. Therefore, an initial regulatory flexibility analysis has not been performed. DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2011-D029) in correspondence.

V. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Part 252

Government procurement.

Ynette R. Shelkin,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR part 252 is proposed to be 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. 1303 and 48 CFR chapter 1.

2. Amend section 252.212-7001 by revising the clause date, and paragraphs (b)(5)(i), (b)(11)(i), (b)(14)(i), (b)(20), and (b)(21) to read as follows:

252.212-7001 Contract terms and conditions required to implement statutes or executive orders applicable to defense acquisitions of commercial items.

CONTRACT TERMS AND CONDITIONS REQUIRED TO IMPLEMENT STATUTES OR EXECUTIVE ORDERS APPLICABLE TO DEFENSE ACQUISITIONS OF COMMERCIAL ITEMS (DATE)

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(b) * * *

(5)(i) 252.225-7001, Buy American Act and Balance of Payments Program (DATE) (41 U.S.C. chapter 83, E.O. 10582).

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(11)(i) 252.225-7021, Trade Agreements (DATE) (19 U.S.C. 2501-2518 and 19 U.S.C. 3301 note)

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(14)(i) 252.225-7036, Buy American Act—Free Trade Agreements—Balance of Payments Program (DATE) (41 U.S.C. chapter 83 and 19 U.S.C. 3301 note)

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(20) 252.237-7010, Prohibition on Interrogation of Detainees by Contractor Personnel (NOV 2010) (Section 1038 of Pub. L. 111-84).

(21) 252.237-7019, Training for Contractor Personnel Interacting with Detainees (SEP 2006) (Section 1092 of Public Law 108-375).

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3. Amend section 252.225-7001 by revising the clause date, paragraph (a)(8), and paragraph (b) to read as follows:

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

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BUY AMERICAN ACT AND BALANCE OF PAYMENTS PROGRAM (DATE)

(a) * * *

(8) Qualifying country end product means—

- (i) An unmanufactured end product mined or produced in a qualifying country; or
(ii) An end product manufactured in a qualifying country if—

(A) The cost of the following types of components exceeds 50 percent of the cost of all its components:

- (1) Components mined, produced, or manufactured in a qualifying country.
(2) Components mined, produced, or manufactured in the United States.

(3) Components of foreign origin of a class or kind for which the Government has determined that sufficient and reasonably available commercial quantities of a satisfactory quality are not mined, produced, or manufactured in the United States; or
(B) The end product is a COTS item.

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(b) This clause implements the Buy American Act (41 U.S.C. chapter 83). In accordance with 41 U.S.C. 1907, 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.

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4. Amend section 252.225-7021 by revising the clause date and paragraph (a)(10) to read as follows:

252.225-7021 Trade agreements.

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TRADE AGREEMENTS (DATE)

(a) * * *

(10) Qualifying country end product means—

- (i) An unmanufactured end product mined or produced in a qualifying country; or
(ii) An end product manufactured in a qualifying country if—

(A) The cost of the following types of components exceeds 50 percent of the cost of all its components:

- (1) Components mined, produced, or manufactured in a qualifying country.
(2) Components mined, produced, or manufactured in the United States.

(3) Components of foreign origin of a class or kind for which the Government has determined that sufficient and reasonably available commercial quantities of a satisfactory quality are not mined, produced, or manufactured in the United States; or
(B) The end product is a COTS item.

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5. Amend section 252.225-7036 by revising the clause date and paragraph (a)(13) to read as follows:

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

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

(a) * * *

(13) Qualifying country end product means—

- (i) An unmanufactured end product mined or produced in a qualifying country; or
(ii) An end product manufactured in a qualifying country if—

(A) The cost of the following types of components exceeds 50 percent of the cost of all its components:

- (1) Components mined, produced, or manufactured in a qualifying country.
(2) Components mined, produced, or manufactured in the United States.

(3) Components of foreign origin of a class or kind for which the Government has determined that sufficient and reasonably available commercial quantities of a satisfactory quality are not mined, produced, or manufactured in the United States; or
(B) The end product is a COTS item.

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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 203, 204, and 252

RIN 0750-AG99

Defense Federal Acquisition Regulation Supplement; Representation Relating to Compensation of Former DoD Officials (DFARS Case 2010-D020)

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

ACTION: Proposed rule.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to require that offerors represent whether former DoD officials employed by the offeror are in compliance with post-employment restrictions.

DATES: Comments on the proposed rule should be submitted in writing to the address shown below on or before August 5, 2011, to be considered in the formation of the final rule.

ADDRESSES: Submit comments identified by DFARS Case 2010-D020, using any of the following methods:
Regulations.gov: http://www.regulations.gov.

Submit comments via the Federal eRulemaking portal by inputting "DFARS Case 2010-D020" under the heading "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "DFARS Case 2010-D020." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and