Responding to a Breach of Personally Identifiable Information).

(c) The contractor may provide its own training or use the training of another agency unless the contracting agency specifies that only its agency-provided training is acceptable (see 24.302(b)).

(d) The contractor is required to maintain and, upon request, to provide documentation of completion of privacy training for all applicable employees.

(e) No contractor employee shall be permitted to have or retain access to a system of records, create, collect, use, process, store, maintain, disseminate, disclose, or dispose, or otherwise handle personally identifiable information, or design, develop, maintain, or operate a system of records, unless the employee has completed privacy training that, at a minimum, addresses the elements in paragraph (b) of this section.

24.302 Contract clause.

(a) The contracting officer shall insert the clause at FAR 52.224–3, Privacy Training, in solicitations and contracts when, on behalf of the agency, contractor employees will—

(1) Have access to a system of records;

(2) Create, collect, use, process, store, maintain, disseminate, disclose, dispose, or otherwise handle personally identifiable information; or

(3) Design, develop, maintain, or operate a system of records.

(b) When an agency specifies that only its agency-provided training is acceptable, use the clause with its Alternate I.

PART 25—FOREIGN ACQUISITION

Sec.

Subpart 25.1—Buy American—Supplies

Subpart 25.2—Buy American—Construction Materials

Subpart 25.3—Contracts Performed Outside the United States

Subpart 25.4—Trade Agreements

Subpart 25.5—Evaluating Foreign Offers—Supply Contracts

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

AUTHORITY: 40 U.S.C. 121(c); 10 U.S.C. chapter 4 and 10 U.S.C. chapter 137 legacy provisions (see 10 U.S.C. 3016); and 51 U.S.C. 20113.

SOURCE: 64 FR 72419, Dec. 27, 1999, unless otherwise noted.

25.000 Scope of part.

(a) This part provides policies and procedures for—

(1) Acquisition of foreign supplies, services, and construction materials; and

(2) Contracts performed outside the United States.

(b) It implements 41 U.S.C. chapter 83, Buy American; trade agreements; and other laws and regulations.

[73 FR 10957, Feb. 28, 2008, as amended at 79 FR 24208, Apr. 29, 2014]

25.001 General.

(a) 41 U.S.C. chapter 83, Buy American—

(1) Restricts the purchase of supplies, that are not domestic end products, for use within the United States. A foreign end product may be purchased if the contracting officer determines that the price of the lowest domestic offer is unreasonable or if another exception applies (see Subpart 25.1); and

(2) Requires, with some exceptions, the use of only domestic construction materials in contracts for construction in the United States (see Subpart 25.2).

(b) The restrictions in the Buy American statute are not applicable in acquisitions subject to certain trade agreements (see Subpart 25.4). In these acquisitions, end products and construction materials from certain countries receive nondiscriminatory treatment in evaluation with domestic offers. Generally, the dollar value of the acquisition determines which of the trade agreements applies. Exceptions to the applicability of the trade agreements are described in Subpart 25.4.

(c) The test to determine the country of origin for an end product under the Buy American statute (see the various country ''end product'' definitions in 25.003) is different from the test to determine the country of origin for an end product under the trade agreements, or the criteria for the representation on end products manufactured outside the United States (see 52.225–18).

(1) The Buy American statute uses a two-part test to define a ''domestic end product'' or ''domestic construction

material'' (manufactured in the United States and a domestic content test). The domestic content test has been waived for acquisition of commercially available off-the-shelf (COTS) items, except a product that consists wholly or predominantly of iron or steel or a combination of both (excluding COTS fasteners) (see 25.101(a) and 25.201(b)).

(2) Under the trade agreements, the test to determine country of origin is ''substantial transformation'' (*i.e.*, transforming an article into a new and different article of commerce, with a name, character, or use distinct from the original article).

(3) For the representation at 52.225–18, the only criterion is whether the place of manufacture of an end product is in the United States or outside the United States, without regard to the origin of the components.

(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. If the construction material consists wholly or predominantly of iron or steel, the iron or steel must be produced in the United States.

[64 FR 72419, Dec. 27, 1999, as amended at 67 FR 21535, Apr. 30, 2002; 71 FR 20306, Apr. 19, 2006; 71 FR 57377, Sept. 28, 2006; 74 FR 14626, Mar. 31, 2009; 75 FR 38691, July 2, 2010; 75 FR 53165, Aug. 30, 2010; 78 FR 37694, June 21, 2013; 79 FR 24208, Apr. 29, 2014; 86 FR 6186, Jan. 19, 2021]

25.002 Applicability of subparts.

The following table shows the applicability of the subparts. Subpart 25.5 provides comprehensive procedures for offer evaluation and examples.

	Subpart	Supplies for use		Construction		Services performed	
		Inside U.S.	Outside U.S.	Inside U.S.	Outside U.S.	Inside U.S.	Outside U.S.
25.1	Buy American—Supplies	X					
25.2	Buy American—Construction Materials			X			
25.3	Contracts Performed Outside the United States		X		X		X
25.4	Trade Agreements	X	X	X	X	X	X
25.5	Evaluating Foreign Offers—Supply Contracts	X	X				
25.6	American Recovery and Reinvestment Act—Buy American statute—Construction Materials.			X			
25.7	Prohibited Sources	X	X	X	X	X	X
25.8	Other International Agreements and Coordination	X	X		X		X
25.9	Customs and Duties	X					
25.10	Additional Foreign Acquisition Regulations	X	X	X	X	X	X
25.11	Solicitation Provisions and Contract Clauses	X	X	X	X	X	X

[64 FR 72419, Dec. 27, 1999, as amended at 67 FR 21535, Apr. 30, 2002; 71 FR 20306, Apr. 19, 2006; 73 FR 10957, Feb. 28, 2008; 74 FR 14626, Mar. 31, 2009; 79 FR 24208, Apr. 29, 2014]

25.003 Definitions.

As used in this part—

Caribbean Basin country means any of the following countries: Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, Bonaire, British Virgin Islands, Curacao, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saba, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Sint Eustatius, Sint Maarten, or Trinidad and Tobago.

Caribbean Basin country end product—

(1) Means an article that—

(i)(A) Is wholly the growth, product, or manufacture of a Caribbean Basin country; or

(B) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a Caribbean Basin country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed; and

(ii) Is not excluded from duty-free treatment for Caribbean countries under 19 U.S.C. 2703(b).

(A) For this reason, the following articles are not Caribbean Basin country end products:

(*1*) Tuna, prepared or preserved in any manner in airtight containers.

(*2*) Petroleum, or any product derived from petroleum.

(*3*) Watches and watch parts (including cases, bracelets, and straps) of whatever type including, but not limited to, mechanical, quartz digital, or quartz analog, if such watches or watch parts contain any material that is the product of any country to which the Harmonized Tariff Schedule of the United States (HTSUS) column 2 rates of duty apply (*i.e.*, Afghanistan, Cuba, Laos, North Korea, and Vietnam).

(*4*) Certain of the following: textiles and apparel articles; footwear, handbags, luggage, flat goods, work gloves, and leather wearing apparel; or handloomed, handmade, and folklore articles.

(B) Access to the HTSUS to determine duty-free status of articles of the types listed in paragraph (1)(ii)(A)(*4*) of this definition is available via the Internet at *https://usitc.gov/tata/hts/index.htm*. In particular, see the following:

(*1*) General Note 3(c), Products Eligible for Special Tariff treatment.

(*2*) General Note 17, Products of Countries Designated as Beneficiary Countries under the United States-Caribbean Basin Trade Partnership Act of 2000.

(*3*) Section XXII, Chapter 98, Subchapter II, Articles Exported and Returned, Advanced or Improved Abroad, U.S. Note 7(b).

(*4*) Section XXII, Chapter 98, Subchapter XX, Goods Eligible for Special Tariff Benefits under the United States-Caribbean Basin Trade Partnership Act; and

(2) Refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the acquisition, includes services (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

Civil aircraft and related articles means—

(1) All aircraft other than aircraft to be purchased for use by the Department of Defense or the U.S. Coast Guard;

(2) The engines (and parts and components for incorporation into the engines) of these aircraft;

(3) Any other parts, components, and subassemblies for incorporation into the aircraft; and

(4) Any ground flight simulators, and parts and components of these simulators, for use with respect to the aircraft, whether to be used as original or replacement equipment in the manufacture, repair, maintenance, rebuilding, modification, or conversion of the aircraft and without regard to whether the aircraft or articles receive duty-free treatment under section 601(a)(2) of the Trade Agreements Act.

Component means an article, material, or supply incorporated directly into an end product or construction material.

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

Cost of components means—

(1) For components purchased by the contractor, the acquisition cost, including transportation costs to the place of incorporation into the end product or construction material (whether or not such costs are paid to a domestic firm), and any applicable duty (whether or not a duty-free entry certificate is issued); or

(2) For components manufactured by the contractor, all costs associated with the manufacture of the component, including transportation costs as described in paragraph (1) of this definition, plus allocable overhead costs, but excluding profit. Cost of components does not include any costs associated with the manufacture of the end product.

Critical component means a component that is mined, produced, or manufactured in the United States and deemed critical to the U.S. supply chain. The list of critical components is at 25.105.

Critical item means a domestic construction material or domestic end product that is deemed critical to the U.S. supply chain. The list of critical items is at 25.105.

Designated country means any of the following countries:

(1) A World Trade Organization Government Procurement Agreement (WTO GPA) country (Armenia, Aruba, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, 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, Moldova, Montenegro, Netherlands, New Zealand, North Macedonia, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Taiwan (known in the World Trade Organization as ''the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu'' (Chinese Taipei)), Ukraine, or United Kingdom);

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

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

(4) A Caribbean Basin country (Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, Bonaire, British Virgin Islands, Curacao, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saba, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Sint Eustatius, Sint Maarten, or Trinidad and Tobago).

Designated country end product means a WTO GPA country end product, an FTA country end product, a least developed country end product, or a Caribbean Basin country end product.

Domestic construction material means—

(1) For use in subparts other than 25.6—

(i) For construction material that does not consist wholly or predominantly of iron or steel or a combination of both—

(A) An unmanufactured construction material mined or produced in the United States; or

(B) A construction material manufactured in the United States, if—

(*1*) The cost of the components mined, produced, or manufactured in the United States exceeds 60 percent of the cost of all its components, except that the percentage will be 65 percent for items delivered in calendar years 2024 through 2028 and 75 percent for items delivered starting in calendar year 2029 (unless an alternate percentage is established for a contract in accordance with FAR 25.201(c)). Components of foreign origin of the same class or kind for which nonavailability determinations have been made are treated as domestic. Components of unknown origin are treated as foreign; or

(*2*) The construction material is a commercially available off-the-shelf (COTS) item; or

(ii) For construction material that consists wholly or predominantly of iron or steel or a combination of both, a construction material manufactured in the United States if the cost of foreign iron and steel constitutes less than 5 percent of the cost of all the

components used in such construction material. The cost of foreign iron and steel includes but is not limited to the cost of foreign iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the construction material and a good faith estimate of the cost of all foreign iron or steel components excluding COTS fasteners. Iron or steel components of unknown origin are treated as foreign. If the construction material contains multiple components, the cost of all the materials used in such construction material is calculated in accordance with the definition of ''cost of components'' in this section; or

(2) For use in subpart 25.6, see the definition in 25.601.

Domestic end product means—

(1) For an end product that does not consist wholly or predominantly of iron or steel or a combination of both—

(i) An unmanufactured end product mined or produced in the United States;

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

(A) The cost of its components mined, produced, or manufactured in the United States exceeds 60 percent of the cost of all its components, except that the percentage will be 65 percent for items delivered in calendar years 2024 through 2028 and 75 percent for items delivered starting in calendar year 2029 (unless an alternate percentage is established for a contract in accordance with FAR 25.101(d)). Components of foreign origin of the same class or kind as those that the agency determines are not mined, produced, or manufactured in sufficient and reasonably available commercial quantities of a satisfactory quality are treated as domestic. Components of unknown origin are treated as foreign. Scrap generated, collected, and prepared for processing in the United States is considered domestic; or

(B) The end product is a COTS item; or

(2) For an end product that consists wholly or predominantly of iron or steel or a combination of both, an end product manufactured in the United States, if the cost of foreign iron and steel constitutes less than 5 percent of the cost of all the components used in the end product. The cost of foreign iron and steel includes but is not limited to the cost of foreign iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the end product and a good faith estimate of the cost of all foreign iron or steel components excluding COTS fasteners. Iron or steel components of unknown origin are treated as foreign. If the end product contains multiple components, the cost of all the materials used in such end product is calculated in accordance with the definition of ''cost of components'' in this section.

Domestic offer means an offer of a domestic end product. When the solicitation specifies that award will be made on a group of line items, a domestic offer means an offer where the proposed price of the domestic end products exceeds 50 percent of the total proposed price of the group.

Eligible offer means an offer of an eligible product. When the solicitation specifies that award will be made on a group of line items, an eligible offer means a foreign offer where the combined proposed price of the eligible products and the domestic end products exceeds 50 percent of the total proposed price of the group.

Eligible product means a foreign end product, construction material, or service that, due to applicability of a trade agreement to a particular acquisition, is not subject to discriminatory treatment.

End product means those articles, materials, and supplies to be acquired for public use.

Fastener means a hardware device that mechanically joins or affixes two or more objects together. Examples of fasteners are nuts, bolts, pins, rivets, nails, clips, and screws.

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

Foreign contractor means a contractor or subcontractor organized or existing under the laws of a country other than the United States.

Foreign end product means an end product other than a domestic end product.

Foreign iron and steel means iron or steel products not produced in the United States. Produced in the United States means that all manufacturing processes of the iron or steel must take place in the United States, from the initial melting stage through the application of coatings, except metallurgical processes involving refinement of steel additives. The origin of the elements of the iron or steel is not relevant to the determination of whether it is domestic or foreign.

Foreign offer means any offer other than a domestic offer.

Free Trade Agreement country means Australia, Bahrain, Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Korea (Republic of), Mexico, Morocco, Nicaragua, Oman, Panama, Peru, or Singapore.

Free Trade Agreement country end product means an article that—

(1) Is wholly the growth, product, or manufacture of a Free Trade Agreement (FTA) country; or

(2) In the case of an article 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 article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product, includes services (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

Israeli end product means an article that—

(1) Is wholly the growth, product, or manufacture of Israel; or

(2) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in Israel into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed.

Least developed country means any of the following countries: Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, Laos, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Nepal, Niger, Rwanda, Samoa, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, Somalia, South Sudan, Tanzania, Timor-Leste, Togo, Tuvalu, Uganda, Vanuatu, Yemen, or Zambia.

Least developed country end product means an article that—

(1) Is wholly the growth, product, or manufacture of a least developed country; or

(2) In the case of an article 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 article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product, includes services (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

Noneligible offer means an offer of a noneligible product.

Noneligible product means a foreign end product that is not an eligible product.

Predominantly of iron or steel or a combination of both means that the cost of the iron and steel content exceeds 50 percent of the total cost of all its components. The cost of iron and steel is the cost of the iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the product and a good faith estimate of the cost of iron or steel components excluding COTS fasteners.

Steel means an alloy that includes at least 50 percent iron, between 0.02 and 2 percent carbon, and may include other elements.

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

U.S.-made end product means an article that is mined, produced, or manufactured in the United States or that is substantially transformed in the United States into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed.

World Trade Organization Government Procurement Agreement (WTO GPA) country means any of the following countries: Armenia, Aruba,Australia, Austria, Belgium, Bulgaria, Canada, Croatia, 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, Moldova, Montenegro, Netherlands, New Zealand, North Macedonia, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Taiwan, Ukraine, or United Kingdom.

WTO GPA country end product means an article that—

(1) Is wholly the growth, product, or manufacture of a WTO GPA country; or

(2) In the case of an article 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 article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

[64 FR 72419, Dec. 27, 1999]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting section 25.003, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.govinfo.gov*.

Subpart 25.1—Buy American—Supplies

25.100 Scope of subpart.

(a) This subpart implements—

(1) 41 U.S.C. chapter 83, Buy American;

(2) Executive Order 10582, December 17, 1954;

(3) Executive Order 13881, July 15, 2019;

(4) Executive Order 14005, January 25, 2021; and

(5) Waiver of the domestic content test of the Buy American statute for acquisition of commercially available off-the-shelf (COTS) items in accordance with 41 U.S.C. 1907, but see 25.101(a)(2)(ii).

(b) It applies to supplies acquired for use in the United States, including supplies acquired under contracts set aside for small business concerns, if—

(1) The supply contract exceeds the micro-purchase threshold; or

(2) The supply portion of a contract for services that involves the furnishing of supplies (e.g., lease) exceeds the micro-purchase threshold.

[74 2722, Jan. 15, 2009, as amended at 79 FR 24208, Apr. 29, 2014; 86 FR 6187, Jan. 19, 2021; 87 FR 12790, Mar. 7, 2022]

25.101 General.

(a) The Buy American statute restricts the purchase of supplies that are not domestic end products. For manufactured end products, the Buy American statute, E.O. 13881, and E.O. 14005 use a two-part test to define a domestic end product.

(1) The article must be manufactured in the United States; and

(2)(i) Except for an end product that consists wholly or predominantly of iron or steel or a combination of both, the cost of domestic components shall exceed 60 percent of the cost of all the components, except that the percentage will be 65 percent for items delivered in calendar years 2024 through 2028 and 75 percent for items delivered starting in calendar year 2029. But see paragraph (d) of this section. In accordance with 41 U.S.C. 1907, this domestic content test of the Buy American statute has been waived for acquisitions of COTS items (see 12.505(a)) (but see paragraph (a)(2)(ii) of this section).

(ii) For an end product that consists wholly or predominantly of iron or steel or a combination of both, the cost of foreign iron and steel must constitute less than 5 percent of the cost of all the components used in the end product (see the definition of ''foreign iron and steel'' at 25.003). The cost of foreign iron and steel includes but is not limited to the cost of foreign iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the end product and a good faith estimate of the cost of all foreign iron or steel components excluding COTS fasteners. This domestic content test of the Buy American statute has not been waived for acquisitions of COTS items in this category, except for COTS fasteners.

(b) The Buy American statute applies to small business set-asides. A manufactured product of a small business concern is a U.S.-made end product, but is not a domestic end product unless it meets the domestic content test in paragraph (a)(2) of this section.

(c) Exceptions that allow the purchase of a foreign end product are listed at 25.103. The unreasonable cost exception is implemented through the use of an evaluation factor applied to low foreign offers that are not eligible offers. The evaluation factor is not used to provide a preference for one foreign offer over another. Evaluation procedures and examples are provided in subpart 25.5.

(d)(1) A contract with a period of performance that spans the schedule of domestic content threshold increases specified in paragraph (a)(2)(i) of this section shall be required to comply with each increased threshold for the items in the year of delivery, unless the senior procurement executive of the contracting agency allows for application of an alternate domestic content test for that contract under which the domestic content threshold in effect at time of contract award will apply to the entire period of performance for the contract. This authority is not delegable. The senior procurement executive shall consult the Office of Management and Budget's Made in America Office before allowing the use of the alternate domestic content test.

(2) When a senior procurement executive allows for application of an alternate domestic content test for a contract—

(i) See 25.1101(a)(1)(ii) or 25.1101(b)(1)(v) for use of the appropriate Alternate clause to reflect the domestic content threshold that will apply to the entire period of performance for that contract; and

(ii) Use the fill-in at 52.213–4(b)(1)(xvii)(B) instead of including 52.225–1 Alternate I when using 52.213–4, Terms and Conditions—Simplified Acquisitions (Other Than Commercial Products and Commercial Services).

[64 FR 72419, Dec. 27, 1999, as amended at 74 FR 2722, Jan. 15, 2009; 79 FR 24208, Apr. 29, 2014; 86 FR 6187, Jan. 19, 2021; 87 FR 12790, Mar. 7, 2022]

25.102 Policy.

Except as provided in 25.103, acquire only domestic end products for public use inside the United States.

25.103 Exceptions.

When one of the following exceptions applies, the contracting officer may acquire a foreign end product without regard to the restrictions of the Buy American statute:

(a) *Public interest.* The head of the agency may make a determination that domestic preference would be inconsistent with the public interest. This exception applies when an agency has an agreement with a foreign government that provides a blanket exception to the Buy American statute.

(b) *Nonavailability.* The Buy American statute does not apply with respect to articles, materials, or supplies if articles, materials, or supplies of the class or kind to be acquired, either as end items or components, are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.

(1) *Class determinations.* (i) A nonavailability determination has been made for the articles listed in 25.104. This determination does not necessarily mean that there is no domestic source for the listed items, but that domestic sources can only meet 50 percent or less of total U.S. Government and nongovernment demand.

(ii) Before acquisition of an article on the list, the procuring agency is responsible to conduct market research appropriate to the circumstances, including seeking of domestic sources. This applies to acquisition of an article as—

(A) An end product; or

(B) A significant component (valued at more than 50 percent of the value of all the components).

(iii) The determination in paragraph (b)(1)(i) of this section does not apply if the contracting officer learns at any time before the time designated for receipt of bids in sealed bidding or final offers in negotiation that an article on the list is available domestically in sufficient and reasonably available commercial quantities of a satisfactory quality to meet the requirements of the solicitation. The contracting officer must—

(A) Ensure that the appropriate Buy American statute provision and clause are included in the solicitation (see 25.1101(a), 25.1101(b), or 25.1102);

(B) Specify in the solicitation that the article is available domestically and that offerors and contractors may not treat foreign components of the same class or kind as domestic components; and

(C) Submit a copy of supporting documentation to the appropriate council identified in 1.201–1, in accordance with agency procedures, for possible removal of the article from the list.

(2) *Individual determinations.* (i) The head of the contracting activity may make a determination that an article, material, or supply is not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality. A determination is not required before January 1, 2030, if there is an offer for a foreign end product that exceeds 55 percent domestic content (see 25.106(b)(2) and 25.106(c)(2)).

(ii) If the contracting officer considers that the nonavailability of an article is likely to affect future acquisitions, the contracting officer may submit a copy of the determination and supporting documentation to the appropriate council identified in 1.201–1, in accordance with agency procedures, for possible addition to the list in 25.104.

(3) A written determination is not required if all of the following conditions are present:

(i) The acquisition was conducted through use of full and open competition.

(ii) The acquisition was synopsized in accordance with 5.201.

(iii) No offer for a domestic end product was received.

(c) *Unreasonable cost.* The contracting officer may determine that the cost of a domestic end product would be unreasonable, in accordance with 25.106 and subpart 25.5.

(d) *Resale.* The contracting officer may purchase foreign end products specifically for commissary resale.

(e) *Information technology that is a commercial product.* The restriction on purchasing foreign end products does not apply to the acquisition of information technology that is a commercial product, when using fiscal year 2004 or subsequent fiscal year funds (section 535(a) of Division F, Title V, Consolidated Appropriations Act, 2004, and similar sections in subsequent appropriations acts).

[64 FR 72419, Dec. 27, 1999, as amended at 70 FR 11742, Mar. 9, 2005; 71 FR 224, Jan. 3, 2006; 79 FR 24209, Apr. 29, 2014; 86 FR 61028, Nov. 4, 2021; 87 FR 12791, Mar. 7, 2022]

25.104 Nonavailable articles.

(a) The following articles have been determined to be nonavailable in accordance with 25.103(b)(1)(i):

Acetylene, black.
Agar, bulk.
Anise.
Antimony, as metal or oxide.
Asbestos, amosite, chrysotile, and crocidolite.
Bamboo shoots.
Bananas.
Bauxite.
Beef, corned, canned.
Beef extract.
Bephenium hydroxynapthoate.
Bismuth.
Books, trade, text, technical, or scientific; newspapers; pamphlets; magazines; periodicals; printed briefs and films; not printed in the United States and for which domestic editions are not available.
Brazil nuts, unroasted.
Cadmium, ores and flue dust.
Calcium cyanamide.

Capers.
Cashew nuts.
Castor beans and castor oil.
Chalk, English.
Chestnuts.
Chicle.
Chrome ore or chromite.
Cinchona bark.
Cobalt, in cathodes, rondelles, or other primary ore and metal forms.
Cocoa beans.
Coconut and coconut meat, unsweetened, in shredded, desiccated, or similarly prepared form.
Coffee, raw or green bean.
Colchicine alkaloid, raw.
Copra.
Cork, wood or bark and waste.
Cover glass, microscope slide.
Crane rail (85-pound per foot).
Cryolite, natural.
Dammar gum.
Diamonds, industrial, stones and abrasives.
Emetine, bulk.
Ergot, crude.
Erythrityl tetranitrate.
Fair linen, altar.
Fibers of the following types: abaca, abace, agave, coir, flax, jute, jute burlaps, palmyra, and sisal.
Goat hair canvas.
Goat and kidskins.
Grapefruit sections, canned.
Graphite, natural, crystalline, crucible grade.
Hand file sets (Swiss pattern).
Handsewing needles.
Hemp yarn.
Hog bristles for brushes.
Hyoscine, bulk.
Ipecac, root.
Iodine, crude.
Kaurigum.
Lac.
Leather, sheepskin, hair type.
Lavender oil.
Manganese.
Menthol, natural bulk.
Mica.
Microprocessor chips (brought onto a Government construction site as separate units for incorporation into building systems during construction or repair and alteration of real property).
Modacrylic fiber.
Nickel, primary, in ingots, pigs, shots, cathodes, or similar forms; nickel oxide and nickel salts.
Nitroguanidine (also known as picrite).
Nux vomica, crude.
Oiticica oil.
Olive oil.
Olives (green), pitted or unpitted, or stuffed, in bulk.
Opium, crude.
Oranges, mandarin, canned.
Petroleum, crude oil, unfinished oils, and finished products.
Pineapple, canned.
Pine needle oil.
Platinum and related group metals, refined, as sponge, powder, ingots, or cast bars.
Pyrethrum flowers.
Quartz crystals.
Quebracho.
Quinidine.
Quinine.
Rabbit fur felt.
Radium salts, source and special nuclear materials.
Rosettes.
Rubber, crude and latex.
Rutile.
Santonin, crude.
Secretin.
Shellac.
Silk, raw and unmanufactured.
Spare and replacement parts for equipment of foreign manufacture, and for which domestic parts are not available.
Spices and herbs, in bulk.
Sugars, raw.
Swords and scabbards.
Talc, block, steatite.
Tantalum.
Tapioca flour and cassava.
Tartar, crude; tartaric acid and cream of tartar in bulk.
Tea in bulk.
Thread, metallic (gold).
Thyme oil.
Tin in bars, blocks, and pigs.
Triprolidine hydrochloride.
Tungsten.
Vanilla beans.
Venom, cobra.
Water chestnuts.
Wax, carnauba.
Wire glass.
Woods; logs, veneer, and lumber of the following species: Alaskan yellow cedar, angelique, balsa, ekki, greenheart, lignum vitae, mahogany, and teak.
Yarn, 50 Denier rayon.
Yeast, active dry and instant active dry.

(b) This list will be published in the FEDERAL REGISTER for public comment no less frequently than once every five years. Unsolicited recommendations for deletions from this list may be submitted at any time and should provide sufficient data and rationale to permit evaluation (see 1.502).

[64 FR 72419, Dec. 27, 1999, as amended at 69 FR 34241, June 18, 2004; 70 FR 11743, Mar. 9, 2005; 75 FR 34283, June 16, 2010]

25.105 Critical components and critical items.

(a) The following is a list of articles that have been determined to be a critical component or critical item and their respective preference factor(s).

(1)–(2) [Reserved]

(b) The list of articles and preference factors in paragraph (a) of this section will be published in the FEDERAL REGISTER for public comment no less frequently than once every 4 years. Unsolicited recommendations for deletions from this list may be submitted at any time and should provide sufficient data and rationale to permit evaluation (*see* 1.502).

(c) For determining reasonableness of cost for domestic end products that contain critical components or are critical items (*see* 25.106(c)).

[87 FR 12791, Mar. 7, 2022]

25.106 Determining reasonableness of cost.

(a) The contracting officer—

(1) Must use the evaluation factors in paragraphs (b) and (c) of this section unless the head of the agency makes a written determination that the use of higher factors is more appropriate. If the determination applies to all agency acquisitions, the agency evaluation factors must be published in agency regulations; and

(2) Must not apply evaluation factors to offers of eligible products if the acquisition is subject to a trade agreement under subpart 25.4.

(b) *For end products that are not critical items and do not contain critical components.* (1)(i) If there is a domestic offer that is not the low offer, and the restrictions of the Buy American statute apply to the low offer, the contracting officer must determine the reasonableness of the cost of the domestic offer by adding to the price of the low offer, inclusive of duty—

(A) 20 percent, if the lowest domestic offer is from a large business concern; or

(B) 30 percent, if the lowest domestic offer is from a small business concern. The contracting officer must use this factor, or another factor established in agency regulations, in small business set-asides if the low offer is from a small business concern offering the product of a small business concern that is not a domestic end product (*see* subpart 19.5).

(ii) The price of the domestic offer is reasonable if it does not exceed the evaluated price of the low offer after addition of the appropriate evaluation factor in accordance with paragraph (a) or (b)(1)(i) of this section. See evaluation procedures at subpart 25.5.

(2)(i) For end products that are not COTS items and do not consist wholly or predominantly of iron or steel or a combination of both, if the procedures in paragraph (b)(1)(i) of this section result in an unreasonable cost determination for the domestic offer or there is no domestic offer received, and the low offer is for a foreign end product that does not exceed 55 percent domestic content, the contracting officer shall—

(A) Treat the lowest offer of a foreign end product that is manufactured in the United States and exceeds 55 percent domestic content as a domestic offer; and

(B) Determine the reasonableness of the cost of this offer by applying the evaluation factors listed in paragraph (b)(1)(i) of this section to the low offer.

(ii) The price of the lowest offer of a foreign end product that exceeds 55 percent domestic content is reasonable if it does not exceed the evaluated price of the low offer after addition of the appropriate evaluation factor in accordance with paragraph (a) or (b)(1)(i) of this section. See evaluation procedures at subpart 25.5.

(iii) The procedures in this paragraph (b)(2) will no longer apply as of January 1, 2030.

(c) *For end products that are critical items or contain critical components.* (1)(i) If there is a domestic offer that is not the low offer, and the restrictions of the Buy American statute apply to the low offer, the contracting officer shall determine the reasonableness of the cost of the domestic offer by adding to the price of the low offer, inclusive of duty—

(A) 20 percent, plus the additional preference factor identified for the critical item or end product containing critical components listed at section

25.105, if the lowest domestic offer is from a large business concern; or

(B) 30 percent, plus the additional preference factor identified for the critical item or end product containing critical components listed at section 25.105, if the lowest domestic offer is from a small business concern. The contracting officer shall use this factor, or another factor established in agency regulations, in small business set-asides if the low offer is from a small business concern offering the product of a small business concern that is not a domestic end product (see subpart 19.5).

(ii) The price of the domestic offer is reasonable if it does not exceed the evaluated price of the low offer after addition of the appropriate evaluation factor in accordance with paragraph (a) or (b) of this section. See evaluation procedures at subpart 25.5.

(2)(i) For end products that are not COTS items and do not consist wholly or predominantly of iron or steel or a combination of both, if the procedures in paragraph (c)(1)(ii) of this section result in an unreasonable cost determination for the domestic offer or there is no domestic offer received, and the low offer is for a foreign end product that does not exceed 55 percent domestic content, the contracting officer shall—

(A) Treat the lowest offer of a foreign end product that is manufactured in the United States and exceeds 55 percent domestic content as a domestic offer; and

(B) Determine the reasonableness of the cost of this offer by applying the evaluation factors listed in paragraph (c)(1) of this section to the low offer.

(ii) The price of the lowest offer of a foreign end product that exceeds 55 percent domestic content is reasonable if it does not exceed the evaluated price of the low offer after addition of the appropriate evaluation factor in accordance with paragraph (a) or (b) of this section. See evaluation procedures at subpart 25.5.

(iii) The procedures in this paragraph (c)(2) will no longer apply as of January 1, 2030.

[64 FR 72419, Dec. 27, 1999, as amended at 79 FR 24209, Apr. 29, 2014; 86 FR 6187, Jan. 19, 2021. Redesignated and amended at 87 FR 12791, Mar. 7, 2022]

Subpart 25.2—Buy American—Construction Materials

25.200 Scope of subpart.

(a) This subpart implements—

(1) 41 U.S.C. chapter 83, Buy American;

(2) Executive Order 10582, December 17, 1954;

(3) Executive Order 13881, July 15, 2019;

(4) Executive Order 14005, January 25, 2021; and

(5) Waiver of the domestic content test of the Buy American statute for acquisitions of commercially available off-the-shelf (COTS) items in accordance with 41 U.S.C. 1907, but see 25.201(b)(2)(ii).

(b) It applies to contracts for the construction, alteration, or repair of any public building or public work in the United States.

(c) When using funds appropriated or otherwise provided by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5) (Recovery Act) for construction, see subpart 25.6.

[74 FR 2722, Jan. 15, 2009, as amended at 74 FR 22810, May 14, 2009; 79 FR 24209, Apr. 29, 2014; 86 FR 6187, Jan. 19, 2021; 87 FR 12792, Mar. 7, 2022]

25.201 Policy.

(a) Except as provided in 25.202, use only domestic construction materials in construction contracts performed in the United States.

(b) The Buy American statute restricts the purchase of construction materials that are not domestic construction materials. For manufactured construction materials, the Buy American statute, E.O. 13881, and E.O. 14005 use a two-part test to define domestic construction materials.

(1) The article must be manufactured in the United States; and

(2)(i) Except for construction material that consists wholly or predominantly of iron or steel or a combination of both, the cost of domestic components must exceed 60 percent of the cost of all the components, except that the percentage will be 65 percent for items delivered in calendar years 2024 through 2028 and 75 percent for items delivered starting in calendar year 2029, but see paragraph (c) of this section. In accordance with 41 U.S.C. 1907, this domestic content test of the Buy American statute has been waived for acquisitions of COTS items (see 12.505(a)).

(ii) For construction material that consists wholly or predominantly of iron or steel or a combination of both, the cost of foreign iron and steel must constitute less than 5 percent of the cost of all the components used in such construction material (see the definition of ''foreign iron and steel'' at 25.003). The cost of foreign iron and steel includes but is not limited to the cost of foreign iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the construction material and a good faith estimate of the cost of all foreign iron or steel components excluding COTS fasteners. This domestic content test of the Buy American statute has not been waived for acquisitions of COTS items in this category, except for COTS fasteners.

(c)(1) A contract with a period of performance that spans the schedule of domestic content threshold increases specified in paragraph (b)(2)(i) of this section shall be required to comply with each increased threshold for the items in the year of delivery, unless the senior procurement executive of the contracting agency allows for application of an alternate domestic content test for that contract under which the domestic content threshold in effect at time of contract award will apply to the entire period of performance for the contract. This authority is not delegable. The senior procurement executive shall consult the Office of Management and Budget's Made in America Office before allowing the use of the alternate domestic content test.

(2) When a senior procurement executive allows for application of an alternate domestic content test for a contract, see 25.1102(a)(3) or (c)(4) for use of the appropriate Alternate clause to reflect the domestic content threshold that will apply to the entire period of performance for that contract.

[86 FR 6187, Jan. 19, 2021, as amended at 87 FR 12792, Mar. 7, 2022]

25.202 Exceptions.

(a) When one of the following exceptions applies, the contracting officer may allow the contractor to acquire foreign construction materials without regard to the restrictions of the Buy American statute:

(1) *Impracticable or inconsistent with public interest.* The head of the agency may determine that application of the restrictions of the Buy American statute to a particular construction material would be impracticable or would be inconsistent with the public interest. The public interest exception applies when an agency has an agreement with a foreign government that provides a blanket exception to the Buy American statute.

(2) *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. A determination is not required before January 1, 2030, if there is an offer for a foreign construction material that exceeds 55 percent domestic content (see 25.204(b)(1)(ii) and 25.204(b)(2)(ii)).

(3) *Unreasonable cost.* The contracting officer concludes that the cost of domestic construction material is unreasonable in accordance with 25.204.

(4) *Information technology that is a commercial product.* The restriction on purchasing foreign construction material does not apply to the acquisition of information technology that is a commercial product, when using Fiscal Year 2004 or subsequent fiscal year funds (section 535(a) of Division F,

Title V, Consolidated Appropriations Act, 2004, and similar sections in subsequent appropriations acts).

(b) *Determination and findings.* When a determination is made for any of the reasons stated in this section that certain foreign construction materials may be used, the contracting officer must list the excepted materials in the contract. The agency must make the findings justifying the exception available for public inspection.

(c) *Acquisitions under trade agreements.* For construction contracts with an estimated acquisition value of $6,708,000 or more, see subpart 25.4.

[64 FR 72419, Dec. 27, 1999, as amended at 65 FR 36026, June 6, 2000; 67 FR 56123, Aug. 30, 2002; 69 FR 1053, Jan. 7, 2004; 70 FR 11743, Mar. 9, 2005; 71 FR 865, Jan. 5, 2006; 73 FR 10963, Feb. 28, 2008; 75 FR 38690, July 2, 2010; 75 FR 60267, Sept. 29, 2010; 77 FR 12934, Mar. 2, 2012; 78 FR 80380, Dec. 31, 2013; 79 FR 24209, Apr. 29, 2014; 80 FR 81895, Dec. 31, 2015; 83 FR 3398, Jan. 24, 2018; 85 FR 2618, Jan. 15, 2020; 86 FR 61028, Nov. 4, 2021; 86 FR 74530, Dec. 30, 2021; 87 FR 12792, Mar. 7, 2022; 89 FR 13963, Feb. 23, 2024]

25.203 Preaward determinations.

(a) For any acquisition, an offeror may request from the contracting officer a determination concerning the inapplicability of the Buy American statute for specifically identified construction materials. The time for submitting the request is specified in the solicitation in paragraph (b) of either 52.225–10 or 52.225–12, 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 52.225–9 or 52.225–11, 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.

[64 FR 72419, Dec. 27, 1999, as amended at 79 FR 24209, Apr. 29, 2014]

25.204 Evaluating offers of foreign construction material.

(a) Offerors proposing to use foreign construction material other than that listed by the Government in the applicable clause at 52.225–9, paragraph (b)(2), or 52.225–11, paragraph (b)(3), or covered by the WTO GPA or a Free Trade Agreement (paragraph (b)(2) of 52.225–11), must provide the information required by paragraphs (c) and (d) of the respective clauses.

(b)(1) *For construction material that is not a critical item and does not contain critical components.* (i) Unless the head of the agency specifies a higher percentage, the contracting officer shall add to the offered price 20 percent of the cost of any foreign construction material proposed for exception from the requirements of the Buy American statute based on the unreasonable cost of domestic construction materials. In the case of a tie, the contracting officer shall 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.

(ii) For construction material that is not a COTS item and does not consist wholly or predominantly of iron or steel or a combination of both, if the procedures in paragraph (b)(1)(i) of this section result in an unreasonable cost determination for the domestic construction material offer or there is no domestic construction material offer received, and the low offer is for foreign construction material that does not exceed 55 percent domestic content, the contracting officer shall—

(A) Treat the lowest offer of foreign construction material that is manufactured in the United States and exceeds 55 percent domestic content as a domestic offer; and

(B) Determine the reasonableness of the cost of this offer by applying the evaluation factor listed in paragraph (b)(1)(i) to the low offer.

(iii) The procedures in paragraph (b)(1)(ii) of this section will no longer apply as of January 1, 2030.

(2) *For construction material that is a critical item or contains critical components.* (i) The contracting officer shall add to the offered price 20 percent, plus the additional preference factor identified for the critical item or construction material containing critical components listed at section 25.105, of the cost of any foreign construction material proposed for exception from the requirements of the Buy American statute based on the unreasonable cost of domestic construction materials. In

the case of a tie, the contracting officer shall 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. See 25.105 for the list of critical components and critical items.

(ii) For construction material that is not a COTS item and does not consist wholly or predominantly of iron or steel or a combination of both, if the procedures in paragraph (b)(2)(i) of this section result in an unreasonable cost determination for the domestic construction material offer or there is no domestic construction material offer received, and the low offer is for foreign construction material that does not exceed 55 percent domestic content, the contracting officer shall—

(A) Treat the lowest offer of foreign construction material that is manufactured in the United States and exceeds 55 percent domestic content as a domestic offer; and

(B) Determine the reasonableness of the cost of this offer by applying the evaluation factors listed in this paragraph (b)(2) to the low offer.

(iii) The procedures in paragraph (b)(2)(ii) of this section will no longer apply as of January 1, 2030.

(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)(2) of 52.225–9, or paragraph (b)(3) of 52.225–11), the contracting officer must add the excepted materials to the list in the contract clause.

[64 FR 72419, Dec. 27, 1999, as amended at 69 FR 1053, Jan. 7, 2004; 69 FR 77873, Dec. 28, 2004; 79 FR 24209, Apr. 29, 2014; 86 FR 6187, Jan. 19, 2021; 87 FR 12792, Mar. 7, 2022]

25.205 Postaward determinations.

(a) If a contractor requests a determination regarding the inapplicability of the Buy American statute 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 the Buy American statute made after contract award on information required by paragraphs (c) and (d) of the applicable clause at 52.225–9 or 52.225–11 and/or other readily available information.

(c) If a determination, under 25.202(a), is made after contract award that an exception to the Buy American statute 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 price of a domestic construction material, adequate consideration is at least the differential established in 25.202(a) or in accordance with agency procedures.

[64 FR 72419, Dec. 27, 1999, as amended at 79 FR 24209, Apr. 29, 2014]

25.206 Noncompliance.

The contracting officer must—

(a) Review allegations of Buy American statute violations;

(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 the Buy American statute in accordance with 25.205.

(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 the Buy American statute 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 the Buy American statute, 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 suspending or debarring 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.

[64 FR 72419, Dec. 27, 1999, as amended at 79 FR 24209, Apr. 29, 2014]

Subpart 25.3—Contracts Performed Outside the United States

SOURCE: 73 FR 10957, Feb. 28, 2008, unless otherwise noted.

25.301 Contractor personnel in a designated operational area or supporting a diplomatic or consular mission outside the United States.

25.301–1 Scope.

(a) This section applies to contracts requiring contractor personnel to perform outside the United States—

(1) In a designated operational area during—

(i) Contingency operations;

(ii) Humanitarian or peacekeeping operations; or

(iii) Other military operations or military exercises, when designated by the combatant commander; or

(2) When supporting a diplomatic or consular mission—

(i) That has been designated by the Department of State as a danger pay post (see *https://aoprals.state.gov/*''; or

(ii) That the contracting officer determines is a post at which application of the clause at FAR 52.225–19, Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission outside the United States, is appropriate.

(b) Any of the types of operations listed in paragraph (a)(1) of this section may include stability operations such as—

(1) Establishment or maintenance of a safe and secure environment; or

(2) Provision of emergency infrastructure reconstruction, humanitarian relief, or essential governmental services (until feasible to transition to local government).

(c) This section does not apply to personal services contracts (see FAR 37.104), unless specified otherwise in agency procedures.

[73 FR 10957, Feb. 28, 2008, as amended at 85 FR 27101, May 6, 2020]

25.301–2 Government support.

(a) Generally, contractors are responsible for providing their own logistical and security support, including logistical and security support for their employees. The agency shall provide logistical or security support only when the appropriate agency official, in accordance with agency guidance, determines that—

(1) Such Government support is available and is needed to ensure continuation of essential contractor services; and

(2) The contractor cannot obtain adequate support from other sources at a reasonable cost.

(b) The contracting officer shall specify in the contract, and in the solicitation if possible, the exact support to be provided, and whether this support is provided on a reimbursable basis, citing the authority for the reimbursement.

25.301–3 Weapons.

The contracting officer shall follow agency procedures and the weapons policy established by the combatant

commander or the chief of mission when authorizing contractor personnel to carry weapons (see paragraph (i) of the clause at 52.225–19, Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission outside the United States).

25.301–4 Contract clause.

Insert the clause at 52.225–19, Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission outside the United States, in solicitations and contracts, other than personal service contracts with individuals, that will require contractor personnel to perform outside the United States—

(a) In a designated operational area during—

(1) Contingency operations;

(2) Humanitarian or peacekeeping operations; or

(3) Other military operations or military exercises, when designated by the combatant commander; or

(b) When supporting a diplomatic or consular mission—

(1) That has been designated by the Department of State as a danger pay post (see *https://aoprals.state.gov/*''; or

(2) That the contracting officer determines is a post at which application of the clause FAR 52.225–19, Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission outside the United States, is appropriate.

[73 FR 10957, Feb. 28, 2008, as amended at 85 FR 27101, May 6, 2020]

25.302 Contractors performing private security functions outside the United States.

[78 FR 37672, June 21, 2013]

25.302–1 Scope.

This section prescribes policy for implementing section 862 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2008 (Pub. L. 110–181), as amended by section 853 of the NDAA for FY 2009 (Pub. L. 110–417), and sections 831 and 832 of the NDAA for FY 2011 (Pub. L. 111–383) (see 10 U.S.C. Subtitle A, Part V, Subpart G Note).

[78 FR 37672, June 21, 2013, as amended at 87 FR 73898, Dec. 1, 2022]

25.302–2 Definitions.

As used in this section—

Area of combat operations means an area of operations designated as such by the Secretary of Defense when enhanced coordination of contractors performing private security functions working for Government agencies is required.

Other significant military operations means activities, other than combat operations, as part of a contingency operation outside the United States that is carried out by United States Armed Forces in an uncontrolled or unpredictable high-threat environment where personnel performing security functions may be called upon to use deadly force (see 25.302–3(a)(2)).

Private security functions means activities engaged in by a contractor, as follows—

(1) Guarding of personnel, facilities, designated sites, or property of a Federal agency, the contractor or subcontractor, or a third party; or

(2) Any other activity for which personnel are required to carry weapons in the performance of their duties in accordance with the terms of the contract.

[78 FR 37672, June 21, 2013, as amended at 81 FR 67777, Sept. 30, 2016]

25.302–3 Applicability.

(a) This section applies to contracts that require performance outside the United States—

(1) In an area of combat operations as designated by the Secretary of Defense; or

(2) In an area of other significant military operations as designated by the Secretary of Defense, and only upon agreement of the Secretary of Defense and the Secretary of State.

(b) These designations can be found at *http://www.acq.osd.mil/dpap/pacc/cc/designated_areas_of_other_significant_military_operations.html* and *http://www.acq.osd.mil/dpap/pacc/cc/designated_areas_of_combat_operations.html*.

(c) When the applicability requirements of this subsection are met, contractors and subcontractors must comply with 32 CFR part 159, whether the contract is for the performance of private security functions as a primary deliverable or the provision of private security functions is ancillary to the stated deliverables.

(d) The requirements of section 25.302 shall not apply to—

(1) Contracts entered into by elements of the intelligence community in support of intelligence activities; or

(2) Temporary arrangements entered into on a non-DoD contract for the performance of private security functions by individual indigenous personnel not affiliated with a local or expatriate security company. These temporary arrangements must still comply with local law.

[78 FR 37672, June 21, 2013, as amended at 81 FR 67777, Sept. 30, 2016]

25.302–4 Policy.

(a) *General.* (1) The policy, responsibilities, procedures, accountability, training, equipping, and conduct of personnel performing private security functions in designated areas are addressed at 32 CFR part 159, entitled ''Private Security Contractors Operating in Contingency Operations.'' Contractor responsibilities include ensuring that employees are aware of, and comply with, relevant orders, directives, and instructions; keeping appropriate personnel records; accounting for weapons; registering and identifying armored vehicles, helicopters, and other military vehicles; and reporting specified incidents in which personnel performing private security functions under a contract are involved.

(2) In addition, contractors are required to fully cooperate with any Government-authorized investigation into incidents reported pursuant to paragraph (c)(3) of the clause at 52.225–26, Contractors Performing Private Security Functions Outside the United States, by providing access to employees performing private security functions and relevant information in the possession of the contractor regarding the incident concerned.

(b) *Implementing guidance.* In accordance with 32 CFR part 159—

(1) Geographic combatant commanders will provide DoD contractors performing private security functions with guidance and procedures for the operational environment in their area of responsibility; and

(2) In a designated area of combat operations, or areas of other significant military operations, as designated by the Secretary of Defense and only upon agreement of the Secretary of Defense and the Secretary of State, the relevant Chief of Mission will provide implementing instructions for non-DoD contractors performing private security functions and their personnel consistent with the standards set forth by the geographic combatant commander. In accordance with 32 CFR 159.4(c), the Chief of Mission has the option of instructing non-DoD contractors performing private security functions and their personnel to follow the guidance and procedures of the geographic combatant commander and/or a sub-unified commander or joint force commander where specifically authorized by the combatant commander to do so and notice of that authorization is provided to non-DoD agencies.

[78 FR 37672, June 21, 2013, as amended at 81 FR 67777, Sept. 30, 2016]

25.302–5 Remedies.

(a) In addition to other remedies available to the Government—

(1) The contracting officer may direct the contractor, at its own expense, to remove and replace any contractor or subcontractor personnel performing private security functions who fail to comply with or violate applicable requirements. Such action may be taken at the Government's discretion without prejudice to its rights under any other contract provision, *e.g.,* termination for default;

(2) The contracting officer shall include the contractor's failure to comply with the requirements of this section in appropriate databases of past performance and consider any such failure in any responsibility determination or evaluation of past performance; and

(3) In the case of award-fee contracts, the contracting officer shall consider a

contractor's failure to comply with the requirements of this subsection in the evaluation of the contractor's performance during the relevant evaluation period, and may treat such failure as a basis for reducing or denying award fees for such period or for recovering all or part of award fees previously paid for such period.

(b) If the performance failures are severe, prolonged, or repeated, the contracting officer shall refer the matter to the appropriate suspending and debarring official.

[78 FR 37672, June 21, 2013]

25.302–6 Contract clause.

(a) Use the clause at 52.225–26, Contractors Performing Private Security Functions Outside the United States, in solicitations and contracts for performance outside the United States in an area of—

(1) Combat operations, as designated by the Secretary of Defense; or

(2) Other significant military operations, as designated by the Secretary of Defense and only upon agreement of the Secretary of Defense and the Secretary of State.

(b) The clause is not required to be used for—

(1) Contracts entered into by elements of the intelligence community in support of intelligence activities; or

(2) Temporary arrangements entered into by non-DoD contractors for the performance of private security functions by individual indigenous personnel not affiliated with a local or expatriate security company.

[78 FR 37672, June 21, 2013, as amended at 81 FR 67777, Sept. 30, 2016]

Subpart 25.4—Trade Agreements

25.400 Scope of subpart.

(a) This subpart provides policies and procedures applicable to acquisitions that are covered by—

(1) The World Trade Organization Government Procurement Agreement (WTO GPA), as approved by Congress in the Uruguay Round Agreements Act (Pub. L. 103–465);

(2) Free Trade Agreements (FTA), consisting of—

(i) USMCA (United States-Mexico-Canada Agreement, as approved by Congress in the United States-Mexico-Canada Agreement Implementation Act (Government Procurement Agreement applicable only to the United States and Mexico) (Pub. L. 116–113) (19 U.S.C. chapter 29 (sections 4501–4732));

(ii) Chile FTA (the United States-Chile Free Trade Agreement, as approved by Congress in the United States-Chile Free Trade Agreement Implementation Act (Pub. L. 108–77) (19 U.S.C. 3805 note));

(iii) Singapore FTA (the United States-Singapore Free Trade Agreement, as approved by Congress in the United States-Singapore Free Trade Agreement Implementation Act (Pub. L. 108–78) (19 U.S.C. 3805 note));

(iv) Australia FTA (the United States-Australia Free Trade Agreement, as approved by Congress in the United States-Australia Free Trade Agreement Implementation Act (Pub. L. 108–286) (19 U.S.C. 3805 note));

(v) Morocco FTA (The United States—Morocco Free Trade Agreement, as approved by Congress in the United States—Morocco Free Trade Agreement Implementation Act (Pub. L. 108–302) (19 U.S.C. 3805 note));

(vi) CAFTA–DR (The Dominican Republic-Central America-United States Free Trade Agreement, as approved by Congress in the Dominican Republic-Central America-United States Free Trade Agreement Implementation Act (Pub. L. 109–53) (19 U.S.C. 4001 note));

(vii) Bahrain FTA (the United States-Bahrain Free Trade Agreement, as approved by Congress in the United States-Bahrain Free Trade Agreement Implementation Act (Pub. L. 109–169) (19 U.S.C. 3805 note));

(viii) Oman FTA (the United States-Oman Free Trade Agreement, as approved by Congress in the United States-Oman Free Trade Agreement Implementation Act (Pub. L. 109–283) (19 U.S.C. 3805 note));

(ix) Peru FTA (the United States-Peru Trade Promotion Agreement, as approved by Congress in the United States-Peru Trade Promotion Agreement Implementation Act (Pub. L. 110–138) (19 U.S.C. 3805 note));

(x) Korea FTA (the United States-Korea Free Trade Agreement Implementation Act (Pub. L. 112–41) (19 U.S.C 3805 note));

(xi) Colombia FTA (the United States-Colombia Trade Promotion Agreement Implementation Act (Pub. L. 112–42) (19 U.S.C. 3805 note)); and

(xii) Panama FTA (the United States-Panama Trade Promotion Agreement Implementation Act (Pub. L. 112–43) (19 U.S.C. 3805 note));

(3) The least developed country designation made by the U.S. Trade Representative, pursuant to the Trade Agreements Act (19 U.S.C. 2511(b)(4)), in acquisitions covered by the WTO GPA;

(4) The Caribbean Basin Trade Initiative (CBTI) (determination of the U.S. Trade Representative that end products or construction material granted duty-free entry from countries designated as beneficiaries under the Caribbean Basin Economic Recovery Act (19 U.S.C. 2701, *et seq.*), with the exception of Panama, must be treated as eligible products in acquisitions covered by the WTO GPA);

(5) The Israeli Trade Act (the U.S.-Israel Free Trade Area Agreement, as approved by Congress in the United States-Israel Free Trade Area Implementation Act of 1985 (19 U.S.C. 2112 note)); or

(6) The Agreement on Trade in Civil Aircraft (U.S. Trade Representative waiver of the Buy American statute for signatories of the Agreement on Trade in Civil Aircraft, as implemented in the Trade Agreements Act of 1979 (19 U.S.C. 2513)).

(b) For application of the trade agreements that are unique to individual agencies, see agency regulations.

[69 FR 77873, Dec. 28, 2004, as amended at 71 FR 219, 2006; 71 FR 20307, Apr. 19, 2006; 71 FR 36937, June 28, 2006; 71 FR 67777, Nov. 22, 2006; 74 FR 28428, June 15, 2009; 77 FR 13954, Mar. 7, 2012; 77 FR 27549, May 10, 2012; 77 FR 69724, Nov. 20, 2012; 79 FR 24209, Apr. 29, 2014; 87 FR 73892, Dec. 1, 2022]

25.401 Exceptions.

(a) This subpart does not apply to—

(1) Acquisitions set aside for small businesses;

(2) Acquisitions of arms, ammunition, or war materials, or purchases indispensable for national security or for national defense purposes;

(3) Acquisitions of end products for resale;

(4) Acquisitions from Federal Prison Industries, Inc., under Subpart 8.6, and acquisitions under Subpart 8.7, Acquisition from Nonprofit Agencies Employing People Who Are Blind or Severely Disabled;

(5) Other acquisitions not using full and open competition, if authorized by Subpart 6.2 or 6.3, when the limitation of competition would preclude use of the procedures of this subpart; or sole source acquisitions justified in accordance with 13.501(a); and

(6) Goods and services specifically excluded under individual trade agreements, such as exceptions negotiated by the U.S. Trade Representative for particular agencies. See the agency supplementary regulations.

(b) In the World Trade Organization Government Procurement Agreement (WTO GPA) and each FTA, there is a U.S. schedule that lists services that are excluded from that agreement in acquisitions by the United States. Acquisitions of the following services are excluded from coverage by the U.S. schedule of the WTO GPA or an FTA as indicated in this table:

	The service (Federal Service Codes from the Federal Procurement Data System Product/Service Code Manual are indicated in parentheses for some services.)	WTO GPA AND KOREA FTA	Bahrain FTA, CAFTA–DR, Chile FTA, Columbia FTA, USMCA, Oman FTA, Panama FTA, and Peru FTA	Singapore FTA	Australia and Morocco FTA
(1)	All services purchased in support of military services overseas..	X	X	X	X

	The service (Federal Service Codes from the Federal Procurement Data System Product/Service Code Manual are indicated in parentheses for some services.)	WTO GPA AND KOREA FTA	Bahrain FTA, CAFTA–DR, Chile FTA, Columbia FTA, USMCA, Oman FTA, Panama FTA, and Peru FTA	Singapore FTA	Australia and Morocco FTA
(2)	(i) Automatic data processing (ADP) telecommunications and transmission services (D304), except enhanced (*i.e.*, value-added) telecommunications services..	X	X	.....	.....
	(ii) ADP teleprocessing and timesharing services (D305), telecommunications network management services (D316), automated news services, data services or other information services (D317), and other ADP and telecommunications services (D399).	X	X	.....	.....
	(iii) Basic telecommunications network services (*i.e.*, voice telephone services, packet-switched data transmission services, circuit-switched data transmission services, telex services, facsimile services, and private leased circuit services, but not information services, as defined in 47 U.S.C. 153(24)).	*	*	X	X
(3)	Dredging	X	X	X	X
(4)	(i) Operation and management contracts of certain Government or privately owned facilities used for Government purposes, including Federally Funded Research and Development Centers.	X	.....	X	.....
	(ii) Operation of all Department of Defense, Department of Energy, or the National Aeronautics and Space Administration facilities; and all Government-owned research and development facilities or Government-owned environmental laboratories.	* *	X	* *	X
(5)	Research and development	X	X	X	X
(6)	Transportation services (including launching services, but not including travel agent services).	X	X	X	X
(7)	Utility services	X	X	X	X
(8)	Maintenance, repair, modification, rebuilding and installation of equipment related to ships (J019).	.....	X	.....	X
(9)	Nonnuclear ship repair (J998)	.....	X	.....	X

*NOTE 1. Acquisitions of the services listed at (2)(iii) of this table are a subset of the excluded services at (2)(i) and (ii), and are therefore not covered under the WTO GPA.

**NOTE 2. Acquisitions of the services listed at (4)(ii) of this table are a subset of the excluded services at (4)(i), and are therefore not covered under the WTO GPA.

[69 FR 1054, Jan. 7, 2004, as amended at 69 FR 77874, Dec. 28, 2004; 70 FR 18958, Apr. 11, 2005; 71 FR 219, Jan. 3, 2006; 71 FR 20307, Apr. 19, 2006; 71 FR 36937, June 28, 2006; 71 FR 67777, Nov. 22, 2006; 74 FR 28428, June 15, 2009; 77 FR 13954, Mar. 7, 2012; 77 FR 27550, May 10, 2012; 77 FR 69724, Nov. 20, 2012; 78 FR 6189, Jan. 29, 2013; 81 FR 83099, Nov. 18, 2016; 87 FR 73892, Dec. 1, 2022]

25.402 General.

(a)(1) The Trade Agreements Act (19 U.S.C. 2501, *et seq.*) provides the authority for the President to waive the Buy American statute and other discriminatory provisions for eligible products from countries that have signed an international trade agreement with the United States, or that meet certain other criteria, such as being a least developed country. The President has delegated this waiver authority to the U.S. Trade Representative. In acquisitions covered by the WTO GPA, Free Trade Agreements, or the Israeli Trade Act, the U.S. Trade Representativehas waived the Buy American statute and other discriminatory provisions for eligible products. Offers of eligible products receive equal consideration with domestic offers.

(2) The contracting officer shall determine the origin of services by the country in which the firm providing the services is established. See Subpart 25.5 for evaluation procedures for supply contracts covered by trade agreements.

(b) The value of the acquisition is a determining factor in the applicability of trade agreements. Most of these dollar thresholds are subject to revision

by the U.S. Trade Representative approximately every 2 years. The various thresholds are summarized as follows:

TABLE 1 TO PARAGRAPH (b)

Trade agreement	Supply contract (equal to or exceeding)	Service contract (equal to or exceeding)	Construction contract (equal to or exceeding)
WTO GPA	$174,000	$174,000	$6,708,000
FTAs:			
Australia FTA	102,280	102,280	6,708,000
Bahrain FTA	174,000	174,000	13,296,489
CAFTA–DR (Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua)	102,280	102,280	6,708,000
Chile FTA	102,280	102,280	6,708,000
Colombia FTA	102,280	102,280	6,708,000
Korea FTA	100,000	100,000	6,708,000
Morocco FTA	174,000	174,000	6,708,000
USMCA:			
—Mexico	102,280	102,280	13,296,489
Oman FTA	174,000	174,000	13,296,489
Panama FTA	174,000	174,000	6,708,000
Peru FTA	174,000	174,000	6,708,000
Singapore FTA	102,280	102,280	6,708,000
Israeli Trade Act	50,000	.....	.....

[69 FR 77874, Dec. 28, 2004, as amended at 71 FR 219, Jan. 3, 2006; 71 FR 865, Jan. 5, 2006; 71 FR 20307, Apr. 19, 2006; 71 FR 36937, June 28, 2006; 71 FR 67777, Nov. 22, 2006; 72 FR 46358, Aug. 17, 2007; 73 FR 10963, Feb. 28, 2008; 73 FR 16747, Mar. 28, 2008; 74 FR 28428, June 15, 2009; 75 FR 38690, July 2, 2010; 77 FR 27550, May 10, 2012; 77 FR 69724, Nov. 20, 2012; 78 FR 80380, Dec. 31, 2013; 79 FR 24209, Apr. 29, 2014; 80 FR 81895, Dec. 31, 2015; 83 FR 3398, Jan. 24, 2018; 85 FR 2618, Jan. 15, 2020; 86 FR 74530, Dec. 30, 2021; 87 FR 73892, Dec. 1, 2022; 89 FR 13963, Feb. 23, 2024]

25.403 World Trade Organization Government Procurement Agreement and Free Trade Agreements.

(a) Eligible products from WTO GPA and FTA countries are entitled to the nondiscriminatory treatment specified in 25.402(a)(1). The WTO GPA and FTAs specify procurement procedures designed to ensure fairness (see 25.408).

(b) *Thresholds.* (1) To determine whether the acquisition of products by lease, rental, or lease-purchase contract (including lease-to-ownership, or lease-with-option-to purchase) is covered by the WTO GPA or an FTA, calculate the estimated acquisition value as follows:

(i) If a fixed-term contract of 12 months or less is contemplated, use the total estimated value of the acquisition.

(ii) If a fixed-term contract of more than 12 months is contemplated, use the total estimated value of the acquisition plus the estimated residual value of the leased equipment at the conclusion of the contemplated term of the contract.

(iii) If an indefinite-term contract is contemplated, use the estimated monthly payment multiplied by the total number of months that ordering would be possible under the proposed contract, *i.e.*, the initial ordering period plus any optional ordering periods.

(iv) If there is any doubt as to the contemplated term of the contract, use the estimated monthly payment multiplied by 48.

(2) The estimated value includes the value of all options.

(3) If, in any 12-month period, recurring or multiple awards for the same type of product or products are anticipated, use the total estimated value of these projected awards to determine whether the WTO GPA or an FTA applies. Do not divide any acquisition with the intent of reducing the estimated value of the acquisition below the dollar threshold of the WTO GPA or an FTA.

(c) *Purchase restriction.* (1) Under the Trade Agreements Act (19 U.S.C. 2512), in acquisitions covered by the WTO

GPA, acquire only U.S.-made or designated country end products or U.S. or designated country services, unless offers for such end products or services are either not received or are insufficient to fulfill the requirements. This purchase restriction does not apply below the WTO GPA threshold for supplies and services, even if the acquisition is covered by an FTA.

(2) This restriction does not apply to purchases of supplies by the Department of Defense from a country with which it has entered into a reciprocal agreement, as provided in departmental regulations.

[64 FR 72419, Dec. 27, 1999, as amended at 65 FR 36026, June 6, 2000; 67 FR 21535, Apr. 30, 2002; 67 FR 56123, Aug. 30, 2002; 69 FR 1054, Jan. 7, 2004; 69 FR 77875, Dec. 28, 2004; 89 FR 61338, July 30, 2024]

25.404 Least developed countries.

For acquisitions covered by the WTO GPA, least developed country end products, construction material, and services must be treated as eligible products.

[69 FR 77875, Dec. 28, 2004]

25.405 Caribbean Basin Trade Initiative.

Under the Caribbean Basin Trade Initiative, the United States Trade Representative has determined that, for acquisitions covered by the WTO GPA, Caribbean Basin country end products, construction material, and services must be treated as eligible products. In accordance with Section 201 (a)(3) of the Dominican Republic—Central America—United States Free Trade Implementation Act (Pub. L. 109–53) (19 U.S.C. 4031), when the CAFTA-DR agreement enters into force with respect to a country, that country is no longer designated as a beneficiary country for purposes of the Caribbean Basin Economic Recovery Act, and is therefore no longer included in the definition of ''Caribbean Basin country'' for purposes of the Caribbean Basin Trade Initiative.

[65 FR 24322, Apr. 25, 2000, as amended at 67 FR 6118, Feb. 8, 2002; 69 FR 1055, Jan. 7, 2004; 69 FR 77875, Dec. 28, 2004; 71 FR 36937, June 28, 2006; 79 FR 24209, Apr. 29, 2014]

25.406 Israeli Trade Act.

Acquisitions of supplies by most agencies are covered by the Israeli Trade Act, if the estimated value of the acquisition is $50,000 or more but does not exceed the WTO GPA threshold for supplies (see 25.402(b)). Agencies other than the Department of Defense, the Department of Energy, the Department of Transportation, the Bureau of Reclamation of the Department of the Interior, the Federal Housing Finance Board, and the Office of Thrift Supervision must evaluate offers of Israeli end products without regard to the restrictions of the Buy American statute. The Israeli Trade Act does not prohibit the purchase of other foreign end products. In accordance with Section 201 (a)(3) of the Dominican Republic—Central America—United States Free Trade Implementation Act (Pub. L. 109–53), when the CAFTA-DR agreement enters into force with respect to a country, that country is no longer designated as a beneficiary country for purposes of the Caribbean Basin Economic Recovery Act, and is therefore no longer included in the definition of ''Caribbean Basin country'' for purposes of the Caribbean Basin Trade Initiative.

[64 FR 72419, Dec. 27, 1999, as amended at 67 FR 21535, Apr. 30, 2002; 69 FR 1055, Jan. 7, 2004; 69 FR 77875, Dec. 28, 2004; 71 FR 36937, June 28, 2006; 79 FR 24209, Apr. 29, 2014]]

25.407 Agreement on Trade in Civil Aircraft.

Under the authority of Section 303 of the Trade Agreements Act, the U.S. Trade Representative has waived the Buy American statute for civil aircraft and related articles that meet the substantial transformation test of the Trade Agreements Act, from countries that are parties to the Agreement on Trade in Civil Aircraft. Those countries are Albania, Austria, Belgium, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Ireland, Italy, Japan, Latvia, Lithuania, Luxembourg, Macao China, Malta, Montenegro, the Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland, Taiwan

(Chinese Taipei), and the United Kingdom.

[77 FR 12936, Mar. 2, 2012, as amended at 78 FR 70481, Nov. 25, 2013; 79 FR 24209, Apr. 29, 2014; 80 FR 81893, Dec. 31, 2015]

25.408 Procedures.

(a) If the WTO GPA or an FTA applies (see 25.401), the contracting officer must—

(1) Comply with the requirements of 5.203, Publicizing and response time;

(2) Comply with the requirements of 5.207, Preparation and transmittal of synopses;

(3) Not include technical requirements in solicitations solely to preclude the acquisition of eligible products;

(4) Specify in solicitations that offerors must submit offers in the English language and in U.S. dollars (see 52.214–34, Submission of Offers in the English Language, and 52.214–35, Submission of Offers in U.S. Currency, or paragraph (c)(5) of 52.215–1, Instruction to Offerors—Competitive Acquisitions); and

(5) Provide unsuccessful offerors from WTO GPA or FTA countries notice in accordance with 14.409–1 or 15.503.

(b) See Subpart 25.5 for evaluation procedures and examples.

[64 FR 72419, Dec. 27, 1999, as amended at 68 FR 56679, Oct. 1, 2003; 69 FR 1055, Jan. 7, 2004; 69 FR 77875, Dec. 28, 2004; 73 FR 10962, Feb. 28, 2008]

Subpart 25.5—Evaluating Foreign Offers—Supply Contracts

25.501 General.

The contracting officer—

(a) Must apply the evaluation procedures of this subpart to each line item of an offer unless either the offer or the solicitation specifies evaluation on a group basis (see 25.503);

(b) May rely on the offeror's certification of end product origin when evaluating a foreign offer;

(c) Must identify and reject offers of end products that are prohibited in accordance with subpart 25.7; and

(d) When trade agreements are involved, must not use the Buy American statute evaluation factors prescribed in this subpart to provide a preference for one foreign offer over another foreign offer.

[64 FR 72419, Dec. 27, 1999, as amended at 67 FR 21535, Apr. 30, 2002; 71 FR 20306, Apr. 19, 2006; 79 FR 24209, Apr. 29, 2014; 87 FR 12792, Mar. 7, 2022]

25.502 Application.

(a) Unless otherwise specified in agency regulations, perform the following steps in the order presented:

(1) Eliminate all offers or offerors that are unacceptable for reasons other than price; *e.g.*, nonresponsive, debarred or suspended, or a prohibited source (see Subpart 25.7).

(2) Rank the remaining offers by price.

(3) If the solicitation specifies award on the basis of factors in addition to cost or price, apply the evaluation factors as specified in this section and use the evaluated cost or price in determining the offer that represents the best value to the Government.

(b) For acquisitions covered by the WTO GPA (see Subpart 25.4)—

(1) Consider only offers of U.S.-made or designated country end products, unless no offers of such end products were received;

(2) If the agency gives the same consideration given eligible offers to offers of U.S.-made end products that are not domestic end products, award on the low offer. Otherwise, evaluate in accordance with agency procedures; and

(3) If there were no offers of U.S.-made or designated country end products, make a nonavailability determination (see 25.103(b)(2)) and award on the low offer (see 25.403(c)).

(c) For acquisitions not covered by the WTO GPA, but subject to the Buy American statute (an FTA or the Israeli Trade Act also may apply), the following applies:

(1) If the low offer is a domestic offer or an eligible offer under NAFTA or the Israeli Trade Act, award on that offer.

(2) If the low offer is a noneligible offer and there were no domestic offers (*see* 25.103(b)(3)), award on the low offer. The procedures at 25.106(b)(2) and 25.106(c)(2) do not apply.

(3) If the low offer is a noneligible offer and there is an eligible offer that is lower than the lowest domestic offer,

award on the low offer. The procedures at 25.106(b)(2) and 25.106(c)(2) do not apply.

(4) Otherwise, apply the appropriate evaluation factor provided in 25.106 to the low offer. The procedures at 25.106(b)(2) and 25.106(c)(2) do not apply.

(i) If the evaluated price of the low offer remains less than the lowest domestic offer, award on the low offer.

(ii) If the price of the lowest domestic offer is less than the evaluated price of the low offer, award on the lowest domestic offer.

(d) *Ties*. (1) If application of an evaluation factor results in a tie between a domestic offer and a foreign offer, award on the domestic offer.

(2) If no evaluation preference was applied (*i.e.*, offers afforded nondiscriminatory treatment under the Buy American statute), resolve ties between domestic and foreign offers by a witnessed drawing of lots by an impartial individual.

(3) Resolve ties between foreign offers from small business concerns (under the Buy American statute, a small business offering a manufactured article that does not meet the definition of ''domestic end product'' is a foreign offer) or foreign offers from a small business concern and a large business concern in accordance with 14.408–6(a).

[64 FR 72419, Dec. 27, 1999, as amended at 67 FR 21535, Apr. 30, 2002; 69 FR 1055, Jan. 7, 2004; 69 FR 77875, Dec. 28, 2004; 71 FR 20306, Apr. 19, 2006; 79 FR 24209, Apr. 29, 2014; 87 FR 12792, Mar. 7, 2022]

25.503 Group offers.

(a) If the solicitation or an offer specifies that award can be made only on a group of line items or on all line items contained in the solicitation or offer, reject the offer—

(1) If any part of the award would consist of prohibited end products (see subpart 25.7); or

(2) If the acquisition is covered by the WTO GPA and any part of the offer consists of items restricted in accordance with 25.403(c).

(b) If an offer restricts award to a group of line items or to all line items contained in the offer, determine for each line item whether to apply an evaluation factor (see 25.504–4, Example 1).

(1) First, evaluate offers that do not specify an award restriction on a line item basis in accordance with 25.502, determining a tentative award pattern by selecting for each line item the offer with the lowest evaluated price.

(2) Evaluate an offer that specifies an award restriction against the offered prices of the tentative award pattern, applying the appropriate evaluation factor on a line item basis.

(3) Compute the total evaluated price for the tentative award pattern and the offer that specified an award restriction.

(4) Unless the total evaluated price of the offer that specified an award restriction is less than the total evaluated price of the tentative award pattern, award based on the tentative award pattern.

(c) If the solicitation specifies that award will be made only on a group of line items or all line items contained in the solicitation, determine the category of end products on the basis of each line item, but determine whether to apply an evaluation factor on the basis of the group of items (see 25.504–4, Example 2).

(1) If the proposed price of domestic end products exceeds 50 percent of the total proposed price of the group, evaluate the entire group as a domestic offer. Evaluate all other groups as foreign offers.

(2) For foreign offers, if the proposed price of domestic end products and eligible products exceeds 50 percent of the total proposed price of the group, evaluate the entire group as an eligible offer.

(3) Apply the evaluation factor to the entire group in accordance with 25.502.

(d) If no trade agreement applies to a solicitation and the solicitation specifies that award will be made only on a group of line items or all line items contained in the solicitation, determine the category of end products (*i.e.*, domestic or foreign) on the basis of each line item, but determine whether to apply an evaluation factor on the basis of the group of items (*see* 25.504–4(c), Example 3).

(1) If the proposed price of domestic end products exceeds 50 percent of the

total proposed price of the group, evaluate the entire group as a domestic offer. Evaluate all other groups as foreign offers.

(2) Apply the evaluation factor to the entire group in accordance with 25.502, except where 25.502(c)(4) applies and the evaluated price of the low offer remains less than the lowest domestic offer. Where the evaluated price of the low offer remains less than the lowest domestic offer, treat as a domestic offer any group where the proposed price of end products with a domestic content of at least 55 percent exceeds 50 percent of the total proposed price of the group.

(3) Apply the evaluation factor to the entire group in accordance with 25.502(c)(4).

[64 FR 72419, Dec. 27, 1999, as amended at 69 FR 77875, Dec. 28, 2004; 71 FR 20306, Apr. 19, 2006; 87 FR 12793, Mar. 7, 2022]

25.504 Evaluation Examples.

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

[67 FR 21535, Apr. 30, 2002]

25.504–1 Buy American statute.

(a)(1) *Example 1.*

Offer A	$16,000	Domestic end product, small business.
Offer B	$15,700	Domestic end product, small business.
Offer C	$10,100	U.S.-made end product (not domestic), small business.

(2) *Analysis.* This acquisition is for end products for use in the United States and is set aside for small business concerns. The Buy American statute applies. Since the acquisition value is less than $50,000 and the acquisition is set aside, none of the trade agreements apply. Perform the steps in 25.502(a). Offer C is of 50 percent domestic content, therefore Offer C is evaluated as a foreign end product, because it is the product of a small business but is not a domestic end product (*see* 25.502(c)(4)). Since Offer B is a domestic offer, apply the 30 percent factor to Offer C (*see* 25.106(b)(2)). The resulting evaluated price of $13,130 remains lower than Offer B. The cost of Offer B is therefore unreasonable (*see* 25.106(b)(1)(ii)). The 25.106(b)(2) procedures do not apply. Award on Offer C at $10,100 (*see* 25.502(c)(4)(i)).

(b)(1) *Example 2.*

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

(2) *Analysis:* This acquisition is for end products for use in the United States and is set aside for small business concerns. The Buy American statute applies. Perform the steps in 25.502(a). Offer C is evaluated as a foreign end product because it is the product of a small business but is not a domestic end product (see 25.502(c)(4)). After applying the 30 percent factor, the evaluated price of Offer C is $13,260. Award on Offer B at $10,700 (see 25.502(c)(4)(ii)).

(c)(1) *Example 3.*

Offer A	$14,000	Domestic end product (complies with the required domestic content), small business.
Offer B	12,500	U.S.-made end product (not domestic, exceeds 55% domestic content), small business.

Offer C	10,100	U.S.-made end product (not domestic, with less than 55% domestic content), small business.

(2) *Analysis.* This acquisition is for end products for use in the United States and is set aside for small business concerns. The Buy American statute applies. Since the acquisition value is less than $50,000 and the acquisition is set aside, none of the trade agreements apply. Perform the steps in 25.502(a). Offers B and C are initially evaluated as foreign end products, because they are the products of small businesses but are not domestic end products (*see* 25.502(c)(4)). Offer C is the low offer. After applying the 30 percent factor, the evaluated price of Offer C is $13,130. The resulting evaluated price of $13,130 remains lower than Offer A. The cost of Offer A is therefore unreasonable. Offer B is then treated as a domestic offer, because it is for a U.S.-made end product that exceeds 55 percent domestic content (*see* 25.106(b)(2)). Offer B is determined reasonable because it is lower than the $13,130 evaluated price of Offer C. Award on Offer B at $12,500.

[64 FR 72419, Dec. 27, 1999, as amended at 67 FR 21535, Apr. 30, 2002; 79 FR 24209, Apr. 29, 2014; 86 FR 6187, Jan. 15, 2021; 87 FR 12793, Mar. 7, 2022; 87 FR 73892, Dec. 1, 2022]

25.504–2 WTO GPA/Caribbean Basin Trade Initiative/FTAs.

Example 1.

Offer A	$304,000	U.S.-made end product (not domestic).
Offer B	$303,000	U.S.-made end product (domestic), small business.
Offer C	$300,000	Eligible product.
Offer D	$295,000	Noneligible product (not U.S.-made).

Analysis: Eliminate Offer D because the acquisition is covered by the WTO GPA and there is an offer of a U.S.-made or an eligible product (see 25.502(b)(1)). If the agency gives the same consideration given eligible offers to offers of U.S.-made end products that are not domestic offers, it is unnecessary to determine if U.S.-made end products are domestic (large or small business). No further analysis is necessary. Award on the low remaining offer, Offer C (see 25.502(b)(2)).

[69 FR 77875, Dec. 28, 2004, as amended at 75 FR 38690, July 2, 2010; 86 FR 6188, Jan. 15,2021]

25.504–3 FTA/Israeli Trade Act.

(a) *Example 1.*

Offer A	$105,000	Domestic end product, small business.
Offer B	$100,000	Eligible product.

Analysis: Since the low offer is an eligible offer, award on the low offer (see 25.502(c)(1)).

(b) *Example 2.*

Offer A	$105,000	Eligible product.
Offer B	$103,000	Noneligible product.

Analysis: Since the acquisition is not covered by the WTO GPA , the contracting officer can consider the noneligible offer. Since no domestic offer was received, make a nonavailability determination and award on Offer B (see 25.502(c)(2)).

(c) *Example 3.*

Offer A	$105,000	Domestic end product, large business.
Offer B	$103,000	Eligible product.
Offer C	$100,000	Noneligible product.

Analysis: Since the acquisition is not covered by the WTO GPA , the contracting officer can consider the noneligible offer. Because the eligible offer (Offer B) is lower than the domestic offer (Offer A), no evaluation factor applies to the low offer (Offer C). Award on the low offer (see 25.502(c)(3)).

[69 FR 77875, Dec. 28, 2004, as amended at 86 FR 6188, Jan. 19, 2021]

25.504–4 Group award basis.

(a) *Example 1.*

Item	Offers		
	A	B	C
1	DO = $55,000	EL = $56,000	NEL = $50,000
2	NEL = 13,000	EL = 10,000	EL = 13,000
3	NEL = 11,500	DO = 12,000	DO = 10,000
4	NEL = 24,000	EL = 28,000	NEL = 22,000
5	DO = 18,000	NEL = 10,000	DO = 14,000

Item	Offers		
	A	B	C
Total	121,500	116,000	109,000

Problem: Offeror C specifies all-or-none award. Assume all offerors are large businesses. The acquisition is not covered by the WTO GPA .

Analysis: (see 25.503)

STEP 1: Evaluate Offers A & B before considering Offer C and determine which offer has the lowest evaluated cost for each line item (the tentative award pattern):

Item 1: Low offer A is domestic; select A.

Item 2: Low offer B is eligible; do not apply factor; select B.

Item 3: Low offer A is noneligible and Offer B is a domestic offer. Apply a 20 percent factor to Offer A. The evaluated price of Offer A is higher than Offer B; select B.

Item 4: Low offer A is noneligible. Since neither offer is a domestic offer, no evaluation factor applies; select A.

Item 5: Low offer B is noneligible; apply a 20 percent factor to Offer B. Offer A is still higher than Offer B; select B.

STEP 2: Evaluate Offer C against the tentative award pattern for Offers A and B:

Item	Offers		
	Low offer	Tentative award pattern from A and B	C
1	A	DO = $55,000	*NEL = $60,000
2	B	EL = 10,000	EL = 13,000
3	B	DO = 12,000	DO = 10,000
4	A	NEL = 24,000	NEL = 22,000
5	B	*NEL = 12,000	DO = 14,000
Total		113,000	119,000

*Offer + 20 percent.

On a line item basis, apply a factor to any noneligible offer if the other offer for that line item is domestic.

For Item 1, apply a factor to Offer C because Offer A is domestic and the acquisition was not covered by the WTO GPA. The evaluated price of Offer C, Item 1, becomes $60,000 ($50,000 plus 20 percent). Apply a factor to Offer B, Item 5, because it is a noneligible product and Offer C is domestic. The evaluated price of Offer B is $12,000 ($10,000 plus 20 percent). Evaluate the remaining items without applying a factor.

STEP 3: The tentative unrestricted award pattern from Offers A and B is lower than the evaluated price of Offer C. Award the combination of Offers A and B. Note that if Offer C had not specified all-or-none award, award would be made on Offer C for line items 3 and 4, totaling an award of $32,000.

(b) *Example 2.*

Item	Offers		
	A	B	C
1	DO = $50,000	EL = $50,500	NEL = $50,000
2	NEL = 10,300	NEL = 10,000	EL = 10,200
3	EL = 20,400	EL = 21,000	NEL = 20,200
4	DO = 10,500	DO = 10,300	DO = 10,400
Total	91,200	91,800	90,800

Problem: The solicitation specifies award on a group basis. Assume the Buy American statute applies and the acquisition cannot be set aside for small business concerns. All offerors are large businesses.

Analysis: (see 25.503(c))

STEP 1: Determine which of the offers are domestic (see 25.503(c)(1)):

	Domestic (percent)	Determination
A	$50,000 (Offer A1) + $10,500 (Offer A4) = $60,500	Domestic.
	$60,500/$91,200 (Offer A Total) = 66.3%	
B	$10,300 (Offer B4)/$91,800 (Offer B Total) $ = 11.2%	Foreign.
C	$10,400 (Offer C4)/$90,800 (Offer C Total) = 11.5%	Foreign.

STEP 2: Determine whether foreign offers are eligible or noneligible offers (see 25.503(c)(2)):

	Domestic + eligible (percent)	Determination
A	N/A (Both Domestic)	Domestic.
B	$50,500 (Offer B1) + $21,000 (Offer B3) + $10,300 (Offer B4) = $81,800	Eligible.
	$81,800/$91,800 (Offer B Total) = 89.1%	
C	$10,200 (Offer C2) + $10,400 (Offer C4) = $20,600	Noneligible.
	$20,600/$90,800 (Offer C Total) = 22.7%	

STEP 3: Determine whether to apply an evaluation factor (see 25.503(c)(3)). The low offer (Offer C) is a foreign offer. There is no eligible offer lower than the domestic offer. Therefore, apply the factor to the low offer. Addition of the 20 percent factor (use 30 percent if Offer A is a small business) to Offer C yields an evaluated price of $108,960 ($90,800 + 20 percent). Award on Offer A (see 25.502(c)(4)(ii)). Note that, if Offer A were greater than Offer B, an evaluation factor would not be applied, and award would be on Offer C (see 25.502(c)(3)).

(c) *Example 3.*

Item	Offers		
	A	B	C
1	DO = $17,800	FO (>55%) = $16,000	FO (<55%) = $11,200.
2	FO (>55%) = $9,000	FO (>55%) = $8,500	DO = $10,200.
3	FO (<55%) = $11,200	FO (>55%) = $12,000	FO (<55%) = $11,000.
4	DO = $10,000	DO = $9,000	FO (<55%) = $6,400.
Total	$48,000	$45,500	$38,800.

Key:
DO = Domestic end product (complies with the required domestic content).
FO > 55% = Foreign end product with domestic content exceeding 55%.
FO < 55% = Foreign end product with domestic content of 55% or less.

Problem: The solicitation specifies award on a group basis. Assume only the Buy American statute applies (*i.e.*, no trade agreements apply) and the acquisition cannot be set aside for small business concerns. All offerors are large businesses.

Analysis: (see 25.503(d))

STEP 1: Determine which of the offers are domestic (see 25.503(d)(1)):

	Domestic (percent)	Determination
A	$17,800 (Offer A1) + $10,000 (Offer A4) = $27,800	Domestic.
	$27,800/$48,000 (Offer A Total) = 58%	
B	$9,000 (Offer B4)/$45,500 (Offer B Total) = 19.8%	Foreign.
C	$10,200 (Offer C2)/$38,800 (Offer C Total) = 26.3%	Foreign.

STEP 2: Determine which offer, domestic or foreign, is the low offer. If the low offer is a foreign offer, apply the evaluation factor (see 25.503(d)(2)). The low offer (Offer C) is a foreign offer. Therefore, apply the factor to the low offer. Addition of the 20 percent factor (use 30 percent if Offer A is a small business) to Offer C yields an evaluated price of $46,560 ($38,800 + 20 percent). Offer C remains the low offer.

STEP 3: Determine if there is a foreign offer that could be treated as a domestic offer (see 25.106(b)(2) and 25.503(d)(2)).

	Amount of domestic content (percent)	Determination
A	N/A	N/A.
B	$9,000 (Offer B4)/$45,500 (Offer B Total) $ = 19.8% is domestic. AND $16,000 (Offer B1) + $8,500 (Offer B2) + $12,000 (Offer B3) = $36,500. $36,500/$45,500 (Offer B Total) = 80.2% can be treated as domestic. 19.8% + 80.2% = 100% is domestic or can be treated as domestic.	Can be treated as domestic.
C	$10,200 (Offer C2)/$38,800 (Offer C Total) = 26.3% is domestic.	Foreign.

STEP 4: If there is a foreign offer that could be treated as a domestic offer, compare the evaluated price of the low offer to the price of the offer treated as domestic (*see* 25.503(d)(3)). Offer B can be treated as a domestic offer ($45,500). The evaluated price of the low offer (Offer C) is $46,560. Award on Offer B.

[64 FR 72419, Dec. 27, 1999; 65 FR 4633, Jan. 31, 2000; 69 FR 77875, Dec. 28, 2004; 79 FR 24209, Apr. 29, 2014; 86 FR 6188, Jan. 19, 2021; 87 FR 12793, Mar. 7, 2022]

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

SOURCE: 74 FR 14626, Mar. 31, 2009, unless otherwise noted.

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) with regard to manufactured construction material and 41 U.S.C. chapter 83, Buy American (referred to in this subpart as the Buy American statute) with regard to unmanufactured construction material. It applies to construction projects that use funds appropriated or otherwise provided by the Recovery Act.

[75 FR 53165, Aug. 30, 2010, as amended at 79 FR 24209, Apr. 29, 2014]

25.601 Definitions.

As used in this subpart—

Domestic construction material means the following:

(1) An unmanufactured construction material mined or produced in the United States. (The Buy American statute applies.)

(2) A manufactured construction material that is manufactured in the United States and, if the construction material consists wholly or predominantly of iron or steel, the iron or steel was produced in the United States. (Section 1605 of the Recovery Act applies.)

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.

Public building or public work means a building or work, the construction, prosecution, completion, or repair of which is carried on directly or indirectly 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 (see 22.401). These buildings and works may include, without limitation, bridges, dams, plants, highways, parkways, streets, subways, tunnels, sewers, mains, power lines, pumping stations, heavy generators, railways, airports, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, and canals, and the construction, alteration, maintenance, or repair of such buildings and works.

Recovery Act designated country means a World Trade Organization Government Procurement Agreement country,

a Free Trade Agreement country, or a least developed country.

[74 FR 14626, Mar. 31, 2009, as amended at 75 FR 53165, Aug. 30, 2010; 79 FR 24209, Apr. 29, 2014; 86 FR 6189, Jan. 19, 2021]

25.602 Policy.

25.602–1 Section 1605 of the Recovery Act.

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 unless the public building or public work is located in the United States and—

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

(i) All manufactured construction material must be manufactured in the United States.

(ii) *Iron or steel components.* (A) Iron or steel components of construction material consisting wholly or predominantly of iron or steel must be produced in the United States. This does not restrict the origin of the elements of the iron or steel, but requires that all manufacturing processes of the iron or steel must take place in the United States, except metallurgical processes involving refinement of steel additives.

(B) The requirement in paragraph (a)(1)(ii)(A) of this section does not apply to iron or steel components or subcomponents in construction material that does not consist wholly or predominantly of iron or steel.

(iii) *All other components.* There is no restriction on the origin or place of production or manufacture of components or subcomponents that do not consist of iron or steel.

(iv) *Examples.* (A) If a steel guardrail consists predominantly of steel, even though coated with aluminum, then the steel would be subject to the section 1605 restriction requiring that all stages of production of the steel occur in the United States, in addition to the requirement to manufacture the guardrail in the United States. There would be no restrictions on the other components of the guardrail.

(B) If a wooden window frame is delivered to the site as a single construction material, there is no restriction on any of the components, including the steel lock on the window frame; or

(2) If trade agreements apply, the manufactured construction material shall either comply with the requirements of paragraph (a)(1) of this subsection, or be wholly the product of or be substantially transformed in a Recovery Act designated country;

(b) Manufactured materials purchased directly by the Government and delivered to the site for incorporation into the project shall meet the same domestic source requirements as specified for manufactured construction material in paragraphs (a)(1) and (a)(2) of this section; and

(c) A project may include several contracts, a single contract, or one or more line items on a contract.

25.602–2 Buy American statute.

Except as provided in 25.603, use only unmanufactured construction material mined or produced in the United States, as required by the Buy American statute or, if trade agreements apply, unmanufactured construction material mined or produced in a designated country may also be used.

[75 FR 53165, Aug. 30, 2010, as amended at 79 FR 24209, Apr. 29, 2014]

25.603 Exceptions.

(a)(1) When one of the following exceptions applies, the contracting officer may allow the contractor to incorporate foreign manufactured construction materials without regard to the restrictions of section 1605 of the Recovery Act or foreign unmanufactured construction material without regard to the restrictions of the Buy American statute:

(i) *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.

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

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

(2) In addition, the head of the agency may determine that application of the Buy American statute to a particular unmanufactured construction material would be impracticable.

(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) For determinations with regard to the inapplicability of section 1605 of the Recovery Act, unless the construction material has already been determined to be domestically nonavailable (*see* list at 25.104), the head of the agency shall provide a notice to the FEDERAL REGISTER within three business days after the determination is made, with a copy to the Administrator for Federal Procurement Policy and to the Recovery Accountability and Transparency Board. 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 $6,708,000 or more, also see subpart 25.4. Offers proposing the use of construction material from a designated country shall receive equal consideration with offers proposing the use of domestic construction material.

(2) For purposes of applying section 1605 of the Recovery Act to evaluation of manufactured construction material, designated countries do not include the Caribbean Basin Countries.

[75 FR 53166, Aug. 30, 2010, as amended at 77 FR 12934, Mar. 2, 2012; 78 FR 80380, Dec. 31, 2013; 79 FR 24209, Apr. 29, 2014; 80 FR 81896, Dec. 31, 2015; 83 FR 3398, Jan. 24, 2018; 85 FR 2618, Jan. 15, 2020; 86 FR 74530, Dec. 30, 2021; 89 FR 13963, Feb. 23, 2024]

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

(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 statute 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) *Manufactured construction material.* The contracting officer must compare the offered price of the contract using foreign manufactured construction material (*i.e.,* any construction material not manufactured in the United States, or construction material consisting predominantly of iron or steel and the iron or steel is not produced in the United States) 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 20 percent, then the contracting officer shall determine that the cost of the domestic unmanufactured construction material is unreasonable.

[74 FR 14626, Mar. 31, 2009, as amended at 75 FR 53166, Aug. 30, 2010; 79 FR 24209, Apr. 29, 2014; 86 FR 6189, Jan. 19, 2021]

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 manufactured construction material is incorporated in the offer based on an exception for unreasonable cost of comparable domestic construction material requested by the offeror.

(2) In addition, use an evaluation factor of 20 percent applied to the cost of foreign unmanufactured construction material incorporated in the offer based on an exception for unreasonable cost of comparable domestic unmanufactured construction material requested by the offeror.

(3) Total evaluated price = offered price + (.25 × offered price, if (a)(1) applies) + (.20 × cost of foreign unmanufactured construction material, if (a)(2) applies).

(b) If the solicitation specifies award on the basis of factors in addition to cost or price, apply the evaluation factors as specified in paragraph (a) of this section and use the evaluated price in determining the offer that represents the best value to the Government.

(c) Unless paragraph (b) applies, 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.

(d) 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.

(e) 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.

[74 FR 14626, Mar. 31, 2009, as amended at 75 FR 53166, Aug. 30, 2010; 86 FR 6189, Jan. 19, 2021]

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 statute 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 statute 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 statute 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).

[74 FR 14626, Mar. 31, 2009, as amended at 79 FR 24209, Apr. 29, 2014]

25.607 Noncompliance.

The contracting officer must—

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

(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 statute 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 statute 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 statute, 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 suspending or debarring 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 agency's inspector general or the officer responsible for criminal investigation.

[74 FR 14626, Mar. 31, 2009, as amended at 75 FR 53167, Aug. 30, 2010; 79 FR 24209, Apr. 29, 2014]

Subpart 25.7—Prohibited Sources

SOURCE: 73 FR 33638, June 12, 2008, unless otherwise noted.

25.700 Scope of subpart.

This subpart implements—

(a) Economic sanctions administered by the Office of Foreign Assets Control (OFAC) in the Department of the Treasury prohibiting transactions involving certain countries, entities, and individuals;

(b) The Sudan Accountability and Divestment Act of 2007 (Pub. L. 110–174) (50 U.S.C. 1701 note);

(c) The Iran Sanctions Act of 1996 (Iran Sanctions Act) (Pub. L. 104–172; 50 U.S.C. 1701 note), including amendments by the Iran Freedom Support Act (Pub. L. 109–293), section 102 of the Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 (Pub. L. 111–195), and Titles II and III of the Iran Threat Reduction and Syria Human Rights Act of 2012 (Pub. L. 112–158); and

(d) Prohibition against contracting with entities that export sensitive technologies to Iran (22 U.S.C. 8515).

[75 FR 60256, Sept. 29, 2010, as amended at 77 FR 73518, Dec. 10, 2012; 78 FR 46783, Aug. 1, 2013; 79 FR 24209, Apr. 29, 2014]

25.701 Restrictions administered by the Department of the Treasury on acquisitions of supplies or services from prohibited sources.

(a) Except as authorized by OFAC, agencies and their contractors and subcontractors must not acquire any supplies or services if any proclamation, Executive order, or statute administered by OFAC, or if OFAC's implementing regulations at 31 CFR Chapter V, would prohibit such a transaction by a person subject to the jurisdiction of the United States.

(b) Except as authorized by OFAC, most transactions involving Cuba, Iran, and Sudan are prohibited, as are most imports from Burma or North Korea into the United States or its outlying areas. In addition, lists of entities and individuals subject to economic sanctions are included in OFAC's List of Specially Designated Nationals and Blocked Persons at *https://ofac.treasury.gov/specially-designated-nationals-and-blocked-persons-list-sdn-human-readable-lists* More information about these restrictions, as well as updates, is available in OFAC's regulations at 31 CFR Chapter V and/or on OFAC's website at *https://ofac.treasury.gov/*

(c) Refer questions concerning the restrictions in paragraphs (a) or (b) of this section to the Department of the Treasury, Office of Foreign Assets Control, Washington, DC 20220, (Telephone (202) 622–2490).

[73 FR 33638, June 12, 2008, as amended at 89 FR 61338, July 30, 2024]

25.702 Prohibition on contracting with entities that conduct restricted business operations in Sudan.

25.702–1 Definitions.

As used in this section—

Appropriate Congressional committees means—

(1) The Committee on Banking, Housing, and Urban Affairs, The Committee on Foreign Relations, and the Select Committee on Intelligence of the Senate; and

(2) The Committee on Financial Services, the Committee on Foreign Relations, and the Permanent Select Committee on Intelligence of the House of Representatives.

Business operations means engaging in commerce in any form, including by acquiring, developing, maintaining, owning, selling, possessing, leasing, or operating equipment, facilities, personnel, products, services, personal property, real property, or any other apparatus of business or commerce.

Marginalized populations of Sudan means—

(1) Adversely affected groups in regions authorized to receive assistance under section 8(c) of the Darfur Peace and Accountability Act (Pub. L. 109–344) (50 U.S.C. 1701 note); and

(2) Marginalized areas in Northern Sudan described in section 4(9) of such Act.

Restricted business operations—

(1) Means, except as provided in paragraph (2) of this definition, business operations in Sudan that include power production activities, mineral extraction activities, oil-related activities, or the production of military equipment, as those terms are defined in the Sudan Accountability and Divestment Act of 2007 (Pub. L. 110–174).

(2) Does not include business operations that the person (as that term is defined in Section 2 of the Sudan Accountability and Divestment Act of 2007) conducting the business can demonstrate—

(i) Are conducted under contract directly and exclusively with the regional government of southern Sudan;

(ii) Are conducted pursuant to specific authorization from the Office of Foreign Assets Control in the Department of the Treasury, or are expressly exempted under Federal law from the requirement to be conducted under such authorization;

(iii) Consist of providing goods or services to marginalized populations of Sudan;

(iv) Consist of providing goods or services to an internationally recognized peacekeeping force or humanitarian organization;

(v) Consist of providing goods or services that are used only to promote health or education; or

(vi) Have been voluntarily suspended.

[64 FR 72419, Dec. 27, 1999, as amended at 74 FR 40465, Aug. 11, 2009]

25.702–2 Certification.

As required by the Sudan Accountability and Divestment Act of 2007 (Pub. L. 110–174), each offeror must certify that it does not conduct restricted business operations in Sudan.

25.702–3 Remedies.

Upon the determination of a false certification under subsection 25.702–2—

(a) The contracting officer may terminate the contract;

(b) The suspending official may suspend the contractor in accordance with the procedures in Subpart 9.4; and

(c) The debarring official may debar the contractor for a period not to exceed 3 years in accordance with the procedures in Subpart 9.4.

25.702–4 Waiver.

(a) The President may waive the requirement of subsection 25.702–2 on a case-by-case basis if the President determines and certifies in writing to the appropriate congressional committees that it is in the national interest to do so.

(b) An agency seeking waiver of the requirement shall submit the request to the Administrator of the Office of Federal Procurement Policy (OFPP), allowing sufficient time for review and approval. Upon receipt of the waiver request, OFPP shall consult with the President's National Security Council, Office of African Affairs, and the Department of State Sudan Office and Sanctions Office to assess foreign policy aspects of making a national interest recommendation.

(c) Agencies may request a waiver on an individual or class basis; however, waivers are not indefinite and can be cancelled if warranted.

(1) A class waiver may be requested only when the class of supplies is not available from any other source and it is in the national interest.

(2) Prior to submitting the waiver request, the request must be reviewed and cleared by the agency head.

(3) All waiver requests must include the following information:

(i) Agency name, complete mailing address, and point of contact name, telephone number, and email address;

(ii) Offeror's name, complete mailing address, and point of contact name, telephone number, and email address;

(iii) Description/nature of product or service;

(iv) The total cost and length of the contract;

(v) Justification, with market research demonstrating that no other offeror can provide the product or service and stating why the product or service must be procured from this offeror, as well as why it is in the national interest for the President to waive the prohibition on contracting with this offeror that conducts restricted business operations in Sudan, including consideration of foreign policy aspects identified in consultation(s) pursuant to 25.702–4(b);

(vi) Documentation regarding the offeror's past performance and integrity (see the Contractor Performance Assessment Reporting System (CPARS) including the Federal Awardee Performance Information and Integrity System at *https://www.cpars.gov''* and any other relevant information);

(vii) Information regarding the offeror's relationship or connection with other firms that conduct prohibited business operations in Sudan; and

(viii) Any humanitarian efforts engaged in by the offeror, the human rights impact of doing business with the offeror for which the waiver is requested, and the extent of the offeror's business operations in Sudan.

(d) The consultation in 25.702–4(b) and the information in 25.702–4(c)(3) will be considered in determining whether to recommend that the President waive the requirement of subsection 25.702–2. In accordance with section 6(c) of the Sudan Accountability and Divestment Act of 2007, OFPP will semiannually submit a report to Congress, on April 15th and October 15th, on the waivers granted.

[73 FR 33638, June 12, 2008, as amended at 76 FR 68038, Nov. 2, 2011; 84 FR 47866, Sept. 10, 2019]

25.703 Prohibition on contracting with entities that engage in certain activities or transactions relating to Iran.

25.703–1 Definitions.

As used in this section—

Person—

(1) Means—

(i) A natural person;

(ii) A corporation, business association, partnership, society, trust, financial institution, insurer, underwriter, guarantor, and any other business organization, any other nongovernmental entity, organization, or group, and any governmental entity operating as a business enterprise; and

(iii) Any successor to any entity described in paragraph (1)(ii) of this definition; and

(2) Does not include a government or governmental entity that is not operating as a business enterprise.

Sensitive technology—

(1) Means hardware, software, telecommunications equipment, or any other technology that is to be used specifically—

(i) To restrict the free flow of unbiased information in Iran; or

(ii) To disrupt, monitor, or otherwise restrict speech of the people of Iran; and

(2) Does not include information or informational materials the export of which the President does not have the authority to regulate or prohibit pursuant to section 203(b)(3) of the International Emergency Economic Powers Act (50 U.S.C. 1702(b)(3)).

[75 FR 60256, Sept. 29, 2010, as amended at 76 FR 68030, Nov. 2, 2011; 77 FR 23368, Apr. 18, 2012]

25.703–2 Iran Sanctions Act.

(a) *Certification*—(1) *Certification relating to activities described in section 5 of the Iran Sanctions Act.* As required by section 6(b)(1)(A) of the Iran Sanctions Act (50 U.S.C. 1701 note), unless an exception applies in accordance with paragraph (c) of this subsection, or a waiver is granted in accordance with 25.703–4, each offeror must certify that the offeror, and any person owned or controlled by the offeror, does not engage in any activity for which sanctions may be imposed under section 5 of the Iran Sanctions Act. Such activities, which are described in detail in section 5 of the Iran Sanctions Act, relate to the energy sector of Iran and development by Iran of weapons of mass destruction or other military capabilities.

(2) *Certification relating to transactions with Iran's Revolutionary Guard Corps.* As required by section 6(b)(1)(B) of the Iran Sanctions Act (50 U.S.C. 1701 note), unless an exception applies in accordance with paragraph (c) of this subsection, or a waiver is granted in accordance with 25.703–4, each offeror must certify that the offeror, and any person owned or controlled by the offeror, does not knowingly engage in any significant transaction (*i.e.*, a transaction that exceeds $10,000) with Iran's Revolutionary Guard Corps or any of its officials, agents, or affiliates, the property and interests in property of which are blocked pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701 *et seq.*) (see OFAC's Specially Designated Nationals and Blocked Persons List at *https://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx*).

(b) *Remedies.* Upon the determination of a false certification under paragraph (a) of this section, the agency shall take one or more of the following actions:

(1) The contracting officer terminates the contract in accordance with procedures in part 49, or for commercial products and commercial services , see 12.403.

(2) The suspending official suspends the contractor in accordance with the procedures in subpart 9.4.

(3) The debarring official debars the contractor for a period of at least two years in accordance with the procedures in subpart 9.4.

(c) *Exception for trade agreements.* The certification requirements of paragraph (a) of this subsection do not apply if the acquisition is subject to trade agreements and the offeror certifies that all the offered products are designated country end products or designated country construction material (see subpart 25.4).

[77 FR 73519, Dec. 10, 2012, as amended at 80 FR 38298, July 2, 2015; 83 FR 42573, Aug. 22, 2018; 85 FR 40067, July 2, 2020; 86 FR 61028, Nov. 4, 2021]

25.703–3 Prohibition on contracting with entities that export sensitive technology to Iran.

(a) The head of an executive agency may not enter into or extend a contract for the procurement of goods or services with a person that exports certain sensitive technology to Iran, as determined by the President, and has an active exclusion in the System for Award Management at *http://www.sam.gov* (22 U.S.C. 8515).

(b) Each offeror must represent that it does not export any sensitive technology to the government of Iran or any entities or individuals owned or controlled by, or acting on behalf or at the direction of, the government of Iran.

(c) *Exception for trade agreements.* The representation requirement of paragraph (b) of this subsection does not apply if the acquisition is subject to trade agreements and the offeror certifies that all the offered products are designated country end products or designated country construction material (see subpart 25.4).

[76 FR 68031, Nov. 2, 2011, as amended at 77 FR 188, Jan. 3, 2012; 77 FR 73519, Dec. 10, 2012; 78 FR 37679, June 21, 2013; 78 FR 46783, Aug. 1, 2013; 83 FR 48697, Sept. 26, 2018]

25.703–4 Waiver.

(a) An agency or contractor seeking a waiver of the requirements of 25.703–2 or 25.703–3, consistent with section 6(b)(5) of the Iran Sanctions Act or 22 U.S.C. 8551(b), respectively, and the Presidential Memorandum of September 23, 2010 (75 FR 67025), shall submit the request to the Office of Federal Procurement Policy, allowing sufficient time for review and approval.

(b) Agencies may request a waiver on an individual or class basis; however, waivers are not indefinite and can be cancelled, if warranted.

(1) A class waiver may be requested only when the class of supplies or equipment is not available from any other source and it is in the national interest.

(2) Prior to submitting the waiver request, the request must be reviewed and cleared by the agency head.

(c) In general, all waiver requests should include the following information:

(1) Agency name, complete mailing address, and point of contact name, telephone number, and email address.

(2) Offeror's name, complete mailing address, and point of contact name, telephone number, and email address.

(3) Description/nature of product or service.

(4) The total cost and length of the contract.

(5) Justification, with market research demonstrating that no other offeror can provide the product or service and stating why the product or service must be procured from this offeror.

(i) If the offeror exports sensitive technology to the government of Iran or any entities or individuals owned or controlled by, or acting on behalf or at the direction of, the government of Iran, provide rationale why it is in the national interest for the President to waive the prohibition on contracting with this offeror, as required by 22 U.S.C. 8551(b).

(ii) If the offeror conducts activities for which sanctions may be imposed under section 5 of the Iran Sanctions Act or engages in any transaction that exceeds the threshold at 25.703–2(a)(2) with Iran's Revolutionary Guard Corps or any of its officials, agents, or affiliates, the property and interests in property of which are blocked pursuant to the International Emergency Economic Powers Act, provide rationale why it is essential to the national security interests of the United States for the President to waive the prohibition on contracting with this offeror, as required by section 6(b)(5) of the Iran Sanctions Act.

(6) Documentation regarding the offeror's past performance and integrity (see the Contractor Performance Assessment Reporting System (CPARS) and the Federal Awardee Performance Information and Integrity System at *https://www.cpars.gov''* and any other relevant information).

(7) Information regarding the offeror's relationship or connection with other firms that—

(i) Export sensitive technology to the government of Iran or any entities or individuals owned or controlled by, or acting on behalf or at the direction of, the government of Iran;

(ii) Conduct activities for which sanctions may be imposed under section 5 of the Iran Sanctions Act; or

(iii) Conduct any transaction that exceeds the threshold at 25.703–2(a)(2) with Iran's Revolutionary Guard Corps or any of its officials, agents, or affiliates, the property and interests in property of which are blocked pursuant to the International Emergency Economic Powers Act.

(8) *Describe*— (i) The sensitive technology and the entity or individual to which it was exported (*i.e.*, the government of Iran or an entity or individual owned or controlled by, or acting on behalf or at the direction of, the government of Iran);

(ii) The activities in which the offeror is engaged for which sanctions may

be imposed under section 5 of the Iran Sanctions Act; or

(iii) The transactions that exceed the threshold at 25.703–2(a)(2) with Iran's Revolutionary Guard Corps or any of its officials, agents, or affiliates, the property and interests in property of which are blocked pursuant to the International Emergency Economic Powers Act.

[77 FR 73519, Dec. 10, 2012, as amended at 80 FR 38298, July 2, 2015; 84 FR 47866, Sept. 10, 2019; 85 FR 27091, May 6, 2020]

Subpart 25.8—Other International Agreements and Coordination

25.801 General.

Treaties and agreements between the United States and foreign governments affect the evaluation of offers from foreign entities and the performance of contracts in foreign countries.

25.802 Procedures.

(a) When placing contracts with contractors located outside the United States, for performance outside the United States, contracting officers must—

(1) Determine the existence and applicability of any international agreements and ensure compliance with these agreements; and

(2) Conduct the necessary advance acquisition planning and coordination between the appropriate U.S. executive agencies and foreign interests as required by these agreements.

(b) The Department of State publishes many international agreements in the ''United States Treaties and Other International Agreements'' series. Copies of this publication normally are available in overseas legal offices and U.S. diplomatic missions.

(c) Contracting officers must award all contracts with Taiwanese firms or organizations through the American Institute of Taiwan (AIT). AIT is under contract to the Department of State.

Subpart 25.9—Customs and Duties

25.900 Scope of subpart.

This subpart provides policies and procedures for exempting from import duties certain supplies purchased under Government contracts.

25.901 Policy.

United States laws impose duties on foreign supplies imported into the customs territory of the United States. Certain exemptions from these duties are available to Government agencies. Agencies must use these exemptions when the anticipated savings to appropriated funds will outweigh the administrative costs associated with processing required documentation.

25.902 Procedures.

For regulations governing importations and duties, see the Customs Regulations issued by the U.S. Customs Service, Department of the Treasury (19 CFR Chapter 1). Except as provided elsewhere in the Customs Regulations (see 19 CFR 10.100), all shipments of imported supplies purchased under Government contracts are subject to the usual Customs entry and examination requirements. Unless the agency obtains an exemption (see 25.903), those shipments are also subject to duty.

25.903 Exempted supplies.

(a) Subchapters VIII and X of Chapter 98 of the Harmonized Tariff Schedule of the United States (19 U.S.C. 1202) list supplies for which exemptions from duty may be obtained when imported into the customs territory of the United States under a Government contract. For certain of these supplies, the contracting agency must certify to the Commissioner of Customs that they are for the purpose stated in the Harmonized Tariff Schedule (see 19 CFR 10.102–104, 10.114, and 10.121 and 15 CFR part 301 for requirements and formats).

(b) Supplies (excluding equipment) for Government-operated vessels or aircraft may be withdrawn from any customs-bonded warehouse, from continuous customs custody elsewhere than in a bonded warehouse, or from a foreign-trade zone, free of duty and internal revenue tax as provided in 19 U.S.C. 1309 and 1317. The contracting activity must cite this authority on the appropriate customs form when making purchases (see 19 CFR 10.59–10.65).

Subpart 25.10—Additional Foreign Acquisition Regulations

25.1001 Waiver of right to examination of records.

(a) *Policy*. The clause at 52.215–2, Audit and Records—Negotiation, prescribed at 15.209(b), and paragraph (d) of the clause at 52.212–5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Products and Commercial Services, prescribed at 12.301(b)(4), implement 10 U.S.C. 3841 and 41 U.S.C. 4706. The basic clauses authorize examination of records by the Comptroller General.

(1) Insert the appropriate basic clause, whenever possible, in negotiated contracts with foreign contractors.

(2) The contracting officer may use 52.215–2 with its *Alternate III* or 52.212–5 with its *Alternate I* after—

(i) Exhausting all reasonable efforts to include the basic clause;

(ii) Considering factors such as alternate sources of supply, additional cost, and time of delivery; and

(iii) The head of the agency has executed a determination and findings in accordance with paragraph (b) of this section, with the concurrence of the Comptroller General. However, concurrence of the Comptroller General is not required if the contractor is a foreign government or agency thereof or is precluded by the laws of the country involved from making its records available for examination.

(b) *Determination and findings*. The determination and findings must—

(1) Identify the contract and its purpose, and identify if the contract is with a foreign contractor or with a foreign government or an agency of a foreign government;

(2) Describe the efforts to include the basic clause;

(3) State the reasons for the contractor's refusal to include the basic clause;

(4) Describe the price and availability of the supplies or services from the United States and other sources; and

(5) Determine that it will best serve the interest of the United States to use the appropriate alternate clause in paragraph (a)(2) of this section.

[73 FR 33638, June 12, 2008, as amended at 79 FR 24209, Apr. 29, 2014; 86 FR 61028, Nov. 4, 2021; 87 FR 73898, Dec. 1, 2022]

25.1002 Use of foreign currency.

(a) Unless an international agreement or the WTO GPA (see 25.408(a)(4)) requires a specific currency, contracting officers must determine whether solicitations for contracts to be entered into and performed outside the United States will require submission of offers in U.S. currency or a specified foreign currency. In unusual circumstances, the contracting officer may permit submission of offers in other than a specified currency.

(b) To ensure a fair evaluation of offers, solicitations generally should require all offers to be priced in the same currency. However, if the solicitation permits submission of offers in other than a specified currency, the contracting officer must convert the offered prices to U.S. currency for evaluation purposes. The contracting officer must use the current market exchange rate from a commonly used source in effect as follows:

(1) For acquisitions conducted using sealed bidding procedures, on the date of bid opening.

(2) For acquisitions conducted using negotiation procedures—

(i) On the date specified for receipt of offers, if award is based on initial offers; otherwise

(ii) On the date specified for receipt of final proposal revisions.

(c) If a contract is priced in foreign currency, the agency must ensure that adequate funds are available to cover currency fluctuations to avoid a violation of the Anti-Deficiency Act (31 U.S.C. 1341, 1342, 1511–1519).

[64 FR 72419, Dec. 27, 1999, as amended at 69 FR 1055, Jan. 7, 2004; 69 FR 77876, Dec. 28, 2004]

25.1003 Tax on certain foreign procurements.

See 29.204 for the imposition of the tax on certain foreign procurements pursuant to the James Zadroga 9/11 Health and Compensation Act of 2010 (Pub. L. 111–347), 26 U.S.C. 5000C, and

its implementing regulations at 26 CFR 1.5000C–1 through 1.5000C–7.

[85 FR 27099, May 6, 2020]

Subpart 25.11—Solicitation Provisions and Contract Clauses

25.1101 Acquisition of supplies.

The following provisions and clauses apply to the acquisition of supplies and the acquisition of services involving the furnishing of supplies.

(a)(1)(i) Insert the clause at 52.225–1, Buy American—Supplies, in solicitations and contracts with a value exceeding the micro-purchase threshold but not exceeding $50,000; and in solicitations and contracts with a value exceeding $50,000, if none of the clauses prescribed in paragraphs (b) and (c) of this section apply, except if—

(A) The solicitation is restricted to domestic end products in accordance with subpart 6.3;

(B) The acquisition is for supplies for use within the United States and an exception to the Buy American statute applies (*e.g.*, nonavailability, public interest, or information technology that is a commercial product); or

(C) The acquisition is for supplies for use outside the United States.

(ii) The contracting officer shall use the clause with its Alternate I to reflect the domestic content threshold that will apply to the entire period of performance, when the senior procurement executive allows for application of an alternate domestic content test for the contract in accordance with 25.101(d). For contracts that the contracting officer estimates will be awarded in calendar year 2022 or 2023, the contracting officer shall insert ''60'' in paragraph (1)(ii)(A) of the definition of ''domestic end product.'' For contracts that the contracting officer estimates will be awarded in calendar year 2024, 2025, 2026, 2027, or 2028, the contracting officer shall insert ''65''. For contracts that the contracting officer estimates will be awarded after calendar year 2028 the contracting officer shall insert ''75''.

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

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

(A) The acquisition is for supplies, or for services involving the furnishing of supplies, for use within the United States, and the acquisition value is $50,000 or more, but is less than $174,000;

(B) The acquisition is not for information technology that is a commercial product, using fiscal year 2004 or subsequent fiscal year funds; and

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

(ii) If the acquisition value is $50,000 or more but is less than $100,000, use the clause with its Alternate II.

(iii) If the acquisition value is $100,000 or more but is less than $102,280, use the clause with its Alternate III.

(iv) The contracting officer shall use the clause with its Alternate IV to reflect the domestic content threshold that will apply to the entire period of performance, when the senior procurement executive allows for application of an alternate domestic content test for the contract in accordance with 25.102(d). For contracts that the contracting officer estimates will be awarded in calendar year 2022 or 2023, the contracting officer shall insert ''60'' in paragraph (1)(ii)(A) of the definition of ''domestic end product.'' For contracts that the contracting officer estimates will be awarded in calendar year 2024, 2025, 2026, 2027, or 2028, the contracting officer shall insert ''65''. For contracts that the contracting officer estimates will be awarded after calendar year 2028 the contracting officer shall insert ''75''.

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

(ii) If the acquisition value is $50,000 or more but is less than $100,000, use the provision with its Alternate II.

(iii) If the acquisition value is $100,000 or more, but is less than $102,280, use the provision with its Alternate III.

(c)(1) Insert the clause at 52.225–5, Trade Agreements, in solicitations and contracts valued at $174,000 or more, if the acquisition is covered by the WTO GPA (see subpart 25.4) and the agency has determined that the restrictions of the Buy American statute are not applicable to U.S.-made end products. If the agency has not made such a determination, the contracting officer must follow agency procedures.

(2) Insert the provision at 52.225–6, Trade Agreements Certificate, in solicitations containing the clause at 52.225–5.

(d) Insert the provision at 52.225–7, Waiver of Buy American Statute for Civil Aircraft and Related Articles, in solicitations for civil aircraft and related articles (see 25.407), if the acquisition value is less than $174,000.

(e) Insert the clause at 52.225–8, Duty-Free Entry, in solicitations and contracts for supplies that may be imported into the United States and for which duty-free entry may be obtained in accordance with 25.903(a), if the value of the acquisition—

(1) Exceeds the simplified acquisition threshold; or

(2) Does not exceed the simplified acquisition threshold, but the savings from waiving the duty is anticipated to be more than the administrative cost of waiving the duty. When used for acquisitions that do not exceed the simplified acquisition threshold, the contracting officer may modify paragraphs (c)(1) and (j)(2) of the clause to reduce the dollar figure.

(f) Insert the provision at 52.225–18, Place of Manufacture, in solicitations that are predominantly for the acquisition of manufactured end products, (*i.e.*, the estimated value of the manufactured end products exceeds the estimated value of other items to be acquired as a result of the solicitation).

[64 FR 72419, Dec. 27, 1999]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting section 25.1101, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.govinfo.gov*.

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).

(a) Insert the clause at 52.225–9, Buy American—Construction Materials, in solicitations and contracts for construction that is performed in the United States valued at less than $6,708,000.

(1) List in paragraph (b)(2) of the clause all foreign construction material excepted from the requirements of the Buy American statute.

(2) If the head of the agency determines that a higher percentage is appropriate, substitute the higher evaluation percentage in paragraph (b)(3)(i) of the clause.

(3) The contracting officer shall use the clause with its Alternate I to reflect the domestic content threshold that will apply to the entire period of performance, when the senior procurement executive allows for application of an alternate domestic content test for the contract in accordance with 25.201(c). For contracts that the contracting officer estimates will be awarded in calendar year 2022 or 2023, the contracting officer shall insert ''60'' in paragraph (1)(ii)(A) of the definition of ''domestic construction material.'' For contracts that the contracting officer estimates will be awarded in calendar year 2024, 2025, 2026, 2027, or 2028, the contracting officer shall insert ''65''. For contracts that the contracting officer estimates will be awarded after calendar year 2028 the contracting officer shall insert ''75''.

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

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

(c) Insert the clause at 52.225–11, Buy American—Construction Materials under Trade Agreements, in solicitations and contracts for construction that is performed in the United States valued at $6,708,000 or more.

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

(2) If the head of the agency determines that a higher percentage is appropriate, substitute the higher evaluation percentage in paragraph (b)(4)(i) of the clause.

(3) For acquisitions valued at $6,708,000 or more, but less than $13,296,489, use the clause with its Alternate I. List in paragraph (b)(3) of the clause all foreign construction material excepted from the requirements of the Buy American statute, unless the excepted foreign construction material is from a designated country other than Bahrain, Mexico, and Oman.

(4) The contracting officer shall use the clause with its Alternate II to reflect the domestic content threshold that will apply to the entire period of performance, when the senior procurement executive allows for application of an alternate domestic content test for the contract in accordance with 25.201(c). For contracts that the contracting officer estimates will be awarded in calendar year 2022 or 2023, the contracting officer shall insert ''60'' in paragraph (1)(ii)(A) of the definition of ''domestic construction material.'' For contracts that the contracting officer estimates will be awarded in calendar year 2024, 2025, 2026, 2027, or 2028, the contracting officer shall insert ''65''. For contracts that the contracting officer estimates will be awarded after calendar year 2028 the contracting officer shall insert ''75''.

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

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

(3) For acquisitions valued at $6,708,000 or more, but less than $13,296,489, use the provision with its Alternate II.

(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) If these Recovery Act provisions and clauses are only applicable to a project consisting of certain line items in the contract, identify in the schedule the line items to which the provisions and clauses apply.

(3) 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 materials excepted from the Buy American statute or section 1605 of the Recovery Act, other than manufactured construction material from a Recovery Act designated country or unmanufactured construction material from a designated country.

(ii) *Alternate I.* List in paragraph (b)(3) of the clause all foreign construction material excepted from the Buy American statute or section 1605 of the Recovery Act, other than—

(A) Manufactured construction material from a Recovery Act designated country other than Bahrain, Mexico, or Oman; or

(B) Unmanufactured construction material from a designated country other than Bahrain, Mexico, or Oman.

[64 FR 72419, Dec. 27, 1999]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting § 25.1102, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at *www.govinfo.gov*.

25.1103 Other provisions and clauses.

(a) *Restrictions on certain foreign purchases.* Insert the clause at 52.225–13, Restrictions on Certain Foreign Purchases, in solicitations and contracts, unless an exception applies.

(b) *Translations.* Insert the clause at 52.225–14, Inconsistency Between English Version and Translation of Contract, in solicitations and contracts

if anticipating translation into another language.

(c) *Foreign currency offers.* Insert the provision at 52.225–17, Evaluation of Foreign Currency Offers, in solicitations that permit the use of other than a specified currency. Insert in the provision the source of the rate to be used in the evaluation of offers.

(d) The contracting officer shall include in each solicitation for the acquisition of other than commercial products or commercial services the provision at 52.225–20, Prohibition on Conducting Restricted Business Operations in Sudan—Certification.

(e) The contracting officer shall include in all solicitations the provision at 52.225–25, Prohibition on Contracting with Entities Engaging in Certain Activities or Transactions Relating to Iran—Representation and Certifications.

[64 FR 72419, Dec. 27, 1999, as amended at 65 FR 36026, 36028, June 6, 2000; 67 FR 21538, Apr. 30, 2002; 67 FR 56122, 56124, Aug. 30, 2002; 68 FR 4051, Jan. 27, 2003; 68 FR 56686, Oct. 1, 2003; 69 FR 1055, Jan. 7, 2004; 69 FR 8315, Feb. 23, 2004; 71 FR 866, Jan. 5, 2006; 71 FR 20306, Apr. 19, 2006; 71 FR 57368, Sept. 28, 2006; 73 FR 33639, June 12, 2008; 75 FR 60257, Sept. 29, 2010; 76 FR 68031, Nov. 2, 2011; 77 FR 73518, Dec. 10, 2012; 86 FR 61028, Nov. 4, 2021]

PART 26—OTHER SOCIOECONOMIC PROGRAMS

Subpart 26.1—Indian Incentive Program

Sec.

Subpart 26.2—Major Disaster or Emergency Assistance Activities

Subpart 26.3—Historically Black Colleges and Universities and Minority Institutions

Subpart 26.4—Food Donations to Nonprofit Organizations

Subpart 26.5—Drug-Free Workplace

Subpart 26.6—Encouraging Contractor Policies to Ban Text Messaging While Driving

Subpart 26.11—Encouraging Contractor Policies to Ban Text Messaging While Driving

AUTHORITY: 40 U.S.C. 121(c); 10 U.S.C. chapter 4 and 10 U.S.C. chapter 137 legacy provisions (see 10 U.S.C. 3016); and 51 U.S.C. 20113.

SOURCE: 56 FR 41737, Aug. 22, 1991, unless otherwise noted.

NOTE: This part has been created to facilitate promulgation of additional FAR and agency level socioeconomic coverage which properly fall under FAR Subchapter D—Socioeconomic Programs, but neither implements nor supplements existing FAR Parts 19 or 22 through 25.