Subpart 25.1 - Buy American-Supplies

Parent topic: Part 25 - Foreign Acquisition

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*.

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)(xviii)(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*).

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).

25.104 Nonavailable articles.

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

(1) Antimony, as metal or oxide.

(2) Bamboo shoots.

(3) Bananas.

(4) Bismuth.

(5) 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.

(6) Brazil nuts, unroasted.

(7) Capers.

(8) Cashew nuts.

(9) Chestnuts.

(10) Chrome ore or chromite.

(11) Cocoa beans.

(12) Coconut and coconut meat, unsweetened, in shredded, desiccated, or similarly prepared form.

(13) Coffee, raw or green bean.

(14) Cork, wood or bark and waste.

(15) Cover glass, microscope slide.

(16) Fair linen, altar.

(17) Fibers of the following types: abaca, abace, agave, coir, flax, jute, jute burlaps, palmyra, and sisal.

(18) Grapefruit sections, canned.

(19) Hemp yarn.

(20) Hog bristles for brushes.

(21) Hyoscine, bulk.

(22) Modacrylic fiber.

(23) Nitroguanidine (also known as picrite).

(24) Oranges, mandarin, canned.

(25) Pineapple, canned.

(26) Quartz crystals.

(27) Rubber, crude and latex (natural).

(28) Rutile.

(29) Silk, raw and unmanufactured.

(30) Spare and replacement parts for equipment of foreign manufacture, and for which domestic parts are not available.

(31) Spices and herbs, in bulk.

(32) Swords and scabbards.

(33) Tapioca flour and cassava.

(34) Tartar, crude; tartaric acid and cream of tartar in bulk.

(35) Tea in bulk.

(36) Tin in bars, blocks, and pigs.

(37) Vanilla beans.

(38) Venom, cobra.

(39) Water chestnuts.

(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).

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)).

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.