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).

Parent topic: Subpart 25.1 - Buy American-Supplies