PART 470—COMMODITY ACQUISITIONS

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Parent topic: SUBCHAPTER I—FOOD ASSISTANCE PROGRAMS

470.000 Scope of part.

This part sets forth the policies, procedures and requirements governing the procurement of agricultural commodities by the Department of Agriculture for use:

(a) Under child nutrition programs such as the National School Lunch Program, The Emergency Food Assistance Program, Commodity Supplemental Food Program, Food Distribution Program on Indian Reservations, and any other domestic food assistance program.

(b) Under Title II of the Food for Peace Act (7 U.S.C. 1721 *et seq.*), the Food for Progress Act of 1985, the McGovern-Dole International Food for Education and Child Nutrition Program, and any other international food assistance program.

470.101 Definitions.

The following definitions are applicable to this subpart:

Commingled product means grains, oilseeds, rice, pulses, other similar commodities and the products of such commodities, when such commodity or product is normally stored on a commingled basis in such a manner that the commodity or product produced in the United States cannot be readily distinguished from a commodity or product not produced in the United States.

Foreign Agriculture Service (FAS) means such agency located within the Department of Agriculture.

Free alongside ship (f.a.s.) means a term of sale where the seller fulfills its obligation to deliver when the goods have been placed alongside the vessel on the quay or in lighters at the named port of shipment. The buyer bears all costs and risks of loss of or damage to the goods from that moment.

Grantee organization means an organization which will receive commodities from the United States Agency for International Development under Title II of the Food for Peace Act (7 U.S.C. 1721 *et seq.*) or from the Foreign Agricultural Service under the Food for Progress Act of 1985; the McGovern-Dole International Food for Education and Child Nutrition Program; and any other international food assistance program.

Ingredient means spices, vitamins, micronutrients, desiccants, and preservatives when added to an agricultural commodity product.

Last contract lay day means the last day specified in an ocean freight contract by which the carriage of goods must start for contract performance.

Lowest landed cost means with respect to an agricultural product acquired under this part, the lowest aggregate cost for the acquisition of such product and the shipment of such product to a foreign destination.

Multi-port or multi-trip voyage charter means the charter of an ocean carrier in which the carrier will stop at two or more ports to discharge cargo.

470.102 Policy.

(a) *Policy.* USDA follows the policies and procedures set forth in the FAR as supplemented by the AGAR, in the procurement of agricultural commodities and products of agricultural commodities that are used in domestic and international food assistance and nutrition programs.

(b) *Electronic submission.* To the maximum extent possible, the use of electronic submission of solicitation-related documents shall be used with respect to the acquisition of agricultural commodities and related freight. However, to the extent that a solicitation allows for the submission in paper or hard copy format in addition to information in an electronic format and there is a discrepancy in such submissions, the information submitted in paper or hard copy format shall prevail unless the electronic submission states that a specific existing written term is superseded by the electronic submission.

(c) *Freight.* With respect to the acquisition of freight for the shipment of agricultural commodities and products of agricultural commodities, the provisions of the FAR, including part 47, shall be utilized as applicable and various types of services to be obtained may include multi-trip voyage charters.

470.103 United States origin of agricultural products.

(a) *Products for use in international food assistance programs.* As provided by 7 U.S.C. 1732(2) and 1736o-1(a) commodities and the products of agricultural commodities acquired for use in international feeding and development programs shall be products of United States origin. A product shall not be considered to be a product of the United States if it contains any ingredient that is not

produced in the United States if that ingredient is:

(1) Produced in the United States; and

(2) Commercially available in the United States at fair and reasonable prices from domestic sources.

(b) *Products for use in domestic food assistance programs.* Commodities and the products of agricultural commodities acquired by USDA for use in domestic food assistance programs shall be a product of the United States, except as may otherwise be required by law, and shall be considered to be such a product if it is grown, processed, and otherwise prepared for sale or distribution exclusively in the United States except with respect to ingredients as defined above. Ingredients from non-domestic sources will be allowed to be utilized as a United States product if such ingredients are not otherwise:

(1) Produced in the United States; and

(2) Commercially available in the United States at fair and reasonable prices from domestic sources.

(c) *Commingled product.*

(1) Except as provided in paragraph (c)(2) of this section, a commingled product shall be considered to be a product of the United States if the offeror can establish that the offeror has in inventory at the time the contract for the commodity or product is awarded to the offeror, or obtains during the contract performance period specified in the solicitation, or a combination thereof, a sufficient quantity of the commodity or product that was produced in the United States to fulfill the contract being awarded, and all unfulfilled contracts that the offeror entered into to provide such commingled product to the United States.

(2) To the extent USDA has determined a commodity is one that is generally commingled but is also one which can be readily stored on an identity preserved basis with respect to its country of origin, USDA may require that the commodity procured shall be of 100 percent United States origin.

(d) *Product derived from animals.* With respect to the procurement of products derived from animals, the solicitation will set forth any specific requirement that is applicable to the country in which the animal was bred, raised, slaughtered or further processed.

470.201 Acquisition of commodities and freight shipment for Foreign Agricultural Service (FAS) programs.

(a) *Lowest landed cost and delivery considerations.*

(1) Except as provided in paragraphs (a)(3) and (4) of this section, in contracts for FAS for commodities and related freight shipment for delivery to foreign destinations, the contracting officer shall consider the lowest landed cost of delivering the commodity to the intended destination. This lowest landed cost determination will be calculated on the basis of rates and service for that portion of the commodities being purchased that is determined is necessary and practicable to meet cargo preference requirements and on an overall (foreign and U.S. flag) basis for the remaining portion of the commodities being procured and the additional factors set forth in this section. Accordingly, the solicitations issued with respect to a commodity procurement, or a related freight procurement will specify that in the event an offer submitted by a party is the lowest offered price, the contracting

officer reserves the right to reject such offer if the acceptance of another offer for the commodity or related freight, when combined with other offers for commodities or related freight, results in a lower landed cost.

(2) USDA may contact any port prior to award to determine the port's cargo handling capabilities, including the adequacy of the port to receive, accumulate, handle, store, and protect the cargo. Factors considered in this determination may include, but not be limited to: The adequacy of building structures, proper ventilation, freedom from insects and rodents, cleanliness, and overall good housekeeping and warehousing practices. USDA may consider the use of another coastal range or port if a situation exists at a port that may adversely affect the ability of USDA to have the commodity delivered in a safe and timely manner. Such situations include:

(i) A port is congested;

(ii) Port facilities are overloaded;

(iii) A vessel would not be able to dock and load cargo without delay;

(iv) Labor disputes or lack of labor may prohibit the loading of the cargo onboard a vessel in a timely manner; or

(v) Other similar situation that may adversely affect the ability of USDA to have the commodity delivered in a timely manner.

(3) Use of other than lowest landed cost. In order to ensure that commodities are delivered in a timely fashion to foreign destinations and without damage, the contracting officer may award an acquisition without regard to the lowest land cost process set forth in paragraph (a)(1) of this section if:

(i) The solicitation specifies that the lowest land cost process will not be followed in the completion of the contract; or

(ii) After issuance of the solicitation, it is determined that:

(A) Internal strife at the foreign destination or urgent humanitarian conditions threatens the lives of persons at the foreign destination;

(B) A specific port's cargo handling capabilities (including the adequacy of the port to receive, accumulate, handle, store, and protect commodities) and other similar factors may adversely affect the delivery of such commodities through damage or untimely delivery. Such similar factors include, but are not limited to: Port congestion; overloaded facilities at the port; vessels not being able to dock and load cargo without delay due to conditions at the port; labor disputes or lack of labor may prohibit the loading of the cargo onboard a vessel in a timely manner; and the existence of inadequate or unsanitary warehouse and other supporting facilities;

(C) The total transit time of a carrier, as it relates to a final delivery date at the foreign destination may impair the timely delivery of the commodity;

(D) Other similar situations arise that materially affect the administration of the program for which the commodity or freight is being procured; or

(E) The contracting officer determines that extenuating circumstances preclude awards on the basis of lowest-landed cost, or that efficiency and cost-savings justify use of types of ocean service that

would not involve an analysis of freight. However, in all such cases, commodities would be transported in compliance with cargo preference requirements. Other types of services may include, but are not limited to, multi-trip voyage charters, indefinite delivery/indefinite quantity (IDIQ), delivery cost and freight (C & F), delivery cost insurance and freight (CIF), and indexed ocean freight costs.

(4) If the contracting officer determines that action may be appropriate under paragraph (a)(3) of this section, prior to the acceptance of any applicable offer, the contracting officer will provide to the Head of Contracting Activity or Designee a written request to obtain commodities and freight in a manner other than on a lowest landed cost basis consistent with title 48 of the CFR. This request shall include a statement of the reasons for not using lowest landed cost basis. The HCA, or the designee one level above the contracting officer, may either accept or reject this request and shall document this determination.

(b) *Multiple offers or delivery points.* If more than one offer for the sale of commodities is received or more than one delivery point has been designated in such offers, in order to achieve a combination of a freight rate and commodity award that produces the lowest landed cost for the delivery of the commodity to the foreign destination, the contracting officer shall evaluate offers submitted on a delivery point by delivery point basis; however, consideration shall be given to prioritized ocean transport service in determining lowest landed cost.

(c) *Freight shipping and rates.*

(1) In determining the lowest-landed cost, USDA shall use the freight rates offered in response to solicitations issued by USDA or, if applicable, the grantee organization.

(2) Freight rates offered must be submitted as specified in the solicitation issued by USDA or, if applicable, the grantee organization. Any such solicitation issued by a grantee organization must contain the following elements:

(i) If directed by USDA, include a closing time for the receipt of written freight offers and state that late written freight offers will not be considered;

(ii) Provide that freight offers are required to have a canceling date no later than the last contract lay day specified in the solicitation;

(iii) Provide the same deadline for receipt of written freight offers from both U.S. flag vessel and non-U.S. flag vessels; and

(iv) Be received and opened prior to any related offer for acquisition of commodities to be shipped.

(3) USDA may require organizations that will receive commodities from USDA to submit information relating to the capacity of a U.S. port, or, if applicable, a terminal, prior to the acquisition of such commodities or freight.

(d) *Freight rate notification.* If USDA is not the party procuring freight with respect to a shipment of an agricultural commodity for delivery to a foreign destination, the organization that will receive commodities from USDA, or its shipping agent, shall be notified by USDA of the vessel freight rate used in determining the commodity contract award and the organization will be responsible for finalizing the charter or booking contract with the vessel representing the freight rate.

470.202 Acquisition of commodities for United States Agency for International Development (USAID) programs.

(a) *Lowest landed cost and delivery considerations.*

(1) Except as provided in paragraphs (a)(3) and (d)(2) of this section, with respect to the acquisition of agricultural commodities for delivery to foreign destinations and related freight to transport such commodities under Title II of Public Law 83-480, contracts will be entered into in a manner that will result in the lowest landed cost of such commodity delivery to the intended destination. This lowest landed cost determination shall be calculated on the basis of rates and service for that portion of the commodities being purchased that is determined is necessary and practicable to meet cargo preference requirements and on an overall (foreign and U.S. flag) basis for the remaining portion of the commodities being procured and the additional factors set forth in this section. Accordingly, the solicitations issued with respect to a commodity procurement, or a freight procurement will specify that in the event an offer submitted by a party is the lowest offered price, the contracting officer reserves the right to reject such offer if the acceptance of another offer for the commodity or freight, when combined with other offers for commodities or freight, results in a lower landed cost.

(2) USDA may contact any port prior to award to determine the port's cargo handling capabilities, including the adequacy of the port to receive, accumulate, handle, store, and protect the cargo. Factors which will be considered in this determination will include, but not be limited to, the adequacy of building structures, proper ventilation, freedom from insects and rodents, cleanliness, and overall good housekeeping and warehousing practices. USDA may consider the use of another coastal range or port if a situation exists at a port that may adversely affect the ability of USDA to have the commodity delivered in a safe and/or timely manner. Such situations include:

(i) A port is congested;

(ii) Port facilities are overloaded;

(iii) A vessel would not be able to dock and load cargo without delay;

(iv) Labor disputes or lack of labor may prohibit the loading of the cargo onboard a vessel in a timely manner; or

(v) Other similar situation that may adversely affect the ability of the Department to have the commodity delivered in a timely manner.

(3) In order to ensure that commodities are delivered in a timely fashion to foreign destinations and without damage, USDA may complete an acquisition without regard to the lowest land cost process set forth in paragraph (a)(1) of this section, if:

(i) The solicitation specifies that the lowest land cost process will not be followed in the completion of the contract; or

(ii) After issuance of the solicitation, it is determined that:

(A) Internal strife at the foreign destination or urgent humanitarian conditions threatens the lives of persons at the foreign destination;

(B) A specific port's cargo handling capabilities (including the adequacy of the port to receive,

accumulate, handle, store, and protect commodities) and other similar factors will adversely affect the delivery of such commodities without damage or in a timely manner. Such similar factors include, but are not limited to: Port congestion; overloaded facilities at the port; vessels would not be able to dock and load cargo without delay; labor disputes or lack of labor may prohibit the loading of the cargo onboard a vessel in a timely manner; and the existence of inadequate or unsanitary warehouse and other supporting facilities;

(C) The total transit time of a carrier, as it relates to a final delivery date at the foreign destination may impair the ability of USDA to achieve timely delivery of the commodity; or

(D) Other similar situations arise that materially affect the administration of the program for which the commodity or freight is being procured.

(4) If the contracting officer determines that action may be appropriate under paragraph (a)(3) of this section, prior to the acceptance of any applicable offer, the contracting officer shall provide to the HCA or Designee and to USAID, a written request to obtain commodities and freight in a manner other than on a lowest landed cost basis. This request shall include a statement of the reasons for not using lowest landed cost basis. The HCA or Designee one level above the contracting officer, with the concurrence of USAID, shall, on an expedited basis, either accept or reject this request and shall document this determination in writing and provide a copy to USAID.

(b) *Freight shipping and rates.*

(1) In determining lowest-landed cost as specified in paragraph (a) of this section, USDA shall use vessel rates offered in response to solicitations issued by USAID or grantee organizations receiving commodities under 7 U.S.C. 1721 *et seq.*

(2) USAID may require, or direct a grantee organization to require, an ocean carrier to submit offers electronically through a Web-based system maintained by USDA. If electronic submissions are required, USDA may, at its discretion, accept corrections to such submissions that are submitted in a written form other than by use of such Web-based system.

(c) *Delivery date.* The contracting officer shall consider total transit time, as it relates to a final delivery date, in order to satisfy program requirements for Title II of Public Law 83-480.

(d) *Multiple awards or delivery points.*

(1) If more than one offer for the sale of commodities is received or more than one delivery point has been designated in such offers, in order to achieve a combination of a freight rate and commodity award that produces the lowest landed cost for the delivery of the commodity to the foreign destination, the contracting officer shall evaluate offers submitted on a delivery point by delivery point basis; however, consideration shall be given to prioritized ocean transport service in determining lowest landed cost.

(2) The contracting officer may determine that extenuating circumstances preclude awards on the basis of lowest landed cost. However, in all such cases, commodities may be transported in compliance with cargo preference requirements as determined by USAID.

(3) The contracting officer shall notify USAID or, if applicable, the grantee organization, that its shipping agent will be notified of the vessel freight rate used in determining the commodity contract award. The grantee organization or USAID will be responsible for finalizing the charter or booking contract with the vessel representing the freight rate so used.

470.203 Cargo preference.

An agency having responsibility under this subpart shall administer its programs, with respect to this subpart, in accordance with regulations prescribed by the Secretary of Transportation.