

List of Subjects in 48 CFR Part 219

Government procurement.

Michele P. Peterson,

Executive Editor, Defense Acquisition Regulations Council.

Therefore, 48 CFR part 219 and Appendix I to chapter 2 are amended as follows:

1. The authority citation for 48 CFR part 219 and Appendix I to subchapter I continues to read as follows:

Authority: 41 U.S.C. 421 and 48 CFR chapter 1.

PART 219—SMALL BUSINESS PROGRAMS**219.7104 [Amended]**

2. Section 219.7104 is amended in paragraph (b), in the last sentence, and in paragraph (d) by removing “2005” and adding in its place “2008”.

Appendix I—Policy and Procedures for the DOD Pilot Mentor-Protege Program**I-102 [Amended]**

3. Appendix I to chapter 2 is amended in section I-102, in paragraphs (a) and (b), by removing “2002” and adding in its place “2005”.

I-103 [Amended]

4. Appendix I to chapter 2 is amended in section I-103 as follows:

a. In paragraph (a), by removing “2002” and adding in its place “2005”; and

b. In paragraph (b) introductory text and paragraph (c), by removing “2005” and adding in its place “2008”.

I-109 [Amended]

5. Appendix I to chapter 2 is amended in section I-109, in paragraph (e)(3), by removing “2005” and adding in its place “2008”.

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DEPARTMENT OF DEFENSE**48 CFR Parts 225 and 252**

[DFARS Case 2002-D008]

Defense Federal Acquisition Regulation Supplement; Trade Agreements Act—Exception for U.S.-Made End Products

AGENCY: Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD has issued a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement the

determination of the Under Secretary of Defense (Acquisition, Technology, and Logistics) that, for procurements subject to the Trade Agreements Act, it would be inconsistent with the public interest to apply the Buy American Act to U.S.-made end products that are substantially transformed in the United States.

EFFECTIVE DATE: December 20, 2002.

FOR FURTHER INFORMATION CONTACT: Ms. Amy Williams, Defense Acquisition Regulations Council, OUSD(AT&L)DPAP(DAR), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301-3062. Telephone (703) 602-0328; facsimile (703) 602-0350. Please cite DFARS Case 2002-D008.

SUPPLEMENTARY INFORMATION:**A. Background**

On March 14, 2002, the Under Secretary of Defense (Acquisition, Technology, and Logistics) (USD(AT&L)) determined that, for procurements subject to the Trade Agreements Act, it would be inconsistent with the public interest to apply the Buy American Act to U.S.-made end products that are substantially transformed in the United States. This determination expands the May 16, 1997, USD(AT&L) determination (presently implemented in DFARS part 225) that it would be inconsistent with the public interest to apply the Buy American Act to U.S.-made information technology products in Federal Supply Group 70 or 74. The March 14, 2002, determination is consistent with Federal Acquisition Regulation policy applicable to civilian agencies with regard to the treatment of U.S.-made end products.

This DFARS rule implements the March 14, 2002, USD(AT&L) determination. The rule simplifies evaluation of offers in acquisitions subject to the Trade Agreements Act, because it is no longer necessary to determine if a U.S.-made end product is also a domestic end product, *i.e.*, the cost of domestic components exceeds the cost of all components by more than 50 percent. Additionally, the provision at DFARS 252.225-7006, Buy American Act—Trade Agreements—Balance of Payments Program Certificate, and the clause at DFARS 252.225-7007, Buy American Act—Trade Agreements—Balance of Payments Program, are no longer necessary, because the provision at DFARS 252.225-7020, Trade Agreements Certificate, and the clause at DFARS 252.225-7021, Trade Agreements, are now appropriate for all acquisitions subject to the Trade Agreements Act. This rule also applies

the March 14, 2002, USD(AT&L) determination to acquisitions subject to the Balance of Payments Program, since the Balance of Payments Program is an extension of the Buy American Act restrictions to acquisitions of supplies for overseas use.

DoD published a proposed rule at 67 FR 49278 on July 30, 2002. Two sources submitted comments on the proposed rule. Both sources supported the DFARS changes in the proposed rule. Therefore, DoD is adopting the proposed rule as a final rule without change.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

B. Regulatory Flexibility Act

This rule may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* A final regulatory flexibility analysis has been prepared and is summarized as follows:

The objective of the rule is to avoid treating products substantially transformed in the United States less favorably than products substantially transformed in a designated, Caribbean Basin, or NAFTA country. Under existing DFARS policy, offers of domestic end products are given a 50 percent price evaluation preference over offers of U.S.-made end products for which the cost of foreign components exceeds the cost of domestic components by 50 percent or more. However, for acquisitions subject to the Trade Agreements Act, an end product of a designated, Caribbean Basin, or NAFTA country is exempt from application of the 50 percent evaluation factor, regardless of the source of the components. Therefore, a company might be encouraged to manufacture a product in a designated, Caribbean Basin, or NAFTA country rather than in the United States. This DFARS rule revises evaluation procedures for acquisitions subject to the Trade Agreements Act to eliminate the 50 percent price advantage that DoD presently gives to domestic end products over U.S.-made end products with foreign component content of 50 percent or more. Therefore, the cost incentive to manufacture components in the United States is removed. However, for companies that provide U.S.-made end products containing foreign components, the incentive to move end product manufacturing facilities to a designated, Caribbean Basin, or NAFTA country is reduced. There were no significant issues raised by the public

comments in response to the initial regulatory flexibility analysis.

C. Paperwork Reduction Act

The rule eliminates the requirement for offerors to track and document the origin of components of U.S.-made end products in acquisitions subject to the Trade Agreements Act. This reduces by 960 hours the annual paperwork burden requirements previously approved by the Office of Management and Budget under Control Number 0704-0229.

List of Subjects in 48 CFR Parts 225 and 252

Government procurement.

Michele P. Peterson,

Executive Editor, Defense Acquisition Regulations Council.

Therefore, 48 CFR parts 225 and 252 are amended as follows:

1. The authority citation for 48 CFR parts 225 and 252 continues to read as follows:

Authority: 41 U.S.C. 421 and 48 CFR chapter 1.

PART 225—FOREIGN ACQUISITION

225.001 [Amended]

2. Section 225.001 is amended as follows:

- a. By removing paragraph (3)(ii) and redesignating paragraph (3)(iii) as paragraph (3)(ii); and
- b. In newly designated paragraph (3)(ii), by removing “U.S. made” and adding in its place “U.S.-made”.

225.003 [Amended]

3. Section 225.003 is amended as follows:

- a. In paragraph (4), by removing “252.225-7007, Buy American Act-Trade Agreements-Balance of Payments Program;” and
- b. In paragraph (12), by removing “252.225-7007, Buy American Act-Trade Agreements-Balance of Payments Program;”.

4. Section 225.103 is amended as follows:

- a. By redesignating paragraph (a)(1) as paragraph (a)(i); and
- b. By revising newly designated paragraph (a)(i)(B) to read as follows:

225.103 Exceptions.

(a)(i) * * *

(B) The Under Secretary of Defense (Acquisition, Technology, and Logistics) has determined that, for procurements subject to the Trade Agreements Act, it is inconsistent with the public interest to apply the Buy American Act to end products that are substantially transformed in the United States.

* * * * *

5. Section 225.402 is revised to read as follows:

225.402 General.

To estimate the value of the acquisition, use the total estimated value of end products subject to trade agreement acts (*see* 225.401-70).

6. Section 225.502 is revised to read as follows:

225.502 Application.

(b) Use the following procedures instead of the procedures in FAR 25.502(b) for acquisitions subject to the Trade Agreements Act:

(i) Consider only offers of U.S.-made, qualifying country, or eligible end products, except as permitted by 225.403.

(ii) If price is the determining factor, award on the low offer.

(c) Use the following procedures instead of those in FAR 25.502(c) for acquisitions subject to the Buy American Act or the Balance of Payments Program.

(i) Treat offers of eligible end products under acquisitions subject to NAFTA as if they were qualifying country offers. As used in this section, the term “nonqualifying country offer” may also apply to an offer that is not an eligible offer under NAFTA.

(ii) Except as provided in paragraph (c)(iii) of this section, evaluate offers by adding a 50 percent factor to the price (including duty) of each nonqualifying country offer (*see* 225.504(1)).

(A) Nonqualifying country offers include duty in the offered price. When applying the factor, evaluate based on the inclusion of duty, whether or not duty is to be exempted. If award is made on the nonqualifying country offer and duty is to be exempted through inclusion of the clause at FAR 52.225-8, Duty-Free Entry, award at the offered price minus the amount of duty identified in the provision at 252.225-7003, Information for Duty-Free Entry Evaluation (*see* 225.504(1)(ii)).

(B) When a nonqualifying country offer includes more than one line item, apply the 50 percent factor—

- (1) On an item-by-item basis; or
- (2) On a group of items, if the solicitation specifically provides for award on a group basis.

(iii) When application of the factor would not result in the award of a domestic end product, *i.e.*, when no domestic offers are received (*see* 225.504(3)) or when a qualifying or NAFTA country offer is lower than the domestic offer (*see* 225.504(2)), evaluate nonqualifying country offers without the 50 percent factor.

(A) If duty is to be exempted through inclusion of the clause at FAR 52.225-

8, Duty-Free Entry, evaluate the nonqualifying country offer exclusive of duty by reducing the offered price by the amount of duty identified in the clause at 252.225-7003, Information for Duty-Free Entry Evaluation (*see* 225.504(2)(ii) and (3)(ii)). If award is made on the nonqualifying country offer, award at the offered price minus duty.

(B) If duty is not to be exempted, evaluate the nonqualifying country offer inclusive of duty (*see* 225.504(2)(i) and (3)(i)).

(iv) If these evaluation procedures result in a tie between a nonqualifying country offer and a domestic offer, make award on the domestic offer.

(v)(A) There are two tests that must be met to determine whether a manufactured item is a domestic end product—

(1) The end product must have been manufactured in the United States; and

(2) The cost of its U.S. and qualifying country components must exceed 50 percent of the cost of all of its components. This test is applied to end products only, and not to individual components.

(B) Because of the component test, the definition of “domestic end product” is more restrictive than the definition for—

(1) “U.S.-made end product” under trade agreements;

(2) “Domestically produced or manufactured products” under small business set-asides or small business reservations; and

(3) Products of small businesses under FAR Part 19.

225.504 [Amended]

7. Section 225.504 is amended by removing paragraph (4).

225.1101 [Amended]

8. Section 225.1101 is amended as follows:

a. In paragraph (2)(i), by removing “252.225-7007, Buy American Act-Trade Agreements-Balance of Payments Program;”

b. By removing paragraph (3)(ii) and redesignating paragraphs (3)(iii) and (3)(iv) as paragraphs (3)(ii) and (3)(iii), respectively;

c. By removing paragraphs (5) and (6) and redesignating paragraphs (7) through (14) as paragraphs (5) through (12), respectively;

d. In newly designated paragraph (9), by removing “when acquiring information technology products in Federal Supply Group 70 or 74” and adding in its place “if the acquisition is subject to the Trade Agreements Act”; and

e. In newly designated paragraph (12), by removing “252.225-7007, Buy

American Act-Trade Agreements-Balance of Payments Program;”.

9. Section 225.7501 is amended by revising paragraph (b)(1)(iii) to read as follows:

225.7501 Policy.

* * * * *

(b) * * *

(1) * * *

(iii) For acquisitions subject to the Trade Agreements Act, is a U.S.-made end product; or

* * * * *

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

252.212-7001 [Amended]

10. Section 252.212-7001 is amended as follows:

a. By revising the clause date to read “(DEC 2002)”; and

b. In paragraph (b), by removing “____ 252.225-7007 Buy American Act-Trade Agreements-Balance of Payments Program (OCT 2002)(41 U.S.C. 10a-10d, 19 U.S.C. 2501-2518, and 19 U.S.C. 3301 note).”.

252.225-7006 and 252.225-7007 [Removed and Reserved]

11. Sections 252.225-7006 and 252.225-7007 are removed and reserved.

252.225-7008 [Amended]

12. Section 252.225-7008 is amended in the introductory text by removing “225.1101(7)” and adding in its place “225.1101(5)”.

252.225-7009 [Amended]

13. Section 252.225-7009 is amended in the introductory text by removing “225.1101(8)” and adding in its place “225.1101(6)”.

252.225-7010 [Amended]

14. Section 252.225-7010 is amended in the introductory text by removing “225.1101(9)” and adding in its place “225.1101(7)”.

252.225-7020 [Amended]

15. Section 252.225-7020 is amended in the introductory text by removing “225.1101(10)” and adding in its place “225.1101(8)”.

252.225-7021 [Amended]

16. Section 252.225-7021 is amended in the introductory text by removing “225.1101(11)” and adding in its place “225.1101(9)”.

252.225-7035 [Amended]

17. Section 252.225-7035 is amended in the introductory text and in Alternate I by removing “225.1101(12)” and adding in its place “225.1101(10)”.

252.225-7036 [Amended]

18. Section 252.225-7036 is amended in the introductory text and in Alternate I introductory text by removing “225.1101(13)” and adding in its place “225.1101(11)”.

252.225-7037 [Amended]

19. Section 252.225-7037 is amended in the introductory text by removing “225.1101(14)” and adding in its place “225.1101(12)”.

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