

Department of Defense

Pt. 225

PART 225—FOREIGN ACQUISITION

Sec.

- 225.000 Scope of part.
- 225.001 General.
- 225.003 Definitions.

Subpart 225.1—Buy American Act—Supplies

- 225.103 Exceptions.
- 225.104 Nonavailable articles.
- 225.170 Acquisition from or through other Government agencies.
- 225.171 Solicitations.

Subpart 225.2—Buy American Act—Construction Materials

- 225.202 Exceptions.
- 225.206 Noncompliance.

Subpart 225.3—Balance of Payments Program

- 225.302 Policy.
- 225.304 Procedures.

Subpart 225.4—Trade Agreements

- 225.401 Exceptions.
- 225.401-70 Products subject to trade agreement acts.
- 225.402 General.
- 225.403 Trade Agreements Act.
- 225.408 Procedures.

Subpart 225.5—Evaluating Foreign Offers—Supply Contracts

- 225.502 Application.
- 225.504 Evaluation examples.

Subpart 225.7—Prohibited Sources

- 225.701 Restrictions.
- 225.770 Secondary Arab boycott of Israel.
- 225.770-1 Restriction.
- 225.770-2 Procedures.
- 225.770-3 Exceptions.
- 225.770-4 Waivers.
- 225.770-5 Solicitation provision and contract clause.
- 225.771 Prohibition on acquisition from the People's Republic of China.
- 225.771-1 Definition.
- 225.771-2 Legal authority.
- 225.771-3 Prohibition on contract award.
- 225.771-4 Procedures.
- 225.771-5 Solicitation provision.

Subpart 225.8—Other International Agreements and Coordination

- 225.801 General.
- 225.802 Procedures.

- 225.802-70 Contracts for performance outside the United States and Canada.
- 225.802-71 End user certificates.
- 225.870 Contracting with Canadian contractors.
- 225.870-1 General.
- 225.870-2 Solicitation of Canadian contractors.
- 225.870-3 Submission of offers.
- 225.870-4 Contracting procedures.
- 225.870-5 Contract administration.
- 225.870-6 Termination procedures.
- 225.870-7 Acceptance of Canadian supplies.
- 225.870-8 Industrial security.
- 225.871 North Atlantic Treaty Organization (NATO) cooperative projects.
- 225.871-1 Scope.
- 225.871-2 Definitions.
- 225.871-3 General.
- 225.871-4 Statutory waivers.
- 225.871-5 Directed subcontracting.
- 225.871-6 Disposal of property.
- 225.871-7 Congressional notification.
- 225.872 Contracting with qualifying country sources.
- 225.872-1 General.
- 225.872-2 Applicability.
- 225.872-3 Solicitation procedures.
- 225.872-4 Evaluation of offers.
- 225.872-5 Contract administration.
- 225.872-6 Audit.
- 225.872-7 Industrial security for qualifying countries.
- 225.872-8 Subcontracting with qualifying country sources.
- 225.873 Waiver of United Kingdom commercial exploitation levies.
- 225.873-1 Policy.
- 225.873-2 Procedures.
- 225.873-3 Contract clause.

Subpart 225.9—Customs and Duties

- 225.901 Policy.
- 225.902 Procedures.
- 225.903 Exempted supplies.

Subpart 225.10—Additional Foreign Acquisition Regulations

- 225.1070 Clause deviations in overseas contracts.

Subpart 225.11—Solicitation Provisions and Contract Clauses

- 225.1101 Acquisition of supplies.
- 225.1103 Other provisions and clauses.

Subpart 225.70—Authorization Acts, Appropriations Acts, and Other Statutory Restrictions on Foreign Acquisition

- 225.7000 Scope of subpart.
- 225.7001 Definitions.
- 225.7002-1 Restrictions.
- 225.7002-2 Exceptions.

Pt. 225

48 CFR Ch. 2 (10-1-01 Edition)

- 225.7002-3 Contract clauses.
- 225.7003 Restriction on overseas military construction.
- 225.7004 Restriction on overseas architect-engineer services.
- 225.7005 Waiver of certain restrictions.
- 225.7006 Restrictions on construction or repair of vessels in foreign shipyards.
- 225.7007 Restriction on acquisition of foreign buses.
 - 225.7007-1 Restriction.
 - 225.7007-2 Applicability.
 - 225.7007-3 Exceptions.
 - 225.7007-4 Waiver.
- 225.7008 Restriction on research and development.
- 225.7009 [Reserved]
- 225.7010 Restriction on certain chemical weapons antidote.
 - 225.7010-1 Restriction.
 - 225.7010-2 Exception.
 - 225.7010-3 Waiver.
- 225.7011 Restriction on Ballistic Missile Defense research, development, test, and evaluation.
 - 225.7011-1 Definitions.
 - 225.7011-2 Restriction.
 - 225.7011-3 Exceptions.
 - 225.7011-4 Procedures.
 - 225.7011-5 Solicitation provision.
- 225.7012 Restrictions on anchor and mooring chain.
 - 225.7012-1 Restrictions.
 - 225.7012-2 Waiver.
 - 225.7012-3 Contract clauses.
- 225.7013-225.7014 [Reserved]
- 225.7015 Restriction on night vision image intensifier tubes and devices.
 - 225.7015-1 Restriction.
 - 225.7015-2 Exception.
 - 225.7015-3 Contract clause.
- 225.7016 Restriction on air circuit breakers for naval vessels.
 - 225.7016-1 Restriction.
 - 225.7016-2 Exceptions.
 - 225.7016-3 Waiver.
 - 225.7016-4 Contract clause.
- 225.7017 Restriction on carbon, alloy, and armor steel plate.
 - 225.7017-1 Restriction.
 - 225.7017-2 Exceptions.
 - 225.7017-3 Waiver.
 - 225.7017-4 Contract clause.
- 225.7018 Restriction on four ton dolly jacks.
 - 225.7018-1 Restriction.
 - 225.7018-2 Waiver.
 - 225.7018-3 Contract clause.
- 225.7019 Restrictions on ball and roller bearings.
 - 225.7019-1 Restrictions.
 - 225.7019-2 Exceptions.
 - 225.7019-3 Waiver.
 - 225.7019-4 Contract clause.
- 225.7020 Restriction on vessel propellers.
 - 225.7020-1 Restriction.
 - 225.7020-2 Exceptions.
 - 225.7020-3 Waiver.

- 225.7020-4 Contract clause.
- 225.7021 Restriction on aircraft fuel cells.
 - 225.7021-1 Restriction.
 - 225.7021-2 Waiver.
 - 225.7021-3 Contract clause.
- 225.7022 Restrictions on totally enclosed lifeboat survival systems.
 - 225.7022-1 Restrictions.
 - 225.7022-2 Exceptions.
 - 225.7022-3 Waiver.
 - 225.7022-4 Contract clause.
- 225.7023 Restriction on supercomputers.
 - 225.7023-1 Restriction.
 - 225.7023-2 Waiver.
 - 225.7023-3 Contract clause.

Subpart 225.71—Other Restrictions on Foreign Acquisition

- 225.7100 Scope of subpart.
- 225.7101 Definitions.
- 225.7102 Forgings.
 - 225.7102-1 Policy.
 - 225.7102-2 Exceptions.
 - 225.7102-3 Waiver.
 - 225.7102-4 Contract clause.
- 225.7103 Polyacrylonitrile (PAN) carbon fiber.
 - 225.7103-1 Policy.
 - 225.7103-2 Waivers.
 - 225.7103-3 Contract clause.

Subpart 225.72—Reporting Contract Performance Outside the United States

- 225.7200 Scope of subpart.
- 225.7201 Exception.
- 225.7202 Distribution of reports.
- 225.7203 Contract clause.

Subpart 225.73—Acquisitions for Foreign Military Sales

- 225.7300 Scope of subpart.
- 225.7301 General.
- 225.7302 Procedures.
- 225.7303 Pricing acquisitions for FMS.
 - 225.7303-1 Contractor sales to other foreign customers.
 - 225.7303-2 Cost of doing business with a foreign government or an international organization.
 - 225.7303-3 Government-to-government agreements.
 - 225.7303-4 Contingent fees.
 - 225.7303-5 Acquisitions wholly paid for from nonrepayable funds.
- 225.7304 Source selection.
- 225.7305 Limitation of liability.
- 225.7306 Exercise of options for FMS.
- 225.7307 Offset arrangements.
- 225.7308 Contract clauses.

Subpart 225.74—Antiterrorism/Force Protection Policy for Defense Contractors Outside the United States

- 225.7400 Scope of subpart.

Department of Defense

225.003

225.7401 General.
225.7402 Contract clause.

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

SOURCE: 56 FR 36367, July 31, 1991, unless otherwise noted.

225.000 Scope of part.

This part also provides policy and procedures for—

- (1) Purchasing foreign defense supplies, services, and construction materials;
- (2) Foreign military sale acquisitions;
- (3) Coordinating acquisitions involving work to be performed in foreign countries;
- (4) Cooperative programs.

225.001 General.

To apply the policies and procedures of this part, analyze and evaluate offers of foreign end products generally as follows:

- (1) *Statutory or policy restrictions.*
 - (i) Determine whether the product is restricted by—
 - (A) Defense authorization or appropriations acts (see subpart 225.70); or
 - (B) DoD policy (see subpart 225.71 and FAR 6.302-3).
 - (ii) Where an exception to or waiver of a restriction would result in award of a foreign end product, apply the policies and procedures of the Buy American Act or the Balance of Payments Program, and, if applicable the trade agreements.
 - (2) *Memoranda of understanding or other international agreements.*
 - (i) Determine whether the offered product is the product of one of the countries (qualifying country), listed in 225.872-1.
 - (ii) If the product is the product of a qualifying country, evaluate the offer under subpart 225.5 and 225.872-4.
 - (3) *Trade agreements.*
 - (i) Determine whether the product is covered by the Trade Agreements Act or the North American Free Trade Agreement Implementation Act (see subpart 225.4).
 - (ii) If the product is an eligible product under subpart 225.4, evaluate the offer under subpart 225.5.
 - (iii) If the product is not an eligible product, a qualifying country end prod-

uct, or a U.S. made end product, purchase of the foreign end product may be prohibited (see FAR 25.403(c) and 225.403(c).

(4) *Contractors controlled by terrorist nations.*

(i) Determine whether the contractor is controlled by a terrorist nation.

(ii) If the contractor is controlled by a terrorist nation, comply with 209.104-1(g).

(5) *Buy American Act and Balance of Payments Program.* See the evaluation procedures in subpart 225.5.

[65 FR 19850, Apr. 13, 2000]

225.003 Definitions.

As used in this part—

- (1) “Caribbean Basin country end product” includes petroleum or any product derived from petroleum.
- (2) “Defense equipment” means any equipment, item of supply, component, or end product purchased by the DoD.
- (3) “Domestic concern” means a concern incorporated in the United States or an unincorporated concern having its principal place of business in the United States.
- (4) “Domestic end product” has the meaning given in the clauses at 252.225-7001, Buy American Act and Balance of Payments Program; 252.225-7007, Buy American Act—Trade Agreements—Balance of Payments Program; and 252.225-7036, Buy American Act—North American Free Trade Agreement Implementation Act—Balance of Payments Program, instead of the meaning in FAR 25.003.
- (5) “Eligible product” means, instead of the definition at FAR 25.003, a designated, NAFTA, or Caribbean Basin country end product in the categories listed in 225.401-70.
- (6) “Foreign concern” means any concern other than a domestic concern.
- (7) “Nondesignated country end product” means any end product which is not a U.S. made end product or a designated country end product.
- (8) “Nonqualifying country” means a country other than the United States or a qualifying country.
- (9) “Nonqualifying country end product” means an end product which is neither a domestic nor qualifying country end product.

(10) “Nonqualifying country offer” means an offer of a nonqualifying country end products, including the price of transportation to destination.

(11) “Qualifying country” is a term used to describe certain countries with memoranda of understanding or international agreements with the United States. These countries are listed in 225.872-1.

(12) “Qualifying country component” and “qualifying country end product” are defined in the clauses at 252.225-7001, Buy American Act and Balance of Payments Program; 252.225-7007, Buy American Act—Trade Agreements—Balance of Payments Program; and 252.225-7036, Buy American Act—North American Free Trade Agreement Implementation Act—Balance of Payments Program. “Qualifying country end product” is also defined in the clause at 252.225-7021, Trade Agreements.

(13) “Qualifying country offer” means an offer of a qualifying country end product, including the price of transportation to destination.

(14) “Source” when restricted by such words as foreign, domestic, qualifying country, etc., refers to the actual manufacturer or producer of the end product or component.

[65 FR 19850, Apr. 13, 2000]

Subpart 225.1—Buy American Act—Supplies

SOURCE: 65 FR 19850, Apr. 13, 2000, unless otherwise noted.

225.103 Exceptions.

(a)(1)(A) Specific public interest exceptions for DoD for certain countries are in 225.872.

(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 information technology products in Federal Supply Group 70 or 74 that are substantially transformed in the United States.

(ii)(A) Normally, use the evaluation procedures in subpart 225.5, but consider recommending a public interest

exception where the purposes of the Buy American Act are not served, or in order to meet a need set forth in 10 U.S.C. 2533. For example, a public interest exception may be appropriate—

(1) If accepting the low domestic offer will involve substantial foreign expenditures, or accepting the low foreign offer will involve substantial domestic expenditures;

(2) To ensure access to advanced state-of-the-art commercial technology; or

(3) To maintain the same source of supply for spare and replacement parts (also see paragraph (b)(iii)(B) of this section)—

(i) For an end item that qualifies as an American good; or

(ii) In order not to impair intergration of the military and commercial industrial base.

(B) A determination whether to grant a public interest exception shall be made after consideration of the factors in 10 U.S.C. 2533—

(1) At a level above the contracting officer for acquisitions valued at less than \$100,000;

(2) By the head of the contracting activity for acquisitions valued at \$100,000 or more but less than \$1,000,000; or

(3) By the agency head for acquisitions valued at \$1,000,000 or more.

(b)(i) A determination that an article, material, or supply is not reasonably available is required where no domestic offer is received or when domestic offers are insufficient to meet the requirement and award is to be made on a nonqualifying country end product.

(ii) Except as provided in FAR 25.103(b)(3), the determination must be approved—

(A) At a level above the contracting officer, if the acquisition is estimated not to exceed \$25,000;

(B) By the chief of the contracting officer if the acquisition is estimated not to exceed \$250,000;

(C) By the head of the contracting activity (HCA) or immediate deputy if the acquisition is estimated not to exceed \$2 million; or

(D) By the head of the agency, or designee at a level no lower than an HCA,

Department of Defense

225.302

if the acquisition is estimated to exceed \$2 million.

(iii) A determination as to whether an article, material, or supply is reasonably available is not required for—

(A) End products or components listed in 225.104(a)(iii) or FAR 25.104(a);

(B) Acquisitions for spare/replacement parts when the acquisition is restricted to the original manufacturer or supplier; or

(C) Acquisition of foreign drugs by the Defense Supply Center, Philadelphia, when the Chief of the Technical Operations Division, Directorate of Medical Materiel, determines that only the requested foreign drug will fulfill the requirements.

(iv) Under coordinated acquisition (see Subpart 208.70), the determination is the responsibility of the requiring department when the requiring department specifies acquisition of a foreign end product.

(c) The cost of a domestic end product is unreasonable if it is not the low evaluated offer when evaluated under Subpart 225.5.

[65 FR 19850, Apr. 13, 2000, as amended at 65 FR 39705, June 27, 2000]

225.104 Nonavailable articles.

(a)(i) DoD has determined that the articles, materials, and supplies listed in FAR 25.104(a) and in paragraph (a)(iii) of this section, when purchased as end items or components, are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality. Regard these items or components as being of domestic origin when incorporated in—

(A) An end product or construction material manufactured in the United States; or

(B) A qualifying country end product or construction material. (For construction material, see FAR Subpart 25.2.)

(ii) Scrap is domestic in origin if generated in, collected in, and prepared for processing in the United States.

(iii)(A) Aluminum clad steel wire.

(B) Sperm oil.

225.170 Acquisition from or through other Government agencies.

Contracting activities must apply the evaluation procedures in subpart 225.5 when using Federal supply schedules.

225.171 Solicitations.

(a) For oral solicitations, inform prospective vendors that only domestic and qualifying country end products are acceptable, except nonqualifying country end products are acceptable if—

(1) The items are excepted either on a blanket or an individual basis; or

(2) The price of the nonqualifying country end product is the low offer under the evaluation procedures in subpart 225.5.

(b) When only domestic end products are acceptable, the solicitation must make a statement to that effect.

Subpart 225.2—Buy American Act—Construction Materials

225.202 Exceptions.

(a)(2) A nonavailability determination is not required for construction materials listed in FAR 25.104(a) or in 225.104(a)(iii). For other materials, a nonavailability determination must be approved at the levels specified in 225.103(b)(ii). Use the estimated value of the construction materials to determine the approval level.

[65 FR 19851, Apr. 13, 2000]

225.206 Noncompliance.

(c)(4) Prepare any report of noncompliance in accordance with the procedures at 209.406-3 or 209.407-3.

[64 FR 62986, Nov. 18, 1999]

Subpart 225.3—Balance of Payments Program

SOURCE: 65 FR 19851, Apr. 13, 2000, unless otherwise noted.

225.302 Policy.

(1) DoD implements the Balance of Payments Program using evaluation

225.302

factors similar to those which implement the Buy American Act. The Balance of Payments Program restrictions—

- (i) Apply to acquisitions for foreign military sales;
- (ii) Do not apply to services, except services which primarily involve the acquisition of supplies;
- (iii) Do not apply to qualifying country end products;
- (iv) Do not apply to articles, materials, or supplies produced or manufactured in Panama when purchased by and for the use of U.S. forces in Panama; and
- (v) For acquisitions subject to the Trade Agreements Act, do not apply to information technology products in Federal Supply Group 70 or 74 that are substantially transformed in the United States.

(2)(i) Before solicitation, the determinations required by FAR 25.303(b) may be made by the following individuals or their immediate deputies:

ARMY

- Deputy Chief of Staff for Research, Development and Acquisition, Headquarters, U.S. Army Material Command
- Commander in Chief, U.S. Army Europe and DCSLOG, U.S. Army, Europe
- Commander Eighth U.S. Army and Chief of Staff, Eighth U.S. Army
- Commander, Corps of Engineers Command
- Commander, U.S. Army, Japan
- Commander, U.S. Army Medical Research and Development Command
- Commander, U.S. Army Forces Command
- Commander, U.S. Army, South

NAVY

- Commander-in-Chief, U.S. Naval Forces, Europe
- Commander, U.S. Naval Forces, Japan
- Commander, U.S. Naval Forces, Philippines
- Commander-in-Chief, U.S. Atlantic Fleet
- Commander-in-Chief, U.S. Pacific Fleet
- Commander, Military Sealift Command
- Commandant, U.S. Marine Corps
- Commander, Naval Facilities Engineering Command
- Commanding General, III Marine Amphibious Force

AIR FORCE

- Commander, U.S. Air Forces in Europe
- Commander, Pacific Air Forces
- Commander, Air Mobility Command
- Commander, Air Force Materiel Command
- Commander, Air Combat Command
- Commander, Air Force Space Command

48 CFR Ch. 2 (10-1-01 Edition)

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**DEPARTMENT OF DEFENSE EDUCATION
ACTIVITY**

Director

(ii) The authority to make the determinations referred to in paragraph (2)(i) of this section may be redelegated below the levels specified in that paragraph for acquisitions estimated at 500,000 or less in foreign cost.

(3)(i) This authority is not intended for use in making repetitive supply acquisitions or acquisitions of total annual supply requirements of items available in the United States but not available within the time required.

(ii) DoD has determined that requirements for the items on the lists at FAR 25.104(a) and at 225.104(a)(iii) can only be filled by a foreign end product.

(4) DoD has determined the following items can only be acquired or performed in the country concerned:

(i) Maintenance and repair of, and acquisition of spare parts for, foreign-manufactured vehicles, equipment, machinery, and systems; provided, in the case of spare parts, the acquisition is restricted to the original manufacturer or its supplier in accordance with DoD standardization policy (see DoD Directive 4120.3, Defense Standardization and Specification Program).

(ii) Industrial gases.

(iii) Brand drugs specified by the Defense Medical Materiel Board.

(iv) Bulk construction materials: sand, gravel, and other soil materials, stone, concrete masonry units, and fired brick.

(v) Overhaul and repair of vessels, aircraft, and vehicles which—

(A) Are home-ported/stationed/deployed overseas; and

(B) Cannot practically return to the United States or to U.S. operated repair facilities.

(vi) Ready-mixed asphalt and portland cement concrete, provided that foreign cost is estimated at not more than \$100,000.

(5)(i) Purchase of materials, equipment, and supplies for construction overseas shall generally be the responsibility of the contractor performing the work; but where necessary to comply with foreign law, to avoid taxation, or to obtain other advantages, consider direct purchase. Consider savings that may be obtained by exemptions from import and other taxes and, to the extent economical, take advantage of tax exemptions available under existing agreements.

(ii) When purchase of materials is the responsibility of the construction contractor, the evaluation differential is determined through the estimating process and applied before solicitation.

225.304 Procedures.

(a) *Solicitation of offers.* When soliciting orally, advise vendors that only domestic and qualifying country end products are acceptable unless an exception applies or the price of a domestic end product is unreasonable.

(b) *Evaluation of offers.*

(i) Use the evaluation procedures in subpart 225.5 instead of the evaluation procedures in FAR subpart 25.5. Treatment of duty may differ when delivery is overseas.

(A) Duty may not be applicable to nonqualifying country offers.

(B) The U.S. Government cannot guarantee the exemption of duty for components or end products imported into foreign countries.

(C) Foreign governments may impose duties, and offers including such duties must be evaluated as offered.

(ii) Where the evaluation procedures in Subpart 225.5 result in the award of nonqualifying country end product, the acquisition of domestic end products is unreasonable or inconsistent with public interests. If no domestic end product offers are received, the determination in FAR 25.303(b)(1) is not required.

Subpart 225.4—Trade Agreements

SOURCE: 65 FR 19852, Apr. 13, 2000, unless otherwise noted.

225.401 Exceptions.

(b)(i) If a department or agency considers an individual acquisition of a product to be indispensable for national security or national defense purposes and appropriate for exclusion from the provisions of FAR subpart 25.4, it may submit a request with supporting rationale to the Director of Defense Procurement (USD (AT&L) DP).

(ii) The following national security/national defense exceptions do not require approval by USD (AT&L) DP:

(A) Where purchase from foreign sources is restricted by the DoD annual appropriations or authorization acts (see subpart 225.70) or by the establishment of required sources of supplies and services under FAR part 8.

(B) Where competition from foreign sources is restricted under the authority of FAR 6.302-3(a)(2)(i). Provide USD (AT&L) DP a copy of the justification for restricting competition (see FAR 6.303-1(d)).

(C) Where competition from foreign sources is restricted under subpart 225.71.

225.401-70 Products subject to trade agreement acts.

Foreign end products subject to the Trade Agreements Act and NAFTA are those in the following Federal supply groups (FSG). If a product is not in one of the listed groups, the Trade Agreements Act and NAFTA do not apply. The definition of Caribbean Basin country end products in FAR 25.003 excludes those end products that are not eligible for duty-free treatment under 19 U.S.C. 2703(b). However, 225.003 expands the definition of Caribbean Basin country end products to include petroleum and any product derived from petroleum. The list of products has been annotated to indicate those products that are eligible for designated and NAFTA countries, but are not presently eligible for Caribbean Basin countries.

225.402

48 CFR Ch. 2 (10-1-01 Edition)

FSG	Category/Description
22	Railway equipment
23	Motor vehicles, trailers, and cycles (except 2350 and buses under 2310)
24	Tractors
25	Vehicular equipment components
26	Tires and tubes
29	Engine accessories
30	Mechanical power transmission equipment
32	Woodworking machinery and equip- ment
34	Metalworking machinery
35	Service and trade equipment
36	Special industry machinery (except 3690)
37	Agricultural machinery and equip- ment
38	Construction, mining, excavating, and highway maintenance equip- ment
39	Materials handling equipment
40	Rope, cable, chain and fittings
41	Refrigeration and air conditioning equipment
42	Fire fighting, rescue and safety equipment
43	Pumps and compressors
44	Furnace, steam plant and drying equipment (except 4470)
45	Plumbing, heating, and sanitation equipment
46	Water purification and sewage treat- ment equipment
47	Piping, tubing, hose, and fitting
48	Valves
49	Maintenance and repair shop equip- ment (except 4920-4927, 4931-4935, 4960)
53	Hardware and abrasives
54	Prefabricated structures and scaf- olding
55	Lumber, millwork, plywood, and ve- neer
56	Construction and building materials
61	Electric wire, and power and dis- tribution equipment
62	Lighting fixtures and lamps
63	Alarm and signal systems
65	Medical, dental, and veterinary equipment and supplies
66	Instruments and laboratory equip- ment (except aircraft clocks under 6645)—See FAR 25.003 exclusion of certain watches and watch parts for certain Caribbean Basin countries
67	Photographic equipment
68	Chemicals and chemical products
69	Training aids and devices
70	General purpose ADPE, software, supplies, and support equipment
71	Furniture
72	Household and commercial fur- nishings and appliances
73	Food preparation and serving equip- ment

FSG	Category/Description
74	Office machines, visible record equip- ment and ADP equipment
75	Office supplies and devices
76	Books, maps, and other publications
77	Musical instruments, phonographs, and home type radios
78	Recreational and athletic equipment
79	Cleaning equipment and supplies
80	Brushes, paints, sealers, and adhe- sives
81	Containers, packaging and packing supplies (except 8140)
84	Luggage (only 8460)—See FAR 25.003 for exclusion of luggage for Carib- bean Basin countries
85	Toiletries
87	Agricultural supplies
88	Live animals
91	Fuels, oils, and waxes
93	Nonmetallic fabricated materials
94	Nonmetallic crude materials
96	Ores, minerals, and their primary products
99	Miscellaneous

225.402 General.

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

(2) See subpart 225.5 for evaluation of eligible products and U.S. made end products, except when acquiring information technology end products in Federal Supply Group 70 or 74 that are subject to the Trade Agreements Act.

225.403 Trade Agreements Act.

(c)(i) Except as provided in paragraphs (c)(ii) and (iii) of this section, do not purchase nondesignated country end products subject to the Trade Agreements Act unless they are NAFTA, Caribbean Basin, or qualifying country end products (see 225.872-1).

(ii) The prohibition in paragraph (c)(i) of this section does not apply when the contracting officer determines that offers of U.S. made, qualifying country, or eligible products from responsive, responsible offerors are either—

(A) Not received; or

(B) Insufficient to fill the Government's requirements.

In these cases, accept all responsive, responsible offers of U.S. made, qualifying country, and eligible products before accepting any other offers.

(iii) National interest waivers under section 302(b)(2) of the Trade Agreements Act are approved on a case-by-case basis. Except as delegated in paragraphs (c)(iii)(A) and (B) of this section, a request for a national interest waiver shall include supporting rationale and be submitted under department/agency procedures to the Director of Defense Procurement.

(A) The head of the contracting activity may approve a national interest waiver for a purchase by an overseas purchasing activity of products critical to the support of U.S. forces stationed abroad. The waiver must be supported by a written statement from the requiring activity stating that the requirement is critical for the support of U.S. forces stationed abroad.

(B) The Commander, Defense Energy Support Center, may approve national interest waivers for purchases of fuel for use by U.S. forces overseas.

§ 225.408 Procedures.

(a)(4) The requirements of FAR 25.408(a)(4) do not apply to offshore acquisitions or to Defense Energy Support Center post, camp, or station overseas requirements.

Subpart 225.5—Evaluating Foreign Offers—Supply Contracts

SOURCE: 65 FR 19853, Apr. 13, 2000, unless otherwise noted.

§ 225.502 Application.

Use the following procedures instead of those in FAR 25.502. These procedures do not apply to acquisitions of information technology end products in Federal Supply Group 70 or 74 that are subject to the Trade Agreements Act.

(1) Treat offers of eligible end products under acquisitions subject to the Trade Agreements Act or 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 a trade agreement (see 225.504(4)).

(2) Except as provided in paragraph (3) 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)).

(i) 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)).

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

(A) On an item-by-item basis; or

(B) On a group of items, if the solicitation specifically provides for award on a group basis.

(3) 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 country offer is lower than the domestic offer (see 225.504(2)), evaluate nonqualifying country offers without the 50 percent factor.

(i) 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.

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

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

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

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

(B) 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.

(ii) Because of the component test, the definition of "domestic end production" is more restrictive than the definition for—

(A) "U.S. made end product" under trade agreements;

(B) "Domestically produced or manufactured products" under small business set-asides or small business reservations; and

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

(iii) If an offer is for a "U.S. made end product," "domestically produced end product," or the product of a small business, but is not a "domestic end product" as defined in the clause at 252.225-7001, Buy American Act and Balance of Payments Program, treat the offer as a nonqualifying country offer (see 225.504(4)).

225.504 Evaluation examples.

(1) Example 1.

(i) Alternate I: Duty Not Exempted for Nonqualifying Country Offers:

Nonqualifying Country Offer	
(including \$100 duty)	\$6,000
Domestic Offer	8,900
Qualifying Country Offer	9,100

Award on Domestic Offer. The 50% evaluation factor is added to the nonqualifying country offer, inclusive of duty, yielding an evaluated price of \$9,000.

(ii) Alternate II: Duty Exempted:

Nonqualifying Country Offer	
(including \$1,000 duty)	\$600,000
Domestic Offer	910,000
Qualifying Country Offer	920,000

Award on Nonqualifying Country Offer. The addition of the evaluation factor yields an evaluated price of \$900,000. Since duty is being exempted for nonqualifying country offers, the duty is subtracted from the offered price, which is awarded at \$599,000.

(2) Example 2.

(i) Alternate I: Duty Not Exempted for Nonqualifying Country Offers:

Nonqualifying Country Offer	
(including \$100 duty)	\$6,000

Domestic Offer	8,500
Qualifying Country Offer	7,800

Award on Nonqualifying Country Offer. Since the qualifying country offer is lower than the domestic offer, the nonqualifying country offer is evaluated without the factor. Since duty is not being exempted for nonqualifying country offers, the offer is evaluated and award is made at the price inclusive of duty (\$6,000).

(ii) Alternate II: Duty Exempted:

Nonqualifying Country Offer	
(including \$1,000 duty)	\$880,500
Domestic Offer	950,000
Qualifying Country Offer	880,000

Award on Nonqualifying Country Offer. Again, the qualifying country offer is lower than the domestic offer. The nonqualifying country offer is, therefore, evaluated without the factor. Since duty is being exempted for nonqualifying country offers, the duty identified by the offeror is subtracted from the offered price, which is evaluated and awarded at \$879,500.

(3) Example 3.

(i) Alternate I: Duty Not Exempted for Nonqualifying Country Offers:

Nonqualifying Country Offer	
(including \$150 duty)	\$9,600
Qualifying Country Offer	9,500

Award on Qualifying Country Offer. Since no domestic offers are received, the nonqualifying country offer is evaluated without the evaluation factor. Since duty is not being exempted and would be paid by the Government, the nonqualifying country offer is evaluated inclusive of duty.

(ii) Alternate II: Duty Exempted:

Nonqualifying Country Offer	
(including \$1,000 duty)	\$880,500
Qualifying Country Offer	880,000

Award on Nonqualifying Country Offer. Since no domestic offers are received, the nonqualifying country offer is evaluated without the evaluation factor. Since duty is being exempted, duty is subtracted from the nonqualifying country offer, which is evaluated and awarded at \$879,500.

(4) Example 4.

(i) Alternate I:

Offer of U.S. Made End Product	
which is not a Domestic Offer	\$800,000
Domestic Offer	820,000
Eligible Product	830,000

Department of Defense

225.771-2

Award on Domestic End Product. U.S. made end products which are not also domestic end products are evaluated the same as nonqualifying country end products. Adding the 50% evaluation factor yields an evaluated price of \$1,200,000.

(ii) Alternate II:

Offer of U.S. Made End Product which is not a Domestic Offer	\$800,000
Eligible Product	820,000
Domestic Offer	830,000

Award on U.S. Made End Product. Adding the 50% evaluation factor to the U.S. made end product would not result in the award of a domestic end product since the eligible product, which is evaluated the same as a qualifying country offer, is lower. All offers are evaluated without the factor.

Subpart 225.7—Prohibited Sources

225.701 Restrictions.

See 209.104-1(g)(i) for restrictions on contracting with firms owned or controlled by foreign governments that support terrorism. See 209.104-1(g)(ii) for prohibition on award of a DoD contract under a national security program to an entity controlled by a foreign government when access to proscribed information is required to perform the contract.

[59 FR 51133, Oct. 7, 1994. Redesignated at 65 FR 19854, Apr. 13, 2000]

225.770 Secondary Arab boycott of Israel.

225.770-1 Restriction.

In accordance with 10 U.S.C. 2410i, do not enter into a prime contract with a foreign person, company, or entity unless it has certified that it does not comply with the secondary Arab boycott of Israel.

[58 FR 28467, May 13, 1993]

225.770-2 Procedures.

For contracts awarded to the Canadian Commercial Corporation (CCC), the CCC will submit a certification from its proposed subcontractor with the other required precontractual material (see 225.870).

[57 FR 53599, Nov. 12, 1992]

225.770-3 Exceptions.

The restriction does not apply to—

(a) Purchases at or below the simplified acquisition threshold;

(b) Contracts for consumable supplies, provisions, or services for the support of the United States or of allied forces in a foreign country; or

(c) Contracts pertaining to any equipment, technology, data, or services for intelligence or classified purposes, or the acquisition or lease thereof in the interest of national security.

[57 FR 53599, Nov. 12, 1992, as amended at 64 FR 2598, Jan. 15, 1999]

225.770-4 Waivers.

The Secretary of Defense may waive the restriction on the basis of national security interests. Waiver requests should be forwarded to the Director of Defense Procurement, Office of the Under Secretary of Defense (Acquisition, Technology, and Logistics).

[57 FR 53599, Nov. 12, 1992, as amended at 60 FR 61597, Nov. 30, 1995; 65 FR 39705, June 27, 2000]

225.770-5 Solicitation provision and contract clause.

Unless an exception applies or a waiver has been granted, use the clause at 252.225-7031, Secondary Arab Boycott of Israel, in all solicitations and contracts.

[57 FR 53599, Nov. 12, 1992]

225.771 Prohibition on acquisition from the People’s Republic of China.

225.771-1 Definition.

“People’s Republic of China” is defined in the provision at 252.225-7017, Prohibition on Award to Companies Owned by the People’s Republic of China.

[64 FR 8728, Feb. 23, 1999]

225.771-2 Legal authority.

This section implements Section 8120 of the DoD Appropriations Act for fiscal year 1999 (Pub. L. 105-262), as amended by Section 144 of Title I, Division C, of the Omnibus Consolidated

225.771-3

and Emergency Supplemental Appropriations Act, 1999 (Pub. L. 105-277).

[65 FR 6554, Feb. 10, 2000]

225.771-3 Prohibition on contract award.

If using fiscal year 1999 funds made available by Title III (Procurement) or Title IV (Research, Development, Test and Evaluation) of Pub. L. 105-262, do not award or renew a contract with any company in which the Director of Defense Procurement has determined that the People's Republic of China or the People's Liberation Army of the People's Republic of China owns more than 50 percent interest.

[65 FR 6554, Feb. 10, 2000]

225.771-4 Procedures.

(a) Forward any information that the People's Republic of China or the People's Liberation Army of the People's Republic of China owns more than 50 percent interest in a company, through the head of the agency, to the Director, Defense Procurement, ATTN: OUSD (AT&L) DP/FC, 3060 Defense Pentagon, Washington, DC 20301-3060.

(b) Upon verification of the information, the Director of Defense Procurement will ask the General Services Administration to list the company as ineligible on the List of Parties Excluded from Federal Procurement and Non-procurement Programs.

[65 FR 6554, Feb. 10, 2000]

225.771-5 Solicitation provision.

Use the provision at 252.225-7017, Prohibition on Award to Companies Owned by the People's Republic of China, in solicitations for contracts that will use fiscal year 1999 funds made available by Title III or IV of Pub. L. 105-262.

[65 FR 6554, Feb. 10, 2000]

Subpart 225.8—Other International Agreements and Coordination

225.801 General.

(1) Treaties and agreements between the U.S. and foreign governments affect both—

(i) The way offers from foreign contractors are evaluated in DoD acquisitions; and

48 CFR Ch. 2 (10-1-01 Edition)

(ii) Performance of DoD contracts in foreign countries.

(2) This subpart covers acquisition policy and procedures based on treaties and international agreements.

(3) Information on specific agreements is available as follows—

(i) Memoranda of understanding (MOU) and other international agreements between the United States and the countries listed in 225.872-1 are maintained in the Office of the Deputy Assistant Secretary of Defense (Procurement) (Foreign Contracting) (703) 697-9351, DSN 227-9351).

(ii) Military Assistance Advisory Groups, Naval Missions, and Joint U.S. Military Aid Groups normally have copies of the agreements applicable to the countries concerned.

(iii) Copies of international agreements covering existing agreements in the United Kingdom of Great Britain and Northern Ireland, Western European countries, North Africa, and in the Middle East are filed with the U.S. European Command (EUCOM).

(iv) Agreements with countries in the Pacific and Far East are filed with the U.S. Pacific Command (CINCPAC).

225.802 Procedures.

225.802-70 Contracts for performance outside the United States and Canada.

(a) When a purchasing activity anticipates placement of a contract for performance outside the United States or Canada and the contracting activity is not under the command jurisdiction of a unified or specified command for the country involved, the purchasing activity shall maintain liaison with the cognizant contract administration office (CAO) during preaward negotiations and postaward administration. The CAO will provide pertinent information for contract negotiations, effect appropriate coordination, and obtain required approvals for the performance of the contract.

(b) Where the acquisition requires the performance of work in the foreign country by U.S. personnel or a third country contractor, or where the acquisition will require logistics support for contract employees, source inspection, or additional Government employees—

Department of Defense

225.870-1

(1) The contracting activity must coordinate with the cognizant contract administration office before contract award.

(2) The contracting officer shall request the following information from the contract administration office—

(i) The applicability of any international agreements to the acquisition;

(ii) Security requirements applicable to the area;

(iii) The standards of conduct required to be observed by the prospective contractor and its employees, and any action that may be taken in the event required standards are not maintained;

(iv) Requirements for use of foreign currencies, including applicability of U.S. holdings of excess foreign currencies;

(v) Availability of logistics support for contractor employees; and

(vi) Information on taxes and duties from which the Government may be exempt.

(3) The contracting officer shall furnish the following information to the contract administration office—

(i) A synopsis of the work to be performed and, if practical, a copy of the solicitation;

(ii) Any contractor logistical support desired in support of U.S. or foreign military sale requirements;

(iii) Contract performance period and estimated contract value;

(iv) Number and nationality of contractor employees and date of planned arrival of contractor personnel;

(v) Contract security requirements; and

(vi) Other pertinent information to effect complete coordination and cooperation.

[56 FR 36367, July 31, 1991, as amended at 65 FR 52952, Aug. 31, 2000]

225.802-71 End user certificates.

Contracting officers considering the purchase of an item from a foreign source may encounter a request for the signing of a certificate to the effect that the Armed Forces of the United States is the end user of the equipment, and that it will not be transferred to third parties without authorization from the Government of the country selling the item. When encoun-

tering this situation, refer to DoD Directive 2040.3, End User Certificates, for guidance.

[57 FR 42630, Sept. 15, 1992]

225.870 Contracting with Canadian contractors.

225.870-1 General.

(a) The Canadian Government guarantees to the U.S. Government all commitments, obligations, and covenants of the Canadian Commercial Corporation under any contract or order issued to the Corporation by any contracting activity of the U.S. Government. The Canadian Government has waived notice of any change or modification which may be made, from time to time, in these commitments, obligations, or covenants.

(b) For production planning purposes, Canada is considered to be part of the defense industrial base (see 225.870-2(b)).

(c) Contracts with contractors located in Canada should be awarded to and administered by the Canadian Commercial Corporation, except for—

(1) Negotiated purchases for experimental, developmental, or research work unless the contract is for a project under the Defense Development Sharing Program;

(2) Purchases of unusual or compelling urgency;

(3) Small purchases; or

(4) Purchases made by DoD activities located in Canada.

(d) The Canadian Commercial Corporation, in placing contracts with Canadian or U.S. concerns, uses provisions in the contracts that give DoD the same production rights, data, and information that DoD would obtain in contracts with U.S. concerns.

(e) When contracts are placed with the Canadian Commercial Corporation, the government of Canada will provide the following services, without charge to DoD departments and agencies—

(1) *Contract administration services*, including—

(i) Cost and pricing analysis;

(ii) Industrial security;

(iii) Accountability and disposal of Government property;

(iv) Production expediting;

225.870-2

(v) Compliance with Canadian labor laws;

(vi) Processing termination claims and disposing of termination inventory;

(vii) Customs documentation;

(viii) Processing of disputes and appeals; and

(ix) Such other related contract administration functions as may be required with respect to the Canadian Commercial Corporation contract with the Canadian supplier; and

(2) *Audits.* When required, audits are performed by the Audit Service Group, Supply and Services Canada. Requests for audit on non-Canadian Commercial Corporation contracts should be routed through the cognizant contract management office of the Defense Contract Management Agency.

(3) *Inspection.* The Department of National Defence (Canada) provides inspection personnel, services, and facilities, at no charge to DoD departments and agencies (see 225.870-7).

[56 FR 36367, July 31, 1991, as amended at 65 FR 52952, Aug. 31, 2000]

225.870-2 Solicitation of Canadian contractors.

(a) Except for the acquisitions in 225.870-1(c) (1) through (4), include Canadian firms on bidders mailing lists and comparable source lists only at the request of the Canadian Commercial Corporation.

(b) Include Canadian planned producers under the Industrial Readiness Planning Program on bidders mailing lists for their planned items (see FAR 14.205-1).

(c) Send solicitations directly to Canadian firms appearing on the appropriate bidders mailing lists. Send a complete copy of the solicitation and a listing of Canadian firms solicited to the Canadian Commercial Corporation, 11th Floor, 50 O'Connor Street, Ottawa, Ontario, K1A-0S6, Canada.

(d) Furnish a solicitation, if requested, to the Canadian Commercial Corporation even if no Canadian firm is solicited.

(e) Handle small purchases (see FAR part 13) directly with Canadian firms

48 CFR Ch. 2 (10-1-01 Edition)

and not through the Canadian Commercial Corporation.

[56 FR 36367, July 31, 1991, as amended at 57 FR 42630, Sept. 15, 1992]

225.870-3 Submission of offers.

(a) As indicated in 225.870-4, the Canadian Commercial Corporation is the prime contractor. To indicate acceptance of offers by individual Canadian companies, the Canadian Commercial Corporation issues a letter, supporting the Canadian offer, containing the following information—

(1) Name of the Canadian offeror;

(2) Confirmation and endorsement of the offer in the name of the Canadian Commercial Corporation; and

(3) A statement that the Corporation shall subcontract 100 percent with the offeror.

(b) When a Canadian offer cannot be processed through the Canadian Commercial Corporation in time to meet the bid-opening requirement or the closing date for receipt of proposals, the Corporation may permit Canadian firms to submit offers directly. The Canadian Commercial Corporation's endorsement of award, however, must be received by the contracting officer before contract award.

(c) All sealed bids will be submitted by the Canadian Commercial Corporation in terms of U.S. currency. Do not adjust contracts awarded under sealed bidding for losses or gains from fluctuation in exchange rates.

(d) Except for sealed bids, all offers and quotations submitted by the Canadian Commercial Corporation are normally in terms of Canadian currency. The Corporation may, at the time of submitting an offer, elect to quote and receive payment in terms of U.S. currency, in which case the contract shall—

(1) Provide for payment in U.S. currency; and

(2) Shall not be adjusted for losses or gains from fluctuation in exchange rates.

225.870-4 Contracting procedures.

(a) Award individual contracts covering purchases from suppliers located in Canada, except for those in 225.870-1(c)(1) through (4), to the Canadian Commercial Corporation, 11th Floor, 50

Department of Defense

225.870-8

O'Connor Street, Ontario, Canada, K1A-0S6.

(b) Direct communication with the Canadian supplier is authorized and encouraged in connection with all technical aspects of the contract; provided, that the Corporation's approval is obtained on any matters involving changes to the contract.

(c) Identify in the contract, the type of currency, i.e., U.S. or Canadian. Contracts that provide for payment in Canadian currency shall quote the contract price in terms of Canadian dollars and shall identify the amount by the initials CN; e.g., \$1,647.23CN. The contract shall clearly indicate on its face the U.S./Canadian conversion rate at the time of award and the U.S. dollar equivalent of the Canadian dollar contract amount.

[56 FR 36367, July 31, 1991, as amended at 57 FR 42630, Sept. 15, 1992]

225.870-5 Contract administration.

(a) Assign contract administration in accordance with part 242. When contract administration is performed in Canada by the cognizant contract management office of the Defense Contract Management Agency, the paying office to be named in the contract for disbursement of DoD funds (DoD Department Code: 17-Navy; 21-Army; 57-Air Force; 97-all other DoD components), whether payment is in Canadian or U.S. dollars, shall be: DFAS-Columbus Center, DFAS-CO/New Dominion Division, PO Box 182041, Columbus, OH 43218-2041.

(b) For cost-reimbursement type contracts—

(1) Audits on contracts with the Canadian Commercial Corporation (CCC) are automatically arranged by the Department of Supplies and Services (DSS), Canada. Audit reports are furnished to DSS. Upon advice from DSS, the CCC will certify the invoice and forward it with SF 1034, Public Voucher, to the administrative contracting officer for further processing and transmittal to the disbursing office.

(2) On contracts placed directly with Canadian firms, the administrative contracting officer requests audits from the Audit Services Bureau (ASB), Ottawa, Ontario, Canada.

(i) Invoices are approved by the ASB/DSS auditor on a provisional basis pending completion of the contract and final audit.

(ii) The ASB/DSS forwards these invoices, accompanied by SF 1034, Public Voucher, to the administrative contracting officer for further processing and transmittal to the disbursing officer.

(iii) ASB/DSS furnishes periodic advisory audit reports directly to the administrative contracting officer.

[56 FR 36367, July 31, 1991, as amended at 65 FR 52952, Aug. 31, 2000]

225.870-6 Termination procedures.

(a) The Canadian Commercial Corporation will continue administering contracts that may be terminated by the U.S. contracting officer.

(b) The Corporation will settle all Canadian subcontracts in accordance with the policies, practices, and procedures of the Canadian Government.

(c) The U.S. agency administering the contract with the Canadian Commercial Corporation shall provide any services required by the Canadian Commercial Corporation, including disposal of inventory, for settlement of any subcontracts placed in the United States. Settlement of such U.S. subcontracts is made under this regulation.

225.870-7 Acceptance of Canadian supplies.

(a) When contracts placed in Canada, either with the Canadian Commercial Corporation or directly with Canadian suppliers, require contract quality assurance (CQA) and/or acceptance before shipment, CQA and/or acceptance, as applicable, will be performed by the Department of National Defence (Canada), under paragraph 6 of the Letter of Agreement.

(b) Signature by the Department of National Defence (Canada) quality assurance representative on the DoD inspection and acceptance form is satisfactory evidence of acceptance for payment purposes.

225.870-8 Industrial security.

Industrial security for Canada shall be in accordance with the U.S.-Canada Industrial Security Agreement of March 31, 1952, as amended.

225.871

48 CFR Ch. 2 (10-1-01 Edition)

225.871 North Atlantic Treaty Organization (NATO) cooperative projects.

225.871-1 Scope.

(a) This section provides guidance on awarding contracts based on NATO cooperative projects.

(b) The authority is 22 U.S.C. 2767 and 10 U.S.C. 2350b.

225.871-2 Definitions.

(a) *Cooperative project* means a jointly managed arrangement—

(1) Described in a written agreement between the parties;

(2) Undertaken to further the objectives of standardization, rationalization, and interoperability of the armed forces of North Atlantic Treaty Organization member countries; and

(3) Providing for—

(i) One or more of the other participants to share with the United States the cost of research and development, testing, evaluation, or joint production (including follow-on support) of certain defense articles;

(ii) Concurrent production in the United States and in another member country of a defense article jointly developed; or

(iii) Acquisition by the United States of a defense article or defense service from another member country.

(b) *Other participant* means a cooperative project participant other than the United States.

225.871-3 General.

(a) Cooperative project authority. (1) Departments or agencies, that have authority to do so, may enter into a cooperative project agreement with NATO or with one or more member countries of that organization under DoD Directive 5530.3, International Agreements.

(2) Under laws and regulations governing the negotiation and implementation of cooperative project agreements, departments and agencies may enter into contracts, or incur other obligations, on behalf of other participants without charge to any appropriation or contract authorization.

(3) Agency heads have authority to solicit and award contracts to implement cooperative projects.

(b) Contracts implementing cooperative projects shall comply with all ap-

plicable laws relating to Government acquisition, unless a waiver is granted under 225.871-4. A waiver of certain laws and regulations may be obtained if—

(1) Required by the terms of a written cooperative project agreement;

(2) It will significantly further NATO standardization, rationalization, and interoperability; and

(3) It is approved by the appropriate DoD official.

225.871-4 Statutory waivers.

(a) The Deputy Secretary of Defense may waive for contracts or subcontracts placed outside the United States any provision of law that specifically prescribes—

(1) Procedures for the formation of contracts;

(2) Terms and conditions for inclusion in contracts;

(3) Requirements for, or preferences to be given—

(i) To goods grown, produced, or manufactured in the United States or in U.S. Government-owned facilities; or

(ii) For services to be performed in the United States; or

(4) Requirements regulating the performance of contracts.

(b) There is no authority for waiver of—

(1) Any provision of the Arms Export Control Act (22 U.S.C. 2751);

(2) Any provision of 10 U.S.C. 2304;

(3) The cargo preference laws of the United States, including the Military Cargo Preference Act of 1904 (10 U.S.C. 2631) and the Cargo Preference Act of 1954 (46 U.S.C. 1241(b)); or

(4) Any of the financial management responsibilities administered by the Secretary of the Treasury.

(c) If a waiver is contemplated under the terms of a cooperative project agreement, forward a request for the waiver to the Deputy Secretary of Defense, through the Director of Defense Procurement. The waiver request must include a draft Determination and Findings for signature by the Deputy Secretary of Defense establishing that the waiver is necessary to significantly further NATO standardization, rationalization, and interoperability.

Department of Defense

225.872-1

(d) The approval of the Deputy Secretary of Defense must be obtained before committing to make waivers in an agreement or an amendment to an agreement or contract.

225.871-5 Directed subcontracting.

(a) The Director of Defense Procurement may authorize the direct placement of subcontracts with particular subcontractors. Directed subcontracting is not authorized unless specifically addressed in the cooperative project agreement.

(b) In some instances, it may not be feasible to name specific subcontractors at the time the agreement is concluded. The general provisions for work sharing at the prime and subcontractor level, however, must be clearly delineated in the agreement. This will provide the authority necessary to implement such arrangements during the acquisition phase.

(c) The agreement is the authority necessary for including a contractual provision requiring the prime contractor to place certain subcontracts with particular subcontractors. No separate justification and approval during the acquisition process is required.

225.871-6 Disposal of property.

Dispose of property that is jointly acquired by the members of a cooperative project under the procedures established in the agreement or in a manner consistent with the terms of the agreement.

225.871-7 Congressional notification.

(a) Congress must be notified whenever DoD determines to award a prime contract or subcontract to a particular contractor if the determination was not part of the certification made under Section 27(f) of the Arms Export Control Act before finalizing the cooperative agreement.

(1) Departments and agencies must provide a proposed Congressional notice to the Director of Defense Procurement, Office of the Under Secretary of Defense (Acquisition, Technology, and Logistics), in sufficient time to forward to Congress before the time of contract award.

(2) The proposed notice shall include the reason why the authority to des-

ignate a particular contractor or subcontractor should be used.

(b) Congressional notification is also required each time a statutory waiver is exercised under 225.871-4, if such information was not provided in the certification to Congress before finalizing the cooperative agreement. Exercise of the waiver means a contract award or modification which provides for a statutory exception.

[56 FR 36367, July 31, 1991, as amended at 60 FR 61597, Nov. 30, 1995; 65 FR 39705, June 27, 2000]

225.872 Contracting with qualifying country sources.

225.872-1 General.

(a) As a result of memoranda of understanding and other international agreements, the DoD has determined it inconsistent with the public interest to apply restrictions of the Buy American Act/Balance of Payments Program to the acquisition of defense equipment which is mined, produced, or manufactured in any of the following countries (referred to in this part as "qualifying countries")—

Australia
Belgium
Canada
Denmark
Egypt
Federal Republic of Germany
France
Greece
Israel
Italy
Luxembourg
Netherlands
Norway
Portugal
Spain
Turkey
United Kingdom of Great Britain and Northern Ireland

(b) Individual acquisitions for products of the following qualifying countries may, on a purchase-by-purchase basis, be exempted from application of the Buy American Act and Balance of Payments Program as inconsistent with the public interest—

Austria
Finland
Sweden
Switzerland

225.872-2

(c) The determination in paragraph (a) of this subsection does not limit the authority of the cognizant Secretary to restrict acquisitions to domestic sources or reject an otherwise acceptable offer from a qualifying country source in instances where considered necessary for national defense reasons.

[56 FR 36367, July 31, 1991, as amended at 57 FR 53599, Nov. 12, 1992; 60 FR 61597, Nov. 30, 1995; 62 FR 34122, June 24, 1997; 63 FR 5745, Feb. 4, 1998]

225.872-2 Applicability.

(a) This section applies to all acquisitions of supplies except where restricted by—

(1) Provision of U.S. National Disclosure Policy (NDP), DOD Directive 5230.11, Disclosure of Classified Military Information to Foreign Governments and International Organizations;

(2) U.S. defense mobilization base requirements purchased under the authority of FAR 6.302-3(a)(2)(i) except for quantities in excess of that required to maintain the defense mobilization base. This restriction does not apply to Canadian planned producers—

(i) Review individual solicitations to determine whether this restriction applies.

(ii) Information concerning restricted items may be obtained from the Deputy Under Secretary of Defense (Industrial Affairs);

(3) Other U.S. laws or regulations (e.g., the annual defense appropriations act); and

(4) U.S. industrial security requirements.

(b) This section does not apply to construction contracts.

[56 FR 36367, July 31, 1991, as amended at 60 FR 61597, Nov. 30, 1995; 62 FR 34123, June 24, 1997; 65 FR 39705, June 27, 2000]

225.872-3 Solicitation procedures.

(a) Include qualifying country sources on bidders mailing lists and comparable source lists upon their request (see FAR 14.205).

(b) Except for items developed under the U.S./Canadian Development Sharing Program, use the criteria for soliciting and making awards under FAR part 19 for small business concerns without regard to whether there are potential qualifying country sources

48 CFR Ch. 2 (10-1-01 Edition)

for the end product. Do not consider an offer of a qualifying country end product if the solicitation is identified for the exclusive participation of small business firms.

(c) Send solicitations directly to qualifying country sources. Solicit Canadian sources through the Canadian Commercial Corporation in accordance with 225.870.

(d) Use international air mail if solicitation destinations are outside the United States and security classification permits such use (see FAR 14.202 and FAR 14.203).

(e) If unusual technical or security requirements preclude the acquisition of otherwise acceptable defense equipment from qualifying country sources, review the need for such requirements. Do not impose unusual technical or security requirements solely for the purpose of precluding the acquisition of defense equipment from qualifying countries.

(f) Do not automatically exclude qualifying country sources from submitting offers because their supplies have not been tested and evaluated by the department/agency.

(1) Consider the adequacy of qualifying country service testing on a case-by-case basis. Departments or agencies that must limit solicitations to sources whose items have been service tested and evaluated by the department/agency shall consider supplies from qualifying country sources that have been tested and accepted by the qualifying country for service use.

(2) The department/agency may perform a confirmatory test, if necessary.

(3) Apply U.S. test and evaluation standards, policies, and procedures when the department/agency decides that confirmatory tests of qualifying country end products are necessary.

(4) Where it appears that these provisions might adversely delay service programs, obtain the concurrence of the DoD Acquisition Executive, Under Secretary of Defense (Acquisition, Technology, and Logistics), before excluding the qualifying country source from consideration.

(g) Permit industry representatives from a qualifying country to attend symposia, program briefings, prebid conferences (see FAR 14.207 and

Department of Defense

225.872-4

15.201(c)), and similar meetings that address U.S. defense equipment needs and requirements. When practical, structure these meetings to allow attendance by representatives of qualifying country concerns.

[56 FR 36367, July 31, 1991, as amended at 60 FR 61597, Nov. 30, 1995; 63 FR 55052, Oct. 14, 1998; 65 FR 39705, June 27, 2000]

225.872-4 Evaluation of offers.

(a) Qualifying country sources competing for DoD requirements must be responsive to the terms and conditions of DoD solicitations.

(b) Evaluate offers of end products from the qualifying country sources in 225.872-1(a) without application of the 50 percent Buy American Act or Balance of Payments Program evaluation factor, in accordance with 225.304 and 225.502.

(c) Evaluate offers of end products from the qualifying country sources in 225.872-1(b) without application of the 50 percent Buy American Act or Balance of Payments Program evaluation factor. If the offer, as evaluated, is low or otherwise eligible for award, the contracting officer shall request an exemption of the Buy American Act/Balance of Payments Program as inconsistent with the public interest, unless another exception such as the Trade Agreements Act applies.

(1) To obtain an exemption, process a Determination and Findings for signature—

(i) At a level above the contracting officer, for acquisitions of \$25,000 or less;

(ii) By the chief of the contracting office, for acquisitions of \$250,000 or less;

(iii) By the head of the contracting activity (HCA), for acquisitions of \$2 million or less; or

(iv) By the head of the agency, or designee at a level no lower than an HCA, for acquisitions over \$2 million.

(2) The Determination and Findings shall be substantially as follows for end items, or modified as necessary for components—

SERVICE OR AGENCY

Exemption of the Buy American Act/Balance of Payments Program

Determination and Findings

Upon the basis of the following findings and determination which I hereby make in accordance with the provisions of FAR 25.102, acquisition of (*qualifying country—identify country*) (*describe item*) may be made as provided below.

Findings

1. The (*contracting activity*) proposes to purchase under contract number, _____, mined, produced, or manufactured in (*country of origin*). The total estimated cost of this acquisition is _____.

2. The United States Government and the Government of _____ have agreed to remove barriers to procurement at the prime and subcontract level for defense equipment produced in each other's countries insofar as laws and regulations permit.

3. The agreement provides that competitive offers of (*qualifying country*) end products will be evaluated by the Department of Defense without imposing any price differential under the Buy American Act or Balance of Payments Program and without taking applicable U.S. customs and duties into consideration so that (*qualifying country*) items may better compete for sales of defense equipment to the Department of Defense. In addition, the Agreement stipulates that acquisitions of (*qualifying country*) items must fully satisfy Department of Defense requirements for performance, quality, and delivery and shall cost the Department of Defense no more than would comparable U.S. source or other foreign source defense equipment eligible for award.

4. To achieve the above objectives, the solicitation contained the (*title and number of the Buy American Act clause contained in the contract*). Offers were solicited from other sources and the offer received for (*qualifying country end item*) is found to be otherwise eligible for award.

Determination

Pursuant to the Buy American Act and Balance of Payments Program, I hereby determine that it is inconsistent with the public interest to apply the restrictions of the Buy American Act or the Balance of Payments Program to the proposed offer.

225.872-5

(Date)

[56 FR 36367, July 31, 1991, as amended at 57 FR 42630, Sept. 15, 1992; 63 FR 11534, Mar. 9, 1998; 65 FR 39705, June 27, 2000]

225.872-5 Contract administration.

(a) Arrangements exist with some qualifying countries to provide reciprocal contract administration services. Some arrangements are at no cost to either government. To determine whether such an arrangement has been negotiated and what contract administration functions are covered, contact the Deputy Director of Defense Procurement (Foreign Contracting), ((703) 697-9351, DSN 227-9351).

(b) When contract administration services are required on contracts to be performed in qualifying countries, direct the request to the cognizant activity under DLAH 4105.4, section II, part 2 (DoD Directory of Contract Administration Services Components). Contract administration services for DoD subcontracts placed by qualifying country sources in the United States will be arranged by the cognizant activity under DLAH 4105.4, section II, part 2.

(c) The contract administration activity receiving a delegation or secondary delegation shall review the delegation to determine whether any portion of the delegation are covered by memoranda of understanding annexes, and delegate those functions to the appropriate organization in the qualifying country's government.

(d) Information on quality assurance delegations to foreign governments is in subpart 246.4, Government Contract Quality Assurance.

[56 FR 36367, July 31, 1991, as amended at 60 FR 29498, June 5, 1995]

225.872-6 Audit.

(a) Memoranda of understanding with some qualifying countries contain annexes that provide for reciprocal "no-cost" audits of contracts and subcontracts (pre- and post-award).

(b) To determine if such an annex is applicable to a particular qualifying country, contact the Deputy Director of Defense Procurement (Foreign Con-

48 CFR Ch. 2 (10-1-01 Edition)

tracting), ((703) 697-9351/2/3, DSN 227-9351/2/3).

(c) Handle requests for audits in qualifying countries under 215.404-2(c).

(1) Except for the United Kingdom (UK), send the request to the administrative contracting officer at the cognizant activity listed in Section 2B of the Federal Directory of Contract Administration Services Components. Send the request for audit from the UK directly to their Ministry of Defence.

(2) Send an advance copy of the request to the focal point identified by the Foreign Contracting Directorate, Office of the Director of Defense Procurement.

[56 FR 36367, July 31, 1991, as amended at 60 FR 29498, June 5, 1995; 63 FR 55052, Oct. 14, 1998; 64 FR 61028, Nov. 9, 1999]

225.872-7 Industrial security for qualifying countries.

The required procedures for safeguarding classified defense information necessary for the performance of contracts awarded to qualifying country sources are in the DoD Industrial Security Regulation DoD 5220.22-R (implemented for the Army by AR 380-49; for the Navy by SECNAV Instruction 5510.1H; for the Air Force by AFI 31-601; for the Defense Information Systems Agency by DCA Instruction 240-110-8; and for the National Imagery and Mapping Agency by NIMA Instruction 5220.22).

[56 FR 36367, July 31, 1991, as amended at 56 FR 67215, Dec. 30, 1991; 64 FR 51076, Sept. 21, 1999; 64 FR 61029, Nov. 9, 1999]

225.872-8 Subcontracting with qualifying country sources.

In reviewing contractor subcontracting procedures, the contracting officer shall ensure that the prime contract does not preclude qualifying country sources from competing for subcontracts, except when restricted by national security interest reasons, mobilization base considerations, or applicable U.S. laws or regulations. (See the clause at 252.225-7002, Qualifying Country Sources as Subcontractors.)

Department of Defense

225.902

225.873 Waiver of United Kingdom commercial exploitation levies.

Subpart 225.9—Customs and Duties

225.873-1 Policy.

DoD and the Government of the United Kingdom (U.K.) have agreed to waive U.K. commercial exploitation levies and U.S. nonrecurring cost recoupment charges on a reciprocal basis. In order for U.K. levies to be waived, they must be identified and a waiver must be requested before award of the contract or subcontract under which the levies are charged.

[57 FR 53599, Nov. 12, 1992]

225.873-2 Procedures.

(a) Waiver of U.K. levies must be approved by the Government of the U.K. When an offeror or contractor identifies a levy included in an offered or contract price, the contracting officer shall provide written notification to the Defense Security Cooperation Agency, Attn: PSD-PMD, 1111 Jefferson Davis Highway, Arlington, VA 22202-4306, telephone (703) 601-3864. The Defense Security Cooperation Agency will request a waiver of the levy from the Government of the U.K. The notification shall include—

- (1) Name of the U.K. firm;
- (2) Prime contract number;
- (3) Description of item for which waiver is being sought;
- (4) Quantity being acquired; and
- (5) Amount of levy.

(b) Waiver may occur after contract award. Where levies are waived before contract award, the offer will be evaluated without the levy. Where levies are identified but not waived before contract award, the offer will be evaluated inclusive of the levies.

[57 FR 53599, Nov. 12, 1992, as amended at 64 FR 51076, Sept. 21, 1999]

225.873-3 Contract clause.

Use the clause at 252.225-7032, Waiver of United Kingdom Levies, in all solicitations and contracts for supplies—

(a) Where U.K. firms are expected to participate as offerors/prime contractors; or

(b) If a subcontract over \$1 million with a U.K. firm is anticipated.

[57 FR 53599, Nov. 12, 1992]

SOURCE: 65 FR 19855, Apr. 13, 2000, unless otherwise noted.

225.901 Policy.

(1) Section XXII, Chapter 98, Subchapter VIII, Item 9808.00.30 of the Harmonized Tariff Schedule of the United States authorizes duty-free importation of defense supplies.

(2) 19 U.S.C. 1309 authorizes duty-free importation of certain supplies (not including equipment) for vessels or aircraft operated by the United States (see FAR 25.903(b)).

(3) Unless the supplies are entitled to duty-free treatment under a special category in the Harmonized Tariff Schedule of the United States (*e.g.*, the Caribbean Basin Economic Recovery Act or NAFTA), or unless the supplies already have entered into the customs territory of the United States and duty already has been paid, DoD will issue duty-free entry certificates for—

(i) Qualifying country supplies (end products and components) on all defense contracts;

(ii) Eligible products (end products but not components) on defense contracts subject to the Trade Agreement Act or NAFTA; and

(iii) Other foreign supplies, if there is reasonable assurance that the administrative and other costs of processing and controlling the certificates will not exceed the amount of duty that would be paid.

225.902 Procedures.

(1) *General.*

(i) *Preaward.*

(A) Unless duty was paid prior to submission of the offer, an offer of domestic end products with no nonqualifying country components, an offer of qualifying country end products, or an offer of eligible products under the Trade Agreements Act or NAFTA, should not include duty.

(B) Offers of U.S. made end products with nonqualifying country components, and offers that are neither qualifying country offers nor offers of eligible products under a trade agreement, should contain applicable duty.

(c) Exclude from the evaluation of domestic end products, or information technology end products in Federal Supply Group 70 or 74 in acquisitions subject to the Trade Agreements Act, any duty for nonqualifying country components listed in the provision at 252.225-7003, Information for Duty-Free Entry Evaluation, for which duty-free entry will be granted.

(D) Except for acquisitions of information technology end products in Federal Supply Group 70 or 74 subject to the Trade Agreements Act, apply the evaluation procedures for the Buy American Act in accordance with 225.502.

(ii) *Award.* Exclude duty from the contract price for supplies (end products or components) that are to be accorded duty-free entry. If duty-free entry is granted to the successful offeror in accordance with the clause at FAR 52.225-8, Duty-Free Entry, and the clause at 252.225-7003, Information for Duty-Free Entry Evaluation, request that the offeror provide the list of foreign supplies that are subject to such duty-free entry, and list such supplies in the contract clause at 252.225-7008, Supplies to be Accorded Duty-Free Entry.

(iii) *Postaward.*

(A) Issue duty-free entry certificates for all qualifying country supplies in accordance with the policy at 225.901(3)(i) and the clause at 252.225-7009, Duty-Free Entry—Qualifying Country Supplies (End Products and Components); for all eligible products subject to trade agreements in accordance with the policy at 225.901(3)(ii) and the clause at 252.225-7037, Duty-Free Entry—Eligible End Products; and for other foreign supplies in accordance with the policy at 225.901(3)(iii) on contracts containing the clause at FAR 52.225-8, Duty-Free Entry; or (following to the extent practicable the procedures required by the clause at FAR 52.225-8, Duty-Free Entry, and the clause at 252.225-7010, Duty-Free Entry—Additional Provisions) on other contracts—

(1) That fall within one of the following categories:

(i) Direct purchases of foreign supplies under a DoD prime contract, whether title passes at point of origin

or at destination in the United States, provided the contract states that the final price is exclusive of duty.

(ii) Purchases of foreign supplies by a domestic prime contractor under a cost-reimbursement type contract or by a cost-reimbursement type subcontractor (where no fixed-price prime or fixed-price subcontract intervenes between the purchaser and the Government), whether title passes at point of origin or at destination in the United States. If a fixed-price prime or fixed-price subcontract intervenes, follow the criteria stated in paragraph (a)(iii)(A)(1)(iii) of this section.

(iii) Purchases of foreign supplies by a fixed-price domestic prime contractor, a fixed-price subcontractor, or a cost-type subcontractor where a fixed-price prime contract or fixed-price subcontract intervenes, provided the fixed-price prime contract and, where applicable, fixed-price subcontract prices are, or are amended to be, exclusive of duty;

(2) For which the supplies so purchased will be delivered to the Government or incorporated in Government-owned property or in an end product to be furnished to the Government, and for which duty will be paid if such supplies or any portion are used for other than the performance of the Government contract or disposed of other than for the benefit of the Government in accordance with the contract terms; and

(3) For which such acquisition abroad is authorized by the terms of the contract or subcontract or by the contracting officer.

(B) Under a fixed-price contract, negotiate an equitable reduction in the contract price if duty-free entry is granted for any nonqualifying country component not listed in the Schedule as duty-free, even if contract award was based on furnishing a domestic component or a qualifying country component.

(2) *Formal entry and release.*

(i) The administrative contracting officer must—

(A) Ensure that prime contractors are aware of and understand any Duty-Free Entry clause requirements. Contractors should understand that failure

by them or their subcontractors to include the data required by the clause will result in treatment of the shipment as without benefit of free entry under Section XXII, Chapter 98, Subchapter VIII, Item 9808.00.30 of the Harmonized Tariff Schedule of the United States.

(B) Upon receipt of the required notice of purchase of foreign supplies from the contractor or any tier subcontractor—

(1) Verify the duty-free entitlement of goods entering under the contract; and

(2) Review the prime contract to ensure that performance of the contract requires the foreign supplies (quantity and price) identified in the notice.

(C) Upon receipt of notification from the contractor that it is placing a foreign purchase that was not identified at the time of contract award—

(1) Determine whether a reduction in the contract price is required under the clause at FAR 52.225-8, Duty-Free Entry;

(2) If so, make an equitable adjustment in the contract price, unless the procuring contracting officer waives this adjustment;

(3) Determine the price of the foreign supplies exclusive of duty, and advise the contractor that that amount will be the maximum dollar value of supplies for which duty-free entry certificates will be issued.

(D) Within 20 days after receiving the notification of purchase of foreign supplies, forward the following information in the format indicated to the Commander, DCM New York, ATTN: Customs Team, DCMDE-GNIC, 207 New York Avenue, Building 120, Staten Island, NY 10305-5013:

We have received a contractor notification of the purchase of foreign supplies. I have verified that foreign supplies are required for the performance of the contract. If required, the prime contract price has been or will be adjusted.

- Prime Contractor Name and Address:
- Prime Contractor CAGE Code:
- Prime Contract Number plus Delivery Order Number, if applicable:
- Total Dollar Value of the Prime Contract or Delivery Order:
- Expiration Date of the Prime Contract or Delivery Order:

- Foreign Supplier Name and Address:
- Number of Subcontract/Purchase Order for Foreign Supplies:
- Total Dollar Value of the Subcontract for Foreign Supplies:
- Expiration Date of the Subcontract for Foreign Supplies:
- CAO Activity Address Number:
- ACO Name and Telephone Number:
- ACO Code:
- Signature:
- Title:

(E) If a contract modification results in a change to any data verifying duty-free entitlement previously furnished, forward a revised notification including the changed data to DCM New York.

(ii) The responsibility for issuing duty-free entry certificates for foreign supplies purchased under a DoD contract or subcontract rests with the Customs Team, DCMDE-GNIC, DCM New York. Upon receipt of import documentation for incoming shipments from the contractor, its agent, or the U.S. Customs Service, DCM New York will verify the duty-free entitlement and execute the duty-free entry certificate.

(iii) Upon arrival of foreign supplies at ports of entry, the consignee, generally the contractor or its agent (import broker) for shipments to other than a military installation, will file U.S. Customs Form 7501, 7501A, or 7506, with the District Director of Customs.

(3) *Immediate entry and release.* Importations made in the name of a DoD military facility or being shipped directly to a military facility are entitled to release under the immediate delivery procedure.

(i) A DoD immediate delivery application has been approved and is on file at Customs Headquarters.

(ii) The application is for an indefinite period and is good for all Customs districts, areas, and ports.

[65 FR 19855, Apr. 13, 2000, as amended at 65 FR 52952, Aug. 31, 2000]

225.903 Exempted supplies.

- (b)(i) The term “supplies”—
- (A) Includes articles known as “stores,” such as food, medicines, and toiletries, as well as all consumable articles necessary and appropriate for the propulsion, operation, and maintenance of the vessel or aircraft, such as

fuel, oil, gasoline, grease, paint, cleansing compounds, solvents, wiping rags, and polishes.

(B) Does not include portable articles necessary and appropriate for the navigation, operation, or maintenance of vessel or aircraft and for the comfort and safety of the persons on board, such as rope, bolts and nuts, bedding, china and cutlery, which are included in the term "equipment."

(ii) The duty-free certificate shall be printed, stamped, or typed on the face of Customs Form 7501, or attached, and shall be executed by a duly designated officer or civilian official of the appropriate department or agency in the following form:

(Date) _____

I certify that the acquisition of this material constituted a purchase of supplies by the United States for vessels or aircraft operated by the United States, and is admissible free of duty pursuant to 19 U.S.C. 1309.

(Name) _____

(Title) _____

(Organization) _____

Subpart 225.10—Additional Foreign Acquisition Regulations

225.1070 Clause deviations in overseas contracts.

See 201.403(2) for approval authority for clause deviations in overseas contracts with governments of North Atlantic Treaty Organization (NATO) countries or other allies or with United Nations or NATO organizations.

[65 FR 19856, Apr. 13, 2000]

Subpart 225.11—Solicitation Provisions and Contract Clauses

SOURCE: 65 FR 19856, Apr. 13, 2000, unless otherwise noted.

225.1101 Acquisition of supplies.

(1) Use the provision at 252.225-7000, Buy American Act—Balance of Payments Program Certificate, instead of the provision at FAR 52.225-2, Buy American Act—Balance of Payments Program Certificate. Use the provision in any solicitation that includes the clause at 252.225-7001, Buy American Act and Balance of Payments Program.

(2) Use the clause at 252.225-7001, Buy American Act and Balance of Payments Program, instead of the clause at FAR 52.225-1, Buy American Act—Balance of Payments Program—Supplies, in solicitations and contracts for supplies or services that require the furnishing of supplies.

(i) Do not use the clause if an exception to the Buy American Act or Balance of Payments Program is known to apply or if using the clause at 252.225-7007, Buy American Act—Trade Agreements—Balance of Payments Program; 252.225-7021, Trade Agreements; or 252.225-7036, Buy American Act—North American Free Trade Agreement Implementation Act—Balance of Payments Program.

(ii) The clause need not be used if nonqualifying country end products are ineligible for award, including—

(A) End products restricted to domestic or domestic and qualifying country sources under appropriations and authorization act restrictions (see subpart 225.70);

(B) End products restricted to domestic or domestic and Canadian sources (see subpart 225.71); and

(C) End products restricted under the authority of FAR 6.302-3.

(iii) The clause may be used if the contracting officer anticipates a waiver of the restriction in paragraph (2)(ii)(A) or (B) of this section.

(3) Use the clause at 252.225-7002, Qualifying Country Sources as Subcontractors, in solicitations and contracts that include one of the following clauses:

(i) 252.225-7001, Buy American Act and Balance of Payments Program.

(ii) 252.225-7007, Buy American Act—Trade Agreements—Balance of Payments Program.

(iii) 252.225-7021, Trade Agreements.

(iv) 252.225-7036, Buy American Act—North American Free Trade Agreement Implementation Act—Balance of Payment Program.

(4) Use the provision at 252.225-7003, Information for Duty-Free Entry Evaluation, in solicitations that include the clause at FAR 52.225-8, Duty-Free Entry. Use the provision with its Alternate I when the clause at 252.225-7021, Trade Agreements, is used.

(5) Use the provision at 252.225-7006, Buy American Act—Trade Agreements—Balance of Payments Program Certificate, instead of the provision at FAR 52.225-6, Trade Agreements Certificate, in all solicitations that include the clause at 252.225-7007, Buy American Act—Trade Agreements—Balance of Payments Program.

(6) Except as provided in paragraph (11) of this section, use the clause at 252.225-7007, Buy American Act—Trade Agreements—Balance of Payments Program, instead of the clause at FAR 52.225-5, Trade Agreements. The clause need not be used where purchase from foreign sources is restricted (see 225.401(b)(ii)). The clause may be used where the contracting officer anticipates a waiver of the restriction.

(7) Use the clause at 252.225-7008, Supplies to be Accorded Duty-Free Entry, in solicitations and contracts that provide for duty-free entry and that include the clause at FAR 52.225-8, Duty-Free Entry.

(8) Use the clause at 252.225-7009, Duty-Free Entry—Qualifying Country Supplies (End Products and Components), in solicitations and contracts for supplies and in solicitations and contracts for supplies for exclusive use outside the United States.

(9) Use the clause at 252.225-7010, Duty-Free Entry—Additional Provisions, in solicitations and contracts that include the clause at FAR 52.225-8, Duty-Free Entry.

(10) Use the provision at 252.225-7020, Trade Agreements Certificate, in all solicitations that include the clause at 252.225-7021, Trade Agreements.

(11) Use the clause at 252.225-7021, Trade Agreements, instead of the clause at FAR 52.225-5, Trade Agreements, when acquiring information technology products in Federal Supply Group 70 or 74.

(12) Use the provision at 252.225-7035, Buy American Act—North American Free Trade Agreement Implementation Act—Balance of Payments Program Certificate, instead of the provision at FAR 52.225-4, Buy American Act—North American Free Trade Agreement—Israeli Trade Act—Balance of Payments Program Certificate, in all solicitations that include the clause at

252.225-7036, Buy American Act—North American Free Trade Agreement Implementation Act—Balance of Payments Program.

(i) Use the basic provision when the basic clause at 252.225-7036 is used.

(ii) Use the provision with its Alternate I when the clause at 252.225-7036 is used with its Alternate I.

(13) Use the clause at 252.225-7036, Buy American Act—North American Free Trade Agreement Implementation Act—Balance of Payments Program, instead of the clause at FAR 52.225-3, Buy American Act—North American Free Trade Agreement—Israeli Trade Act—Balance of Payments Program. The clause need not be used where purchase from foreign sources is restricted (see 225.401 (b)(ii)). The clause may be used where the contracting officer anticipates a waiver of the restriction.

(i)(A) Use the clause in all solicitations and contracts for the items listed at 225.401-70, when the estimated value is \$54,372 or more and the Trade Agreements Act does not apply. Include the clause in solicitations for multiple line items if any line item is subject to NAFTA.

(B) Use the clause with its Alternate I when the estimated value is between \$25,000 and \$54,372.

(ii) Application of the procedures in 225.402 and the acquisition of non-eligible and eligible products under the same solicitation may result in the application of the North American Free Trade Agreement Implementation Act to only some of the items solicited. In such case, indicate in the Schedule those items covered by the Act.

(14) Use the clause at 252.225-7037, Duty-Free Entry—Eligible End Products, in solicitations and contracts for supplies and services when the clause at 252.225-7007, Buy American Act—Trade Agreements—Balance of Payments Program; 252.225-7021, Trade Agreements; or 252.225-7036, Buy American Act—North American Free Trade Agreement Implementation Act—Balance of Payments Program, is used.

[65 FR 19856, Apr. 13, 2000, as amended at 65 FR 36034, June 6, 2000]

225.1103 Other provisions and clauses.

(1) In order to allow accurate reporting, by cognizant accounting and disbursing officers, of foreign and domestic expenditures, use the clause at 252.225-7005, Identification of Expenditures in the United States, in all negotiated contracts over \$25,000 where—

(i) For supply contracts, the contract requires end products manufactured or produced in the United States; and

(A) The contractor is a foreign concern; or

(B) The contractor is a domestic concern and the Government will take title outside the United States.

(ii) For contracts for construction, repair, and maintenance of real property, or services to be performed outside the United States—

(A) The contractor is a domestic concern; or

(B) The contractor is a foreign concern and the contract requires acquisition of materials, equipment, or services from U.S. sources.

(2) Use the clause at 252.225-7041, Correspondence in English, in solicitations and contracts when contract performance will be wholly or in part in a foreign country.

(3) Use the clause at 252.225-7042, Authorization to Perform, in solicitations and contracts when contract performance will be wholly or in part in a foreign country.

Subpart 225.70—Authorization Acts, Appropriations Acts, and Other Statutory Restrictions on Foreign Acquisition

225.7000 Scope of subpart.

(a) This subpart contains restrictions on the acquisition of foreign products and services, imposed by Defense appropriations and authorization acts and other statutes. Refer to the acts to verify current applicability of the restrictions.

(b) Nothing in this subpart affects the applicability of the Buy American Act or Balance of Payments Program.

[56 FR 36367, July 31, 1991, as amended at 62 FR 2856, Jan. 17, 1997]

225.7001 Definitions.

As used in this subpart—

(a) *Bearing components and miniature and instrument ball bearings* are defined in the clause at 252.225-7016, Restriction on Acquisition of Ball and Roller Bearings.

(b) *Hand or measuring tools* means those tools listed in Federal supply classifications 51 and 52, respectively.

(c) *Possessions*, as used in the phrase “United States or its possessions,” includes Puerto Rico.

(d) *Specialty metals* is defined in the clause at 252.225-7014, Preference for Domestic Specialty Metals.

[61 FR 10899, Mar. 18, 1996, as amended at 61 FR 50453, Sept. 26, 1996]

225.7002-1 Restrictions.

(a) In accordance with Section 9005 of Public Law 102-396, as amended (10 U.S.C. 2241 note, Limitations on Food, Clothing, and Specialty Metals Not Produced in the United States), and Section 8109 of Public Law 104-208, do not acquire supplies consisting in whole or in part of any of the following, that have not been grown or produced in the United States or its possessions—

(1) Food, but this does not restrict acquisition of foods manufactured or processed in the United States or its possessions;

(2) Clothing;

(3) Tents, tarpaulins, or covers;

(4) Cotton and other natural fiber products, or wool (whether in the form of fiber or yarn or contained in fabrics, materials, or manufactured articles), but this does not restrict acquisition of cotton or wool reprocessed or reused in the United States or its possessions;

(5) Woven silk or woven silk blends;

(6) Spun silk yarn for cartridge cloth;

(7) Synthetic fabric or coated synthetic fabric, including all textile fibers and yarns that are for use in such fabrics;

(8) Canvas products; or

(9) Any item of individual equipment (Federal Supply Class 8465) manufactured from or containing any of the listed fibers, yarns, fabrics, or materials.

(b) Do not acquire specialty metals, including stainless steel flatware, that were not melted in steel manufacturing facilities located within the United States or its possessions.

Department of Defense

225.7002-2

(c) Do not acquire hand or measuring tools that were not produced in the United States or its possessions.

[56 FR 36367, July 31, 1991, as amended at 59 FR 27671, May 27, 1994; 62 FR 5780, Feb. 7, 1997; 62 FR 47154, Sept. 8, 1997]

225.7002-2 Exceptions.

Acquisitions in the following categories are not subject to the restrictions in 225.7002-1—

(a) Any of the items in 225.7002-1(a) or (b), if the Secretary concerned, or designee, determines that they cannot be acquired when needed in a satisfactory quality and sufficient quantity grown or produced in the United States or its possessions at U.S. market prices.

(b) Outside the United States—

(1) In support of combat operations;

(2) Perishable foods by activities located outside the United States for their personnel; or

(3) Emergency acquisitions by such activities for their personnel.

(c) Acquisitions by vessels in foreign waters.

(d) Acquisitions of those supplies listed in FAR 25.104(a), unless the supplies are hand or measuring tools.

(e) Acquisitions not exceeding the simplified acquisition threshold.

(f) Acquisitions of end items incidentally incorporating cotton or wool, for which the estimated value of the cotton or wool is not more than 10 percent of the total price of the end item; provided the estimated value of the cotton or wool does not exceed the simplified acquisition threshold.

(g) Supplies purchased specifically for commissary resale.

(h) Purchases of specialty metals by subcontractors at any tier for programs, except—

(1) Aircraft;

(2) Missile and space systems;

(3) Ships;

(4) Tank-automotive;

(5) Weapons; and

(6) Ammunition.

(i) Purchases of specialty metals and chemical warfare protective clothing when the acquisition furthers an agreement with a qualifying country (see section 225.872).

(j) Purchases of fibers and yarns that are for use in synthetic fabric or coated

synthetic fabric (but not the purchase of the synthetic or coated synthetic fabric itself), if—

(1) The fabric is to be used as a component of an end item that is not a textile product. Examples of textile products, made in whole or in part of fabric, include—

(i) Draperies, floor coverings, furnishings, and bedding (Federal Supply Group 72, Household and Commercial Furnishings and Appliances);

(ii) Items made in whole or in part of fabric in Federal Supply Group 83, Textile/leather/furs/apparel/findings/tents/flags, or Federal Supply Group 84, Clothing, Individual Equipment and insignia;

(iii) Upholstered seats (whether for household, office, or other use); and

(iv) Parachutes (Federal Supply Class 1670); or

(2) The fibers and yarns are para-aramid fibers and yarns manufactured in—

(i) The Netherlands; or

(ii) Another qualifying country (see 225.872) if the Under Secretary of Defense (Acquisition, Technology, and Logistics) makes a determination in accordance with section 807 of Pub. L. 105-261 that—

(A) Procuring articles that contain only para-aramid fibers and yarns manufactured from suppliers within the United States or its possessions would result in sole source contracts or subcontracts for the supply of such para-aramid fibers and yarns;

(B) Such sole source contracts or subcontracts would not be in the best interest of the Government or consistent with the objectives of the Competition in Contracting Act (10 U.S.C. 2304); and

(C) The qualifying country permits U.S. firms that manufacture para-aramid fibers and yarns to compete with foreign firms for the sale of para-aramid fibers and yarns in that country.

[56 FR 36367, July 31, 1991, as amended at 58 FR 28467, May 13, 1993; 59 FR 27671, May 27, 1994; 60 FR 61597, Nov. 30, 1995; 61 FR 50453, Sept. 26, 1996; 62 FR 5780, Feb. 7, 1997; 62 FR 47154, Sept. 8, 1997; 64 FR 24529, May 7, 1999; 65 FR 39705, June 27, 2000; 65 FR 52952, Aug. 31, 2000]

225.7002-3

48 CFR Ch. 2 (10-1-01 Edition)

225.7002-3 Contract clauses.

Unless an exception is known to apply—

(a) Use the clause at 252.225-7012, Preference for Certain Domestic Commodities, in all solicitations and contracts which meet or exceed the simplified acquisition threshold.

(b) Use the clause at 252.225-7014, Preference for Domestic Specialty Metals, in all solicitations and contracts over the simplified acquisition threshold that require delivery of an article containing specialty metals. Use the clause with its Alternate I in all solicitations and contracts over the simplified acquisition threshold requiring delivery, for one of the following major programs, of an article containing specialty metals—

- (1) Aircraft;
- (2) Missile and space systems;
- (3) Ships;
- (4) Tank-automotive;
- (5) Weapons; or
- (6) Ammunition.

(c) Use the clause at 252.225-7015, Preference for Domestic Hand or Measuring Tools, in all solicitations and contracts over the simplified acquisition threshold calling for delivery of hand or measuring tools.

[61 FR 50453, Sept. 26, 1996]

225.7003 Restriction on overseas military construction.

For restriction on award of military construction contracts to be performed in the United States territories and possessions in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf, see 236.274(a).

[62 FR 2856, Jan. 17, 1997]

225.7004 Restriction on overseas architect-engineer services.

For restriction on award of architect-engineer contracts to be performed in Japan, in any North Atlantic Treaty Organization member country, or in countries bordering the Arabian Gulf, see 236.602-70.

[62 FR 2857, Jan. 17, 1997]

225.7005 Waiver of certain restrictions.

(a) Where provided for elsewhere in this subpart, the restrictions on cer-

tain foreign purchases under 10 U.S.C. 2534(a) may be waived as follows:

(1)(i) The Under Secretary of Defense (Acquisition, Technology, and Logistics), without power of delegation, may waive the restriction for a particular item for a particular foreign country upon determination that—

(A) United States producers of the item would not be jeopardized by competition from a foreign country, and that country does not discriminate against defense items produced in the United States to a greater degree than the United States discriminates against defense items produced in that country; or

(B) Application of the restriction would impede cooperative programs entered into between DoD and a foreign country, or would impede the reciprocal procurement of defense items under a memorandum of understanding providing for reciprocal procurement of defense items under 225.872, and that country does not discriminate against defense items produced in the United States to a greater degree than the United States discriminates against defense items produced in that country.

(ii) A notice of determination to exercise the waiver authority must be published in the FEDERAL REGISTER and submitted to the congressional defense committees at least 15 days before the effective date of the waiver.

(iii) Such waiver shall be in effect for a period not greater than 1 year.

(iv) For contracts entered into prior to the effective date of a waiver, provided adequate consideration is received to modify the contract, such waiver shall be applied as directed or authorized in the waiver to—

(A) Subcontracts entered into on or after the effective date of the waiver; and

(B) Options for the procurement of items that are exercised after the effective date of the waiver, if the option prices are adjusted for any reason other than the application of the waiver.

(2) The head of the contracting activity may waive the restriction on a case-by-case basis upon execution of a determination and findings that any of the following applies:

Department of Defense

225.7007-4

(i) The restriction would cause unreasonable delays.

(ii) Satisfactory quality items manufactured in the United States or Canada are not available.

(iii) Application of the restriction would result in the existence of only one source for the item in the United States or Canada.

(iv) Application of the restriction is not in the national security interests of the United States.

(v) Application of the restriction would adversely affect a U.S. company.

(3) The restriction is waived when it would cause unreasonable costs. The cost of the item of U.S. or Canadian origin is unreasonable if it exceeds 150 percent of the offered price, inclusive of duty, of items which are not of U.S. or Canadian origin.

(b) In accordance with the provisions of paragraphs (a)(1)(i) through (a)(1)(iii) of this section, the Under Secretary of Defense (Acquisition, Technology, and Logistics) has waived the restrictions of 10 U.S.C. 2534(a) for certain items manufactured in the United Kingdom, including air circuit breakers for naval vessels and totally enclosed lifeboats (see 225.7016 and 225.7022). This waiver applies to—

(1) Procurements under solicitations issued on or after August 4, 1998; and

(2) Subcontracts and options under contracts entered into prior to August 4, 1998, under the conditions described in paragraphs (a)(1)(iv) of this section.

[63 FR 5745, Feb. 4, 1998, as amended at 63 FR 28284, May 22, 1998; 63 FR 43888, Aug. 17, 1998; 65 FR 39705, June 27, 2000]

225.7006 Restrictions on construction or repair of vessels in foreign shipyards.

10 U.S.C. 7309 restricts constructing or repairing vessels in foreign shipyards.

(a) Do not award a contract to construct either of the following in a foreign shipyard—

(1) A vessel constructed for any of the armed forces; or

(2) A major component of the hull or superstructure of any such vessel.

(b) Do not overhaul, repair, or maintain in a foreign shipyard, a naval vessel (or any other vessel under the jurisdiction of the Secretary of the Navy)

homeported in the United States. This restriction does not apply to voyage repairs.

225.7007 Restriction on acquisition of foreign buses.

225.7007-1 Restriction.

In accordance with 10 U.S.C. 2534, do not acquire a multipassenger motor vehicle (bus) unless it is manufactured in the United States or Canada.

[63 FR 5745, Feb. 4, 1998]

225.7007-2 Applicability.

Apply this restriction if the buses are purchased, leased, rented, or made available under contracts for transportation services.

[60 FR 19533, Apr. 19, 1995]

225.7007-3 Exceptions.

This restriction does not apply in any of the following circumstances:

(a) Buses manufactured outside the United States and Canada are needed for temporary use because buses manufactured in the United States or Canada are not available to satisfy requirements that cannot be postponed. Such use may not, however, exceed the lead time required for acquisition and delivery of buses manufactured in the United States or Canada.

(b) The requirement for buses is temporary in nature. For example, to meet a special, nonrecurring requirement or a sporadic and infrequent recurring requirement, buses manufactured outside the United States and Canada may be used for temporary periods of time. Such use may not, however, exceed the period of time needed to meet the special requirement.

(c) Buses manufactured outside the United States and Canada are available at no cost to the U.S. Government.

(d) The acquisition is for an amount that does not exceed the simplified acquisition threshold.

[63 FR 5745, Feb. 4, 1998]

225.7007-4 Waiver.

The waiver criteria at 225.7005(a) apply to this restriction.

[63 FR 43888, Aug. 17, 1998]

225.7008

225.7008 Restriction on research and development.

(a) Public Law 92-570 precludes use of DoD appropriations for award to any foreign corporation, organization, person, or entity for research and development in connection with any weapon system or other military equipment if there is a U.S. corporation, organization, person, or entity—

- (1) Equally competent; and
- (2) Willing to perform at a lower cost.

(b) The statutory restriction in paragraph (a) of this section does not change the rules for selecting research and development contractors in FAR part 35. However, when a U.S. source and a foreign source are equally competent, award to the source that will provide the services at the lower cost.

225.7009 [Reserved]

225.7010 Restriction on certain chemical weapons antidote.

225.7010-1 Restriction.

In accordance with 10 U.S.C. 2534 and defense industrial mobilization requirements (see subpart 208.72), do not acquire chemical weapons antidote contained in automatic injectors, or the components for such injectors, unless the chemical weapons antidote or component is manufactured in the United States or Canada by a company that—

- (a) Is a producer under the industrial preparedness program at the time of contract award;
- (b) Has received all required regulatory approvals; and
- (c) Has the plant, equipment, and personnel to perform the contract in the United States or Canada at the time of contract award.

[60 FR 19533, Apr. 19, 1995, as amended at 62 FR 34123, June 24, 1997; 63 FR 5745, Feb. 4, 1998]

225.7010-2 Exception.

The restriction of 225.7010-1 does not apply if—the acquisition is for an amount that does not exceed the simplified acquisition threshold.

[63 FR 5745, Feb. 4, 1998]

48 CFR Ch. 2 (10-1-01 Edition)

225.7010-3 Waiver.

The waiver criteria at 225.7005(a) apply to this restriction.

[63 FR 43888, Aug. 17, 1998]

225.7011 Restriction on Ballistic Missile Defense research, development, test, and evaluation.

225.7011-1 Definitions.

Competent, foreign firm, and U.S. firm have the meanings given in the provision at 252.225-7018, Notice of Prohibition of Certain Contracts with Foreign Entities for the Conduct of Ballistic Missile Defense RDT&E.

[56 FR 36367, July 31, 1991, as amended at 59 FR 27672, May 27, 1994]

225.7011-2 Restriction.

(a) Section 222 of the Defense Authorization Act for FY1988 and 1989 (Pub. L. 100-180) prohibits the award of certain contracts for the conduct of Ballistic Missile Defense (BMD) Program research, development, test, and evaluation (RDT&E), to foreign governments or firms unless the Secretary of Defense certifies to Congress in writing at any time during the applicable fiscal year that work cannot be competently performed by a U.S. firm at a price equal to or less than the price of the foreign government or firm.

(b) For purposes of implementing this section, heads of contracting activities are authorized to make this certification (see 225.7011-3(b)).

(c) Except as provided in 225.7011-3, do not use any funds appropriated to, or for the use of, DoD to enter into or carry out any contract, including any contract awarded as a result of a broad agency announcement, with a foreign government or firm if the contract provides for the conduct of RDT&E in connection with the BMD.

(d) This prohibition is not intended to deny access to foreign expertise when contract performance requires a level of competency unavailable in the United States.

[56 FR 36367, July 31, 1991, as amended at 59 FR 27672, May 27, 1994]

225.7011-3 Exceptions.

This prohibition shall not apply—

Department of Defense

225.7011-5

(a) To contracts awarded to a foreign government or firm if the contracting officer determines that—

(1) The contract will be performed within the United States;

(2) The contract is exclusively for RDT&E in connection with antitactical ballistic missile systems; or

(3) The foreign government or foreign firm agrees to share a substantial portion of the total contract cost. Consider the foreign share as substantial if it is equitable with respect to the relative benefits to be derived from the contract by the United States and the foreign parties. For example, if the contract is more beneficial to the foreign party, its share of the cost should be correspondingly higher; or

(b) If the head of the contracting activity certifies in writing, before contract award, that a contract for research, development, testing, or evaluation (other than for RDT&E described in paragraph (a)(2) of this subsection) cannot be competently performed by a U.S. firm at a price equal to or less than the price at which the RDT&E would be performed by a foreign government or firm.

225.7011-4 Procedures.

(a) When awarding a prime contract to a foreign government or firm under 225.7011-3(b), the contracting officer or source selection authority, as applicable, shall make a determination that will be the basis for the certification.

(1) The determination must—

(i) Describe the contract effort;

(ii) State the number of proposals solicited and received from both U.S. and foreign firms;

(iii) Identify the proposed awardee and the amount of the contract;

(iv) State that selection of the contractor was based on the evaluation factors contained in the solicitation, or the criteria contained in the broad agency announcement; and

(v) State that the effort cannot be competently performed by a U.S. firm at a price equal to, or less than, the price at which it would be performed by the foreign awardee.

(2) When either a broad agency announcement (BAA) or program research and development announcement

(PRDA) is used, or when the determination is otherwise not based on direct competition between foreign and domestic proposals, the determination must not be merely conclusory.

(i) The determination must specifically explain its basis, include a description of the method used to determine the competency of U.S. firms, and describe the cost or price analysis performed.

(ii) Alternately, the determination may contain—

(A) A finding, including the basis for such finding, that the proposal was submitted solely in response to the terms of a BAA or PRDA, or other solicitation document without any technical guidance from the program office; and

(B) A finding, including the basis for such finding, that disclosure of the information in the proposal for the purpose of conducting a competitive acquisition is prohibited.

(b) Forward a copy of the certification (from 225.7011-3(b)) and, as appropriate, the determination or justification and approval (J&A) within 30 days of contract award to the Ballistic Missile Defense Organization, Attn: BMDO/DRI, 7100 Defense Pentagon, Washington, DC 20301-7100, if award is based on—

(1) A determination under paragraph (a) of this subsection;

(2) Other than full and open competition under FAR subpart 6.3; or

(3) An unsolicited proposal under FAR subpart 15.6.

[56 FR 36367, July 31, 1991, as amended at 59 FR 27672, May 27, 1994; 61 FR 50453, Sept. 26, 1996; 63 FR 11534, Mar. 9, 1998]

225.7011-5 Solicitation provision.

Use the provision at 252.225-7018, Notice of Prohibition of Certain Contracts With Foreign Entities for the Conduct of Ballistic Missile Defense RDT&E, in all competitively negotiated BMD solicitations for research, development, test, and evaluation, unless foreign participation is otherwise excluded.

[56 FR 36367, July 31, 1991, as amended at 59 FR 27672, May 27, 1994]

225.7012

225.7012 Restrictions on anchor and mooring chain.

225.7012-1 Restrictions.

(a) Under Public Law 101-511, Section 8041, and similar sections in subsequent Defense appropriations acts, DoD appropriations for fiscal years 1991 and after may not be used to acquire welded shipboard anchor and mooring chain, four inches in diameter and under, unless—

(1) It is manufactured in the United States, including cutting, heat treating, quality control, testing, and welding (both forging and shot blasting process); and

(2) The cost of the components manufactured in the United States exceeds 50 percent of the total cost of components.

(b) Acquisition of welded shipboard anchor and mooring chain, four inches in diameter and under, when used as a component of a naval vessel, is also restricted under 10 U.S.C. 2534(a)(3)(ii). However, the more stringent restriction under 225.7012-1(a) takes precedence.

[61 FR 13107, Mar. 26, 1996]

225.7012-2 Waiver.

The restriction in 225.7012-1(a) may be waived by the Secretary of the Department responsible for acquisition, on a case-by-case basis, where sufficient domestic suppliers are not available to meet DoD requirements on a timely basis and the acquisition is necessary to acquire capability for national security purposes.

(a) Document the waive in a written D&F containing—

(1) The factors supporting the waiver; and

(2) A certification that the acquisition must be made in order to acquire capability for national security purposes.

(b) Provide a copy of the D&F to the House and Senate Committees on Appropriations.

[61 FR 13107, Mar. 26, 1996]

225.7012-3 Contract clause.

Use the clause at 252.225-7019, Restriction on Acquisition of Foreign An-

48 CFR Ch. 2 (10-1-01 Edition)

chor and Mooring Chain, in all solicitations and contracts—

(a) Using fiscal year 1991 or later funds; and

(b) Requiring welded shipboard anchor or mooring chain of four inches in diameter or less.

[61 FR 13107, Mar. 26, 1996, as amended at 61 FR 50453, Sept. 26, 1996]

225.7013—225.7014 [Reserved]

225.7015 Restriction on night vision image intensifier tubes and devices.

225.7015-1 Restriction.

In accordance with Pub. L. 101-165 and 101-511, fiscal years 1990 and 1991 funds may not be used to acquire second and third generation night vision image intensifier tubes and devices unless they are manufactured in the United States or Canada.

[58 FR 28467, May 13, 1993]

225.7015-2 Exception.

Second and third generation night vision image intensifier tubes and devices manufactured outside the United States or Canada may be acquired if—

(a) Adequate domestic supplies are not available to meet DoD requirements on a timely basis; and

(b) The Secretary of the Department responsible for the acquisition certifies to the House and Senate Committees on Appropriations that the acquisition of tubes and devices manufactured outside the United States or Canada is necessary in order to acquire capability for national security purposes.

225.7015-3 Contract clause.

Use the clause at 252.225-7024, Restriction on Acquisition of Night Vision Image Intensifier Tubes and Devices, in all solicitations and contracts which—

(a) Use fiscal year 1990 or 1991 funds; and

(b) Require second and third generation night vision image intensifier tubes and devices.

[58 FR 28467, May 13, 1993]

Department of Defense

225.7017-4

225.7016 Restriction on air circuit breakers for naval vessels.

225.7016-1 Restriction.

In accordance with 10 U.S.C. 2534 and 225.7005(b), do not acquire air circuit breakers for naval vessels unless they are manufactured in the United States, Canada, or the United Kingdom.

[63 FR 43888, Aug. 17, 1998]

225.7016-2 Exceptions.

This restriction does not apply if—

(a) The acquisition is for an amount that does not exceed the simplified acquisition threshold; or

(b) Spare or repair parts are needed to support air circuit breakers manufactured outside the United States. Support includes the purchase of spare air circuit breakers where those from alternate sources are not interchangeable.

[62 FR 34124, June 24, 1997, as amended at 63 FR 5746, Feb. 4, 1998; 63 FR 43888, Aug. 17, 1998]

225.7016-3 Waiver.

The waiver criteria at 225.7005(a) apply to this restriction.

[63 FR 43888, Aug. 17, 1998]

225.7016-4 Contract clause.

Use the clause at 252.225-7029, Preference for United States or Canadian Air Circuit Breakers, in all solicitations and contracts requiring air circuit breakers for naval vessels, unless—

(a) An exception under 225.7016-2 is known to apply; or

(b) A waiver has been granted in accordance with 225.7016-3.

[60 FR 19534, Apr. 19, 1995]

225.7017 Restriction on carbon, alloy, and armor steel plate.

225.7017-1 Restriction.

In accordance with section 8111 of Pub. L. 102-172, and similar sections in subsequent appropriations acts, all carbon, alloy, and armor steel plate in Federal stock class 9515 or described by American Society for Testing Materials (ASTM) or American Iron and

Steel Institute (AISI) specifications, purchased by the Government or a contractor for use in a Government-owned facility or in a facility controlled (e.g., leased) by DoD, shall be melted and rolled in the United States or Canada.

[58 FR 28468, May 13, 1993]

225.7017-2 Exceptions.

This restriction does not apply to—

(a) Contracts in effect as of November 26, 1991;

(b) Direct purchases by DoD using other than fiscal year 1992 or subsequent year funds; or

(c) Purchases by contractors unless the prime contract uses fiscal year 1992 or subsequent year funds.

[58 FR 28468, May 13, 1993]

225.7017-3 Waiver.

The restriction may be waived by the Secretary of the department responsible for acquisition, on a case-by-case, by certifying to the House and Senate Committees on Appropriations that—

(a) Adequate U.S. or Canadian supplies are not available to meet DoD requirements on a timely basis; and

(b) The acquisition must be made in order to acquire capability for national security purposes.

[57 FR 14994, Apr. 23, 1992]

225.7017-4 Contract clause.

Unless an exception under 225.7017-2 is known to apply or a waiver has been granted in accordance with 225.7017-3, use the clause at 252.225-7030, Restriction on Acquisition of Carbon, Alloy, and Armor Steel Plate, in all solicitations and contracts which—

(a) Require the delivery to the Government of carbon, alloy, or armor steel plate which will be used in a facility owned by the Government or under the control of DoD; or

(b) Require contractors operating in a Government-owned facility or a facility under the control of DoD to purchase carbon, alloy, or armor steel plate.

[57 FR 14994, Apr. 23, 1992, as amended at 57 FR 53600, Nov. 12, 1992]

225.7018

225.7018 Restriction on four ton dolly jacks.

225.7018-1 Restriction.

In accordance with section 9108 of Public Law 102-396, no fiscal year 1993 funds shall be used to procure four ton dolly jacks manufactured outside the United States.

[59 FR 27672, May 27, 1994]

225.7018-2 Waiver.

The restriction in 225.7018-1 may be waived on a case-by-case basis where the Secretary of the Military Department or the Under Secretary of Defense (Acquisition, Technology, and Logistics) certifies to the Committees on Appropriations of the House and Senate that—

(a) Adequate domestic supplies are available to meet requirements on a timely basis; and

(b) The acquisition must be made in order to acquire capability for national security purposes.

[58 FR 28468, May 13, 1993, as amended at 60 FR 61597, Nov. 30, 1995; 65 FR 39705, June 27, 2000]

225.7018-3 Contract clause.

Use the clause at section 252.225-7033, Restriction on Acquisition of Four Ton Dolly Jacks, in solicitations and contracts that use fiscal year 1993 funds for the acquisition of four ton dolly jacks.

[59 FR 27672, May 27, 1994]

225.7019 Restrictions on ball and roller bearings.

225.7019-1 Restrictions.

(a) In accordance with 10 U.S.C. 2534 and 225.7019-3(b)(5), through fiscal year 2005, do not acquire ball and roller bearings or bearing components that are not manufactured in the United States, Canada, or the United Kingdom.

(b) In accordance with Section 8099 of Public Law 104-61 and similar sections in subsequent Defense appropriations acts, do not use fiscal year 1996 or subsequently appropriated funds to acquire ball and roller bearings other than those produced by a domestic source and of domestic origin, i.e.,

48 CFR Ch. 2 (10-1-01 Edition)

bearings and bearing components manufactured in the United States or Canada.

[61 FR 10900, Mar. 18, 1996, as amended at 61 FR 58489, Nov. 15, 1996; 62 FR 34124, June 24, 1997; 63 FR 43888, Aug. 17, 1998; 65 FR 77828, Dec. 13, 2000]

225.7019-2 Exceptions.

(a) The restriction in 225.7019-1(a) does not apply to—

(1) Acquisitions using simplified acquisition procedures, unless ball or roller bearings or bearing components are the end items being purchased;

(2) Purchases of commercial items incorporating ball or roller bearings;

(3) Miniature and instrument ball bearings when necessary to meet urgent military requirements;

(4) Items acquired overseas for use overseas; or

(5) Ball and roller bearings or bearing components or items containing bearings for use in a cooperative or co-production project under an international agreement. This exception does not apply to miniature and instrument ball bearings.

(b) The restriction in 225.7019-1(b) does not apply to contracts or subcontracts for acquisition of commercial items, except for commercial ball and roller bearings acquired as end items.

[61 FR 50453, Sept. 26, 1996, as amended at 65 FR 52952, Aug. 31, 2000; 65 FR 58607, Sept. 29, 2000; 65 FR 77828, Dec. 13, 2000]

225.7019-3 Waiver.

(a) The head of the contracting activity may waive the restriction in 225.7019-1(a)—

(1) Upon execution of a determination and findings that—

(i) No domestic (U.S. or Canadian) bearing manufacturer meets the requirement;

(ii) It is not in the best interests of the United States to qualify a domestic bearing to replace a qualified non-domestic bearing. This determination must be based on a finding that the qualification of a domestically manufactured bearing would cause unreasonable costs or delay. A finding that a cost is unreasonable should take into consideration DoD policy to assist the domestic industrial mobilization base.

Contracts should be awarded to domestic bearing manufacturers to increase their capability to reinvest and become more competitive;

(iii) Application of the restriction would result in the existence of only one source for the item in the United States or Canada;

(iv) Application of the restriction is not in the national security interests of the United States; or

(v) Application of the restriction would adversely affect a U.S. company.

(2) If the acquisition is for an amount less than the simplified acquisition threshold and simplified acquisition procedures are being used.

(3) For multiyear contracts or contracts exceeding 12 months, except those for miniature and instrument ball bearings, only if—

(i) The head of the contracting activity executes a determination and findings in accordance with paragraph (a) of this subsection;

(ii) The contractor submits a written plan for transitioning from the use of nondomestic to domestically manufactured bearings;

(iii) The plan—

(A) States whether a domestically manufactured bearing can be qualified, at a reasonable cost, for use during the course of the contract period;

(B) Identifies any bearings that are not domestically manufactured, their application, and source of supply; and

(C) Describes, including cost and timetable, the transition to a domestically manufactured bearing. (The timetable for the transition should normally take no longer than 24 months from the date the waiver is granted); and

(iv) The contracting officer accepts the plan and incorporates it in the contract.

(4) For miniature and instrument ball bearings, only if the contractor agrees to acquire a like quantity and type of domestic manufacture for non-governmental use.

(b)(1) The Under Secretary of Defense (Acquisition, Technology, and Logistics), without power of delegation, may waive the restriction in 225.7019-1(a) for a particular foreign country upon determination that—

(i) United States producers of the item would not be jeopardized by competition from a foreign country, and that country does not discriminate against defense items produced in the United States to a greater degree than the United States discriminates against defense items produced in that country; or

(ii) Application of the restriction would impede cooperative programs entered into between DoD and a foreign country, or would impede the reciprocal procurement of defense items under a memorandum of understanding providing for reciprocal procurement of defense items under 225.872, and that country does not discriminate against defense items produced in the United States to a greater degree than the United States discriminates against defense items produced in that country.

(2) A notice of the determination to exercise the waiver authority must be published in the FEDERAL REGISTER and submitted to the congressional defense committees at least 15 days before the effective date of the waiver.

(3) Such waiver shall be in effect for a period not greater than 1 year.

(4) For contracts entered into prior to the effective date of a waiver, provided adequate consideration is received to modify the contract, such waiver shall be applied as directed or authorized in the waiver to—

(i) Subcontracts entered into on or after the effective date of the waiver; and

(ii) Options for the procurement of items that are exercised after the effective date of the waiver, if the option prices are adjusted for any reason other than the application of the waiver.

(5) In accordance with the provisions of paragraphs (b)(1) through (b)(3) of this subsection, the Under Secretary of Defense (Acquisition, Technology, and Logistics) has waived the restrictions of 10 U.S.C. 2534(a)(5) for ball and roller bearings manufactured in the United Kingdom. This waiver applies to—

(i) Procurements under solicitations issued on or after August 4, 1998; and

(ii) Subcontracts and options under contracts entered into prior to August 4, 1998, under the conditions described in paragraph (b)(4) of this subsection.

225.7019-4

(c) The Secretary of the department responsible for the acquisition may waive the restriction in 225.7019-1(b) on a case-by-case basis, by certifying to the House and Senate Committees on Appropriations that—

(1) Adequate domestic supplies are not available to meet DoD requirements on a timely basis; and

(2) The acquisition must be made in order to acquire capability for national security purposes.

[61 FR 10900, Mar. 18, 1996, as amended at 61 FR 50453, Sept. 26, 1996; 62 FR 34124, June 24, 1997; 63 FR 5746, Feb. 4, 1998; 63 FR 28285, May 22, 1998; 63 FR 43888, Aug. 17, 1998; 65 FR 39705, June 27, 2000]

225.7019-4 Contract clause.

(a) Use the clause at 252.225-7016, Restriction on Acquisition of Ball and Roller Bearings, in solicitations and contracts, unless—

(1) The restrictions in 225.7019-1 do not apply or a waiver has been granted; or

(2) The contracting officer knows that the items being acquired do not contain ball or roller bearings.

(b) In solicitations and contracts that use simplified acquisition procedures, use the clause with its Alternate I.

[65 FR 77828, Dec. 13, 2000]

225.7020 Restriction on vessel propellers.

225.7020-1 Restriction.

In accordance with Section 8064 of the National Defense Appropriations Act for Fiscal Year 2001 (Public Law 106-259), do not use fiscal year 2000 or 2001 funds to acquire vessel propellers other than those produced by a domestic source of domestic origin, *i.e.*, vessel propellers—

(a) Manufactured in the United States or Canada; and

(b) For which all component castings were poured and finished in the United States or Canada.

[65 FR 77828, Dec. 13, 2000]

48 CFR Ch. 2 (10-1-01 Edition)

225.7020-2 Exceptions.

This restriction does not apply to contracts or subcontracts for acquisition of commercial items.

[65 FR 77828, Dec. 13, 2000]

225.7020-3 Waiver.

The Secretary of the department responsible for acquisition may waive this restriction on a case-by-case basis, by certifying to the House and Senate Committees on Appropriations that—

(a) Adequate domestic supplies are not available to meet DoD requirements on a timely basis; and

(b) The acquisition must be made in order to acquire capability for national security purposes.

[65 FR 77828, Dec. 13, 2000]

225.7020-4 Contract clause.

Use the clause at 252.225-7023, Restriction on Acquisition of Vessel Propellers, in solicitations and contracts for the acquisition of vessels or vessel propellers, unless—

(a) An exception under 225.7020-2 is known to apply or a waiver has been granted in accordance with 225.7020-3; or

(b) The vessels being acquired do not contain vessel propellers.

[65 FR 77828, Dec. 13, 2000]

225.7021 Restriction on aircraft fuel cells.

225.7021-1 Restriction.

In accordance with section 8090 of the Fiscal Year 1994 Defense Appropriations Act (Pub. L. 103-139) and section 8075 of the Fiscal Year 1995 Defense Appropriations Act (Pub. L. 103-335), do not purchase aircraft fuel cells unless they are produced or manufactured in the United States by a domestic-operated entity.

[60 FR 29498, June 5, 1995]

225.7021-2 Waiver.

The restriction may be waived by the Secretary of the department responsible for the acquisition, on a case-by-case basis, by certifying to the House and Senate Committees on Appropriations that—

Department of Defense

225.7023-2

(a) Adequate U.S. supplies are not available to meet requirements on a timely basis; and

(b) The acquisition must be made in order to acquire capability for national security purposes.

[59 FR 11729, Mar. 14, 1994]

225.7021-3 Contract clause.

Unless a waiver has been granted in accordance with 225.7021-2, use the clause at 252.225-7038, Restriction on Acquisition of Aircraft Fuel Cells, in all solicitations and contracts which—

(a) Use fiscal year 1994 or 1995 funds; and

(b) Require delivery of aircraft fuel cells.

[60 FR 29498, June 5, 1995]

225.7022 Restrictions on totally enclosed lifeboat survival systems.

225.7022-1 Restrictions.

(a) In accordance with Section 8124 of the Fiscal Year 1994 Defense Appropriations Act (Public Law 103-139) and Section 8093 of the Fiscal Year 1995 Defense Appropriations Act (Public Law 103-335), do not purchase a totally enclosed lifeboat survival system, which consists of the lifeboat and associated davits and winches, unless 50 percent or more of the components are manufactured in the United States, and 50 percent or more of the labor in the final manufacture and assembly of the entire system is performed in the United States.

(b) In accordance with 10 U.S.C. 2534(a)(3)(B) and 225.7005(b), do not purchase a totally enclosed lifeboat that is a component of a naval vessel, unless it is manufactured in the United States, Canada, or the United Kingdom. In accordance with 10 U.S.C. 2534(h), this restriction may not be implemented through the use of a contract clause or certification. Implementation shall be effected through management and oversight techniques that achieve the objective of the restriction without imposing a significant management burden on the Government or the contractor involved.

[61 FR 13107, Mar. 26, 1996, as amended at 62 FR 34124, June 24, 1997; 63 FR 43888, Aug. 17, 1998]

225.7022-2 Exceptions.

The restriction in 225.7022-1(b) does not apply if—

(a) The acquisition is for an amount that does not exceed the simplified acquisition threshold; or

(b) Spare or repair parts are needed to support totally enclosed lifeboats manufactured outside the United States.

[62 FR 34124, June 24, 1997, as amended at 63 FR 5746, Feb. 4, 1998; 63 FR 43888, Aug. 17, 1998]

225.7022-3 Waiver.

The waiver criteria at 225.7005(a) apply only to the restriction of 225.7022-1(b).

[63 FR 43888, Aug. 17, 1998]

225.7022-4 Contract clause.

Use the clause at 252.225-7039, Restriction on Acquisition of Totally Enclosed Lifeboat Survival Systems, in all solicitations and contracts which require delivery of totally enclosed lifeboat survival systems.

[61 FR 13107, Mar. 26, 1996]

225.7023 Restriction on supercomputers.

225.7023-1 Restriction.

In accordance with section 8112 of Pub. L. 100-202, and similar sections in subsequent Defense Appropriations Acts, do not purchase any supercomputer that is not manufactured in the United States.

[60 FR 34471, July 3, 1995, as amended at 60 FR 61597, Nov. 30, 1995]

225.7023-2 Waiver.

The restriction in 225.7023-1 may be waived by the Secretary of Defense on a case-by-case basis, after the Secretary of Defense certifies to the Armed Services and Appropriations Committees of Congress that—

(a) Adequate U.S. supplies are not available to meet requirements on a timely basis; and

(b) The acquisition must be made in order to acquire capability for national security purposes.

[60 FR 34471, July 3, 1995]

225.7023-3

225.7023-3 Contract clause.

Use the clause at 252.225-7011, Restriction on Acquisition of Supercomputers, in solicitations and contracts for the acquisition of supercomputers.

[60 FR 34471, July 3, 1995, as amended at 60 FR 61597, Nov. 30, 1995]

Subpart 225.71—Other Restrictions on Foreign Acquisition

SOURCE: 62 FR 34124, June 24, 1997, unless otherwise noted.

225.7100 Scope of subpart.

This subpart contains foreign product restrictions which are based on policies designed to protect the defense industrial base.

225.7101 Definitions.

Relevant definitions are in the clause at 252.225-7025, Restriction on Acquisition of Forgings.

225.7102 Forgings.

225.7102-1 Policy.

DoD requirements for the following forging items, whether as end items or components, shall be acquired from domestic sources (as described in the clause at 252.225-7025) to the maximum extent practicable—

Items	Categories
Ship propulsion shafts	Excludes service and landing craft shafts.
Periscope tubes	All.
Ring forgings for bull gears ...	All greater than 120 inches in diameter.

225.7102-2 Exceptions.

The policy in 225.7102-1 does not apply to acquisitions—

- (a) Using simplified acquisition procedures, unless the restricted item is the end item being purchased;
- (b) Overseas for overseas use; or
- (c) When the quantity acquired exceeds the amount needed to maintain the U.S. defense mobilization base (provided such quantity is an economical purchase quantity). The restriction to domestic sources does not apply to the quantity above that required to maintain the base, in which case,

qualifying country sources may compete.

225.7102-3 Waiver.

Upon request from a prime contractor, the contracting officer may waive the requirement for domestic manufacture of the items covered by the policy in 225.7102-1.

225.7102-4 Contract clause.

(a) Use the clause at 252.225-7025, Restriction on Acquisition of Forgings, in solicitations and contracts, except for acquisitions—

- (1) Excepted in 225.7102-2; or
 - (2) Where the contracting officer knows that the supplies being acquired do not contain the restricted items.
- (b) If an exception under 225.7102-2 applies to any portion of the acquisition, specify the exception in the solicitation and contract.

225.7103 Polyacrylonitrile (PAN) carbon fiber.

225.7103-1 Policy.

DoD has imposed restrictions on the acquisitions of PAN carbon fiber from foreign sources. DoD is phasing out the restrictions over the 5-year period ending May 31, 2005. Contractors with contracts that contain the clause at 252.225-7022 must use U.S. or Canadian manufacturers or producers for all PAN carbon fiber requirements.

[65 FR 77832, Dec. 13, 2000]

225.7103-2 Waivers.

Contracting officers may, with the approval of the chief of the contracting office, waive, in whole or in part, the requirement of the clause at 252.225-7022. For example, a waiver may be justified if a qualified U.S. or Canadian source cannot meet scheduling requirements.

225.7103-3 Contract clause.

Use the clause at 252.225-7022, Restriction on Acquisition of Polyacrylonitrile (PAN) Carbon Fiber, in solicitations and contracts for major systems as follows:

- (a) In solicitations and contracts issued on or before May 31, 2003, if—
 - (1) The system is not yet in production (milestone III as defined in DoD

Department of Defense

225.7301

5000.2-R, Mandatory Procedures for Major Defense Acquisition Programs (MDAPS) and Major Automated Information System (MAIS) Acquisition Programs); or

(2) The clause was used in prior program contracts.

(b) In solicitations and contracts issued during the period beginning June 1, 2003, and ending May 31, 2005, if the system is not yet in engineering and manufacturing development (milestone II as defined in DoD 5000.2-R).

[65 FR 77832, Dec. 13, 2000]

Subpart 225.72—Reporting Contract Performance Outside the United States

SOURCE: 58 FR 28469, May 13, 1993, unless otherwise noted.

225.7200 Scope of subpart.

This subpart prescribes procedures for contractor reporting and DoD monitoring of the volume, type, and nature of contract performance outside the United States, to include subcontracts, purchases, and intracompany transfers. It implements 10 U.S.C. 2410g which requires advance notification of contract performance outside the United States and Canada when the contract could have been performed inside the United States or Canada.

225.7201 Exception.

This subpart does not apply to contracts for commercial items, construction, ores, natural gas, utilities, petroleum products and crudes, timber (logs), or subsistence.

[60 FR 61597, Nov. 30, 1995]

225.7202 Distribution of reports.

The contracting officer shall forward a copy of reports submitted by successful offerors as required by the clause at 252.225-7026, Reporting of Contract Performance Outside the United States, to the Deputy Director of Defense Procurement (Foreign Contracting), OUSD(AT&L)DP(FC), Washington, DC 20301-3060. This is necessary to satisfy the requirement of 10 U.S.C. 2410g that the notifications (or copies) be main-

tained in compiled form for five years after the date of submission.

[58 FR 28469, May 13, 1993, as amended at 60 FR 29499, June 5, 1995; 65 FR 39705, June 27, 2000]

225.7203 Contract clause.

Except for acquisitions in 225.7201, use the clause at 252.225-7026, Reporting of Contract Performance Outside the United States, in all solicitations and contracts with an estimated or actual value exceeding \$500,000, including those modified to exceed \$500,000.

Subpart 225.73—Acquisitions for Foreign Military Sales

225.7300 Scope of subpart.

(a) This subpart contains policies and procedures for acquisitions for foreign military sales (FMS) under the Arms Export Control Act (22 U.S.C. Chapter 39). Section 22 of the Arms Export Control Act (22 U.S.C. 2762) authorizes DoD to enter into contracts for resale to foreign countries or international organizations.

(b) This subpart does not apply to—

(1) FMS made from inventories or stocks;

(2) Acquisitions for replenishment of inventories or stocks; or

(3) Acquisitions made under DoD cooperative logistic supply support arrangements.

[63 FR 43889, Aug. 17, 1998]

225.7301 General.

(a) The U.S. Government sells defense articles and services to foreign governments or international organizations through FMS agreements. The agreement is documented in a Letter of Offer and Acceptance (LOA) (see DoD 5105.38-M, Security Assistance Management Manual). The LOA—

(1) Lists the items and services, estimated costs, and terms and conditions of the sale;

(2) Is presented to the foreign customer; and

(3) Provides for signature of the foreign customer to indicate acceptance.

(b) Acquisitions for FMS are conducted under the same acquisition and contract management procedures as other defense acquisitions.

225.7302

(c) Solicitations shall separately identify known FMS requirements and the FMS customer.

(d) Contracts for known FMS requirements shall clearly be marked "FMS requirement" on the face of the contract along with the FMS customer and the case identifier code.

[56 FR 36367, July 31, 1991, as amended at 63 FR 43889, Aug. 17, 1998]

225.7302 Procedures.

On FMS programs that will require an acquisition, the contracting officer assists the departmental/agency activity responsible for preparing the LOA by—

(a) Working with prospective contractors to—

(1) Identify, in advance of the LOA, any unusual provisions or deviations.

(2) Advise the contractor if the departmental/agency activity expands, modifies, or does not accept any requirements proposed by the contractor;

(3) Identify any logistics support necessary to perform the contract; and

(4) For acquisitions over \$10,000 that are to be awarded noncompetitively, asking the prospective contractor(s) for information on price, delivery, and other relevant factors. The request for information must identify the fact that the information is for a potential foreign military sale and must identify the foreign customer.

(b) Working with the departmental/agency activity responsible for preparing the LOA to—

(1) Assist, as necessary, in preparation of the LOA;

(2) Identify and explain all unusual contractual requirements or requests for deviations; and

(3) Assist in preparing the price and availability data.

[56 FR 36367, July 31, 1991, as amended at 62 FR 2617, Jan. 17, 1997; 63 FR 43889, Aug. 17, 1998]

225.7303 Pricing acquisitions for FMS.

(a) Price FMS contracts using the same principles as are used in pricing other defense contracts. Application of the pricing principles in FAR parts 15 and 31 to an FMS contract may result in prices that differ from other defense contract prices for the same item due to the considerations in this section.

48 CFR Ch. 2 (10-1-01 Edition)

(b) If the foreign government has conducted a competition resulting in adequate price competition (see FAR 15.403-1(b)(1)), the contracting officer must not require the submission of cost or pricing data. The contracting officer should consult with the foreign government through security assistance personnel to determine if adequate price competition has occurred.

[64 FR 49683, Sept. 14, 1999]

225.7303-1 Contractor sales to other foreign customers.

If the contractor has made sales of the item required for the foreign military sale to foreign customers under comparable conditions, including quantity and delivery, price the FMS contract in accordance with FAR part 15.

225.7303-2 Cost of doing business with a foreign government or an international organization.

(a) In pricing FMS contracts where non-U.S. Government prices as described in 225.7303-1 do not exist, except as provided in 225.7303-5, recognize the reasonable and allocable costs of doing business with a foreign government or international organization, even though such costs might not be recognized in the same amounts in pricing other defense contracts. Examples of such costs include, but are not limited to—

(1) Selling expenses (not otherwise limited by FAR part 31), e.g.—

(i) Maintaining international sales and service organizations;

(ii) Sales commissions and fees in accordance with FAR subpart 3.4;

(iii) Sales promotions, demonstrations, and related travel for sales to foreign governments. Paragraph 126.8 of the International Traffic in Arms Regulations (ITAR) (22 CFR part 121) may require Government approval for these costs to be allowable. If Government approval is required for promotion or demonstration costs to be allowable, the approval must be obtained.

(iv) Configuration studies and related technical services undertaken as a direct selling effort to a foreign country.

(2) Product support and post-delivery service expenses, such as—

(i) Operations or maintenance training, training or tactics films, manuals, or other related data; and

(ii) Technical field services provided in a foreign country related to accident investigations, weapon system problems, operations/tactics enhancement, and related travel to foreign countries.

(3) Offset costs.

(i) A U.S. defense contractor may recover all costs incurred for offset agreements with a foreign government or international organization if the LOA is financed wholly with customer cash or repayable foreign military finance credits.

(ii) The U.S. Government assumes no obligation to satisfy or administer the offset requirement or to bear any of the associated costs.

(4) Costs that are the subject of advance agreement under the appropriate provisions of FAR part 31; or where the advance understanding places a limit on the amounts of cost that will be recognized as allowable in defense contract pricing, and the agreement contemplated that it will apply only to DoD contracts for the U.S. Government's own requirement (as distinguished from contracts for FMS).

(b) Costs not allowable under FAR part 31 are not allowable in pricing FMS contracts, except as noted in paragraph (c) of this subsection.

(c) The cost limitations for major contractors on independent research and development and bid and proposal (IR&D/B&P) costs for projects that are of potential interest to DoD, in 231.205-18(c)(iii), do not apply to FMS contracts, except as provided in 225.7303-5. Therefore, the cost limitations on independent research and development and bid and proposal (IR&D/B&P) costs in FAR 31.205-18 do not apply to such contracts, except as provided in 225.7303-5. The allowability of IR&D/B&P costs on contracts for FMS not wholly paid for from funds made available on a non-repayable basis shall be limited to the contract's allocable share of the contractor's total IR&D/B&P expenditures. In pricing contracts for such FMS—

(1) Use the best estimate of reasonable costs in forward pricing.

(2) Use actual expenditures, to the extent that they are reasonable, in determining final cost.

(d) Under paragraph (e)(1)(A) of Section 21 of the Arms Export Control Act (22 U.S.C. 2761), the United States must charge for administrative services to recover the estimated cost of administration of sales made under the Army Export Control Act.

[56 FR 36367, July 31, 1991, as amended at 56 FR 67216, Dec. 30, 1991; 57 FR 42631, Sept. 15, 1992; 57 FR 53600, Nov. 12, 1992; 59 FR 50511, Oct. 4, 1994; 61 FR 7744, Feb. 29, 1996; 61 FR 18987, Apr. 30, 1996; 63 FR 43889, Aug. 17, 1998; 64 FR 8729, Feb. 23, 1999; 64 FR 49684, Sept. 14, 1999]

225.7303-3 Government-to-government agreements.

If a government-to-government agreement between the United States and a foreign government for the sale, coproduction, or cooperative logistic support of a specifically defined weapon system, major end item, or support item, contains language in conflict with the provisions of this section, the language of the government-to-government agreement prevails.

225.7303-4 Contingent fees.

(a) Except as provided in paragraph (b) of this subsection, contingent fees are generally allowable under DoD contracts, provided the fees are determined by the contracting officer to be fair and reasonable and are paid to a bona fide employee or a bona fide established commercial or selling agency maintained by the prospective contractor for the purpose of securing business (see FAR Part 31 and FAR Subpart 3.4).

(b)(1) Under DoD 5105.38-M, LOAs for requirements for the governments of Australia, Taiwan, Egypt, Greece, Israel, Japan, Jordan, Republic of Korea, Kuwait, Pakistan, Philippines, Saudi Arabia, Turkey, Thailand, or Venezuela (Air Force) must provide that all U.S. Government contracts resulting from the LOAs prohibit the reimbursement of contingent fees as an allowable cost under the contract, unless the payments have been identified and approved in writing by the foreign customer before contract award (see 225.7308(a)).

(2) For FMS to countries not listed in paragraph (b)(1) of this subsection, contingent fees exceeding \$50,000 per FMS

225.7303-5

case shall be unallowable under DoD contracts, unless payment has been identified and approved in writing by the foreign customer before contract award.

[63 FR 11534, Mar. 9, 1998, as amended at 63 FR 43890, Aug. 17, 1998]

225.7303-5 Acquisitions wholly paid for from nonrepayable funds.

(a) In accordance with 22 U.S.C. 2762(d), FMS wholly paid for from funds made available on a nonrepayable basis shall be priced on the same costing basis with regard to profit, overhead, IR&D/B&P, and other costing elements, as is applicable to acquisitions of like items purchased by DoD for its own use.

(b) Direct costs associated with meeting a foreign customer's additional or unique requirements will be allowable under such contracts. Indirect burden rates applicable to such direct costs shall be permitted at the same rates applicable to acquisitions of like items purchased by DoD for its own use.

(c) A U.S. defense contractor may not recover costs incurred for offset agreements with a foreign government or international organization if the LOA is financed with funds made available on a nonrepayable basis.

[61 FR 18988, Apr. 30, 1996; 61 FR 49531, Sept. 20, 1996, as amended at 63 FR 43890, Aug. 17, 1998; 64 FR 49684, Sept. 14, 1999]

225.7304 Source selection.

(a) FMS customers may request that a defense article or defense service be obtained from a particular contractor. In such cases, FAR 6.302-4 provides authority to contract without full-and-open competition. The FMS customer may also request that a subcontract be placed with a particular firm. The contracting officer shall honor such requests from the FMS customer only if the LOA or other written direction sufficiently fulfills the requirements of FAR subpart 6.3.

(b) Do not allow representatives of the FMS customer to—

(1) Direct the deletion of names of firms from bidders mailing lists or slates of proposed architect-engineer

48 CFR Ch. 2 (10-1-01 Edition)

firms. (They may suggest the inclusion of certain firms);

(2) Interfere with a contractor's placement of subcontracts; or

(3) Participate in the price negotiations between the U.S. Government and the contractor.

(c) Do not accept directions from the FMS customer on source selection decisions or contract terms (except that, upon timely notice, the contracting officer may attempt to obtain any special contract provisions and warranties requested by the FMS customer).

(d) Do not honor any requests by the FMS customer to reject any bid or proposal.

[56 FR 36367, July 31, 1991, as amended at 63 FR 43890, Aug. 17, 1998]

225.7305 Limitation of liability.

The contracting officer must advise the contractor whenever the foreign customer will assume the risk for loss or damage under the appropriate limitation of liability clause(s) (see FAR subpart 46.8). Consider the costs of necessary insurance, if any, obtained by the contractor to cover the risk of loss or damage in establishing the FMS contract price.

225.7306 Exercise of options for FMS.

Consider changes to cost and profit attributable to pricing differences between U.S. and FMS requirements when exercising an option to satisfy an FMS requirement. Also consider such changes if the option is already identified for FMS, but it is exercised for country B requirements instead of the country A requirements for which it was priced.

225.7307 Offset arrangements.

In accordance with the Presidential policy statement of April 16, 1990, DoD does not encourage, enter into, or commit U.S. firms to FMS offset arrangements. The decision whether to engage in offsets, and the responsibility for negotiating and implementing offset arrangements, resides with the companies involved.

[62 FR 34125, June 24, 1997]

225.7308 Contract clauses.

(a) Use the clause at 252.225-7027, Restriction on Contingent Fees for Foreign Military Sales, in all solicitations and contracts for FMS.

(b) Use the clause at 252.225-7028, Exclusionary Policies and Practices of Foreign Governments, in all solicitations and contracts for the purchase of goods and services for international military education training and FMS.

[56 FR 36367, July 31, 1991, as amended at 62 FR 2617, Jan. 17, 1997; 63 FR 43890, Aug. 17, 1998]

Subpart 225.74—Antiterrorism/Force Protection Policy for Defense Contractors Outside the United States

SOURCE: 63 FR 31937, June 11, 1998, unless otherwise noted.

225.7400 Scope of subpart.

This subpart pertains to antiterrorism/force protection policy for contracts that require performance or travel outside the United States.

225.7401 General.

Information and guidance pertaining to DoD antiterrorism/force protection can be obtained from the following offices:

(a) For Navy contracts: Naval Criminal Investigative Service (NCIS), Code 24; telephone, DSN 228-9113 or commercial (202) 433-9113.

(b) For Army contracts: HQDA (DAMO-ODL)/ODCSOP; telephone, DSN 225-8491 or commercial (703) 695-8491.

(c) For Marine Corps contracts: CMC Code POS-10; telephone, DSN 224-4177 or commercial (703) 614-4177.

(d) For Air Force contracts: HQ AFSFC/SFPT; telephone, DSN 473-0927/0928 or commercial (210) 671-0927/0928.

(e) For Combatant Command contracts: The appropriate Antiterrorism Force Protection Office at the Command Headquarters.

(f) For Defense Agencies: The appropriate agency security office.

(g) For additional information: Assistant Secretary of Defense for Special Operations and Low Intensity Conflict, ASD (SOLIC); telephone, DSN 255-0044 or commercial (703) 695-0044.

225.7402 Contract clause.

Use the clause at 252.225-7043, Antiterrorism/Force Protection Policy for Defense Contractors Outside the United States, in solicitations and contracts that require performance or travel outside the United States, except for contracts with—

- (a) Foreign governments;
- (b) Representatives of foreign governments; or
- (c) Foreign corporations wholly owned by foreign governments.

PART 226—OTHER SOCIOECONOMIC PROGRAMS

Subpart 226.1—Indian Incentive Program

- Sec.
- 226.103 Procedures.
- 226.104 Contract clause.

Subpart 226.70—Historically Black Colleges and Universities and Minority Institutions

- 226.7000 Scope of subpart.
- 226.7001 Definitions.
- 226.7002 General policy.
- 226.7003 Set-asides for HBCUs and MIs.
- 226.7003-1 Set-aside criteria.
- 226.7003-2 Set-aside procedures.
- 226.7004 [Reserved]
- 226.7005 Eligibility as an HBCU or MI.
- 226.7006 Protesting an HBCU or MI representation.
- 226.7007 Goals and incentives for subcontracting with HBCU/MIs.
- 226.7008 Solicitation provision and contract clause.

Subpart 226.71—Preference for Local and Small Businesses

- 226.7100 Scope of subpart.
- 226.7101 Definition.
- 226.7102 Policy.
- 226.7103 Procedure.
- 226.7104 Other considerations.

Subpart 226.72—Base Closures and Realignments

- 226.7200 Scope.
- AUTHORITY: 41 U.S.C. 421 and 48 CFR chapter 1.

SOURCE: 56 FR 36388, July 31, 1991, unless otherwise noted.