

DEPARTMENT OF DEFENSE

**GENERAL SERVICES
ADMINISTRATION**

**NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION**

48 CFR Parts 25 and 52

[FAR Case 91-119]

RIN 9000-AG81

**Federal Acquisition Regulation; Buy
American Act—Construction
(Grimberg Decision)**

AGENCIES: Department of Defense (DOD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council are considering changes to the Federal Acquisition Regulation (FAR) to amend FAR Parts 25 and 52 to add guidance on requests for exceptions to the Buy American Act for construction. This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

DATES: *Comment due date:* To be considered in the formulation of a final rule, comments should be submitted on or before February 26, 1996.

ADDRESSES: Comments should be submitted to: General Services Administration, FAR Secretariat (VRS), 18th & F Streets NW., Room 4037, Washington, DC 20405.

FOR FURTHER INFORMATION CONTACT: Mr. Edward Loeb at (202) 501-4547 in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4037, GS Building, Washington, DC 20405 (202) 501-4755. Please cite FAR case 91-119.

SUPPLEMENTARY INFORMATION:

A. Background

In its decision in *John C. Grimberg Co., Inc. v. U.S.*, 869 F.2d 1475 (Fed. Cir. 1989), the Court of Appeals for the Federal Circuit in effect ruled that the current Department of Defense practice of generally denying post-award waivers of the Buy American Act for construction contracts is unreasonable. In light of this decision, FAR revisions are proposed to add guidance on exceptions to the Buy American Act.

B. Regulatory Flexibility Act

The proposed rule is not expected to have a significant economic impact on

a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, because contractors are required to either comply with the Buy American Act or seek exceptions. An Initial Regulatory Flexibility Analysis has, therefore, not been performed. Comments are invited from small businesses and other interested parties. Comments from small entities concerning the affected FAR subpart will also be considered in accordance with 5 U.S.C. 610. Such comments must be submitted separately and should cite 5 U.S.C. 601, *et seq.* (FAR case 91-119), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 96-511) applies because the proposed revisions impose additional record-keeping requirements or information collection requirements or collection of information from offerors, contractors or members of the public which require the approval of the Office of Management and Budget (OMB) under 44 U.S.C. 3501, *et seq.* The proposed rule requires contractors proposing to use foreign construction materials to submit information on the foreign and domestic construction materials, as well as a justification for use of foreign materials. This information will be evaluated by the Government in determining if a request for a waiver of the Buy American Act should be granted. A request for approval of the new information collection requirement has been submitted to OMB.

DATES: Comments may be submitted on or before February 26, 1996.

ADDRESSES: Send comments regarding the burden estimate or any other aspect of the information collection requirement to Mr. Peter Weiss, FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the FAR Secretariat.

Annual Reporting Burden

Public reporting burden for this collection of information is estimated to average .5 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

The annual reporting burden is estimated to be \$37,500 as a result of the following estimated number of hours of labor for compliance: Respondents, 1,000; responses per respondent, 5; total annual responses, 5,000; preparation hours per response, .5; and total response burden hours, 2,500.

List of Subjects in 48 CFR Parts 25 and 52

Government procurement.

Dated: December 18, 1995.

Edward C. Loeb,

Acting Director, Office of Federal Acquisition Policy.

Therefore, it is proposed that 48 CFR parts 25 and 52 be amended as set forth below:

PART 25—FOREIGN ACQUISITION

1. The authority citation for 48 CFR Parts 25 and 52 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

25.200 [Amended]

2. Section 25.200 is amended to revise the cite "41 U.S.C. 10" to read "41 U.S.C. 10a-10d".

3. Section 25.202 is amended by revising paragraph (a)(1), redesignating paragraphs (b) through (c) as paragraphs (c) through (d), and adding a new paragraph (b) to read as follows:

25.202 Policy.

(a) * * *

(1) The cost would be unreasonable (the cost of a particular domestic construction material shall be determined to be unreasonable when the cost of such material exceeds the cost of foreign material by more than 6 percent, unless the agency head determines a higher percentage to be appropriate; see Executive Order 10582);

* * * * *

(b) Offerors should request an exception to the Buy American Act in time to allow determination before submission of offers so that, through competition, economic benefits of the exception are passed along to the Government. Officials making these determinations shall consider the feasibility of foregoing the acquisition or of acquiring a domestic substitute.

* * * * *

25.203, 25.204, and 25.205 [Redesignated as 25.204, 25.206, and 25.207]

4. Sections 25.203, 25.204, and 25.205 are redesignated as 25.204, 25.206, and 25.207, respectively.

4A. A new 25.203 is added to read as follows:

25.203 Exceptions requested before submission of offers.

(a) Any request for exception to the Buy American Act made before receipt of offers shall be evaluated based on the information in the applicable clause at 52.225-5, Buy American Act—

Construction Materials, paragraph (c) and (d) or 52.225-15, Buy American Act—Construction Materials under European Community and North American Free Trade Agreements, paragraphs (c) and (d) and may be supplemented by other information readily available to the contracting officer.

(b) If an exception to the Buy American Act is granted before receipt of offers, the excepted material shall be identified in the clause at 52.225-5 or 52.225-15.

5. Newly designated 25.204 is revised to read as follows:

25.204 Evaluating offers of foreign construction material.

(a) Offerors proposing to use foreign construction material other than that listed in the applicable clause at 52.225-5(b)(2) or 52.225-15(b)(3) must provide the information required by paragraphs (c) and (d) of the respective clauses.

(b) Unless agency regulations specify a higher percentage, the Government will add to the offer price 6 percent of the cost of any foreign construction material proposed for exception from the requirements of the Buy American Act based on the unreasonable cost of domestic construction materials. If the evaluation of offers results in a tie between an offer including foreign construction material, as evaluated, and an offer including solely domestic material, award shall be made on the offer including solely domestic material. This procedure does not apply to foreign construction material whose use is excepted by the Government under the clause at 52.225-5(b)(2) or 52.225-15(b)(3).

(c) Offerors also may submit alternate offers based on use of domestic construction material to avoid the possibility that denial of an exception permitting use of foreign construction material shall cause rejection of the entire offer.

(d) If an exception to the Buy American Act is granted, the excepted material shall be listed in the contract.

6. A new 25.205 is added to read as follows:

25.205 Post award exceptions.

(a) If a contractor requests an exception to the Buy American Act after contract award, the contractor shall explain why the exception could not have been requested before contract award or otherwise was not reasonably foreseeable. If the contractor does not submit a satisfactory explanation, an exception should not be granted unless it is in the Government's best interests.

(b) Any request for exception to the Buy American Act made after contract award shall be evaluated based on information similar to that required before award by the applicable clause at 52.225-5(c) and (d) or 52.225-15(c) and (d) and/or other information readily available to the contracting officer.

(c) If an exception to the Buy American Act is granted after contract award, the contract shall be modified to allow use of the foreign construction material, and adequate consideration shall be negotiated. However, when the basis for the exception is the unreasonable price of a domestic construction material, adequate consideration shall not be less than the differential established in 25.202(a)(1) or agency procedures.

7. Newly designated Section 25.206 is revised to read as follows:

25.206 Noncompliance.

(a) The contracting officer is responsible for conducting Buy American Act investigations when available information indicates such action is warranted.

(b) Unless fraud is suspected, the contracting officer shall notify the contractor of the apparent unauthorized use of foreign construction material and request a reply, to include proposed corrective action.

(c) If an investigation reveals that a contractor or subcontractor has used foreign construction material without authorization, the contracting officer shall take appropriate action, including one or more of the following:

(1) If granting an exception to the Buy American Act is appropriate, the contracting officer may process an exception in accordance with 25.205.

(2) If an exception to the Buy American Act is not appropriate:

(i) The contracting officer should consider requiring removal and replacement of the unauthorized foreign construction material.

(ii) If removal and replacement of foreign construction material incorporated in a building or work would be impracticable, cause undue delay, or otherwise be detrimental to the interests of the Government, the contracting officer may determine in writing that the foreign construction material need not be removed and replaced. Such a determination does not constitute approval of an exception and should be so stated in the determination. Further, such a determination does not affect the Government's right to suspend and/or debar a contractor, subcontractor or supplier for violation of the Buy American Act, or to exercise other

contractual rights and remedies, such as reducing the contract price or terminating the contract for default.

(iii) If the noncompliance is sufficiently serious, the contracting officer should consider exercising appropriate contractual remedies, such as terminating the contract for default. The contracting officer should also consider preparing and forwarding a report for suspension and/or debarment, including findings and supporting evidence in accordance with FAR subpart 9.4, Debarment, Suspension, and Ineligibility. In addition, if the noncompliance appears to be fraudulent, the contracting officer should consider referring the matter to other appropriate agency officials, such as the officer responsible for criminal investigation and prosecution.

8. Newly designated Section 25.207 is revised to read as follows:

25.207 Solicitation provision and contract clause.

(a) The contracting officer shall insert the provision at 52.225-X, Notice of Buy American Act—Construction Materials, in solicitations for construction when the clause at 52.225-5, Buy American Act—Construction Materials, is prescribed.

(b) The contracting officer shall insert the clause at 52.225-5, Buy American Act—Construction Materials, in solicitations and contracts for construction inside the United States, except when the clause at 52.225-15, Buy American Act—Construction Materials under European Community and North American Free Trade Agreements, is prescribed.

(c) The contracting officer shall insert the provision at 52.225-XX, Notice of Buy American Act Requirement—Construction Materials under European Community and North American Free Trade Agreements, in solicitations for construction when the clause at 52.225-15, Buy American Act—Construction Materials under European Community and North American Free Trade Agreements, is prescribed.

(d) The contracting officer shall insert the clause at 52.225-15, Buy American Act—Construction Materials under European Community and North American Free Trade Agreements, in solicitations and contracts for construction inside the United States with an estimated acquisition value of \$6,500,000 (\$8,000,000 for the Power Marketing Administrations) or more, to be awarded by agencies listed in 25.407.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

9. Section 52.225-X is added to read as follows:

52.225-X Notice of Buy American Act requirement—construction materials.

As prescribed in 25.207(a), insert the following provision:

Notice of Buy American Act Requirement—Construction Materials (Date)

(a) Offerors are required to comply with the requirements of FAR clause 52.225-5, Buy American Act—Construction Materials, of this solicitation. The terms “construction material” and “domestic construction material” as used in this provision, have the meanings set forth in FAR clause 52.225-5(a), Definitions.

(b) Offerors should request an exception to the Buy American Act in time to allow determination before submission of offers. For evaluation of a request for an exception to the requirements of the Buy American Act prior to bid opening, the information and applicable supporting data required by FAR clause 52.225-5(c) and (d) shall be included in the request. If a request has not been made before the time set for receipt of offers or a response has not been received to a request made prior to receipt of offers, the information and supporting data shall be included in the offer.

(c) *Evaluation of offers.* (1) For evaluation of offers, (unless agency regulations specify a higher percentage) the Government will add to the offer price 6 percent of the cost of any foreign construction material proposed for exception from the requirements of the Buy American Act based on claimed unreasonable cost of domestic construction materials.

(2) If the evaluation of offers results in a tie between an offer including foreign construction material, as evaluated, and an offer including solely domestic material, award shall be made on the offer including solely domestic material.

(3) This procedure does not apply to foreign construction material whose use is excepted by the Government under FAR clause 52.225-5(b)(2) of the solicitation.

(d) *Alternate offerors.* (1) When an offer includes foreign construction material, offerors also may submit alternate offers based on use of domestic construction material.

(2) If alternate offers are submitted, a separate SF 1442 shall be submitted for each alternate offer, and a separate price comparison table prepared in accordance

with FAR clause 52.225-5(c) and (d) shall be submitted for each offer that is based on the use of any foreign construction material.

(3) If a particular exception requested under FAR clause 52.225-5(c), is not approved—

(i) The Government will evaluate only offers based on use of the equivalent domestic construction material, and the offeror shall be required to furnish such domestic construction material;

(ii) In sealed bid procurements, any offer based on use of that particular foreign construction material must be rejected as nonresponsive; and

(iii) In negotiated procurements, any offer based on use of that particular foreign construction material may not be accepted unless revised during negotiations. (End of provision)

10. Section 52.225-5 is amended by revising the introductory paragraph; revising the clause date; revising paragraph (a) introductory text; by removing the phrase “as used in this clause” from the definitions of “Components”, “Construction materials” and “Domestic construction materials”; by revising paragraph (b); and adding paragraphs (c) and (d) to read as follows:

52.225-5 Buy American Act—construction materials.

As prescribed in 25.207(b), insert the following clause:

Buy American Act—Construction Materials (Date)

(a) Definitions. As used in this clause

* * * * *

(b)(1) The Buy American Act (41 U.S.C. 10(a)-10(d)) requires that only domestic construction material be used in performing this contract, except as provided in subparagraphs (b)(2) or (b)(3) of this clause.

(2) This requirement does not apply to the excepted construction material or components listed by the Government below:

(list applicable accepted materials or indicate “none”.)

(3) Other foreign construction material may be used if the Government determines that—

(i) The cost would be unreasonable (the cost of a particular domestic construction material shall be determined to be unreasonable when the cost of such material exceeds the cost of foreign material by more than 6 percent, unless the agency head determines a higher percentage to be appropriate);

(ii) The use of a particular domestic construction material would be impracticable; or

(iii) The construction material is not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality.

(4) The Contractor agrees that only domestic construction material will be used by the Contractor, subcontractors, material men, and suppliers in the performance of this contract, except for foreign construction materials, if any—

(i) Listed in paragraph (b)(2) of this clause; or

(ii) Proposed by the Contractor and approved by the Government in accordance with paragraphs (c) and (d) of this clause.

(c) *Request for exceptions.* (1) Contractors proposing to use foreign construction material shall provide adequate information for Government evaluation of the request for exception to the Buy American Act. Each submission shall include a description of the foreign and domestic construction materials, including unit of measure, quantity, prices and time of delivery or availability, location of the construction project, name and address of the proposed contractor, and a detailed justification of the reason for use of foreign materials cited in accordance with subparagraph (b)(3) of this clause. A submission based on unreasonable cost shall include a reasonable survey of the market and a completed price comparison table in the format in paragraph (d) of this clause. The price of construction material shall include all delivery costs to the construction site and any applicable duty (whether or not a duty-free certificate may be issued).

(2) If an exception to the Buy American Act is granted after contract award, the contract shall be modified to allow use of the foreign construction material, and adequate consideration shall be negotiated. However, when the basis for the exception is the unreasonable price of a domestic construction material, adequate consideration shall not be less than the differential established in subparagraph (b)(3)(i) of this clause.

(3) If a request for an exception to the Buy American Act is not granted, the use of that particular foreign construction material will be a failure to comply with the Act.

(d) For evaluation of requests under paragraph (c) of this clause, the following information and any applicable supporting data based on the canvas of suppliers shall be included in the request.

FOREIGN AND DOMESTIC CONSTRUCTION MATERIALS PRICE COMPARISON

Construction material description	Unit of measure	Quantity	Price (dollars)
Item 1:			
Foreign construction material
Domestic construction material
Item 2:			
Foreign construction material
Domestic construction material

FOREIGN AND DOMESTIC CONSTRUCTION MATERIALS PRICE COMPARISON—Continued

Construction material description	Unit of measure	Quantity	Price (dollars)
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List name, address, telephone number and contact for suppliers surveyed. Attach copy of response; if oral, attach summary. Include other applicable supporting information.

Include all delivery costs to the construction site and any applicable duty (whether or not a duty-free entry certificate is issued).

(End of clause)

11. Section 52.225-XX is added to read as follows:

52.225-XX Notice of Buy American Act requirement—construction materials under European Community and North American Free Trade Agreements.

As prescribed in 25.207(c), insert the following provision:

Notice of Buy American Act Requirement—Construction Materials Under European Community and North American Free Trade Agreements (Date)

(a) Offerors are required to comply with the requirements of Federal Acquisition Regulation (FAR) clause 52.225-15 of this solicitation. The definitions set forth at 52.225-15(a) have the same meaning in this provision.

(b) Offerors should request an exception to the Buy American Act in time to allow determination before receipt of offers. For evaluation of a request for an exception to the requirements of the Buy American Act prior to bid opening, the information and applicable supporting data required by 52.225-15 (c) and (d) shall be included in the request. If a request has not been made before the time set for receipt of offers or a response has not been received to a request made prior to receipt of offers, the information and supporting data shall be included in the offer.

(c) *Evaluation of offers.* (1) For evaluation of offers, (unless agency regulations specify a higher percentage) the Government will add to the offer price 6 percent of the cost of any foreign construction material proposed for exception from the requirements of the Buy American Act based on claimed unreasonable cost of domestic construction materials.

(2) If the evaluation of offers results in a tie between an offer including foreign construction material, as evaluated, and an offer including solely domestic material, award shall be made on the offer including solely domestic material.

(3) This procedure does not apply to foreign construction material whose use is excepted by the Government under 52.225-15(b)(3) of the solicitation.

(d) *Alternate offers.* (1) When an offer includes foreign construction material, offerors also may submit alternate offers based on use of domestic construction material.

(2) If alternate offers are submitted, a separate SF 1442 shall be submitted for each alternate offer, and a separate price comparison table prepared in accordance with 52.225-15 (c) and (d) shall be submitted

for each alternate offer that is based on the use of any foreign construction material.

(3) If a particular exception requested under 52.225 15(c) is not approved—

(i) The Government will evaluate only offers based on use of the equivalent domestic construction material, and the offeror shall be required to furnish such domestic construction material;

(ii) In sealed bid procurements, any offer based on use of that particular foreign construction material must be rejected as nonresponsive; and.

(iii) In negotiated procurements, any offer based on use of that particular foreign construction material may not be accepted unless revised during negotiations.

(End of provision)

12. Section 52.225-15 is amended by revising the introductory paragraph, the clause date, and paragraphs (b) and (c); and adding paragraph (d) to read as follows:

52.225-15 Buy American Act—Construction Materials under European Community and North American Free Trade Agreements.

As prescribed in 25.207(d), insert the following clause:

Buy American Act—Construction Materials Under European Community and North American Free Trade Agreements (Date)

(a) Definitions. As used in this clause—

* * * * *

(b)(1) The Buy American Act (41 U.S.C. 10(a)-10(d)) requires that only domestic construction material be used in performing this contract, except as provided in subparagraphs (b)(2), (b)(3), or (b)(4) of this clause.

(2) The Memorandum of Understanding between the United States of America and the European Economic Community on Government Procurement, and the North American Free Trade Agreement (NAFTA), provide that EC and NAFTA construction materials are exempted from application of the Buy American Act.

(3) This requirement does not apply to the excepted construction material or components listed by the Government below:

(list applicable accepted materials or indicate "none".)

(4) Other foreign construction material may be used if the Government determines that—

(i) The cost would be unreasonable (the cost of a particular domestic construction material shall be determined to be unreasonable when the cost of such material exceeds the cost of foreign material by more

than 6 percent, unless the agency head determines a higher percentage to be appropriate);

(ii) The use of a particular domestic construction material would be impracticable; or

(iii) The construction material is not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality.

(5) The Contractor agrees that only domestic construction material will be used by the Contractor, subcontractors, material men, and suppliers in the performance of this contract, except for foreign construction materials, if any—

(i) Listed in paragraph (b)(3) of this clause;

or

(ii) Proposed by the Contractor and approved by the Government in accordance with paragraphs (c) and (d) of this clause.

(c) *Request for exceptions.* (1) Contractors proposing to use foreign construction material shall provide adequate information for Government evaluation of the request for exception to the Buy American Act. Each submission shall include a description of the foreign and domestic construction materials, including unit of measure, quantity, prices and time of delivery or availability, location of the construction project, name and address of the proposed contractor, and a detailed justification or the reason for use of foreign materials cited in accordance with subparagraph (b)(3) of this clause. A submission based on unreasonable cost shall include a reasonable survey of the market and a completed price comparison table in the format in paragraph (d) of this clause. The price of construction material shall include all delivery costs to the construction site and any applicable duty (whether or not a duty-free certificate may be issued).

(2) If an exception to the Buy American Act is granted after contract award, the contract shall be modified to allow use of the foreign construction material, and adequate consideration shall be negotiated. However, when the basis for the exception is the unreasonable price of a domestic construction material, adequate consideration shall not be less than the differential established in subparagraph (b)(4)(i) of this clause.

(3) If a request for an exception to the Buy American Act is not granted, the use of that particular foreign construction material will be a failure to comply with the Act.

(d) For evaluation of requests under paragraph (c) of this clause, the following information and any applicable supporting data based on the canvas of suppliers shall be included in the request.

FOREIGN AND DOMESTIC CONSTRUCTION MATERIALS PRICE COMPARISON

Construction material description	Unit of measure	Quantity	Price (dollars)*
Item 1:			
Foreign construction material	\$
Domestic construction material	\$
Item 2:			
Foreign construction material	\$
Domestic construction material	\$
List name, address, telephone number and contact for suppliers surveyed. Attach copy of response; if oral, attach summary. Include other applicable supporting information.			

* Include all delivery costs to the construction site and any applicable duty (whether or not a duty-free entry certificate is issued).

[End of clause]

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