

- a. Revising the date of the clause to read “(Oct 2010)”;
- b. Removing from paragraph (e)(1)(v) “accurate cost” and adding “accurate certified cost” in its place;
- c. Removing from paragraph (e)(1)(vii)(C) “reason cost” and adding “reason certified cost” in its place; and
- d. Removing from paragraphs (e)(1)(vii)(D) and (e)(1)(vii)(E) “subcontractor’s cost” and adding “subcontractor’s certified cost” in its place.

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## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Parts 2, 5, 25, and 52

[FAC 2005–45; FAR Case 2009–008; Item III; Docket 2009–0008, Sequence 1]

RIN 9000–AL22

#### Federal Acquisition Regulation; American Recovery and Reinvestment Act of 2009 (the Recovery Act)—Buy American Requirements for Construction Material

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

**ACTION:** Final rule.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) have adopted as final, with changes, an interim rule amending the Federal Acquisition Regulation (FAR) to implement the American Recovery and Reinvestment Act of 2009 (Recovery Act) with respect to the “Buy American—Recovery Act” provision, section 1605 in Division A.

**DATES:** *Effective Date:* October 1, 2010.

*Applicability Date:* The rule applies to solicitations issued and contracts awarded on or after the effective date of this rule. Contracting officers shall modify, on a bilateral basis, in accordance with FAR 1.108(d)(3), existing contracts to include the appropriate FAR clause for future work, if Recovery Act funds will be used. In the event that a contractor refuses to accept such a modification, the contractor will not be eligible for award of any work that uses Recovery Act funds.

**FOR FURTHER INFORMATION CONTACT:** For clarification of content, contact Ms. Cecelia L. Davis, Procurement Analyst, at (202) 219–0202. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAC 2005–45, FAR case 2009–008.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

This final rule implements the unique “Buy American—Recovery Act” provision, section 1605 of the Recovery Act, by revising FAR subpart 25.6, and related provisions and clauses at FAR part 52, with conforming changes to FAR subparts 2.1, 5.2, 25.0, and 25.11. An interim rule was published in the *Federal Register* at 74 FR 14623, March 31, 2009. The public comment period ended June 1, 2009.

As required by section 1605, the final rule makes it clear that there will be full compliance with U.S. obligations under all international trade agreements when undertaking construction covered by such agreements with Recovery Act funds. The new required provisions and clauses implement U.S. obligations under our trade agreements in the same way as they are currently implemented in non-Recovery Act construction contracts. The Caribbean Basin countries are excluded from the definition of “Recovery Act designated country,” because the treatment provided to them is not as a result of a U.S. international obligation.

##### B. Discussion and Analysis

The Regulatory Secretariat received 35 responses, but 2 responses lacked attached comments and 1 response appeared unrelated to the case. The responses included multiple comments on a wide range of issues addressed in the interim rule. Each issue is discussed by topic in the following sections.

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##### 1. Comments on Section 1605 of the Recovery Act

*Comments:* Although the respondents expressed general support for the goals of the Recovery Act to stimulate the U.S. economy, many were concerned about the Recovery Act Buy American restrictions of section 1605. For example:

Several entities representing other countries objected to the potential restrictions on trade. They alleged that the Recovery Act Buy American requirement in section 1605 is not in conformity with the U.S. pledge to refrain from raising new barriers in the framework of the Summit on Financial Markets and the World Economy, November 2008, and the G20 pledge, April 2009. They alleged that it will have a negative impact on the world trade and economy. One respondent stated that it is not rational for the U.S. to take trade protection actions such as the “Buy American—Recovery Act” provision, because it will not be useful for the American and global economy in promoting recovery from the current downturn. Another respondent stated that, to the extent 1605 imposes more restrictive requirements than previously existed, it represents a new barrier to trade in goods between the United States and Canada. One respondent found several aspects of section 1605 problematic because of their “inherent lack of clarity.”

Some United States industry associations also had concerns about section 1605. One objected that the real-life burdens of complying with these country-of-origin requirements cannot be overstated. This respondent concluded that, where the U.S. Government places a premium on

promoting its important socio-economic goals, this requires companies interested in selling in the Federal marketplace to segregate their inventories based on country of origin and implement costly compliance regimes. Another respondent noted a risk that the Recovery Act Buy American provisions may have numerous unintended consequences on the United States and harm American workers and companies and the global economy. A third respondent commented that "Congress' well-meaning intentions, like all protectionist measures, could inadvertently hurt the downstream U.S. users."

*Response:* Comments on the merits of section 1605 of the Recovery Act are outside the scope of this case, because the Councils cannot change the law.

This final rule is focused on the optimal implementation of section 1605 in the FAR, *i.e.*, the Councils have attempted to find the balance between domestic-sourcing requirements and simplicity and clarity of implementation, so that the rule does not become so onerous that it does more harm than good to U.S. industry.

## 2. Applicability of Section 1605 of the Recovery Act

### a. Relation to the Buy American Act

There are two main issues raised by respondents with regard to the applicability of the Buy American Act in contracts funded with Recovery Act funds.

#### i. Does the Buy American Act apply to manufactured construction material used in Recovery Act projects?

*Comments:* A few respondents contended that the Buy American Act still applies to goods covered by section 1605 of the Recovery Act—that both standards must be met. These respondents objected that the interim rule deviated from existing law and regulations that should still govern the purchase of goods covered by the Recovery Act. According to these respondents, any final rule must, at a minimum, preserve the basic requirements of assembly in the United States and the 51 percent domestic component rule, because the Buy American Act still applies. Another respondent claimed that this rule cannot waive the Buy American Act's component test without additional authority.

*Response:* The Recovery Act sets out specific domestic source restrictions for iron, steel, and manufactured goods incorporated into Recovery Act construction projects. In many ways,

these restrictions mirror the Buy American Act, but there are specific differences (no component test, different standards for unreasonable cost, no exception for impracticable, etc.). The Councils and OMB determined that it was reasonable to interpret section 1605 as including all of the "Buy American—Recovery Act" restrictions that Congress intended to apply to iron, steel, and manufactured goods covered by the Recovery Act, *i.e.*, these goods are not also covered by the Buy American Act. Since Congress was clearly aware of the Buy American Act when creating the Recovery Act domestic source restrictions and exceptions, if Congress had wanted the component test or other aspects of the Buy American Act to apply, they would have included them. Congress incorporated those aspects of the Buy American Act that they wanted to apply, and excluded or modified those aspects that they did not want to apply. The Councils have determined that section 1605 of the Recovery Act supersedes the Buy American Act with regard to the acquisition of manufactured construction materials used on a project funded with Recovery Act funds. Therefore, the component test does not apply to construction material used in projects funded by the Recovery Act.

#### ii. Does the Buy American Act apply to unmanufactured construction material used in Recovery Act projects?

*Comments:* Several non-U.S. respondents objected that the interim rule applies the Buy American Act to unmanufactured construction material. One of them stated that the interim rule has expanded the scope of the Recovery Act by way of arbitrary interpretation and constitutes an unjustified limitation of the use of foreign unmanufactured construction materials, given that the use of foreign unmanufactured construction materials is not prohibited by the Recovery Act. A respondent believed that "statutory authority does not exist to extend the provisions required by section 1605 to unmanufactured goods" and asked that this be struck from the final rule. Another objected that the additional 6 percent evaluation factor applied to unmanufactured construction material is only stipulated in the FAR, and should not be permitted under the spirit of the "G20 Statement."

*Response:* Section 1605 did not address unmanufactured construction material. The interim rule coverage of unmanufactured construction material is not based on extending the coverage of section 1605, but on continuing to apply the Buy American Act to that

material not covered by the Recovery Act.

### b. Applicability to Construction Projects/Contracts

#### i. How To Identify a "Construction" Contract

*Comments:* A respondent wanted to know whether the contracting agency will be required to affirmatively stipulate whether a contract is considered a "construction" contract and require that this language be flowed down to subcontractors.

*Response:* Construction contracts are easily identifiable by the presence of construction provisions and clauses in the solicitation and contract, such as the clauses prescribed in FAR subpart 36.5 as well as the Buy American Act provisions and clauses for construction contracts in FAR clauses 52.225–9 through 52.225–12 or now the Recovery Act Buy American, FAR provisions at 52.225–21 through 52.225–24. It is the responsibility of the prime contractor to comply with contract clauses and impose on subcontractors whatever conditions are necessary to enable the prime contractor to meet the contract requirements.

#### ii. Use of terms "contract" and "project"

*Comments:* Two respondents contended that the interim rule is unclear in several places regarding the scope of coverage because the terms "projects" and "contracts" appear to be used interchangeably.

- FAR 25.602(a) states that "None of the funds appropriated or otherwise made available by the Recovery Act may be used for a project for the construction, alteration, maintenance or repair of a public building or public work \* \* \*"

- FAR 25.603(c), implementing the Trade Agreements Act, states that "For construction contracts with an estimated acquisition value \* \* \*"

- FAR 52.225–21(b)(2) states, "The contractor shall use only domestic construction material in performing this contract \* \* \*."

*Response:* Construction "project" is often a more inclusive term than construction "contract." Large construction projects may involve more than one construction contract. The term "project" may also be used to denote a segment of a contract, if the funds are clearly segregated. To clarify this meaning, the Councils have added a statement in the policy section at FAR 25.602 and also clarified in the provision and clause prescriptions at FAR 25.1102(e)(2) that the contract must indicate if the Recovery Act provision

and clause only apply to certain line items in the contract.

The scope of this rule is established, in accordance with section 1605(a) of the Recovery Act, as applying restrictions to “a project for the construction, alteration, maintenance, or repair of a public building or public work.” The final rule has clarified at FAR 25.602 that the agency determines the scope of the project and conveys this to the contractor through the specified applicability of the Recovery Act provision and clause in the contract.

However, the statute can only be implemented through clauses that go into a specific construction contract. Each contract can only impose requirements applicable to that particular contract. Therefore, the term “contract” is used when the interim rule is addressing a requirement that is specific to a contractor or contract, particularly as used in the provisions and clauses.

#### c. Applicability to Construction Materials or Supplies

##### i. Equating “Manufactured Goods Used in the Project” to “Construction Material”

*Comments:* There were many concerns about the interpretation in the interim rule of the applicability of section 1605 to manufactured goods, namely that the rule equates manufactured goods used in the project to construction material.

A respondent contended that the narrow interpretation of manufactured goods “ignores common sense and well-established precedent.” According to the respondent, the rule equates manufactured goods to construction material and limits the applicability to construction materials that are incorporated into a public building or work.

Another respondent stated that the rule should apply to all manufactured goods—not just construction materials, contending that manufactured goods “used in the project” means “all hazmat suits, tool belts, masks, tarps, covers, safety straps, construction clothing, gloves, etc. purchased by the contractor as part of doing the work.”

A respondent stated that regulations for public works projects must require that all manufactured goods, including textile products, must be manufactured in the United States, as intended by the Recovery Act.

On the other hand, a respondent expressed concern that the perceived requirement that all manufactured products on the construction site are covered is proving disastrous for

American equipment manufacturers. This respondent stated that construction equipment manufacturers provide the machines that improve operations and reduce costs of any infrastructure project. The process to verify and prove 100 percent U.S. content of each piece of equipment is onerous.

Some respondents expressed support for the Councils’ approach in FAR subpart 25.6 of treating iron, steel, and manufactured goods as another way of describing “construction material: As that term has been understood and applied with respect to 41 U.S.C. 10a–10d in FAR subpart 25.2 and its associated clauses.”

*Response:* One of the goals in implementation of the Recovery Act was to make the definitions and procedures as close to existing FAR definitions and procedures as possible, except where differences are required by the Recovery Act.

Therefore, when applied to a construction contract, FAR subpart 25.6 and the associated construction clauses use the standard definition of “construction material” at FAR 25.003 that is familiar to contractors and contracting officers. There is a long series of Government Accountability Office (GAO) decisions and case law that then can be applied without completely starting over. For use in a construction contract, the Councils interpreted “manufactured goods used in the project” to be comparable to the long-standing definition of “construction material” as an “article, material, or supply brought to the construction site by the contractor or a subcontractor for incorporation into the building or work.” Review of the existing case law clarifies the many possible nuances relating to construction material and its delivery to the site. Rather than “ignoring well established precedent,” the Councils relied on well-established precedent. The FAR has never applied domestic source restrictions to such items as hazmat suits, tool belts, masks, tarps, covers, safety straps, construction clothing, and gloves, which are used in a construction project by the contractor but are not incorporated into the construction project. Further, the interim rule did not apply the Recovery Act Buy American requirement of section 1605 to equipment used at the construction site, because it is not incorporated into the construction project. These items are not deliverables to the Government, but remain the property of the contractor. The contractor may already have purchased these items before commencement of the contract, and may continue to use

them on subsequent contracts. Therefore, their purchase is not generally subject to restrictions in the terms of the contract.

##### ii. Applicability to Supplies Purchased by the Government

*Comment:* One respondent expressed concern that the interim rule, in the definition of construction material, stated that manufactured goods that are purchased by the Government are supplies and, therefore, excluded from the definition of manufactured goods, as used in section 1605.

*Response:* The statement that items purchased by the Government are supplies, not construction material, has been a standard part of the definition of construction material for many years. It is a true statement that items purchased by the Government are not “construction material” as it is defined in the FAR. However, section 1605 does require that all manufactured goods incorporated into the project must be produced in the United States, whether purchased by the contractor as construction material or purchased by the Government as an item of supply. If the Government directly purchases manufactured goods and delivers them to the site for incorporation into the project, such material must comply with the “Buy American—Recovery Act” restriction of section 1605, even though it is not construction material as defined in the FAR. The final rule clarifies this in the policy section. Furthermore, for added clarity, the final rule deletes from the definition of “construction material” in FAR clauses 52.225–21 and 52.225–23 the phrase about items purchased by the Government not being construction material, because it appears to cause confusion and because the information about actions the Government may take is not pertinent to the contractor for performance of the construction contract.

##### iii. Contractor-Purchased Supplies for Delivery to the Government

*Comments:* A respondent requested that the final rule clarify that, to the extent purchases of supplies made with Recovery Act funds are not covered as construction material, they are subject to normal Buy American Act/Trade Agreements Act requirements.

*Response:* Contractor-purchased supplies that are for delivery to the Government, not for incorporation into the project, continue to be covered by the pre-existing FAR regulations on the Buy American Act and trade agreements, as applicable. This rule only applies to construction contracts funded with Recovery Act funds or

supplies purchased by the Government for incorporation into the project.

d. Manufacture vs. Substantial Transformation or Tariff Shift

There were many comments on the issue of manufacture and substantial transformation.

i. Buy American Act and Substantial Transformation

*Comments:* Several respondents believed that the Buy American Act includes a requirement for substantial transformation. One respondent stated that the rule should use the “long-standing definition” of a domestic manufactured good, *i.e.*, final substantial transformation must occur in the United States. Another respondent stated that the Buy American Act of 1933 includes a substantial transformation test. A respondent also stated that the Buy American Act requires substantial transformation in the United States. The respondent was concerned that the interim rule only requires assembly in the United States.

*Response:* Whether or not the Buy American Act requires “manufacture” or “substantial transformation” is not directly relevant to this rule, but only might be used as a matter of comparison for interpretation of section 1605. The Councils have determined that the Buy American Act does not apply to manufactured construction material. Many of the respondents, whether contending that the Buy American Act still applies or using the Buy American Act for purposes of comparison and interpretation, have misinterpreted the Buy American Act. The Buy American Act includes the requirement for domestic manufactured goods to be “manufactured” in the United States. This term has been used consistently in the FAR as the first prong of the test for domestic manufactured end products and construction material. There is no substantial transformation test included in the Buy American Act. The term “substantial transformation” only comes into the FAR to implement trade agreements. The rule of origin for designated country end products and designated country construction material requires products to be wholly the product of, or be “substantially transformed” in the designated country. Even under trade agreements, there is no requirement for substantial transformation of products produced in the United States, because U.S.-made end products are not designated country products. Actually, the definition of “U.S.-made end product” allows either “substantial transformation” or “manufacture” in the United States to

qualify as a U.S.-made end product, because the Buy American Act has been waived for U.S.-made end products when the World Trade Organization Government Procurement Agreement applies. However, this is not the case for domestic construction material. Even when trade agreements apply, domestic construction material must meet the Buy American requirements of domestic manufacture, not substantial transformation. Therefore, those respondents who argue that the Buy American Act requires substantial transformation are simply wrong.

ii. Should “manufacture” in this rule include the standard of substantial transformation?

*Comment:* Further elaborating on substantial transformation, two respondents recommended that the Councils should adopt a clear rule defining the concept of domestic manufacture consistent with the “well-established standard” of substantial transformation as the first part of the two-pronged test for domestic construction material. The respondent stated that the rule should not confer domestic status simply as a result of minor processing or mere assembly in the United States. According to these respondents, by not adopting substantial transformation, the interim rule has created ambiguity. These respondents pointed out a clear administrative process in the Federal Government for making substantial transformation determinations. They also stated that U.S. Customs and Border Protection (Customs) considers the totality of the circumstances and makes determinations on a case-by-case basis. The respondents questioned why the interim rule omitted any reference to substantial transformation.

Three respondents recommended allowing either manufacture (perhaps combined with the component test) or substantial transformation. According to one of the respondents, allowing both models to determine when a product has been manufactured in the United States ensures greatest flexibility. This respondent believed that this is only relevant below the Trade Agreements Act threshold, *i.e.*, above the threshold, the requirements defined under those pre-existing regulations would apply.

*Response:* Section 1605 of the Recovery Act does not require substantial transformation. It requires that manufactured goods be “produced” in the United States. The Councils have interpreted the law to equate “production” of manufactured goods to “manufacture.” To the extent that the Recovery Act domestic source

restriction is worded consistently with the Buy American Act, it is reasonable to implement in a similar fashion. “Substantial transformation” has never been applied in the FAR to domestic construction material, just to designated country construction material that is subject to trade agreements.

Therefore, the final rule continues to utilize the FAR language that parallels the pre-existing construction contract definition of domestic construction material, requiring manufacture in the United States.

iii. Definition of Manufacture

*Comments:* Other respondents were concerned about the definition of “manufacture.” A respondent stated that the interim rule does not provide a clear definition of what constitutes manufacture, *i.e.*, how to determine whether sufficient activity has taken place in the United States for a material to be considered produced in the United States. Likewise, two respondents noted the various interpretations of “manufacture,” *i.e.*, some believe it is similar or identical in concept to substantial transformation under Customs’ rules, while others believe it is closer to the Buy American Act—Construction clause test for manufacture. One of these respondents asked that the final rule clarify the definition. Yet another respondent stated that, although the rule does not define “manufacture,” the regulations suggest that the test will be similar to the requirement of U.S. manufacture applied under the Buy American Act. This may in some cases be less demanding than the substantial transformation test, which examines whether an article is transformed into a new and different article of commerce, having a new name, character, and use.

*Response:* The Councils have considered in the past including a definition of “manufacture” in the FAR but did not do so because of the case-specific nature of its application. The definition may be different for canned beans than for an aircraft. However, for those who find the word “manufacture” confusing and cite the long-standing tradition of interpretation of “substantial transformation,” there is also a longstanding record of interpretation of “manufacture” under the Buy American Act. (See for example B–175633 of November 3, 1975, which addressed the issue of whether a radio had been manufactured in the United States. The GAO did not find against the Army position that, if the final manufacturing process takes place in the United States, the end product is “manufactured in the United States.”)

## iv. Tariff Shift

*Comments:* A respondent proposed that the rules of origin under 19 CFR part 102, currently used for NAFTA country-of-origin determinations, be applied to decisions regarding whether construction materials are considered domestic. According to the respondent, Customs is currently proposing that the CFR part 102 rules (also known as “tariff shift” rules) be applied for all country-of-origin determinations (See **Federal Register** at 73 FR 43385, July 25, 2008). Tariff shift rules consider the Harmonized Tariff Schedule of the United States classification of the article before and after manufacturing. If the classification shifts, then the article takes on a new country of origin.

*Response:* Companies that contract with the Government are accustomed to the well-established meaning of the term “manufacture” as applied under the Buy American Act and now the Recovery Act.

## e. Iron and Steel

## i. Similarity to Federal Transportation Laws

*Comments:* Three respondents pointed out that the section 1605 restrictions on iron and steel are similar to the Recovery Act Buy American requirements within the statutory and regulatory framework of Federal transportation laws (U.S. Department of Transportation highways and transit program), which mandate that 100 percent of the iron and steel used in a project be domestically manufactured and also impose comparable standards of unreasonable cost.

*Response:* The drafters of the FAR interim rule recognized the similarity to the restrictions applicable to the Federal Transit Administration, and modeled the FAR interim rule restriction on iron and steel after 49 CFR part 661, “Buy America Requirements.”

## ii. 51 Percent Component Test

*Comments:* One respondent wanted the FAR to go back to the 51 percent component test of the Buy American Act for what constitutes iron and steel products manufactured in the United States in order to ensure compliance with our international agreements, assist in getting projects started, limit delays, and ensure competition.

*Response:* Reverting to the 51 percent component test of the Buy American Act to determine what constitutes iron or steel products manufactured in the United States would not fully implement section 1605 of the Recovery Act. Section 1605 singled out iron and steel. In addition to requiring that

manufactured construction material be manufactured in the United States, the law requires that the iron and steel also be produced in the United States. If the 51 percent component test of the Buy American Act were sufficient, then it would have been unnecessary to impose section 1605 at all. The Recovery Act could have continued to apply the Buy American Act without revision.

## iii. Iron or Steel as a Component of Construction Material That Consists Wholly or Predominantly of Iron or Steel

*Comments:* One respondent also requested clarification that construction materials (such as welded steel pipe) that are produced in the United States using steel that was rolled in the United States from foreign slab are “produced in the United States” within the meaning of the Recovery Act.

A respondent stated that the FAR rule should allow contractors to utilize imported steel slab as raw material feed stock—and substantially transform that slab in the United States into flat rolled steel (hot rolled, cold rolled, galvanized, etc.) products, which in turn are used by other manufacturers to produce a wide variety of construction materials. Absent such an approach, construction material using these steel products could be deemed foreign construction materials, simply because the steel slab from which it was made was imported. According to the respondent, this will result in U.S. buyers shying away from these U.S. manufactured construction materials, thus eliminating U.S. jobs.

Another respondent, a carbon steel finishing mill, was concerned that steel can be either the construction material itself or a component of some other manufactured product (such as welded steel pipe). The respondent noted that a manufactured good may consist of only one component.

One respondent approved of the distinction between “steel used as a construction material” and “steel used in a construction material” but requested clarification of the boundaries of these two categories in the final rule. The respondent proposed that the boundary should be between—

- Steel goods delivered to the construction site directly from a steel mill (or its warehouse distributor) (e.g., structural steel items (H-beams, I-beams, etc.), reinforcing rod, and plate); and
- Steel goods that have been further processed from intermediate, non-construction material products produced by a steel mill, into manufactured goods delivered to the construction site.

Alternatively, the respondent offered another definition of “steel used in a construction material”—“all steel goods except steel goods delivered to the construction site directly from a steel mill (or its warehouse/distributor) for use as a construction material.”

*Response:* The Councils agree that a clearer distinction is required for circumstances when the Recovery Act Buy American restriction of section 1605 applies to iron or steel components. The intent of the interim rule was not to draw a line between iron or steel used as a construction material, and iron or steel used in a construction material, as suggested by one respondent, but between construction material that consisted wholly or predominantly of iron or steel and construction material in which iron or steel are minor components. The suggestion that manufactured steel goods not delivered to the construction site directly from the mill should be exempt would not be fulfilling the intent of the law. On the other hand, the requirement that every piece of iron and steel, no matter how miniscule, must be melted and rolled in the United States, would be quite unworkable, and would be counterproductive to the overall intent of the law.

The interim rule separated manufactured construction material into two main categories: Iron or steel used as a construction material and “other” manufactured construction material. The interim rule made clear that manufactured construction material that consisted wholly of iron or steel must be produced in the United States, including all stages of production except metallurgical processes involving refinement of steel additives. It also stated that “other” manufactured construction material would require manufacture in the United States, but imposed no requirement on the components or subcomponents in this category of “other” manufactured construction material.

The interim rule is not clear, however, with regard to treatment of construction material that consists predominantly, but not wholly, of iron or steel. Some respondents assumed that all construction material would fall in the “other” category unless it was wholly of iron or steel. Others interpreted, as was intended, that the “other” category was to cover material which did not consist wholly or predominantly of iron or steel.

The Councils re-examined the requirement of the statute and how best to convey these requirements in the regulations. Because iron and steel are singled out for specific mention in the

statute, the Councils conclude that a primary objective of the Act is to promote the use of domestic iron and steel. The Councils have determined that a clearer way to express the requirements of the law would be to interpret the requirement for iron or steel to be produced in the United States as being in addition to (rather than a subset of) the requirement for all manufactured construction material to be manufactured in the United States. The statute did not include the word "other." All manufactured construction material must be manufactured in the United States. This interpretation supports the requirement that iron or steel, whether or not it has reached the stage of being manufactured construction material, must be produced at all stages in the United States. This is similar to some other domestic source restrictions on particular materials or components such as the restrictions on domestic melting or production of specialty metals at 10 U.S.C. 2533b. The intent of the Councils was to balance full implementation of the law with feasibility of compliance. Therefore, the final rule applies this restriction on domestic production of iron and steel only when the iron or steel is a component of construction material that consists wholly or predominantly of iron or steel. (The respondent was correct that there may be just one component in a construction material).

In view of this policy clarification, the proposal to treat foreign slab as a "component" of other manufactured goods, not requiring production in the United States, is not acceptable, because the resultant construction material consists wholly or predominantly of iron or steel, and allowing foreign slab would not meet the objectives of the law.

The Councils have made changes to the policy at FAR 25.602 to clarify the restriction on the production of iron and steel and have revised the definitions of "domestic construction material" in FAR 25.601 and paragraph (a) of the FAR clauses at 52.225–21 and 52.225–23, specifying that all of the iron or steel in manufactured construction material that consists wholly or predominantly of iron or steel shall be produced in the United States, but the origin of the raw materials of the iron or steel is not restricted.

#### iv. Iron or Steel as Components of Manufactured Construction Material That Does Not Consist Wholly or Predominantly of Iron or Steel

*Comments:* Some respondents objected to the provision in the interim rule that the Recovery Act Buy

American restriction does not apply to iron or steel used as components of other manufactured goods. One respondent stated that the Recovery Act Buy American requirements of section 1605 must apply to all iron and steel, including all iron and steel components and subcomponents used in manufactured construction material. One respondent believed that this provision of the interim rule creates a loophole, in that the use of foreign steel reinforcing bar (rebar) used in concrete slab would be allowed, because the steel rebar would be considered a component of a manufactured product (the concrete slab).

On the other hand, a different respondent believed that the fact that the regulations permit foreign steel or iron used as components or subcomponents of other manufactured construction material to be considered domestic construction materials as long as the manufacturing is done in the United States is a sound and practical decision. This respondent commented that the rule allows U.S. companies flexibility to prudently source from both American and foreign vendors to manage costs, while promoting U.S. manufacture.

*Response:* The interim rule would not allow foreign steel rebar (as a component of concrete slab) because the rule applies to construction material brought to the construction site. The steel rebar is brought separately to the construction site and is therefore itself construction material, not a component of the concrete slab, which is poured and formed on the construction site.

As stated in the prior section, iron and steel components are only exempt from the restriction of section 1605 if the construction material does not consist wholly or predominantly of iron or steel.

#### f. Components

*Comments:* Three respondents agreed with the interim rule approach of not including a requirement relating to the origin of components. They argue that an expansive and practical definition of manufactured goods is needed to allow the contractor leeway in getting the project done on time and within budget.

Many other respondents strongly argued for inclusion of a "component test," often citing the Buy American Act as a precedent.

- One respondent stated that the costs of all the domestic components in the final product must exceed 50 percent of the cost of all the components.

- A respondent stated that Congress' deliberate inclusion of the term "manufactured goods" was plainly

intended to be under the precedent established under the Buy American Act. Yet another respondent stated that the interim rule does not meet the requirements of section 1605 because domestic content requirements for components and subcomponents parts have been omitted. This respondent also objected that the interim rule has ignored a long history of applying a domestic content rule in determining if a good is produced in the United States for purposes of enforcing domestic source restrictions. According to the respondent, OMB acknowledges that the two-part test relied upon is from the Buy American Act, then simply waives the domestic content part of the 1933 Act's text. Desiring an expeditious flow of funding cannot trump the statutory requirement to procure domestically produced goods. Longstanding interpretation of domestic manufactured goods under the Buy American Act also comports with Congressional intent to save and create manufacturing jobs.

- A respondent was disturbed that the interim rule explicitly rejected the use of a component test, one of the minimal Buy American Act standards for rule of origin. The respondent contended that allowing for the use of non-domestic component parts will have a significant impact on the job-creation ability of the stimulus.

- Two respondents stated that the Councils should adopt a clear rule defining the concept of domestic manufacture consistent with the well-established standard of substantial transformation and a 50 percent component content standard (by cost). The FAR should not confer domestic status simply as a result of minor processing or mere assembly in the United States.

*Response:* The Councils in the interim rule did not, as respondents claim, acknowledge dependence on the two-prong Buy American Act test and then waive the component test. The Councils relied on the difference in wording between section 1605 and the Buy American Act. The preamble to the interim rule specifically stated:

"Because section 1605 does not specify a requirement that significantly all the components of construction material must also be domestic, as does the Buy American Act, the definition of domestic construction material under this interim rule does not include a requirement relating to the origin of the components of domestic manufactured construction material" (see **Federal Register** at 74 FR 14624, March 31, 2009). The Buy American Act requires manufacture in the United States "substantially all from articles,

materials, or supplies mined, produced, or manufactured \* \* \* in the United States” (41 U.S.C. 10b). On the other hand, section 1605 only requires the manufactured goods to be “produced” in the United States. If Congress intended the component test to apply, it could have easily so stated in section 1605.

*Comments:* In fact, a few respondents even suggested carrying the component test further than the Buy American Act interpretation of the 50 percent domestic component test. A respondent stated that statutory language could be interpreted to mean a 100 percent domestic content requirement. Another respondent stated that, if OMB wanted to be aggressive, it could write a rule with an even more stringent component test (see Berry Amendment), especially with respect to textile and apparel products.

*Response:* Even if section 1605 were not silent on the issue of a 100 percent domestic component requirement, it would be almost impossible to comply with such a requirement in this current global economy. It would cause immense difficulty to American manufacturers, and section 1605 does not require it.

*Comments:* One respondent was confused about the waiver by the Administrator of OFPP of the component test for COTS items because of the technical correction made to FAR 25.001 by the interim rule. The respondent noted that the interim rule

amends FAR 25.001(c)(1) by waiving the component test for commercially available off-the-shelf items for all procurements, regardless of whether the procurement is funded with Recovery Act funds.

*Response:* The interim rule did not introduce the component test waiver for COTS items at FAR 25.001(c)(1). The final rule for that change was published in the **Federal Register** at 74 FR 2713, January 15, 2009, and became effective February 17, 2009. However, the rationale for that waiver may provide support for the decision that the component test is not appropriate for implementation of the Recovery Act. The Administrator of OFPP waived the component test of the Buy American Act for COTS items because “a waiver of the component test would allow a COTS item to be treated as a domestic end product if it is manufactured in the United States, without tracking the origin of its components. Waiving only the component test of the Buy American Act for COTS items, and still requiring the end product to be manufactured in the United States, reduces significantly the administrative burden on contractors and the associated cost to the Government.” The FAR procedures for evaluation of foreign offers in acquisitions of supplies covered by trade agreements is predicated on agencies treating offers of U.S.-made end products (*i.e.*, offers that may not be

domestic end products that meet the component test of the Buy American Act) more like the agencies treat eligible products (the trade agreements do not apply any component test to eligible products from designated countries). Today’s markets are globally integrated with foreign components often indistinguishable from domestic components. The difficulty in tracking the country of origin of components is a disincentive for firms to contract with the Government.

*Comments:* A number of respondents that agreed with not including the component test for domestic products still requested a definition of “component” in the rule.

*Response:* There are two basic definitions of “component” in the FAR, at 2.101 and 25.003, and associated Buy American Act clauses. In the final rule, there is no separate definition of component in FAR subpart 25.6, so the definition at FAR 25.003 applies to FAR subpart 25.6. However, for increased clarity, the appropriate definition of “component” has been included in the FAR clauses at 52.225–21 and 52.225–23.

g. Summary Matrix of Requirements for Domestic Construction Material

The following matrix summarizes the requirements for domestic construction material in projects that use Recovery Act funds.

#### REQUIREMENTS FOR DOMESTIC CONSTRUCTION MATERIAL IN PROJECTS THAT USE RECOVERY ACT FUNDS

Type of construction material	Applicable statute	Production of construction material	Production of iron/steel	Production of other components
Manufactured—wholly or predominantly iron or steel.	Section 1605 of Recovery Act.	Manufacture in U.S. ....	All processes in U.S. (except steel additives).	No requirement.
Manufactured—not wholly or predominantly iron or steel.	Section 1605 of Recovery Act.	Manufacture in U.S. ....	No requirement .....	No requirement.
Unmanufactured .....	Buy American Act .....	Mined or produced in U.S.	XXX .....	XXX.

### 3. Applicability of International Agreements

#### a. Trade Agreements

*Comments:* As provided by section 1605(d), the Recovery Act Buy American provisions must be applied in a manner consistent with United States obligations under international agreements. One respondent requested that the final regulations should ensure compliance with existing international obligations, but did not specify any shortcomings in the interim rule in this regard. Another respondent considered that the interim rule is creating great consternation with our international

trading partners and could lead them to retaliate with their own protectionist measures. A third respondent claimed that the interim rule did not ensure consistency with international obligations.

*Response:* As required by section 1605, the FAR rule provides for full compliance with U.S. obligations under all international trade agreements when undertaking construction covered by such agreements with Recovery Act funds. The new required provisions and clauses implement U.S. obligations under our trade agreements in much the same way as they are currently implemented in non-Recovery Act

construction contracts, with one exception. The Caribbean Basin countries are excluded from the definition of “Recovery Act designated country,” because the treatment provided to them is not as a result of any U.S. international obligation but is the result of a United States initiative. The new cost evaluation standards do not apply to manufactured construction material from Recovery Act designated countries.

*Comments:* One respondent stated that, as drafted, the interim rule implied that all construction material from Recovery Act designated countries is exempt from the Recovery Act Buy



American requirements set forth in section 1605 and the Buy American Act. This implication is inconsistent with the law because, according to the respondent, not all Recovery Act designated country construction material is exempt. FAR subpart 25.4 limits the foreign products eligible for equal consideration with domestic offers. Even if end products for resale or set asides for small business are produced in Recovery Act designated countries, for example, they would not be deemed eligible products per FAR subpart 25.4. Likewise, one respondent pointed out that FAR subpart 25.4 does not apply to procurements set aside for small businesses and requested clarification in the final rule on continuation of this policy.

*Response:* The FAR subpart 25.4 exception for resale of end products is inapplicable to construction contracts.

FAR subpart 25.4 states that it does not apply to acquisitions set aside for small businesses. FAR 25.603(c) has a cross reference to FAR subpart 25.4.

*Comments:* Two respondents considered that the situation created by the interim rule with regard to sources of iron and steel is unfair. Namely, designated countries have unrestricted ability to provide iron and steel from anywhere, whereas domestic sources must provide iron and steel melted in the United States. According to these respondents, this would incentivize designated country steel firms to stop shipping slabs to the U.S. and to substitute finished construction materials. The result would be a loss of U.S. jobs in both the steel-finishing and construction-material manufacturing sectors.

*Response:* In its trade agreements, the United States commits to apply to products from designated countries the rule of origin that is used in the normal course of trade between these countries, i.e., “wholly the product of” or “substantially transformed” in the designated country. In projects funded by the Recovery Act, we cannot add new restrictions on the products of our trading partners that are not applied to other procurements covered by our agreements.

*Comments:* A respondent recommended that the final FAR rule should provide for the use of an inventory accounting methodology to determine the origin of fungible goods that are commingled American and foreign inventories. This respondent noted that NAFTA permits this methodology to avoid unfairly disqualifying companies that produce eligible products but commingle such

products in inventories with foreign products.

*Response:* The Recovery Act does not permit such methodology.

#### b. G20 Summit Pledge

*Comments:* The countries of the G20 stated at the summit that they would refrain from raising new trade barriers to trade in goods and services. According to various respondents, the new law and the interim rule, by adding the restrictions on the production of iron and steel and increasing the test for unreasonable costs, raise new barriers to trade, even though the Recovery Act Buy American requirement must be applied consistent with U.S. international obligations. A respondent stated that overly restrictive implementation of the Recovery Act will undermine the ability of the U.S. companies with global supply chains to participate in the Recovery Act. According to a respondent, it will lead to closed markets overseas to the detriment of American exports, products, and jobs.

A respondent stated that ambiguities in the interim rule were open to interpretation by Government agencies on multiple levels. In the absence of examples of permissible procurement from foreign sources, the business community must await test cases to determine whether, for example, the letter of the law in terms of the WTO GPA signatory exceptions to the exclusionary principles will truly apply. The respondent believed that this ambiguity serves as a de facto obstacle to foreign suppliers engaging in commerce or any form of business alliance with American bidders.

A non-U.S. respondent stated that access to the U.S. procurement market has been further limited in areas not covered by the WTO GPA. Their preference would be non-application of the new requirements to European Union member countries.

Two foreign respondents also wanted to emphasize that the United States should uphold the G20 statement in implementing the Recovery Act Buy American provisions. One stated that, for acquisitions below the WTO GPA threshold of \$7,443,000 for construction, the new discriminatory procurement requirements would apply in relation to goods from Recovery Act designated countries.

*Response:* These concerns essentially go back to the requirements of section 1605 of the Recovery Act. The FAR rule must implement the law. Section 1605 provides for application consistent with United States obligations under international agreements. Pledges at the

G20 Summit do not constitute international agreements, as contemplated by section 1605. The FAR rule cannot create new exemptions.

#### 4. Other Definitions

##### a. Construction Material

*Comments:* Three respondents stated that, in some circumstances, if foreign pieces are delivered to the jobsite and assembled there instead of being delivered as part of an assembled construction material, those pieces would presumably be in violation. The respondents believe that this rule will encourage or force some assemblies to be done offsite in order to maintain compliance. They recommend allowing the contracting officer some level of discretion.

*Response:* The definition of construction material in the rule as an article, material, or supply brought to the construction site by the contractor or subcontractor for incorporation into the building or work is unchanged from the first sentence of the current FAR 25.003. That is how Government construction subject to the FAR has worked for many years.

*Comments:* One respondent further objected that the new FAR clause 52.225–23 included a definition of construction material that singles out “emergency life safety systems” as discrete and complete, allowing them to be evaluated as a single and distinct construction material, regardless of how and when the parts or components are delivered to the construction site. The respondent stated that there are numerous other types of systems, such as environmental control communications systems, that are integrated into the building in such a fashion that warrant being treated in a similar manner that the FAR should consider.

*Response:* This is the current FAR definition of construction material (see, for example, FAR 52.225–9(a)).

##### b. Public Building or Public Work

*Comment:* A respondent stated that there is no definition or cross reference for “public building” or “public work.”

*Response:* The interim rule at FAR 25.602 referenced the definition of “public building or public work” at FAR 22.401. For the definition in the final rule, please see FAR 25.601.

##### c. Manufactured Construction Material/Unmanufactured Construction Material

*Comment:* One respondent expressed concern that the definitions of manufactured and unmanufactured create no clear standard for determining



when a good is a domestic construction material.

*Response:* The standard for determining whether a good is a domestic construction material is not found in the definitions of “manufactured construction material” and “unmanufactured construction material.” It is found in the definition of “domestic construction material” at FAR 25.601 and in the policy at FAR 25.602. In the final rule, the Councils have expanded the definition of “domestic construction material” at FAR 25.601 to include the more detailed standards relating to iron and steel that were included in the policy statement.

## 5. Exceptions

### a. Class Exceptions

*Comment:* One respondent posited that blanket waivers or broad temporary waivers would be appropriate and should be broadly defined in the FAR. Another respondent noted that the statute was changed during conference to include, at paragraph (b), the phrase “category of cases” for which section 1605 would not apply and wondered why the FAR doesn’t mention or take advantage of this language.

*Response:* The Councils note that neither the statute nor the FAR precludes the use of class waivers in appropriate circumstances.

*Comments:* Four respondents stated that the FAR should include a *de minimis* waiver in order to limit detrimental impacts of a very small-value item preventing a company from providing an entire system on a project. One respondent suggested a waiver for any construction material that costs less than 10 percent of the entire project cost. Another respondent believed that such minimal use should not trigger the 25 percent evaluation factor because such *de minimis* usage will not threaten the commercial viability of relevant U.S. industry. Two respondents used the example of piping where specific gaskets and fittings must be added on site and are not always manufactured domestically.

*Response:* Because construction material is defined as the article, material, or supply delivered to the construction site, and there is no component test (except for iron or steel), it is not possible for the delivery of an entire system to be considered non-domestic because of a very small value foreign component of the system, as long as the component is not delivered separately to the construction site.

Further, the clarification of “produced in the United States” (FAR 25.602(a)(1)) makes clear that iron and steel

components will only be tracked if the construction material is a manufactured construction material that consists wholly or predominantly of iron or steel.

### b. Public Interest

*Comments:* One respondent wanted a nationwide public interest waiver issued to enable Recovery Act funds to be deployed now, when most needed, rather than await publication of “Buy American regulations.” The respondent stated that “(t)he U.S. Environmental Protection Agency (EPA) has taken the prudent approach of using the ‘public interest’ exception to issue a nationwide waiver of the Recovery Act Buy American requirement for State Revolving Loan Fund projects for which debt was incurred between October 1, 2008 and February 17, 2009.”

Two respondents noted that the “public interest” exception does not specify criteria for the agency head to use. One of these respondents asked if there are special procedures that should be included in the FAR.

*Response:* The Councils believe that the first comment is moot, given that the Recovery Act regulations were published in the **Federal Register** at 74 FR 14623, March 31, 2009. Further, the EPA class exception referred to by the respondent was for State Revolving Loan Fund projects, an area that is covered by the OMB guidance, not the FAR.

With regard to the second comment, the Councils note that the language for this exception is modeled on the public interest exception currently in use for the Buy American Act at FAR 25.103(a). The public interest exception may only be authorized by the agency head (with power of redelegation) and is used infrequently. The FAR includes no special procedures so that agency heads retain appropriate flexibility.

*Comment:* Another respondent wanted to know whether each State uses the same criteria or procedures.

*Response:* The FAR is not used by State or local governments; it is used by Federal agencies to contract with appropriated funds. Each agency has a unique mission, and it would not be appropriate to require them all to use the same criteria.

*Comment:* A respondent suggested that the public interest exception be interpreted flexibly, considering economic efficiency and overall quality of goods so that, “even if non-American iron, steel, and manufactured goods may not satisfy the 25 percent rule, they can still be accepted under the public interest exception.”

*Response:* The public interest exception is designed to be used flexibly and only as a last resort when the nonavailability or unreasonable cost exceptions do not fit. However, it is not designed to circumvent the new statutory standards for determination of unreasonable cost of domestic construction material.

### c. Nonavailability

*Comments:* Four respondents queried the nonavailability waiver at FAR 25.603. One of these respondents believed that the nonavailability exception should be modified to require consideration of the geographical scope of the market in which production takes place so that foreign products are not unfairly discriminated against.

*Response:* The Councils disagree. The statute contained no such provision, and to add one now would contradict the intention of the U.S. Congress in enacting the Recovery Act. The statute provides an exception for nonavailability of domestic manufactured construction material. This does not result in any discrimination against foreign construction material, but actually allows the purchase of foreign construction material when domestic manufactured construction material is unavailable.

*Comment:* Another respondent recommended that the final rule provide for a time-limited, streamlined process for issuing nonavailability waivers.

*Response:* The reason for issuing a nonavailability exception is that the items in question are truly not available “in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality.” (FAR 25.603(a)(1)). The Councils believe that contracting officers should not unfairly rush the process of determining whether these conditions apply to an item.

*Comment:* Another point of view expressed by a respondent was that the final rule should require an offeror proposing a nonavailability waiver to provide, in addition to the items already listed, the following: (1) Supplier information or pricing information from a reasonable number of domestic suppliers indicating availability/delivery date for construction materials, (2) information documenting efforts to find available domestic sources, (3) a project schedule, and (4) relevant excerpts from project plans, specifications, and permits indicating the required quantity and quality of construction materials.

This respondent also requested that the contract list all foreign material

used, including construction material from designated countries.

*Response:* The Councils' intention was to use the same requirements for this exception as have been used for Buy American Act non-availability determinations for some 15 years. It would be an unnecessary burden to list designated country construction material, because section 1605 requires compliance with trade agreements, and there is no restriction on the use of designated country construction material when trade agreements apply.

*Comment:* A respondent noted that it seems inconsistent, if designated country materials are not considered foreign construction items, not to consider them when making the determinations in FAR 25.603(a) and (b).

*Response:* Designated country material is considered to be foreign.

#### d. Unreasonable Cost

*Comment:* One respondent stated that "it is quite apparent that a preference for offers excluding foreign construction material lacks the necessary legal justification and constitutes an obvious prejudice against foreign construction material."

*Response:* The Councils disagree. The paragraphs in the solicitation provisions on evaluation of offers (FAR clauses 52.225–22(c) and 52.225–24(c)) clearly state that the preference is for an offer that does not include foreign construction material excepted at the request of the offeror on the basis of unreasonable cost. This does not constitute a prejudice against all foreign construction material. Inclusion of Recovery Act designated country construction material will not cause the Government to discriminate against an offer. This is in accordance with the law, as promulgated by the U.S. Congress and applied consistent with U.S. international obligations.

*Comments:* Two respondents stated that the evaluation of foreign construction materials, and the authority provided to submit alternate offers with equivalent domestic material, constitutes a prejudice against foreign construction material.

*Response:* The Councils disagree and note that the FAR is implementing U.S. law. Further, the implementation scheme is fully compliant with U.S. international agreements.

*Comments:* Two respondents commented that the 25 percent evaluation factor likely renders the unreasonable cost exception moot because it is so high that it will be impossible to meet.

*Response:* The Councils had no discretion about the requirement to add 25 percent to the contract cost when foreign iron, steel, or manufactured goods are proposed to be used in a construction project or public work. The factor is specifically required by the language of section 1605(b)(3) of Public Law 111–5.

*Comment:* Another respondent suggested that the table at FAR 52.225–23(d) should include another category entitled "Recovery Act designated country material."

*Response:* The respondent gave no reason for this suggestion, and the Councils cannot accept the recommendation. The statute provides an exception for unreasonable cost of domestic material, not for unreasonable cost of designated country construction material. The statute requires a comparison of the price differential between domestic manufactured construction material (including iron and steel) and foreign manufactured construction material (other than designated country manufactured construction material). In an acquisition subject to trade agreements, the material that is obtained from designated countries is not part of the evaluation because it is not domestic construction material.

#### 6. Determinations That an Exception Applies

##### a. Process and Publication

*Comments:* Two respondents stated that the use of waivers should be encouraged and simplified.

*Response:* The Councils have made the exception process as streamlined as is possible within the terms of the statute. Agencies already have authority to use class exceptions.

*Comments:* Two respondents believed that the specific two-week timeframe for publication of a waiver in the **Federal Register** should be replaced with language requiring publication in the fastest practicable manner. In addition, the Office of Federal Procurement Policy (OFPP) requested that a copy of the nonavailability determination be provided to the OFPP Administrator.

*Response:* The statute specifically called for publication in the **Federal Register** (Pub. L. 111–5, section 1605(c)). However, the law does not set a time frame for such publication. The Councils agree with the respondents that timely publication is desirable, but the **Federal Register** often must accommodate workload priorities that are out of the control of contracting officers. Therefore, FAR 25.603(b)(2) is revised to require the agency head to

provide the notice to the **Federal Register** within 3 business days after the determination is made. Except in unusual workload circumstances, this change should result in publication in the **Federal Register** in less than 2 weeks.

The final rule includes, at FAR 25.603(b), a requirement to provide to the Administrator for Federal Procurement Policy and to the Recovery Accountability and Transparency Board a copy of a determination made in accordance with FAR 25.603(a) concurrent with its provision to the **Federal Register**.

*Comments:* Six respondents demanded that OMB provide full transparency in the process of obtaining waivers of section 1605's application by requiring that all waiver requests be posted publicly on line. Several of these respondents wanted the waiver request to be posted promptly and publicly on line (the internet or *Recovery.gov*); one wanted the waiver request to be posted within 3 days of its receipt; and one respondent wanted waiver requests to be e-mailed to any trade associations and domestic manufacturers desiring to be on an alert list.

*Response:* While section 1605 does require publication of exceptions made to the requirement to use U.S.-produced iron, steel, and manufactured goods used in the project, there is no requirement in the statute to publish requests for an exception. Therefore, no change is being made to the FAR to introduce such a requirement.

*Comment:* One respondent considered that FAR 25.604(a) confuses inapplicability with exceptions and appears to refer to one of the exceptions as a rationale for that "inapplicability" determination. The respondent believed that the concept of the Buy American clause not being applicable is distinct from a situation where the Buy American clause may apply, but an exception has been granted.

*Response:* The FAR language for this case uses the exact wording from the current FAR Buy American Act coverage. Contracting officers are not waiving section 1605 of the Recovery Act or the Buy American Act, but determining whether an exception applies, and then, if an exception does apply, determining that section 1605 of the Recovery Act or the Buy American Act is inapplicable.

##### b. Requests for Specific Exceptions

*Comments:* Three respondents stated that the recent addition of commercial off-the-shelf (COTS) items to exceptions from the Buy American Act for construction materials (FAR 25.225–9

and –11) and the exception at FAR 25.103(e) for commercial information technology (IT) should be available for Recovery Act-funded construction projects.

*Response:* The Councils do not agree. The COTS item exception only exempts COTS items from the component test of the Buy American Act. This rule does not apply a component test to any of the manufactured construction material subject to section 1605 of the Recovery Act except iron and steel. By definition, unmanufactured construction material does not have components.

With regard to the commercial IT exception, it applies only to the Buy American Act. The Recovery Act exceptions are explicitly stated in section 1605 and are not identical to the Buy American Act exceptions.

*Comments:* Two respondents requested that commercial items, as a category, be exempt from coverage under section 1605.

*Response:* The Councils decline to make this change, as the Congress did not exempt commercial items from section 1605 applicability.

*Comment:* One of these respondents also asked that other typically non-construction materials not primarily made of iron or steel be excluded from coverage.

*Response:* The Councils do not understand the respondent's use of the term "other typically non-construction materials." The Councils have used the standard FAR definition of "construction material" without change. Under this definition, if it is incorporated into a public building or public work, then the material is construction material.

*Comment:* One respondent recommended that the FAR waive application of section 1605 for all manufactured goods not made primarily of iron and steel.

*Response:* The Councils decline for the reason that the Congress specifically included manufactured goods in the coverage of section 1605.

*Comment:* A respondent wanted the Councils to issue a class waiver from the Buy American Act requirements for electronic fluorescent lighting ballasts.

*Response:* The FAR includes, at FAR 25.104(a), a list of items that have been determined nonavailable in accordance with FAR 25.103(b)(1)(i). A class determination made in accordance with the above reference does not necessarily mean that there is no domestic source for the listed items, but that domestic sources can only meet 50 percent or less of total U.S. Government and nongovernment demand. The respondent is free to make a request for

a class determination. In addition, the offeror may request, and the contracting officer may grant, an exception on an individual contract in accordance with FAR 25.603.

#### *7. Exemption for Acquisitions Below the Simplified Acquisition Threshold*

*Comments:* Two respondents requested that the final rule exempt purchases under the simplified acquisition threshold (SAT) from the Recovery Act.

*Response:* The determination was made under the interim rule that section 1605 of the Recovery Act would apply to all contracts, including those below the SAT (see Interim Rule, Supplementary Information, Section C (see **Federal Register** at 74 FR 14625, March 31, 2009)). The Councils remain committed to this position in order to fully implement the goals of the Recovery Act. Therefore, any project, of whatever dollar value, financed with Recovery Act funds is subject to these limitations.

#### *8. Remedies for Noncompliance*

*Comments:* One respondent requested that the final rule include a safe-harbor provision protecting companies receiving Recovery Act funds without proper notice from the Government or the purchasing company.

*Response:* The Councils believe that this is unnecessary, given the protections already built into the use of Recovery Act funds. First, any appropriation of Recovery Act funds receives a special designation that identifies it as Recovery Act money. In addition, FAR 4.1501, 5.704, and 5.705, along with the contract checklist issued by the Recovery Accountability and Transparency Board, require contracting officers to indicate, in the solicitation or award, which products or services are funded under the Recovery Act.

*Comment:* One respondent stated that the regulations must provide adequate remedies, such as debarment, for non-compliance with section 1605. It claimed that only such meaningful remedies can serve to deter misbehavior.

*Response:* All of the usual remedies available through the FAR or Federal law are equally available as remedies for noncompliance with section 1605 regulations. No additional remedies are needed.

*Comment:* One respondent recommended replacing the requirement, at FAR 25.607(c)(4), to refer apparent fraudulent noncompliance to "the agency's Inspector General" rather than to "other appropriate agency officials."

*Response:* This recommendation has been partially accepted. While the agency Inspector General is available for referral of suspected fraud, it is not the only option in this situation. FAR 25.607(c)(4) is revised to include both the agency's Inspector General and other possible officials.

#### *9. Funding Mechanisms*

##### *a. Modifications to Existing Contracts*

*Comments:* Three respondents strongly recommended that the Recovery Act limitations should not be applied to task orders issued under Governmentwide Acquisition Contracts (GWACs) or Multiple Award Contracts (MACs).

*Response:* The Councils cannot make the change requested by these respondents because the Recovery Act restrictions follow the appropriations. Any construction project or public work funded with Recovery Act money must comply with the restrictions in section 1605, whether the contracting vehicle for the project is a contract or task order.

##### *b. Treatment of Mixed Funding*

*Comments:* Seven respondents were concerned that the interim rule failed to provide any clarity about how projects with mixed funding (some Recovery Act funds and other Federal appropriations) would be treated. Several respondents expressed a strong preference for treating mixed-funded projects as not covered by the Recovery Act limitations.

*Response:* Given that the statute was designed so that the section 1605 limitations are tied to the source of funding, the Councils do not have the option of complying with respondents' preference. Any Federal construction or public works contract effort that is funded by any funds, however miniscule, appropriated by the Recovery Act must, by law, comply with the section 1605 requirements. However, the regulations do provide that a contract may be funded with Recovery Act funds and non-Recovery Act funds if the funds are properly segregated by line item or sub-line item. In addition, contracting officers are required to indicate, in the solicitation or award, which products or services are funded under the Recovery Act. However, if the contracting officer does not properly segregate Recovery Act and non-Recovery funds, then the law requires the mixed-funded line items or contracts to be treated as if they were entirely Recovery-Act funded. (See discussion of "project" at 2.b. above and in the FAR text at 25.602–1(c).)

### 10. Interim Rule Improper

*Comment:* One respondent believed it was inappropriate to publish an interim rule, as it deprived interested parties of the right to comment. The need to have rules available as soon as the Recovery Act funds were made available to Federal agencies for obligation, according to the respondent, was not a sufficient justification for the absence of prior public comment.

*Response:* The Administration directed the Councils to publish an interim rule in order to provide contracting agencies with the necessary direction quickly. In any case, respondents were given an opportunity to comment fully on the interim rule, and each comment has been thoroughly considered by the Councils.

### 11. Inconsistencies Between This Rule and Pre-Existing FAR Rule and the OMB Grants Guidance

#### a. Inconsistency With Pre-Existing FAR

*Comments:* One respondent objected that this rule will require well-intentioned and compliant companies to establish yet more processes and systems (many of which will be largely duplicative of existing Buy American Act/Trade Agreements Act compliance requirements) to comply with the Recovery Act. The respondent claimed that this creates significant cost burdens and delays in construction projects. Another respondent stated that any change in current supply chains made in order to comply with this rule will limit competition, cause delays, and increase costs. A respondent objected to the creation of yet another list of designated countries.

*Response:* The Councils used pre-existing FAR language and processes to the extent that it was possible to do so and still meet the requirements of the Recovery Act. The Recovery Act also specified the new requirements for iron and steel and the 25 percent contract evaluation factor.

Recovery Act-designated countries were identified from the language of the statute, the Committee report, and consultation with the United States Trade Representative. Caribbean Basin countries were not included as Recovery Act-designated countries because they are not covered by an international agreement.

#### b. Inconsistency With the OMB Grants Guidance

*Comments:* Four respondents expressed a strong preference that the final rule should have the closest possible alignment with the OMB

guidance governing grants under the Recovery Act.

One respondent noted that the OMB grants guidance includes examples of "public building." The respondent would like to know whether a public building in the FAR is the same as a public building in the OMB guidance.

*Response:* The Councils agree and note that the final rule was developed in close coordination with OMB grant officials. The Councils point out, however, that grants, financial assistance, and loans are not subject to the Buy American Act. Therefore, the coverage cannot be the same in these two regulations regarding unmanufactured construction material. Further, the OMB guidance applies to all assistance recipients, including States. Trade agreements do not apply uniformly at the State level.

The final revised FAR provisions include the definition from FAR 22.401 and add examples of public buildings and public works from the OMB grants guidance.

It is our understanding that the OMB grants coverage will be conformed to the FAR terminology to use "manufacture" in lieu of "substantially transformed." The Councils and OMB are not aware of any other areas where the OMB guidance and this FAR rule are not aligned.

*Comment:* One respondent requested that the Councils consider requesting EPA, Federal Transit/Highways Administration, and other agencies that have issued their own guidance to withdraw it.

*Response:* The Councils decline. There is no reason to request any agency to withdraw contracting guidance that is in compliance with the FAR.

Language in the Recovery Act exempted the Federal Highway Administration (FHA) from section 1605. It is appropriate that FHA maintain separate regulations.

### 12. Need for Additional Guidance

*Comments:* Two respondents stated that there is confusion about the scope of applicability of this rule and requested that the FAR more clearly spell out that contracting authorities are obliged to comply with international commitments and request relevant and user-friendly guidance.

*Response:* The Councils note that changes in the final rule have differentiated projects that are subject to the Recovery Act rules from projects that are subject to existing Buy American Act and trade agreements requirements. The Councils have made it abundantly clear in the final rule and this preamble that Federal agencies

must comply with international agreements when conducting procurements for Recovery Act projects that are covered by such agreements.

Further, contracting authorities that do not comply with the FAR, and thereby with international commitments, should be reported and are subject to sanctions.

*Comment:* One of those respondents thought that the FAR does not explain what regime must be followed in cases where an entity covered by the World Trade Organization Government Procurement Agreement (WTO GPA) conducts procurement jointly with an entity that is not covered by the WTO GPA.

*Response:* If one entity in a joint procurement is covered by the GPA or another international agreement, but another entity that is also involved in the same procurement is not covered by the GPA or another international agreement, the procurement will be conducted in a manner that ensures that U.S. obligations under international agreements are honored. That means that in such a case, products from Recovery Act designated countries will not be subject to the restrictions of section 1605 of the Recovery Act.

### C. Applicability to Contracts at or Below the Simplified Acquisition Threshold

Section 4101 of Public Law 103-355, the Federal Acquisition Streamlining Act (FASA) (41 U.S.C. 429), governs the applicability of laws to contracts or subcontracts in amounts not greater than the simplified acquisition threshold. It is intended to limit the applicability of laws to them. FASA provides that if a provision of law contains criminal or civil penalties, or if the Federal Acquisition Regulatory Council makes a written determination that it is not in the best interest of the Federal Government to exempt contracts or subcontracts at or below the simplified acquisition threshold, the law will apply to them.

The FAR Council determined, for the interim rule, that it should apply to contracts or subcontracts at or below the simplified acquisition threshold, as defined at FAR 2.101. The public comments received did not cause the FAR Council to modify this position for the final rule.

This is a significant regulatory action and, therefore, was subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

## D. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not 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 it will only impact an offeror that wants to use non-U.S. iron, steel, and manufactured goods in a construction project in the United States. The Councils stated in the interim rule their belief that there are adequate domestic sources for these materials, and the Office of Management and Budget (OMB) guidance M-09-10 issued February 18, 2009, entitled "Initial Implementing Guidance for the American Recovery and Reinvestment Act of 2009," provides a strong preference for using small businesses for Recovery Act projects wherever possible. No comments to the contrary were received from small entities in response to the interim rule.

## E. Paperwork Reduction Act

The Paperwork Reduction Act does apply; however, the information collection requirements imposed by the FAR provisions 52.225-22 and 52.225-24 are currently covered by the approved information collection requirements for FAR provisions 52.225-9 and 52.225-11 (OMB Control number 9000-0141, entitled Buy America Act—Construction—FAR Sections Affected: Subpart 25.2; 52.225-9; and 52.225-11). No public comments were received regarding the data elements, the burden, or any other part of the collection.

## List of Subjects in 48 CFR Parts 2, 5, 25, and 52

Government procurement.

Dated: August 18, 2010.

Edward Loeb,

Director, Acquisition Policy Division.

■ Therefore, DoD, GSA, and NASA amend 48 CFR parts 2, 5, 25, and 52 as set forth below:

■ 1. The authority citation for 48 CFR parts 2, 5, 25, and 52 continues to read as follows:

**Authority:** 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

## PART 2—DEFINITIONS OF WORDS AND TERMS

■ 2. Amend section 2.101 in paragraph (b)(2), in the definition "Component", by revising paragraphs (2) and (3); and adding paragraph (4) to read as follows:

### 2.101 Definitions.

\* \* \* \* \*

(b) \* \* \*

(2) \* \* \*

Component \* \* \*

(2) 52.225-1 and 52.225-3, see the definition in 52.225-1(a) and 52.225-3(a);

(3) 52.225-9 and 52.225-11, see the definition in 52.225-9(a) and 52.225-11(a); and

(4) 52.225-21 and 52.225-23, see the definition in 52.225-21(a) and 52.225-23(a).

\* \* \* \* \*

## PART 5—PUBLICIZING CONTRACT ACTIONS

### 5.207 [Amended]

■ 3. Amend section 5.207 by removing from paragraph (c)(13)(iii) the word "Other".

## PART 25—FOREIGN ACQUISITION

■ 4. Amend section 25.001 by adding a new sentence to the end of paragraph (c)(4) to read as follows:

### 25.001 General.

\* \* \* \* \*

(c) \* \* \*

(4) \* \* \* If the construction material consists wholly or predominantly of iron or steel, the iron or steel must be produced in the United States.

■ 5. Amend section 25.003 by revising the definition "Domestic construction material" to read as follows:

### 25.003 Definitions.

\* \* \* \* \*

*Domestic construction material* means—

(1)(i) An unmanufactured construction material mined or produced in the United States;

(ii) A construction material manufactured in the United States, if—

(A) The cost of the components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components.

Components of foreign origin of the same class or kind for which nonavailability determinations have been made are treated as domestic; or

(B) The construction material is a COTS item;

(2) Except that for use in subpart 25.6, see the definition in 25.601.

\* \* \* \* \*

■ 6. Revise section 25.600 to read as follows:

### 25.600 Scope of subpart.

This subpart implements section 1605 in Division A of the American Recovery

and Reinvestment Act of 2009 (Pub. L. 111-5) (Recovery Act) with regard to manufactured construction material and the Buy American Act with regard to unmanufactured construction material. It applies to construction projects that use funds appropriated or otherwise provided by the Recovery Act.

■ 7. Amend section 25.601 by revising the definition "Domestic construction material"; and adding, in alphabetical order, the definition "Public building or public work".

The revised and added text reads as follows:

### 25.601 Definitions.

\* \* \* \* \*

*Domestic construction material* means the following:

(1) An unmanufactured construction material mined or produced in the United States. (The Buy American Act applies.)

(2) A manufactured construction material that is manufactured in the United States and, if the construction material consists wholly or predominantly of iron or steel, the iron or steel was produced in the United States. (Section 1605 of the Recovery Act applies.)

\* \* \* \* \*

*Public building or public work* means a building or work, the construction, prosecution, completion, or repair of which is carried on directly or indirectly by authority of, or with funds of, a Federal agency to serve the interest of the general public regardless of whether title thereof is in a Federal agency (see 22.401). These buildings and works may include, without limitation, bridges, dams, plants, highways, parkways, streets, subways, tunnels, sewers, mains, power lines, pumping stations, heavy generators, railways, airports, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, and canals, and the construction, alteration, maintenance, or repair of such buildings and works.

\* \* \* \* \*

■ 8. Revise section 25.602 to read as follows:

### 25.602 Policy.

#### 25.602-1 Section 1605 of the Recovery Act.

Except as provided in 25.603—

(a) None of the funds appropriated or otherwise made available by the Recovery Act may be used for a project for the construction, alteration, maintenance, or repair of a public building or public work unless the

public building or public work is located in the United States and—

(1) All of the iron, steel, and manufactured goods used as construction material in the project are produced or manufactured in the United States.

(i) All manufactured construction material must be manufactured in the United States.

(ii) *Iron or steel components.* (A) Iron or steel components of construction material consisting wholly or predominantly of iron or steel must be produced in the United States. This does not restrict the origin of the elements of the iron or steel, but requires that all manufacturing processes of the iron or steel must take place in the United States, except metallurgical processes involving refinement of steel additives.

(B) The requirement in paragraph (a)(1)(ii)(A) of this section does not apply to iron or steel components or subcomponents in construction material that does not consist wholly or predominantly of iron or steel.

(iii) *All other components.* There is no restriction on the origin or place of production or manufacture of components or subcomponents that do not consist of iron or steel.

(iv) *Examples.* (A) If a steel guardrail consists predominantly of steel, even though coated with aluminum, then the steel would be subject to the section 1605 restriction requiring that all stages of production of the steel occur in the United States, in addition to the requirement to manufacture the guardrail in the United States. There would be no restrictions on the other components of the guardrail.

(B) If a wooden window frame is delivered to the site as a single construction material, there is no restriction on any of the components, including the steel lock on the window frame; or

(2) If trade agreements apply, the manufactured construction material shall either comply with the requirements of paragraph (a)(1) of this subsection, or be wholly the product of or be substantially transformed in a Recovery Act designated country;

(b) Manufactured materials purchased directly by the Government and delivered to the site for incorporation into the project shall meet the same domestic source requirements as specified for manufactured construction material in paragraphs (a)(1) and (a)(2) of this section; and

(c) A project may include several contracts, a single contract, or one or more line items on a contract.

#### 25.602–2 Buy American Act.

Except as provided in 25.603, use only unmanufactured construction material mined or produced in the United States, as required by the Buy American Act or, if trade agreements apply, unmanufactured construction material mined or produced in a designated country may also be used.

■ 9. Revise section 25.603 to read as follows:

#### 25.603 Exceptions.

(a)(1) When one of the following exceptions applies, the contracting officer may allow the contractor to incorporate foreign manufactured construction materials without regard to the restrictions of section 1605 of the Recovery Act or foreign unmanufactured construction material without regard to the restrictions of the Buy American Act:

(i) *Nonavailability.* The head of the contracting activity may determine that a particular construction material is not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality. The determinations of nonavailability of the articles listed at 25.104(a) and the procedures at 25.103(b)(1) also apply if any of those articles are acquired as construction materials.

(ii) *Unreasonable cost.* The contracting officer concludes that the cost of domestic construction material is unreasonable in accordance with 25.605.

(iii) *Inconsistent with public interest.* The head of the agency may determine that application of the restrictions of section 1605 of the Recovery Act to a particular manufactured construction material, or the restrictions of the Buy American Act to a particular unmanufactured construction material would be inconsistent with the public interest.

(2) In addition, the head of the agency may determine that application of the Buy American Act to a particular unmanufactured construction material would be impracticable.

(b) *Determinations.* When a determination is made, for any of the reasons stated in this section, that certain foreign construction materials may be used—

(1) The contracting officer shall list the excepted materials in the contract; and

(2) For determinations with regard to the inapplicability of section 1605 of the Recovery Act, unless the construction material has already been determined to be domestically nonavailable (*see* list at 25.104), the head of the agency shall

provide a notice to the **Federal Register** within three business days after the determination is made, with a copy to the Administrator for Federal Procurement Policy and to the Recovery Accountability and Transparency Board. The notice shall include—

(i) The title “Buy American Exception under the American Recovery and Reinvestment Act of 2009”;

(ii) The dollar value and brief description of the project; and

(iii) A detailed justification as to why the restriction is being waived.

(c) *Acquisitions under trade agreements.* (1) For construction contracts with an estimated acquisition value of \$7,804,000 or more, also see subpart 25.4. Offers proposing the use of construction material from a designated country shall receive equal consideration with offers proposing the use of domestic construction material.

(2) For purposes of applying section 1605 of the Recovery Act to evaluation of manufactured construction material, designated countries do not include the Caribbean Basin Countries.

■ 10. Amend section 25.604 by revising paragraph (c)(1), and by removing from paragraph (c)(2) “the unmanufactured” and adding “the domestic unmanufactured” in its place.

The revised text reads as follows:

#### 25.604 Preaward determination concerning the inapplicability of section 1605 of the Recovery Act or the Buy American Act.

\* \* \* \* \*

(c) \* \* \*

(1) *Manufactured construction material.* The contracting officer must compare the offered price of the contract using foreign manufactured construction material (*i.e.*, any construction material not manufactured in the United States, or construction material consisting predominantly of iron or steel and the iron or steel is not produced in the United States) to the estimated price if all domestic manufactured construction material were used. If use of domestic manufactured construction material would increase the overall offered price of the contract by more than 25 percent, then the contracting officer shall determine that the cost of the domestic manufactured construction material is unreasonable.

\* \* \* \* \*

■ 11. Amend section 25.605 by—

■ a. Revising paragraphs (a)(1) and (a)(2);

■ b. Redesignating paragraphs (b) through (d) as paragraphs (c) through (e);

■ c. Adding a new paragraph (b); and

■ d. Removing from the newly designated paragraph (c) “If two” and adding “Unless paragraph (b) applies, if two” in its place.

The revised and added text reads as follows:

**25.605 Evaluating offers of foreign construction material.**

(a) \* \* \*

(1) Use an evaluation factor of 25 percent, applied to the total offered price of the contract, if foreign manufactured construction material is incorporated in the offer based on an exception for unreasonable cost of comparable domestic construction material requested by the offeror.

(2) In addition, use an evaluation factor of 6 percent applied to the cost of foreign unmanufactured construction material incorporated in the offer based on an exception for unreasonable cost of comparable domestic unmanufactured construction material requested by the offeror.

(b) If the solicitation specifies award on the basis of factors in addition to cost or price, apply the evaluation factors as specified in paragraph (a) of this section and use the evaluated price in determining the offer that represents the best value to the Government.

\* \* \* \* \*

■ 12. Amend section 25.607 by revising paragraph (c)(4) to read as follows:

**25.607 Noncompliance.**

\* \* \* \* \*

(c) \* \* \*

(4) If the noncompliance is sufficiently serious, consider exercising appropriate contractual remedies, such as terminating the contract for default. Also consider preparing and forwarding a report to the agency suspending or debarring official in accordance with subpart 9.4. If the noncompliance appears to be fraudulent, refer the matter to other appropriate agency officials, such as the agency’s inspector general or the officer responsible for criminal investigation.

■ 13. Amend section 25.1102 by redesignating paragraph (e)(2) as paragraph (e)(3); adding a new paragraph (e)(2); and revising the newly designated paragraph (e)(3) to read as follows:

**25.1102 Acquisition of construction.**

\* \* \* \* \*

(e) \* \* \*

(2) If these Recovery Act provisions and clauses are only applicable to a project consisting of certain line items in the contract, identify in the schedule the line items to which the provisions and clauses apply.

(3) When using clause 52.225–23, list foreign construction material in paragraph (b)(3) of the clause as follows:

(i) *Basic clause.* List all foreign construction materials excepted from the Buy American Act or section 1605 of the Recovery Act, other than manufactured construction material from a Recovery Act designated country or unmanufactured construction material from a designated country.

(ii) *Alternate I.* List in paragraph (b)(3) of the clause all foreign construction material excepted from the Buy American Act or section 1605 of the Recovery Act, other than—

(A) Manufactured construction material from a Recovery Act designated country other than Bahrain, Mexico, or Oman; or

(B) Unmanufactured construction material from a designated country other than Bahrain, Mexico, or Oman.

**PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

■ 14. Amend section 52.225–21 by—

■ a. Revising the section heading;

■ b. Revising the heading and the date of the clause;

■ c. In paragraph (a) by—

■ 1. Adding, in alphabetical order, the definition “Component”;

■ 2. Removing the last sentence from the definition “Construction material”; and

■ 3. Revising the definition “Domestic construction material”; and

■ d. Revising paragraphs (b)(1)(i), (b)(1)(ii), and (b)(4).

The revised and added text reads as follows:

**52.225–21 Required Use of American Iron, Steel, and Manufactured Goods—Buy American Act—Construction Materials.**

\* \* \* \* \*

**Required Use of American Iron, Steel, and Manufactured Goods—Buy American Act—Construction Materials (Oct 2010)**

(a) \* \* \*

*Component* means an article, material, or supply incorporated directly into a construction material.

\* \* \* \* \*

*Domestic construction material* means the following—

(1) An unmanufactured construction material mined or produced in the United States. (The Buy American Act applies.)

(2) A manufactured construction material that is manufactured in the United States and, if the construction material consists wholly or predominantly of iron or steel, the iron or steel was produced in the United States. (Section 1605 of the Recovery Act applies.)

\* \* \* \* \*

(b) \* \* \*

(1) \* \* \*

(i) Section 1605 of the American Recovery and Reinvestment Act of 2009 (Recovery Act) (Pub. L. 111–5), by requiring, unless an exception applies, that all manufactured construction material in the project is manufactured in the United States and, if the construction material consists wholly or predominantly of iron or steel, the iron or steel was produced in the United States (produced in the United States means that all manufacturing processes of the iron or steel must take place in the United States, except metallurgical processes involving refinement of steel additives); and

(ii) The Buy American Act (41 U.S.C. 10a–10d) by providing a preference for unmanufactured construction material mined or produced in the United States over unmanufactured construction material mined or produced in a foreign country.

\* \* \* \* \*

(4) The Contracting Officer may add other foreign construction material to the list in paragraph (b)(3) of this clause if the Government determines that—

(i) The cost of domestic construction material would be unreasonable;

(A) The cost of domestic manufactured construction material, when compared to the cost of comparable foreign manufactured construction material, is unreasonable when the cumulative cost of such material will increase the cost of the contract by more than 25 percent;

(B) The cost of domestic unmanufactured construction material is unreasonable when the cost of such material exceeds the cost of comparable foreign unmanufactured construction material by more than 6 percent;

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

(iii) The application of the restriction of section 1605 of the Recovery Act to a particular manufactured construction material would be inconsistent with the public interest or the application of the Buy American Act to a particular unmanufactured construction material would be impracticable or inconsistent with the public interest.

\* \* \* \* \*

■ 15. Amend section 52.225–22 by—

■ a. Revising the section heading;

■ b. Revising the heading and the date of the provision;

■ c. Removing from paragraph (a) the word “Other”;

■ d. In paragraph (c) by—

■ 1. Adding in paragraph (c)(1) introductory text “in accordance with FAR 25.604” after the word “applies”;

■ 2. Revising paragraph (c)(1)(i);

■ 3. Adding in paragraph (c)(1)(ii) “an exception for the” after the words “based on”; and

■ 4. Redesignating paragraph (c)(2) as paragraph (c)(3); adding a new paragraph (c)(2); and revising the newly designated paragraph (c)(3); and

■ e. Removing from paragraph (d)(1) “paragraph (b)(2)” and adding “paragraph (b)(3)” in its place.



The revised and added text reads as follows:

**52.225–22 Notice of Required Use of American Iron, Steel, and Manufactured Goods—Buy American Act—Construction Materials.**

\* \* \* \* \*

**Notice of Required Use of American Iron, Steel, and Manufactured Goods—Buy American Act—Construction Materials (Oct 2010)**

\* \* \* \* \*

(c) \* \* \*

(1) \* \* \*

(i) 25 percent of the offered price of the contract, if foreign manufactured construction material is incorporated in the offer based on an exception for unreasonable cost of comparable manufactured domestic construction material; and

\* \* \* \* \*

(2) If the solicitation specifies award on the basis of factors in addition to cost or price, the Contracting Officer will apply the evaluation factors as specified in paragraph (c)(1) of this provision and use the evaluated price in determining the offer that represents the best value to the Government.

(3) Unless paragraph (c)(2) of this provision applies, if two or more offers are equal in price, the Contracting Officer will give preference to an offer that does not include foreign construction material excepted at the request of the offeror on the basis of unreasonable cost of comparable domestic construction material.

\* \* \* \* \*

■ 16. Amend section 52.225–23 by—

■ a. Revising the section heading;

■ b. Revising the heading and the date of the clause;

■ c. In paragraph (a) by—

■ 1. Adding, in alphabetical order, the definitions “Component”, “Designated country”, “Designated country construction material”, and “Nondesignated country”;

■ 2. Removing the last sentence from the definition “Construction material”;

■ 3. Revising the definition “Domestic construction material”; and

■ 4. Removing from the definition “Recovery Act designated country” paragraph (2) the word “Israel.”;

■ d. Revising paragraph (b);

■ e. Revising paragraph (c)(3);

■ f. Removing from the table heading in paragraph (d) “Foreign and” and adding “Foreign (Nondesignated Country) and” in its place; and

■ g. In Alternate I by—

■ i. Revising the date of the alternate; and

■ ii. Revising paragraph (b).

The revised and added text reads as follows:

**52.225–23 Required Use of American Iron, Steel, and Manufactured Goods—Buy American Act—Construction Materials Under Trade Agreements.**

\* \* \* \* \*

**Required Use of American Iron, Steel, and Manufactured Goods—Buy American Act—Construction Materials Under Trade Agreements (Oct 2010)**

(a) \* \* \*

*Component* means an article, material, or supply incorporated directly into a construction material.

\* \* \* \* \*

*Designated country* means any of the following countries:

(1) A World Trade Organization Government Procurement Agreement (WTO GPA) country (Aruba, Austria, Belgium, Bulgaria, Canada, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea (Republic of), Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Taiwan, or United Kingdom);

(2) A Free Trade Agreement (FTA) country (Australia, Bahrain, Canada, Chile, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Mexico, Morocco, Nicaragua, Oman, Peru, or Singapore);

(3) A least developed country (Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Djibouti, East Timor, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, Laos, Lesotho, Liberia, Madagascar, Malawi, Maldives, Mali, Mauritania, Mozambique, Nepal, Niger, Rwanda, Samoa, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, Somalia, Tanzania, Togo, Tuvalu, Uganda, Vanuatu, Yemen, or Zambia); or

(4) A Caribbean Basin country (Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, British Virgin Islands, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Netherlands Antilles, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, or Trinidad and Tobago).

*Designated country construction material* means a construction material that is a WTO GPA country construction material, an FTA country construction material, a least developed country construction material, or a Caribbean Basin country construction material.

*Domestic construction material* means the following:

(1) An unmanufactured construction material mined or produced in the United States. (The Buy American Act applies.)

(2) A manufactured construction material that is manufactured in the United States and, if the construction material consists wholly or predominantly of iron or steel, the iron or steel was produced in the United States. (Section 1605 of the Recovery Act applies.)

\* \* \* \* \*

*Nondesignated country* means a country other than the United States or a designated country.

\* \* \* \* \*

(b) *Construction materials.* (1) The restrictions of section 1605 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5) (Recovery Act) do not apply to Recovery Act designated country manufactured construction material. The restrictions of the Buy American Act do not apply to designated country unmanufactured construction material. Consistent with U.S. obligations under international agreements, this clause implements—

(i) Section 1605 of the Recovery Act by requiring, unless an exception applies, that all manufactured construction material in the project is manufactured in the United States and, if the construction material consists wholly or predominantly of iron or steel, the iron or steel was produced in the United States (produced in the United States means that all manufacturing processes of the iron or steel must take place in the United States, except metallurgical processes involving refinement of steel additives); and

(ii) The Buy American Act by providing a preference for unmanufactured construction material mined or produced in the United States over unmanufactured construction material mined or produced in a nondesignated country.

(2) The Contractor shall use only domestic construction material, Recovery Act designated country manufactured construction material, or designated country unmanufactured construction material in performing this contract, except as provided in paragraphs (b)(3) and (b)(4) of this clause.

(3) The requirement in paragraph (b)(2) of this clause does not apply to the construction materials or components listed by the Government as follows:

[*Contracting Officer to list applicable excepted materials or indicate “none”.*]

(4) The Contracting Officer may add other construction material to the list in paragraph (b)(3) of this clause if the Government determines that—

(i) The cost of domestic construction material would be unreasonable;

(A) The cost of domestic manufactured construction material is unreasonable when the cumulative cost of such material, when compared to the cost of comparable foreign manufactured construction material, other than Recovery Act designated country construction material, will increase the overall cost of the contract by more than 25 percent;

(B) The cost of domestic unmanufactured construction material is unreasonable when the cost of such material exceeds the cost of comparable foreign unmanufactured construction material, other than designated country construction material, by more than 6 percent;

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

(iii) The application of the restriction of section 1605 of the Recovery Act to a particular manufactured construction

material would be inconsistent with the public interest or the application of the Buy American Act to a particular unmanufactured construction material would be impracticable or inconsistent with the public interest.

(c) \* \* \*

(3) Unless the Government determines that an exception to section 1605 of the Recovery Act or the Buy American Act applies, use of foreign construction material other than manufactured construction material from a Recovery Act designated country or unmanufactured construction material from a designated country is noncompliant with the applicable Act.

\* \* \* \* \*

*Alternate I (Oct 2010).* \* \* \*

(b) *Construction materials.* (1) The restrictions of section 1605 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111–5) (Recovery Act) do not apply to Recovery Act designated country manufactured construction material. The restrictions of the Buy American Act do not apply to designated country unmanufactured construction material. Consistent with U.S. obligations under international agreements, this clause implements—

(i) Section 1605 of the Recovery Act, by requiring, unless an exception applies, that all manufactured construction material in the project is manufactured in the United States and, if the construction material consists wholly or predominantly of iron or steel, the iron or steel was produced in the United States (produced in the United States means that all manufacturing processes of the iron or steel must take place in the United States, except metallurgical processes involving refinement of steel additives); and

(ii) The Buy American Act by providing a preference for unmanufactured construction material mined or produced in the United States over unmanufactured construction material mined or produced in a nondesignated country.

(2) The Contractor shall use only domestic construction material, Recovery Act designated country manufactured construction material, or designated country unmanufactured construction material, other than Bahrainian, Mexican, or Omani construction material, in performing this contract, except as provided in paragraphs (b)(3) and (b)(4) of this clause.

■ 17. Amend section 52.225–24 by—

■ a. Revising the section heading;

■ b. Revising the heading and the date of the provision;

■ c. Removing from paragraph (a) the word “Other”; and

■ d. Revising paragraph (c).

The revised text reads as follows:

**52.225–24 Notice of Required Use of American Iron, Steel, and Manufactured Goods—Buy American Act—Construction Materials Under Trade Agreements.**

\* \* \* \* \*

**Notice of Required Use of American Iron, Steel, and Manufactured Goods—Buy American Act—Construction Materials Under Trade Agreements (Oct 2010)**

\* \* \* \* \*

(c) *Evaluation of offers.* (1) If the Government determines that an exception based on unreasonable cost of domestic construction material applies in accordance with FAR 25.604, the Government will evaluate an offer requesting exception to the requirements of section 1605 of the Recovery Act or the Buy American Act by adding to the offered price of the contract—

(i) 25 percent of the offered price of the contract, if foreign manufactured construction material is included in the offer based on an exception for the unreasonable cost of comparable manufactured domestic construction material; and

(ii) 6 percent of the cost of foreign unmanufactured construction material included in the offer based on an exception for the unreasonable cost of comparable domestic unmanufactured construction material.

(2) If the solicitation specifies award on the basis of factors in addition to cost or price, the Contracting Officer will apply the evaluation factors as specified in paragraph (c)(1) of this provision and use the evaluated cost or price in determining the offer that represents the best value to the Government.

(3) Unless paragraph (c)(2) of this provision applies, if two or more offers are equal in price, the Contracting Officer will give preference to an offer that does not include foreign construction material excepted at the request of the offeror on the basis of unreasonable cost.

\* \* \* \* \*

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**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Chapter 1**

[Docket FAR 2010–0077, Sequence 7]

**Federal Acquisition Regulation; Federal Acquisition Circular 2005–45; Small Entity Compliance Guide**

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

**ACTION:** Small Entity Compliance Guide.

**SUMMARY:** This document is issued under the joint authority of the Secretary of Defense, the Administrator of General Services and the Administrator of the National Aeronautics and Space Administration. This *Small Entity Compliance Guide* has been prepared in accordance with section 212 of the Small Business Regulatory Enforcement Fairness Act of 1996. It consists of a summary of rules appearing in Federal Acquisition Circular (FAC) 2005–45 which amend the FAR. Interested parties may obtain further information regarding these rules by referring to FAC 2005–45, which precedes this document. These documents are also available via the Internet at <http://www.regulations.gov>.

**DATES:** For effective dates see separate documents, which follow.

**FOR FURTHER INFORMATION CONTACT:** The analyst whose name appears in the table below. Please cite FAC 2005–45 and the specific FAR case number. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755.

**LIST OF RULES IN FAC 2005–45**

Item	Subject	FAR case	Analyst
I .....	Inflation Adjustment of Acquisition-Related Thresholds .....	2008–024	Jackson.
II .....	Definition of Cost or Pricing Data .....	2005–036	Chambers.
III .....	American Recovery and Reinvestment Act of 2009 (the Recovery Act)—Buy American Requirements for Construction Materials.	2009–008	Davis.

**SUPPLEMENTARY INFORMATION:**

Summaries for each FAR rule follow. For the actual revisions and/or amendments made by these FAR cases, refer to the specific item number and

subject set forth in the documents following these item summaries.

FAC 2005–45 amends the FAR as specified below:

**Item I—Inflation Adjustment of Acquisition-Related Thresholds (FAR Case 2008–024)**

This final rule amends the FAR to implement section 807 of the Ronald W.