

that offerors and contractors may not treat foreign components of the same class or kind as domestic components. In addition, the contracting officer must submit a copy of supporting documentation to the appropriate council identified in 1.201-1 in accordance with agency procedures, for possible removal of the article from the list.

**25.105 Determining reasonableness of cost.**

(a) The contracting officer—

(1) Must use the evaluation factors in paragraph (b) of this section unless the head of the agency makes a written determination that the use of higher factors is more appropriate. If the determination applies to all agency acquisitions, the agency evaluation factors must be published in agency regulations; and

(2) Must not apply evaluation factors to offers of eligible products if the acquisition is subject to a trade agreement under Subpart 25.4.

(b) If there is a domestic offer that is not the low offer, and the restrictions of the Buy American Act apply to the low offer, the contracting officer must determine the reasonableness of the cost of the domestic offer by adding to the price of the low offer, inclusive of duty—

(1) 6 percent, if the lowest domestic offer is from a large business concern; or

(2) 12 percent, if the lowest domestic offer is from a small business concern. The contracting officer must use this factor, or another factor established in agency regulations, in small business set-asides if the low offer is from a small business concern offering the product of a small business concern that is not a domestic end product (see Subpart 19.5).

(c) The price of the domestic offer is reasonable if it does not exceed the evaluated price of the low offer after addition of the appropriate evaluation factor in accordance with paragraph (a) or (b) of this section. (See evaluation procedures at Subpart 25.5.)

**Subpart 25.2—Buy American Act—Construction Materials**

**25.200 Scope of subpart.**

This subpart implements the Buy American Act (41 U.S.C. 10a-10d) and Executive Order 10582, December 17, 1954. It applies to contracts for the construction, alteration, or repair of any public building or public work in the United States.

**25.201 Policy.**

Except as provided in 25.202, use only domestic construction materials in construction contracts performed in the United States.

**25.202 Exceptions.**

(a) When one of the following exceptions applies, the contracting officer may acquire foreign construction materials without regard to the restrictions of the Buy American Act:

(1) *Impracticable or inconsistent with public interest.* The head of the agency may determine that application of the restrictions of the Buy American Act to a particular construction material would be impracticable or would be inconsistent with the public interest. The public interest exception applies when an agency has an agreement with a foreign government that provides a blanket exception to the Buy American Act.

(2) *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 25.104(b) also apply if any of those articles are acquired as construction materials.

(3) *Unreasonable cost.* The contracting officer concludes that the cost of domestic construction material is unreasonable in accordance with 25.204.

(b) *Determination and findings.* When a determination is made for any of the reasons stated in this section that certain foreign construction materials

## 25.203

may be used, the contracting officer must list the excepted materials in the contract. The agency must make the findings justifying the exception available for public inspection.

(c) *Acquisitions under trade agreements.* For construction contracts with an estimated acquisition value of \$6,481,000 or more, see 25.403. If the acquisition value is \$7,304,733 or more, also see 25.405.

[64 FR 72419, Dec. 27, 1999, as amended at 65 FR 36026, June 6, 2000; 67 FR 56123, Aug. 30, 2002]

### 25.203 Preaward determinations.

(a) For any acquisition, an offeror may request from the contracting officer a determination concerning the inapplicability of the Buy American Act for specifically identified construction materials. The time for submitting the request is specified in the solicitation in paragraph (b) of either 52.225-10 or 52.225-12, whichever applies. The information and supporting data that must be included in the request are also specified in the solicitation in paragraphs (c) and (d) of either 52.225-9 or 52.225-11, whichever applies.

(b) Before award, the contracting officer must evaluate all requests based on the information provided and may supplement this information with other readily available information.

### 25.204 Evaluating offers of foreign construction material.

(a) Offerors proposing to use foreign construction material other than that listed by the Government in the applicable clause at 52.225-9, paragraph (b)(2), or 52.225-11, paragraph (b)(3), or excepted under the Trade Agreements Act or NAFTA (paragraph (b)(2) of 52.225-11), must provide the information required by paragraphs (c) and (d) of the respective clauses.

(b) Unless the head of the agency specifies a higher percentage, the contracting officer must add to the offered price 6 percent of the cost of any foreign construction material proposed for exception from the requirements of the Buy American Act based on the unreasonable cost of domestic construction materials. In the case of a tie, the contracting officer must give preference to an offer that does not include

## 48 CFR Ch. 1 (10-1-02 Edition)

foreign construction material excepted at the request of the offeror on the basis of unreasonable cost.

(c) Offerors also may submit alternate offers based on use of equivalent domestic construction material to avoid possible rejection of the entire offer if the Government determines that an exception permitting use of a particular foreign construction material does not apply.

(d) If the contracting officer awards a contract to an offeror that proposed foreign construction material not listed in the applicable clause in the solicitation (paragraph (b)(2) of 52.225-9, or paragraph (b)(3) of 52.225-11), the contracting officer must add the excepted materials to the list in the contract clause.

### 25.205 Postaward determinations.

(a) If a contractor requests a determination regarding the inapplicability of the Buy American Act after contract award, the contractor must explain why it could not request the determination before contract award or why the need for such determination otherwise was not reasonably foreseeable. If the contracting officer concludes that the contractor should have made the request before contract award, the contracting officer may deny the request.

(b) The contracting officer must base evaluation of any request for a determination regarding the inapplicability of the Buy American Act made after contract award on information required by paragraphs (c) and (d) of the applicable clause at 52.225-9 or 52.225-11 and/or other readily available information.

(c) If a determination, under 25.202(a), is made after contract award that an exception to the Buy American Act applies, the contracting officer must negotiate adequate consideration and modify the contract to allow use of the foreign construction material. When the basis for the exception is the unreasonable price of a domestic construction material, adequate consideration is at least the differential established in 25.202(a) or in accordance with agency procedures.

### 25.206 Noncompliance.

The contracting officer must—