

§ 201.62

22 CFR Ch. II (4-1-05 Edition)

sale to differ from otherwise comparable sales with respect to terms of sale, supply area, or period of delivery.

(f) The *date the purchase price is fixed* means the date on which the parties agree on the price. If, however, the parties establish the price as of any other date which is subsequent to the date of such agreement and not later than the date of delivery, the term means such other date regardless of whether it precedes, coincides with or follows the legally effective date of the purchase contract.

(g) *Export differential* means the customary difference in price, if any, between domestic sales and otherwise comparable export sales.

(h) *Period of delivery* means the length of time between the date the purchase price is fixed or the date of the purchase contract, whichever is later, and the date by which delivery is to be completed.

(i) *Producer* means any person who grows, mines, manufactures, processes, or assembles a commodity in the form in which it is exported.

(j) *Purchase price* means the total amount which the purchaser agrees to pay or make available to or for the benefit of the supplier (including any person or organization designated by the supplier to receive such payment) for any commodity or commodity-related service which is wholly or partly financed by USAID.

(k) *Representative of the importer* means any entity affiliated with the importer by ownership or management ties, and any office or employee of such entity.

(l) *Similar commodity* means a commodity which is functionally interchangeable with the commodity in the sale being tested, and affords the purchaser substantially equivalent serviceability.

(m) *Supply area* means the source country, or if the commodity is customarily sold at different prices (exclusive of transportation costs) from different geographic areas within a source country, the specific geographic area within the source country from which the commodity is shipped to the cooperating country.

(n) *Time of purchase* means that period encompassing the date the pur-

chase price is fixed during which prices in comparable sales remain substantially constant.

(o) *Transportation cost* means the cost of all transportation by land, sea, or air from the port of export to the destination in the cooperating country, plus the cost of marine insurance, if any, covering such transaction. Such costs are financed by USAID only to the extent provided in § 201.13.

§ 201.62 Responsibilities of borrower/grantee and of supplier.

(a) *Responsibilities of borrower/grantee.* The borrower/grantee shall:

(1) When required by USAID, develop and periodically update, or cooperate with USAID in the development and updating of, lists of importers who have traditionally imported the commodities which may be purchased under the loan or grant. Such listings shall be by commodity groupings selected by USAID, cover all commodities eligible for financing, and, to the extent such information is available, show the names and addresses of all importers, regardless of the source from which their imports originated.

(2) Insure that the importer

(i) Procures in accordance with the conditions set forth in subpart C as applicable, and

(ii) Except as provided otherwise in § 201.22, pays no more than the lowest available competitive price, including transportation cost, for the commodity.

(b) *Responsibility of supplier.* In accordance with the provisions contained in the Supplier's Certificate, which the supplier must execute in order to receive payment, the supplier is responsible for compliance with the provisions of this subpart G, other than paragraph (a) of this section.

§ 201.63 Maximum prices for commodities.

(a) *U.S. prevailing market price—U.S. source.* The purchase price for a commodity, the source of which is the United States, shall not exceed the market price prevailing in comparable export sales in the United States at the time of purchase, adjusted for differences in the transportation cost: *Provided, however,* That if there are no

such comparable export sales, then the purchase price, excluding transportation cost, may not exceed the market price prevailing in comparable domestic sales in the United States at the time of purchase, adjusted upward or downward by the appropriate export differential.

(b) *U.S. prevailing market price—non-U.S. source.* The purchase price, including transportation cost, for a commodity the source of which is not the United States shall be lower than the market price prevailing in comparable export sales in the United States at the time of purchase including transportation cost: *Provided, however,* That if there are no such comparable export sales in the United States, then the purchase price from the source outside the United States, including transportation cost, must be lower than the market price prevailing in comparable domestic sales in the United States at the time of purchase, adjusted upward or downward by the appropriate export differential and transportation cost.

(c) *Supplier's comparable export price—U.S. and non-U.S. sources.* (1) The purchase price excluding transportation cost, shall not exceed prices generally charged by the supplier in comparable export sales from the source country at the time of purchase.

(2) The requirement in paragraph (c)(1) of this section shall not apply to the purchase price:

(i) In any sale under formal competitive bid procedures; or

(ii) In any sale of a commodity generally traded on an organized commodity exchange.

(3) *Comparable export sales* for the purpose of paragraph (c) of this section shall not include sales:

(i) Under formal competitive bid procedures; or

(ii) Of a commodity by a supplier to affiliates if the supplier demonstrates an established practice of selling the commodity to affiliates at prices lower than the prices it charges to nonaffiliates.

(d) *Source country prevailing market price—non-U.S. source.* The purchase price, excluding transportation cost, shall not exceed the market price prevailing in the source country in comparable export sales at the time of pur-

chase: *Provided, however,* That, if there are no such comparable export sales, then the purchase price, excluding transportation cost, shall not exceed the market price prevailing in comparable domestic sales in the source country at the time of purchase, adjusted upward or downward by the appropriate export differential.

(e) *Price test in the absence of comparable sales at time of purchase—(1) Sale by supplier who is not the producer.* The purchase price shall not exceed the sum of:

(i) The lower of the following: The price paid by the supplier for the commodity or the price charged by the producer in the original sale of that specific commodity; and

(ii) A markup over the amount allowed in paragraph (e)(1)(i) of this section which may not exceed the lower of the following: The markup over direct cost that is usual and customary in sales by the supplier of the same commodity, if any, or the most similar commodity, or, the markup over direct cost that is usual and customary in such sales by the competitors of the supplier; and

(iii) To the extent not included in paragraph (e)(1)(i) of this section an amount not to exceed the cost at prevailing rates of those expenses recognized in §201.64(a) and actually incurred in moving the commodities supplied from the point of purchase to a position alongside or on board the vessel or other export conveyance at point of export.

(2) *Sale by a supplier who is the producer.* The purchase price shall not exceed a price established in accordance with the customary pricing practices of the supplier for other products of the same general class as the commodity sold.

(f) *Additional rules for sales through or out of a free port or bonded warehouse.* (1) The purchase price, including transportation costs to a cooperating country, of a commodity which has passed through a free port or bonded warehouse shall not exceed:

(i) The maximum price f.o.b. or f.a.s. source country eligible for USAID-financing under the foregoing provisions of this §201.63: plus

§ 201.64

22 CFR Ch. II (4-1-05 Edition)

(ii) Transportation cost calculated on the basis of the prevailing ocean freight rate for shipments using the most direct route from the source country to the cooperating country on the type and flag of vessel on which the commodity actually moved from the free port or bonded warehouse to the cooperating country.

(2) The purchase price of a commodity f.o.b. or f.a.s. a free port or bonded warehouse shall not exceed the maximum price established in paragraph (f)(1) of this section, minus transportation costs from the free port or bonded warehouse to the cooperating country, calculated on the basis of the prevailing ocean freight rate from the free port or bonded warehouse to the cooperating country for the type and flag of vessel on which the commodity actually moved between those points.

(g) *Commodity price subject to escalation.* If a purchase contract contains a price escalation clause, USAID will finance:

(1) The purchase price of the commodity before the operation of the escalation clause to the extent that it does not exceed the applicable price limitations contained in this subpart; and

(2) That portion of the commodity price attributable to the operation of the price escalation clause if such clause:

(i) Uses a formula based on variations in a cost factor which is reasonably related to the price of the commodity subject to escalation and is readily determinable;

(ii) Provides for downward as well as upward adjustment of the price; and

(iii) Accords with recognized trade practices.

§ 201.64 Application of the price rules to commodities.

(a) *Calculation of commodity prices on a common basis.* In testing whether the purchase price of a commodity exceeds the price in comparable export sales or in comparable domestic sales, as applicable under § 201.63 (a), (c), (d) and (e), it is necessary to insure that the price being tested as well as the prices being used as a test or measurement are calculated on the basis of delivery along-

side or on board the vessel or other export conveyance. Such prices will include, therefore, in addition to the price of the commodity at an internal point in the source country, transportation from that point to the port of export in the source country, and to the extent not already included in the price at the internal point, inspection, export packing, forwarder's fees at customary rates, the cost of placing the commodities on board the vessel or export conveyance (unless this cost is covered in the export freight), and other necessary costs customary in the trade.

(b) *Calculation of commodity prices which involve transportation costs.* (1) In testing the purchase price which includes transportation cost (customarily known as a c. & f. or c.i.f. price) for compliance with the requirements of § 201.63 (a), (c), (d) and (e), USAID will subtract transportation cost as calculated by reference to the freight rate, for the type and flag of vessel on which the commodity was shipped, prevailing on the date the purchase price is fixed. In the absence of evidence to the contrary, the actual transportation cost paid by the supplier shall be presumed to be the transportation cost calculated in accordance with the formula contained in the foregoing sentence.

(2) In testing a purchase price involving transportation cost for compliance with § 201.62 and § 201.63(b), the test or measurement prices shall be:

(i) Prices based upon transportation by a U.S.-flag vessel if the price tested involves transportation by such vessel; or

(ii) Prices based upon transportation by either a U.S.-flag or a foreign-flag vessel, whichever is lower, if the price tested involves transportation by a foreign-flag vessel.

(c) *Calculation of amount eligible for financing when shipment is through or out of a free port or bonded warehouse.* (1) When a shipment to a cooperating country has passed through a free port or bonded warehouse, USAID will finance no more than the lower of the following:

(i) The maximum price described in § 201.63(f)(1), or