

using solicitation provision 52.225-18, Place of Manufacture (and its commercial item equivalent in 52.212-3, Offeror Representations and Certifications-Commercial Items). For purposes of this report, the criteria established in the law is only whether the place of manufacture of an end product is in the United States or outside the United States, without regard to the origin of the components (see 25.001(c)).

■ 4. Amend section 25.1101 by adding paragraph (f) to read as follows:

**25.1101 Acquisition of supplies.**

\* \* \* \* \*

(f) Insert the provision at 52.225-18, Place of Manufacture, in solicitations that are predominantly for the acquisition of manufactured end products, as defined in the provision at 52.225-18 (i.e., the estimated value of the manufactured end products exceeds the estimated value of other items to be acquired as a result of the solicitation).

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

■ 5. Amend section 52.212-3 by—

- a. Revising the date of the provision;
- b. Amending the introductory paragraph of the provision by removing from the first sentence “paragraph (j)” and adding “paragraph (k)” in its place; and by removing from the second sentence “paragraphs (b) through (i)” and adding “paragraphs (b) through (j)” in its place;
- c. Amending paragraph (a) by removing from the end of the introductory paragraph the colon and adding an em dash in its place; and by adding in alphabetical order, the definitions “Manufactured end product” and “Place of manufacture”;
- d. Redesignating paragraph “j” as paragraph “k”; and adding new paragraph “j”;
- e. In the newly designated paragraph (k)(1), removing “paragraph (j)” and adding “paragraph (k)(2)” in its place; and
- f. In the newly designated paragraph (k)(2), in the bracketed paragraph, removing “(b) through (i)” and adding “(b) through (j)” in its place.

The revised text reads as follows:

**52.212-3 Offeror Representations and Certifications—Commercial Items.**

\* \* \* \* \*

OFFEROR REPRESENTATIONS AND CERTIFICATIONS—COMMERCIAL ITEMS (SEP 2006)

\* \* \* \* \*

(a) \* \* \*

*Manufactured end product* means any end product in Federal Supply Classes (FSC) 1000-9999, except—

- (1) FSC 5510, Lumber and Related Basic Wood Materials;
- (2) Federal Supply Group (FSG) 87, Agricultural Supplies;
- (3) FSG 88, Live Animals;
- (4) FSG 89, Food and Related Consumables;
- (5) FSC 9410, Crude Grades of Plant Materials;
- (6) FSC 9430, Miscellaneous Crude Animal Products, Inedible;
- (7) FSC 9440, Miscellaneous Crude Agricultural and Forestry Products;
- (8) FSC 9610, Ores;
- (9) FSC 9620, Minerals, Natural and Synthetic; and
- (10) FSC 9630, Additive Metal Materials.

*Place of manufacture* means the place where an end product is assembled out of components, or otherwise made or processed from raw materials into the finished product that is to be provided to the Government. If a product is disassembled and reassembled, the place of reassembly is not the place of manufacture.

\* \* \* \* \*

(j) *Place of manufacture.* (Does not apply unless the solicitation is predominantly for the acquisition of manufactured end products.) For statistical purposes only, the offeror shall indicate whether the place of manufacture of the end products it expects to provide in response to this solicitation is predominantly—

- (1)  In the United States (Check this box if the total anticipated price of offered end products manufactured in the United States exceeds the total anticipated price of offered end products manufactured outside the United States); or
- (2)  Outside the United States.

\* \* \* \* \*

(End of provision)

■ 6. Add section 52.225-18 to read as follows:

**52.225-18 Place of Manufacture.**

■ As prescribed in 25.1101(f), insert the following solicitation provision:

PLACE OF MANUFACTURE (SEP 2006)

(a) *Definitions.* As used in this clause—

*Manufactured end product* means any end product in Federal Supply Classes (FSC) 1000-9999, except—

- (1) FSC 5510, Lumber and Related Basic Wood Materials;
- (2) Federal Supply Group (FSG) 87, Agricultural Supplies;
- (3) FSG 88, Live Animals;
- (4) FSG 89, Food and Related Consumables;

(5) FSC 9410, Crude Grades of Plant Materials;

(6) FSC 9430, Miscellaneous Crude Animal Products, Inedible;

(7) FSC 9440, Miscellaneous Crude Agricultural and Forestry Products;

(8) FSC 9610, Ores;

(9) FSC 9620, Minerals, Natural and Synthetic; and

(10) FSC 9630, Additive Metal Materials.

*Place of manufacture* means the place where an end product is assembled out of components, or otherwise made or processed from raw materials into the finished product that is to be provided to the Government. If a product is disassembled and reassembled, the place of reassembly is not the place of manufacture.

(b) For statistical purposes only, the offeror shall indicate whether the place of manufacture of the end products it expects to provide in response to this solicitation is predominantly—

- (1)  In the United States (Check this box if the total anticipated price of offered end products manufactured in the United States exceeds the total anticipated price of offered end products manufactured outside the United States); or
- (2)  Outside the United States.

(End of provision)

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**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Part 25**

[FAC 2005-13; FAR Case 2005-022; Item VII; Docket 2006-0020, Sequence 14]

RIN 9000-AK34

**Federal Acquisition Regulation; FAR Case 2005-022, Exception to the Buy American Act for Commercial Information Technology**

**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 (Councils) have agreed to convert to a final rule without change, an interim rule amending the Federal Acquisition

Regulation (FAR) to implement Section 535(a) of Division F of the Consolidated Appropriations Act, 2004, and similar sections in subsequent appropriations acts. Section 535(a) authorizes an exception to the Buy American Act for acquisitions of information technology that are commercial items.

**DATES:** *Effective Date:* September 28, 2006.

**FOR FURTHER INFORMATION CONTACT** For clarification of content, contact Mr. Jeremy Olson, at (202) 501-3221. Please cite FAC 2005-13, FAR case 2005-022. For information pertaining to status or publication schedules, contact the FAR Secretariat at (202) 501-4755.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

This final rule amends the Federal Acquisition Regulation to implement annual appropriations act provisions that exempt acquisitions of information technology that are commercial items from the Buy American Act, including—

- Section 535(a) of Division F, Consolidated Appropriations Act, 2004 (Pub. L. 108-199);
- Section 517 of Division H, Title V of the Consolidated Appropriations Act, 2005 (Pub. L. 108-447); and
- Section 717 of Division A, Transportation, Treasury, Housing and Urban Development, the Judiciary, the District of Columbia, and Independent Agencies Appropriations Act, 2006 (Pub. L. 109-115).

This exception was initially implemented through deviations by the individual agencies, until it became clear that it was not just for one year. The Councils now expect this exception to continue to appear in future appropriations acts. If the exception does not appear in a future appropriations act, the Councils will promptly change the FAR to limit applicability of the exception to the fiscal years to which it applies. DoD, GSA, and NASA published an interim rule in the **Federal Register** at 71 FR 223, January 3, 2006 and the public comment period closed on March 6, 2006.

**Public comments.** The Councils addressed the two public comments as follows:

**Agree with rule**

One respondent concurs with the rule as written. The respondent views this rule as a positive first step in recognizing the Government's need for quicker, cheaper access to commercial-off-the-shelf information technology.

*Response:* None required.

**Rule should not apply to DoD**

The other respondent believes that the exception should not apply to DoD due to the security risk associated with foreign entities potentially gaining access to DoD information systems.

*Response:* This rule implements statute. The statutes that the Councils are implementing do not exempt DoD. Each fiscal year statute states that the restrictions of the Buy American Act *shall not* apply to the acquisition by the Federal Government of information technology that is a commercial item.

Although DoD uses DoD-unique Buy American Act/Free Trade Agreement provisions and clauses, this exception has already been implemented by DoD for Fiscal Years 2004 through 2006 by class deviations signed by the Director of Defense Procurement and Acquisition Policy (2004-O0003, 2005-O0004, 2005-O0010).

Regardless of the applicability of the Buy American Act, Defense FAR Supplement (DFARS) Subpart 239.71, Security and Privacy for Computer Systems, requires defense agencies to ensure that information assurance is provided for information technology in accordance with current policies, procedures, and statutes.

This is not a significant regulatory action and, therefore, was not 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.

**B. Regulatory Flexibility Act**

The Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, applies to this final rule. The Councils prepared a Final Regulatory Flexibility Analysis (FRFA), and it is summarized as follows:

The objective of this rule is to promote Government access to commercial information technology. As a result of this exception, the Buy American Act will no longer apply to acquisitions of commercial information technology. The Free Trade Agreement non-discriminatory provisions are no longer necessary, since all products will be treated without the restrictions of the Buy American Act. The final rule applies to all offerors responding to solicitations for commercial information technology where the Buy American Act previously applied (generally, acquisitions between the micro-purchase threshold and \$193,000). This impact analysis does not include the Department of Defense, which applies this exception to DoD-unique Buy American Act/Free Trade Agreement provisions and clauses under a separate case (DFARS Case 2005-D011). This exception will allow small entities to compete without meeting the Buy American Act domestic end product requirements.

It is anticipated that small business concerns will continue to receive the same number of awards in the range of the micro-purchase threshold to \$100,000, because these awards are generally set-aside for small business concerns. It is also expected that small business concerns will continue to receive awards in the range of \$100,000 to \$193,000, but in this range they will face competition from foreign end products.

This rule will not have an effect on small businesses affected by the "non-manufacturer rule," which means that a contractor under a small business set-aside or 8(a) contract shall be a small business under the applicable size standard and shall provide either its own product or that of another domestic small business manufacturing or processing concern. If there is a small business set-aside, and there is no SBA waiver of the nonmanufacturer rule, then FAR 52.219-6(c) and/or FAR 52.219-18(d) require that a domestic product must be furnished. In this case, the rule will have no effect on small businesses because the nonmanufacturer rule is not changed. If SBA did waive the nonmanufacturer rule, then there is no requirement to purchase a domestic product but an evaluation preference would apply. The rule could have an impact on small businesses when there is no small business set-aside because small businesses may lose the evaluation preference for acquisitions between \$25,000 and \$193,000.

Interested parties may obtain a copy of the FRFA from the FAR Secretariat. The FAR Secretariat has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration.

**C. Paperwork Reduction Act**

The Paperwork Reduction Act does apply because the changes to the FAR will slightly reduce the information collection requirements currently approved by the Office of Management and Budget OMB Clearances 9000-0024 and 9000-0130. We estimate a reduction of approximately 300 hours to OMB Clearance 9000-0024 and 50 hours to 9000-0130.

**List of Subjects in 48 CFR Part 25**

Government procurement.

Dated: September 19, 2006.

**Ralph De Stefano,**

*Director, Contract Policy Division.*

**Interim Rule Adopted as Final Without Change**

■ Accordingly, the interim rule amending 48 CFR part 25, which was published in the **Federal Register** at 71 FR 223, January 3, 2006, is adopted as a final rule without change.

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