

## DEPARTMENT OF DEFENSE

## 48 CFR Parts 206, 208, 212, 225, 242, and 252

[DFARS Case 2002–D009]

## Defense Federal Acquisition Regulation Supplement; Foreign Acquisition

AGENCY: Department of Defense (DoD).

ACTION: Final rule.

**SUMMARY:** DoD has issued a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to simplify and clarify policy pertaining to the acquisition of supplies and services from foreign sources.

**EFFECTIVE DATE:** April 30, 2003.

**FOR FURTHER INFORMATION CONTACT:** Ms. Amy Williams, Defense Acquisition Regulations Council, OUSD(AT&L)DPAP(DAR), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301–3062. Telephone (703) 602–0328; facsimile (703) 602–0350. Please cite DFARS Case 2002–D009.

## SUPPLEMENTARY INFORMATION:

## A. Background

This rule revises DFARS Part 225, Foreign Acquisition, and associated provisions and clauses. The rule—

- Provides streamlined procedures for evaluating foreign offers when acquiring supplies, and adds procedures for evaluating foreign offers in acquisitions in which price is not the determining factor.

- Changes the definition of “qualifying country end product” to permit the qualifying country manufacturing the product to use components from any other qualifying country.

- Lowers the required approval levels for determinations of nonavailability under the Buy American Act.

- Lowers the required approval levels for individual public interest determinations for acquisition of end products from qualifying countries.

- Provides that the Government will evaluate duty only if it is to be paid. Except for qualifying country supplies or eligible end products, the contractor will request duty-free entry only on foreign supplies for which the contractor estimates that duty will exceed \$200 per shipment into the customs territory of the United States. One duty-free entry clause replaces five existing clauses.

- Eliminates the requirement for a contractor to represent that it will comply with all laws, decrees, labor standards, and regulations of the foreign

country in which the contract will be performed.

- Deletes obsolete text and clauses relating to outdated appropriations act restrictions, resulting in the elimination of four clauses.

DoD published a proposed rule in the *Federal Register* at 67 FR 62590 on October 7, 2002. Five sources submitted comments on the proposed rule. Most respondents generally favored the rule, with minor technical suggestions. Differences between the proposed and final rules are addressed below in the discussion of comments 8, 9, 10, 13, 14, 16, and 17.

1. *Comment:* One respondent supported the change in the definition of “qualifying country end product” which permits the qualifying country manufacturing the product to use components of another qualifying country, stating that “This change recognizes the multi-national realities of many manufacturing and assembly operations \* \* \*”.

*DoD Response:* Concur.

2. *Comment:* One respondent suggested that 225.003, Definitions, also incorporate by reference the definitions found at 252.225–7021(a), particularly the definitions for “designated country,” “designated country end product,” and “U.S.-made end product.”

*DoD Response:* Do not concur. These definitions are in the FAR at 25.003. The DFARS supplements the FAR, must be read in conjunction with the FAR, and does not repeat FAR text.

3. *Comment:* One respondent objected to “the expanded” definition of “domestic end product” (252.225–7001 and 252.225–7036) and the two-part test at 225.101, which flows from this definition. The respondent stated that the rule has the potential to allow a manufactured end product that is 100 percent manufactured in a qualifying country to be determined a domestic end product.

*DoD Response:* Do not concur. This rule makes no substantive change to the definition of “domestic end product.” As required by the Buy American Act, a domestic end product must be mined, produced, or manufactured in the United States. With regard to components, the rule requires that the cost of the qualifying country components and the components that are mined, produced, or manufactured in the United States exceed 50 percent of the cost of all components. This rule implements long-standing DoD policy, based on Memoranda of Understanding with DoD’s allies, and does not represent a change from the current regulations.

4. *Comment:* One respondent recommended keeping the definition of “nondesignated country end product” in 225.003.

*DoD Response:* Do not concur. This definition is unnecessary, because the term is no longer used in Part 225.

5. *Comment:* One respondent supported lowering of the approval levels for domestic nonavailability and public interest determinations, because this takes into account the increasingly global nature of manufacturing operations and addresses the short-supply or nonavailability situations that can result when production moves offshore.

*DoD Response:* Concur.

6. *Comment:* One respondent objected to the change at 225.103(a)(ii)(A)(3)(i) from “American good” to “domestic end product.”

*DoD Response:* Do not concur. The rule replaces the term “American good” with “domestic end product” for consistency with the terminology used elsewhere in Part 225 and associated clauses. The change in terminology does not substantially change the meaning of the DFARS text.

7. *Comment:* One respondent objected to the replacement of “original manufacturer” with “original foreign manufacturer” at 225.103(b)(iii)(B), as it changes the focus.

*DoD Response:* Do not concur. DFARS 225.103(b)(iii)(B) relates to a DoD determination that certain articles are not reasonably available from domestic sources because they are spare or replacement parts that must be acquired from the original manufacturer. If the original manufacturer were domestic, the spare or replacement parts could be obtained from a domestic source and no exception would be required.

8. *Comment:* One respondent recommended clarifying that a determination and findings is not required for the items listed in 225.103(b)(iii)(A)–(C).

*DoD Response:* Concur. DoD has changed DFARS 225.103(b)(iii) to clarify that no separate determination is required for these items.

9. *Comment:* One respondent asked whether the references to “\$100K” in 225.103 should be changed to the “simplified acquisition threshold.”

*DoD Response:* Concur. Approval thresholds of \$100,000 that appeared in the proposed rule have been changed to the “simplified acquisition threshold” at 225.103(a)(ii)(B), 225.103(b)(ii), and 225.872–4(b). The circumstances in which the simplified acquisition threshold is greater than \$100,000 would also justify an increased