

threshold for approval for these determinations.

10. *Comment:* One respondent suggested reinstating the text at 225.170 to apply the Part 225 evaluation procedures to foreign items on Federal Supply Schedules.

DoD Response: Concur. DoD has reinstated this text in the final rule.

11. *Comment:* One respondent noted that DFARS specifically identifies the inapplicability of qualifying country offers on small business set-asides (225.872–3). The respondent recommended addition of similar coverage regarding designated country offers or NAFTA offers in Subpart 225.4, Trade Agreements.

DoD Response: Do not concur. The FAR addresses this issue at 25.401(a)(1).

12. *Comment:* One respondent objected that the evaluation procedures—

a. Are still convoluted and confusing;
b. Summarily perpetuate the notion that qualifying country end products are exempt from application of the Buy American Act or Balance of Payments Program;

c. Eliminate the requirement for “two tests that must be met to determine whether a manufactured item is a domestic end product”; and

d. May result in a regulatory pre-determination that a foreign offer that is lower than the lowest domestic offer may be exempt from the Buy American Act and the Balance of Payments Program simply because the regulation says so.

DoD Response: a. Do not concur. Due to the complexity of the laws involved, the evaluation procedures cannot be simplified further. The rule lays out step-by-step procedures, parallel to the FAR, which will lead to the correct conclusion. The rule eliminates many confusing aspects of the current regulation: It no longer requires treatment of offers of eligible end products as if they were qualifying country offers; no longer requires evaluation of duty unless duty is to be paid; and no longer requires application of an evaluation factor to offers that are already known to be unacceptable. In addition, DoD is preparing an on-line training module to provide additional explanatory material and practical examples to clarify the main issues.

b. Concur. The rule does exempt qualifying country end products from application of the Buy American Act or the Balance of Payments Program. This exemption represents long-standing DoD policy implementing Memoranda of Understanding with qualifying countries, whereby DoD has reciprocal

procurement agreements of non-discrimination.

c. Do not concur. The “two tests” previously at 225.502(c)(v)(A) have been moved to 225.101.

d. Do not concur. The determination that a foreign product may be exempt from the Buy American Act and the Balance of Payments Program is not simply because the regulations say so, but because following these evaluation procedures results in correct implementation of the exceptions to the Buy American Act provided in the Buy American Act itself, and further amplified in Executive Order 10582, and determinations of the Secretary of Defense that are in accordance with the Act and the Executive order.

13. *Comment:* One respondent indicated that the phrase “products of the following qualifying countries” at 225.872–1(b) is not sufficiently precise and should take into consideration whether the end product is manufactured in the originating country.

DoD Response: Partially concur. DoD has clarified the text at 225.872–1(a) and (b) by using the term “qualifying country end products.”

14. *Comment:* One respondent did not find the \$200 “per unit” reference with regard to duty to be clear.

DoD Response: Concur. DoD has revised DFARS 225.901(3) and the associated clause at 252.225–7013, to change “\$200 per unit (end product or component)” to “\$200 per shipment into the customs territory of the United States.” Duty-free entry certificates are issued on a per shipment basis.

Therefore, the determination of the threshold at which it is economically worthwhile to issue such certificates should be on a per shipment basis.

Furthermore, DoD has changed the prescription at 225.1101(4) for use of the Duty-Free Entry clause at 252.225–7013, to base its use on whether the supplies will enter the customs territory of the United States, rather than whether the supplies are for exclusive use outside the United States.

15. *Comment:* One respondent was concerned that there are no specific criteria at 225.7003 for determining if a foreign country discriminates against defense items produced in the United States to a greater degree than the United States discriminates against items produced in that country. The respondent stated that “semantics and unsubstantiated allegations of discrimination could be used as a basis for waiving compliance with the Buy American Act * * *

DoD Response: Do not concur. This rule makes no substantive change to the

DFARS text on this subject. This waiver condition comes directly from 10 U.S.C. 2534(d)(2). Since the Under Secretary of Defense (Acquisition, Technology, and Logistics) exercises this authority without power of delegation, it is not necessary to include the determination criteria in the DFARS.

16. *Comment:* One respondent supported the changes proposed under DFARS Case 2002–D008, Trade Agreements Act—Exception for U.S.-Made End Product, that were also included in this rule. Another respondent objected to the changes on the basis that they could create a *de facto* blanket exception to the Buy American Act for all end products that are substantially transformed in the United States.

DoD Response: These comments are outside the scope of this case. Comments on this issue were requested under DFARS Case 2002–D008, for which a final rule was issued on December 20, 2002. However, DoD notes that the exception for U.S.-made end products was based on a determination by the Under Secretary of Defense (Acquisition, Technology, and Logistics) that it was not in the public interest to continue to apply the Buy American Act only to U.S.-made end products in acquisitions subject to the Trade Agreements Act, because the Buy American Act has already been waived for the competing eligible products from countries other than the United States.

This final rule deletes DFARS 225.502(c)(i)(C) to conform to the changes made under DFARS Case 2002–D008.

17. *Comment:* DoD received internal Government comments recommending that the text at 209.104–1, 209.104–70, 209.405–2, 209.409, and the associated clauses at 252.209, not be moved to Part 225 and associated clauses.

DoD Response: Concur. This text has been retained at its present location.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

B. Regulatory Flexibility Act

DoD certifies 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 most of the changes in the rule merely simplify and clarify existing policy and procedures. Other changes, such as the revised definition of “qualifying country end product” primarily affect foreign firms, which, by definition, do not qualify as small entities within the meaning of the