

Procurement Guidance - (1/2014)

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T3.6.4 Foreign Acquisition Revised 10/2007

A Foreign Acquisition

1 Applicability of Buy American Added 10/2012

- a. FAA-specific Buy American provisions (49 U.S.C. §50101) apply when acquiring steel or manufactured products, as described in Section 4 below. In many instances, the Buy American Act (41 U.S.C. §10a) requirements for supplies and construction will only apply when acquiring raw and unmanufactured materials.

- b. Canadian and Mexican steel and manufactured products under certain conditions, and civil aircraft and related supplies of countries that are parties to the Agreement on Civil Aircraft, are treated as domestic for purposes of FAA Buy American and the Buy American Act. See Section 7 Trade Agreements below.

2 Buy American Act - Supplies Revised 10/2012

a. The FAA is subject to the Buy American Act when acquiring supplies, services involving supplies, and construction, alteration or repair in the United States. With limited exceptions, the Buy American Act expresses a strong preference for acquiring only domestic end products. The Buy American Act uses a two-part test to define a domestic end product:

- (1) The article must be manufactured in the United States; and
- (2) The cost of domestic components must exceed 50 percent of the cost of all the components.

b. *Exceptions.* When one of the following exceptions applies, FAA may acquire a foreign end product without regard to Buy American Act restrictions:

- (1) A supply purchase of \$3,000 or less;
- (2) The Administrator, in a written nondelegable determination, states that preference for a domestic end item is not in the public interest;
- (3) The CO determines that articles, materials, and supplies are:
 - (a) For use outside of the U.S.;
 - (b) Unreasonable in terms of cost (see subsection d. below); or
 - (c) End items or components not mined, produced, or manufactured in the U.S. in sufficient and reasonably available commercial quantities and of a satisfactory quality. When a competitive

acquisition results in no offers of domestic end products, the end products can be considered unavailable in the U.S. The articles listed in subsection e. below are considered unavailable domestically; or

(4) The purchase is for information technology that is a commercial item (AMS Policy Appendix C defines commercial item).

c. *Documentation.* The CO must document all exceptions to the Buy American Act.

d. *Determining Reasonableness of Cost.*

(1) This subsection applies to all acquisition of articles, materials, and supplies not covered by the below paragraph e. "Excepted Articles, Materials, and Supplies." If an offer for a domestic end product is not the low offer, and an offer for a foreign end product is the low offer, the CO must determine the reasonableness of the cost of the domestic offer by adding to the cost of the low foreign offer, inclusive of duty, evaluation percentages as follows:

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

(b) 12 percent, if the lowest domestic offer is from a small business concern. The CO must use this factor in small business set-asides if the low offer is from a small business concern not offering a domestic end product.

The increased percentage is for evaluation purposes only in determining best value. It does not affect any vendor's offered price. Examples of best value reasonableness of cost evaluation scenarios are as follows:

Example 1. Lowest domestic offer is from a small business concern. Because a small business is offering a domestic end product, every vendor offering a foreign end product will have the price for the foreign product increased by 12% only for evaluation purposes.

Offeror	Business Size	Domestic End Product	Foreign End Product CLIN	Evaluation Factor	Offer Price	Evaluated Price (including applicable evaluation factor)
A	Large		x	12%	\$100.00	\$112.00
B	Small		x	12%	170.00	190.40
C	Large	x		N/A	200.00	200.00
D	Small	x		N/A	175.00	175.00

The new adjusted prices will be used for evaluation purposes against all other vendors, and not just the vendor offering the domestic end product.

Example 2. Small business set-aside, low offer is from a small business concern offering the product of a small business concern that is not a domestic end product.

Offeror	Business Size	Domestic End Product	Foreign End Product of another small business concern CLIN	Evaluation Factor	Offer Price	Evaluated Price (including applicable evaluation factor)
A	Small		x	12%	\$100.00	\$112.00
B	Small	x		N/A	150.00	150.00
C	Small		x	12%	200.00	224.00
D	Small	x		N/A	175.00	175.00

The new adjusted prices will be used for evaluation purposes against all other vendors, and not just the vendor offering the domestic end product.

Example 3. Lowest domestic offer is from a large business concern.

Offeror	Business Size	Domestic End Product	Foreign End Product of another small business concern CLIN	Evaluation Factor	Offer Price	Evaluated Price (including applicable evaluation factor)
A	Large		x	6%	\$100.00	\$106.00
B	Large	x		N/A	150.00	150.00
C	Small		x	6%	200.00	212.00
D	Large	x		N/A	175.00	175.00

The new adjusted prices will be used for evaluation purposes against all other vendors, and not just the vendor offering the domestic end product.

(2) The price of the domestic offer is reasonable if it does not exceed the evaluated price of the low foreign offer after addition of the appropriate evaluation factor.

(3) The evaluation factor does not apply to offers of Canadian or Mexican end products, or to civil aircraft and related supplies of countries that are parties to the Agreement on Civil Aircraft. Offers of these products are considered domestic end products for evaluation purposes (see below “Trade Agreements” section).

(4) The CO must apply the evaluation procedures to each line item of an offer unless either the offer or the solicitation specifies evaluation on a group basis. The evaluated cost of each offer received is adjusted by any applied Buy American Act evaluation factor for each CLIN, as described in this subsection.

(5) After applying the evaluation factor to the cost or price, the CO may determine which offer represents the best value for award purposes.

e. *Excepted Articles, Materials, and Supplies.* The following articles, materials or supplies are not mined, produced, or manufactured in the U.S. in sufficient and reasonably available commercial quantities of a satisfactory quality. These items may be treated as domestic products for purposes of the Buy American Act requirements:

Acetylene, black.	Emetine, bulk. Ergot,	Petroleum, crude oil,
Agar, bulk.	crude. Erythrityl	unfinished oils, and finished
Anise.	tetranitrate. Fair linen,	products.
Antimony, as metal or	altar.	Pine needle oil.
oxide.	Fibers of the following	Platinum and related group
Asbestos, amosite,	types: abaca, abace,	metals, refined, as sponge,
chrysotile, and	agave, coir, flax, jute,	powder, ingots, or cast bars.
crocidolite.	jute burlaps, palmyra,	Pyrethrum flowers.
Bamboo shoots.	and sisal.	Quartz crystals.
Bananas.	Goat and kidskins.	Quebracho.
Bauxite.	Goat hair canvas.	Quinidine.
Beef, corned, canned.	Grapefruit sections,	Quinine.
Beef extract.	canned.	Rabbit fur felt.
Bephenium	Graphite, natural,	Radium salts, source and
hydroxynapthoate.	crystalline, crucible	special nuclear materials.
Bismuth.	grade.	Rosettes.
Books, trade, text,	Hand file sets (Swiss	Rubber, crude and latex.
technical, or scientific;	pattern).	Rutile.
newspapers; pamphlets;	Handsewing needles.	Santonin, crude.
magazines; periodicals;	Hemp yarn.	
printed briefs and films;		

not printed in the United States and for which domestic editions are not available.	Hog bristles for brushes.	Secretin.
	Hyoscine, bulk.	Shellac.
Brazil nuts, unroasted	Ipecac, root.	Silk, raw and unmanufactured.
Cadmium, ores and flue dust.	Iodine, crude.	Spare and replacement parts for equipment of foreign manufacture, and for which domestic parts are not available.
Calcium cyanamide.	Kaurigum.	
Capers.	Lac.	
Cashew nuts.	Leather, sheepskin, hair type.	Spices and herbs, in bulk.
Castor beans and castor oil.	Lavender oil.	Sugars, raw.
Chalk, English.	Manganese.	Swords and scabbards.
Chestnuts.	Menthol, natural bulk.	Talc, block, steatite.
Chicle.	Mica.	Tantalum.
Chrome ore or chromite.	Microprocessor chips (brought onto a Government construction site as separate units for incorporation into building systems during construction or repair and alteration of real property).	Tapioca flour and cassava.
Cinchona bark.		Tartar, crude; tartaric acid and cream of tartar in bulk.
Cobalt, in cathodes, rondelles, or other primary ore and metal forms.		Tea in bulk.
Cocoa beans.	Modacrylic fur ruff.	Thread, metallic (gold).
Coconut and coconut meat, unsweetened, in shredded, desiccated, or similarly prepared form.	Nickel, primary, in ingots, pigs, shots, cathodes, or similar forms; nickel oxide and nickel salts.	Thyme oil.
Coffee, raw or green bean.	Nitroguanidine (also known as picrite).	Tin in bars, blocks, and pigs.
Colchicine alkaloid, raw.		Tripolidine hydrochloride.
		Tungsten.
		Vanilla beans.
		Venom, cobra.
		Water chestnuts.

Copra.	Nux vomica, crude.	Wax, carnauba.
Cork, wood or bark and waste.	Oiticica oil.	Wire glass.
Cover glass, microscope slide.	Olive oil.	Woods; logs, veneer, and lumber of the following species: Alaskan yellow cedar, angelique, balsa, ekki, greenheart, lignum vitae, mahogany, and teak.
Crane rail (85-pound per foot).	Olives (green), pitted or unpitted, or stuffed, in bulk.	
Cryolite, natural.	Opium, crude.	Yarn, 50 Denier rayon.
Dammar gum.	Oranges, mandarin, canned.	
Diamonds, industrial, stones and abrasives.		

3 Buy American Act - Construction Materials Revised 10/2012

a. The Buy American Act requires that only domestic materials be used in construction, alteration, or repair in the United States.

b. *Exceptions.* The FAA may acquire foreign construction material without regard to Buy American Act restrictions when one of the following exceptions applies:

(1) A construction material purchase of \$3,000 or less.

(2) The Administrator, in written nondelegable determination, states applying the Buy American Act to a construction material is not in the public interest;

(3) When the CO determines the construction material:

(a) Is unreasonable in terms of cost. Unreasonable cost is when the cost of domestic construction material exceeds the cost of foreign construction material by more than 6 percent, unless the agency head determines a higher percentage to be appropriate (see Executive Order 10582);

(b) It is impracticable to use a particular domestic construction material; or

(c) The construction material is not mined, produced, or manufactured in the U.S. in sufficient and reasonably available commercial quantities or of a satisfactory quality. Contractors may also request to use foreign construction material in the contract on these grounds. The contractor must fully document and substantiate the request according to AMS clause 3.6.4-3 "Buy American Act - Construction Materials." The CO will approve or disapprove the contractor's request.

(4) For construction contracts with an estimated acquisition value of \$9,110,318 or more, Canadian and Mexican construction materials may be treated as domestic for purposes of Buy American Act restrictions, pursuant to the NAFTA Implementation Act.

(5) The Buy American Act restrictions do not apply to information technology that is a commercial item.

c. Documentation for Exception. The CO should document the basis for all exceptions taken.

d. Excepted Material. The CO should list excepted materials in the contract. Documentation justifying the exception will be made available for public inspection.

e. Alternate Offers. Offerors 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.

f. Noncompliance. The CO is responsible for Buy American Act investigations when available information indicates such action is warranted. Unless fraud is suspected, the CO must notify the contractor of the apparent unauthorized use of foreign construction material and request a reply, including proposed corrective action. If an investigation reveals a contractor or subcontractor used foreign construction material without authorization, the CO must take appropriate action, including one or more of the following:

(1) Process a determination of inapplicability of the Buy American Act.

(2) Consider requiring removal and replacement of the unauthorized foreign construction material.

(3) If removal and replacement of foreign construction material incorporated in a building or work would be impracticable, cause undue delay, or otherwise be detrimental to the Government's interests, the CO may determine in writing that the foreign construction material need not be removed and replaced. The determination to retain foreign construction material does not constitute a determination that an exception to the Buy American Act applies, and this should be stated in the determination. The determination to retain foreign construction material does not affect the Government's right to suspend or debar a contractor, subcontractor, or supplier for violating of the Buy American Act, or to exercise other contractual rights and remedies, such as reducing the contract price or terminating the contract for default.

(4) If the noncompliance is sufficiently serious, the CO should consider exercising appropriate contractual remedies, such as terminating the contract for default, or consider preparing and forwarding a report for suspension or debarment, including findings and supporting evidence. If the noncompliance appears to be fraudulent, the CO should refer the matter to other appropriate agency officials for criminal investigation.

4 FAA Buy American - Steel and Manufactured Products Revised 10/2012

a. *FAA Buy American.* This section implements FAA-specific Buy American preferences at 49 U.S.C §50101. The CO will not obligate any funds for any project unless steel and manufactured products used in the project are produced in the United States. Projects funded by Research, Engineering and Development are excluded from this requirement.

b. *Delegation and Exceptions.* The Administrator delegated to the FAA Acquisition Executive (FAE) authority to make findings waiving the provisions of FAA Buy American (49 U.S.C. §50101) when:

(1) Requiring domestically produced steel and manufactured products is inconsistent with the public interest;

(2) Steel and manufactured products are not produced in the United States in sufficient and reasonably available quantities or of satisfactory quality; or

(3) In the case of acquisition of facilities and equipment under the Airport and Airway Improvement Act of 1982:

(a) The cost of components and subcomponents produced in the United States is more than 60 percent of the cost of all components of the facility or equipment used in the project; and

(b) Final assembly of the facility or equipment has taken place in the United States; or

(4) Including domestic material will increase the cost of the overall project contract by more than 25 percent.

c. *Waiver Redelelegation.* The FAE further delegated authority as follows:

(1) The Chief of the Contracting Office (COCO) has authority to make findings waiving FAA Buy American provisions when the cost of including domestic material will increase the cost of the overall project contract by more than 25 percent.

(2) The Contracting Officer has authority to make findings waiving FAA Buy American provisions when the cost of including domestic material will increase the cost of the overall project contract by more than 25 percent for individual contract actions not exceeding \$1,000,000 for supplies and \$100,000 for construction contracts.

The FAE retains authority for waivers based on public interest and non-availability.

d. *Foreign Offers.* There is no restriction against a vendor offering foreign steel or manufactured products in its proposal. However, FAA may not award to that vendor unless it is pursuant to one of the exceptions listed above.

e. *Component Cost.* For the purposes of this section, labor costs involved in final assembly will not be included in calculating components costs.

f. *Order of Precedence.* Any acquisition of steel or manufactured product not subject to 49 U.S.C. §50101 should be treated as covered under the Buy American Act (unless a Buy American Act exception applies). In the event of a conflict, the "Buy American-Steel and Manufactured Products" clause takes precedence over other Buy American Act-related clauses.

5 Balance of Payments Program

a. The Balance of Payments Program is applicable to contracts for supplies, services, or construction for use *outside* the United States, and provides for the use of excess or near-excess foreign currency. The Balance of Payments Program restrictions have been waived under certain circumstances under the North American Free Trade Agreement (NAFTA) Implementation Act.

b. *Acquiring Foreign End Products.* The FAA may acquire foreign end products or services for use outside the U.S. if any of the following conditions is met:

(1) The CO determines that a requirement can only be filled by a foreign end product or service, and that it is not feasible to forgo filling it or to provide a domestic substitute;

(2) The acquisition is for perishable subsistence items, ice, books, utilities, communications, and other materials or services that, by their nature or as a practical matter, can only be acquired or performed in the country concerned and a U.S. Government capability does not exist;

(3) The acquisition of foreign end products or services is required by a treaty or executive agreement between governments;

(4) Petroleum supplies and their by-products are required;

(5) The end products or services are paid for with excess or near-excess foreign currencies;

(6) The end products or services are mined, produced, or manufactured in Panama and are required by and for the use of United States Forces in Panama; or

c. *Documentation.* The CO should briefly document the file if an exception to the Balance of Payments Program is applied.

d. *Construction Material.* Contracts will require use of domestic construction materials for construction, repair, or maintenance of real property outside the United States, except when the cost of these materials (including transportation and handling costs) exceeds the cost of foreign construction materials by more than 50 percent. A differential greater than 50 percent may be used when specifically authorized by the CO.

e. *Procedures.*

(1) Screening Information Requests (SIRs) should specifically identify articles, materials, supplies, and services that are excepted from the Balance of Payments Program. When

quotations are obtained orally, vendors should be informed that only domestic end products or services will be acceptable, except for those items that have been excepted or when the price for the foreign end products or services meets the evaluation criteria.

(2) For purposes of evaluation, each foreign offer will be adjusted by increasing it 50 percent. If this adjustment results in a tie between a foreign offer as evaluated and a domestic offer, the domestic offer should be considered the successful offer. When this procedure results in the acquisition of foreign end products or services, the CO may conclude that acquisition of domestic end products or services is unreasonable in cost or inconsistent with the public interest.

f. Foreign Excess Currency Program

(1) DOT/M-60 distributes Office of Management and Budget (OMB) bulletins on excess currencies held by the U.S. for certain countries. The Department of the Treasury, Office of the Assistant Secretary for International Affairs, Office of Development Policy also provides other information that may be relevant.

(2) The CO may use excess and near-excess foreign currencies whenever feasible in payment of contracts over \$1 million performed wholly or partly in any of the countries listed in the bulletins referenced in paragraph (1) above. Therefore, the CO should ascertain if the countries where work will be performed are listed for excess currency because the CO may make award, in some cases, to an offeror willing to accept payment, in whole or part, in excess or near-excess foreign currency, even though the offer, when compared to offers in United States dollars, is not the lowest received. Price differentials may be funded from excess or near-excess foreign currencies available without charge to FAA appropriations, subject to OMB Circular No. A-20, May 21, 1966.

(3) Before issuing SIRs for work to be performed wholly or partly in countries listed in the bulletins referenced in paragraph (1) above, the CO should obtain a determination from the FAA budget officials as to the feasibility of using excess or near-excess foreign currency.

(4) The CO should address the probability of using excess or near-excess foreign currency in the SIRs as follows:

(a) Require that offers be stated in U.S. dollars;

(b) Request that offers also be stated, in whole or in part, in excess or near-excess foreign currency; and

(c) Reserve the right to make the award to the responsive offeror (i) that is willing to accept payment, in whole or in part, in excess or near-excess foreign currency, and (ii) whose offer is most advantageous to the FAA, even though the total price may be higher than offers in U.S. dollars.

6 Payment in Local Foreign Currency

a. The FAA will pay local foreign contractors in local currency when FAA contracts are entered into and performed outside the U.S. unless an international agreement provides for payment in U.S. dollars or the contracting officer determines the use of local currency to be inequitable or inappropriate.

b. When the local currency increases in value in relation to the dollar, a violation of the Anti-Deficiency Act (31 U.S.C. 665) could occur. To avoid this possibility, the FAA should ensure the availability of adequate dollar appropriations to purchase local currency needed to make payments against the contract.

7 Trade Agreements *Revised 4/2013*

a. FAA acquisitions are subject to the following trade-related acts:

(1) The NAFTA Implementation Act (Pub. L. 103-182, 107 Stat. 2057) which involves offers of Canadian or Mexican end products; and

(2) The Agreement on Civil Aircraft (19 U.S.C. 2513) which involves aircraft and related supplies from countries participating in the Agreement.

b. FAA acquisitions are *not* subject to the following trade-related acts:

TITLE	REFERENCE
United States-Bahrain Free Trade Agreement Implementation Act	P.L. 109-169
The Caribbean Basin Trade Initiative (CBTI) under the Caribbean Basin Economic Recovery Act (Note: Except for Panama)	19 U.S.C. 2701
The Dominican Republic-Central America-United States Free Trade Agreement Implementation Act	P.L. 109-53
The least developed country designation made by the U.S. Trade Representative, pursuant to the Trade Agreements Act	19 U.S.C. 2511(b)(4)
United States- Australia Free Trade Agreement Implementation Act	P.L. 108-286
United States-Chile Free Trade Agreement Implementation Act	P.L. 108-77
United States-Colombia Trade Promotion Agreement Implementation Act	P.L. 112-42
United States-Israel Free Trade Area Implementation Act	19 U.S.C. 2112

United States-Korea Free Trade Agreement Implementation Act	P.L. 112-41
United States-Morocco Free Trade Agreement Implementation Act	P.L. 108-302
United States – Oman Free Trade Agreement Implementation Act	P.L. 109-283
United States-Panama Trade Promotion Agreement Implementation Act	P.L. 112-43
United States-Peru Trade Promotion Agreement Implementation Act	P.L. 110-138
United States-Singapore Free Trade Agreement Implementation Act	P.L. 108-78

c. North American Free Trade Agreement.

(1) As required by the NAFTA Implementation Act, the CO will evaluate offers of the following NAFTA country end products without regard to the restrictions of the Buy American Act or the Balance of Payments Program as follows:

(a) NAFTA country construction materials under construction contracts with an estimated acquisition value equal to or exceeding \$10,074,262.

(b) Canadian end products under supply contracts with an estimated value equal to or exceeding \$25,000 and Mexican end products under supply contracts with an estimated value equal to or exceeding \$77,494.

(c) Canadian and Mexican end products under service contracts with an estimated value equal to or exceeding \$77,494.

(2) To determine whether NAFTA applies to the acquisition of products by lease, rental, or lease-purchase contract (including lease-to-ownership, or lease-with-option-to purchase), the CO should calculate the estimated acquisition value as follows:

(a) If a fixed-term contract of 12 months or less is contemplated, use the total estimated value of the acquisition.

(b) If a fixed-term contract of more than 12 months is contemplated, use the total estimated value of the acquisition plus the estimated residual value of the leased equipment at the conclusion of the contemplated term of the contract.

(c) If an indefinite-term contract is contemplated, use the estimated monthly payment multiplied by 48.

(d) If there is any doubt as to the contemplated term of the contract, use the estimated monthly payment multiplied by 48.

(e) If a contemplated acquisition includes an option clause, when calculating the threshold for application of NAFTA provisions include the value of all options.

d. *Civil Aircraft and Related Articles*. The Buy American Act does not apply to acquiring civil aircraft and related articles of countries or instrumentalities that are parties to the Agreement on Civil Aircraft pursuant to a waiver from the U.S. Trade Representative, on February 19, 1980 (45 FR 12349, February 25, 1980). The current list of countries and instrumentalities that are parties to the agreement are on the U.S. Trade Representative website. For the purpose of this waiver, an article is a product of a country or instrumentality when:

- (1) It is wholly the growth, product, or manufacture of that country or instrumentality; or
- (2) In the case of an article that consists in whole or in part of materials from another country or instrumentality, it has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed.

e. This section "Trade Agreements" does not apply to:

- (1) Purchases below an applicable dollar threshold cited in a trade agreement;
- (2) Purchases under small or small disadvantaged business programs;
- (3) Purchases indispensable for national security or for national defense purposes, subject to policies established by the U.S. Trade Representative.
- (4) Research and development contracts;
- (5) Purchases of items for resale;
- (6) Purchases from Federal Prison Industries, Inc. and nonprofit agencies employing people who are blind or severely disabled.

8 Restrictions on Certain Foreign Purchases Revised 7/2006

a. Except as authorized by the Office of Foreign Assets Control (OFAC) in the Department of the Treasury, the FAA and its contractors and subcontractors must not acquire any supplies or services if any proclamation, Executive order, or statute administered by OFAC, or if OFAC'S implementing regulations at 31 CFR Chapter V, would prohibit such a transaction by a person subject to the jurisdiction of the United States.

b. Except as authorized by OFAC, most transactions involving Cuba, Iran, and Sudan are prohibited, as are most imports from North Korea into the United States or its outlying areas. In addition, lists of entities and individuals subject to economic sanctions are included online in OFAC's List of Specially Designated Nationals and Blocked Persons. More information about these restrictions, as well as updates, is available in OFAC's regulations at 31 CFR Chapter V and/or on OFAC's website.

c. Questions concerning the restrictions for foreign purchases may be addressed to:

Department of the Treasury

Office of Foreign Assets Control

Washington, DC 20220

(202) 622-2490

9 Prohibition on Contracting with Entities that Engage in Certain Activities or Transactions Relating to Iran Revised 4/2013

a. *Certification.*

(1) As required by the Iran Sanctions Act of 1996 and the Comprehensive Iran Sanctions, Accountability and Divestment Act of 2010, and Titles II and III of the Iran Threat Reduction and Syria Human Rights Act of 2012 unless an exception applies or a waiver is granted according to paragraph (c) or (d) of this section, each offeror must certify that the offeror, and any other entity owned or controlled by or person controlled by the offeror, does not engage in any activity for which sanctions may be imposed under section 5 of the Iran Sanctions Act. Such activities, which are described under section 5 of the Iran Sanctions Act relate to the energy sector of Iran and the development by Iran of weapons of mass destruction or other military capabilities.

(2) As required in section 6(b)(1)(B) of the Iran Sanctions Act, unless an exception applies or a waiver is granted in accordance with paragraphs (c) or (d) of this section, each offeror must certify that the offeror, and any other entity owned or controlled by or person controlled by the offeror, does not knowingly engage in a transaction exceeding \$3,000 with Iran's Revolutionary Guard Corps or any of its officials, agents, affiliates, the property and interests in property of which are blocked in accordance with the International Emergency Economic Powers Act (see the Department of the Treasury's Office of Foreign Assets Control's (OFAC's) Specially Designated Nationals and Blocked Persons List on their website).

b. *Remedies.* Upon determining a false certification under paragraph (a) of this section, FAA will take one or more of the following actions:

(1) The CO may terminate the contract.

(2) The suspending official may suspend the contractor according to the procedures in AMS Suspensions Procurement Guidance.

(3) The debarbing official may debar the contractor for a period of at least two years according to the procedures in AMS Debarment Procurement Guidance.

c. Exception for trade agreements. The certification requirements of paragraph (a) of this section do not apply to procuring eligible products, as defined in the NAFTA Implementation Act (Pub. L. 103-182, 107 Stat 2057) or the Agreement on Civil Aircraft (19 U.S.C. 2513) (see AMS Trade Agreements Procurement Guidance).

d. Waiver.

(1) The President may waive the requirement for certification on a case-by-case basis if the President determines and certifies in writing to the appropriate congressional committees (Committee on Armed Services of the Senate, Committee on Finance of the Senate, Committee on Banking, Housing, and Urban Affairs of the Senate, Committee on Foreign Relations of the Senate, Committee on Armed Services of the House of Representatives, Committee on Ways and Means of the House of Representatives, Committee on Financial Services of the House of Representatives, and Committee on Foreign Services of the House of Representatives) that it is in the national interest to do so.

(2) If FAA or a contractor seeks a waiver of the requirement, it must submit the request through the Office of Federal Procurement Policy (OFPP), allowing sufficient time for review and approval. Upon receipt of the waiver request, OFPP will consult with the President's National Security Council, the Office of Terrorism and Financial Intelligence in the Department of the Treasury, and the Office of Terrorism Finance and Economic Sanctions Policy, Bureau of Economic, Energy, and Business Affairs in the State Department, allowing sufficient time for review and approval.

(3) In general, all waiver requests should include the following information:

(a) Agency name, complete mailing address, and point of contact name, telephone number, and email address.

(b) Offeror's name, complete mailing address, and point of contact name.

(c) Description/nature of product or service.

(d) The total cost and length of the contract.

(e) Justification with market research demonstrating that no other offeror can provide the product or service and stating why the product or service must be procured from this offeror, as well as why it is in the national interest for the President to waive the prohibition on contracting with this offeror that-

(i) Conducts activities for which sanctions may be imposed under section 5 of the Iran Sanctions Act of 1996; or

(ii) Exports sensitive technology to the government of Iran or any entities or individuals owned or controlled by, or acting on behalf of or at the direction of the government of Iran.

(iii) Engages in any transactions with Iran's Revolutionary Guard Corps as described in a(2) above. In addition to the requirements of d(3) above, the justification for such transactions must address why a waiver is essential to the security interests of the United States.

(f) Documentation regarding this offeror's past performance and integrity (see the Past Performance Information Retrieval System and any other relevant information).

(g) Information regarding the offeror's relationship or connection with other firms that conduct activities as specified under subparagraph d(3)(e) above.

(h) The activities in which the offeror is engaged as specified in subparagraph d.(3)(e) above.

e. Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, Section 106. The head of an executive agency may not enter into or extend a contract for the procurement of goods and services with a person that exports certain sensitive technology to Iran, as determined by the President and listed on the System for Award Management (SAM).

10 Customs and Duties

a. Except as provided elsewhere in the Customs Regulations (see 19 CFR 10.100), all shipments of imported supplies purchased under Government contracts are subject to the usual Customs entry and examination requirements. However, DOT/FAA are not covered by the applicable Treasury regulation/statute allowing entry of duty free goods.

11 International Agreements and Coordination Revised 1/2007

a. Treaties and agreements between the United States and foreign governments affect contracting within foreign countries. The CO should determine the existence and applicability of any international agreement to contracts being planned or processed, and ensure compliance with these agreements.

b. When applicable, the CO should conduct the necessary advance acquisition planning and coordination between the appropriate United States executive agencies and foreign interests as required by these agreements.

c. Many international agreements are compiled in the "United States Treaties and Other International Agreements" series published by the Department of State. Copies of this publication are normally available in overseas legal offices and United States diplomatic missions.

d. All contracts with Taiwanese firms or organizations must be awarded through the American Institute of Taiwan (AIT). AIT is under contract to the Department of State.

12 Examination of Records by Comptroller General

a. The CO should, whenever possible, include the clause "Audit and Records" in negotiated contracts with foreign contractors.

b. *Exceptions.* The clause may be omitted from contracts with foreign contractors in the following instances (authority cited for the HOA is not delegable):

(1) HOA, with concurrence of the Comptroller General, or designee, determines that the omission will serve the best interests of the U.S.; or

(2) The contractor or subcontractor is a foreign government or agency thereof or is precluded by the laws of the country involved from making its books, document, papers, or records available for examination and the HOA determines, after taking into account the price and availability of the property or services from the U.S. sources, that the public interest would be best served by the omission of the clause.

c. *Congressional Notification.* When the CO does not include clause "Audit and Records," the CO will prepare and forward a determination to DOT/M-60 for inclusion in a report to Congress explaining why the omission of the clause will serve the interest of the United States. The determination should:

(1) Identify the contract and its purpose, and whether it is a contract with a foreign contractor or with a foreign government or agency thereof;

(2) Describe the efforts to include the clause;

(3) When applicable, state the reasons for the contractor's refusal to include the clause;

(4) Describe the price and availability of the property or services from the United States and other sources; and

(5) Determine that it will serve the interest of the United States to omit the clause.

13 Inconsistency Between English Version and Translation of Contract

When translation of a contract from English into another language is anticipated, the CO should include a statement indicating that the English meaning will control in the event of an inconsistency between the translated and English terms.

14 Definitions Revised 1/2011

a. "*Canadian end product*" means an article that (a) is wholly the growth, product, or manufacture of Canada, or (b) in the case of an article which consists in whole or in part of materials from another country or instrumentality, has been substantially transformed in Canada into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to its supply; provided, that the value of those incidental services does not exceed that of the product itself.

b. "*Civil aircraft and related articles*" means (a) all aircraft other than aircraft to be purchased for use by the Department of Defense or the U.S. Coast Guard; (b) the engines (and parts and components for incorporation into the engines) of these aircraft; (c) any other parts, components, and subassemblies for incorporation into the aircraft; and (d) any ground flight simulators, and parts and components of these simulators, for use with respect to the aircraft, whether to be used as original or replacement equipment in the manufacture, repair, maintenance, rebuilding, modification, or conversion of the aircraft and without regard to whether the aircraft or articles receive duty-free treatment under section 601(a)(2) of the Trade Agreements Act of 1979.

c. "*Components*" means those articles, materials, and supplies incorporated directly into the end products, or in the case of construction those articles, materials, and supplies incorporated directly into construction materials.

d. "*Construction*" means construction, alteration, or repair of any public building or public work in the United States.

e. "*Construction Materials*" means an article, material, or supply brought to the construction site for incorporation into the building or work. "*Construction Materials*" also includes an item brought to the site pre-assembled from articles, materials, and supplies. However, emergency life safety systems, such as emergency lighting, fire alarm, and audio evacuation systems, which are discrete systems incorporated into a public building or work and which are produced as a complete system, shall be evaluated as a single and distinct construction material regardless of when or how the individual parts or components of such systems are delivered to the construction site.

f. "*Customs territory of the United States,*" as it applies to customs and duties, means the States, the District of Columbia, and Puerto Rico.

g. "*Domestic construction material*" means (a) an unmanufactured construction material mined or produced in the United States, or (b) a construction material manufactured in the United States, if the cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. (In determining whether a construction material is domestic, only the construction material and its components shall be considered.) The cost of each component includes transportation costs to the place of incorporation into the

construction material and any applicable duty (whether or not a duty-free entry certificate is issued).

h. "*Domestic end product*" means (a) an unmanufactured end product mined or produced in the United States, or (b) an end product manufactured in the United States, if the cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. (In determining if an end product is domestic, only the end product and its components shall be considered.) The cost of each component includes transportation costs to the place of incorporation into the end product and any applicable duty (whether or not a duty-free entry certificate is issued). Scrap generated, collected, and prepared for processing in the United States is considered domestic.

i. "*Domestic offer*" means an offered price for a domestic end product, including transportation to destination.

j. "*Domestic services*" means services performed in the United States. If services provided under a single contract are performed both inside and outside the United States, they shall be considered domestic if 25 percent or less of their total cost is attributable to services (including incidental supplies used in connection with these services) performed outside the United States.

k. "*End product*" means those articles, materials, and supplies to be acquired for public use under the contract.

l. "*Foreign construction material*" means a construction material other than a domestic construction material.

m. "*Foreign contractor*" means a contractor or subcontractor organized or existing under the laws of a country other than the United States, its territories, or possessions.

n. "*Foreign end product*" means an end product other than a domestic end product.

o. "*Foreign offer*" means an offered price for a foreign end product, including transportation to destination and duty (whether or not a duty-free entry certificate is issued).

p. "*Foreign services*" means services other than domestic services.

q. "*Instrumentality*" does not include an agency or division of the government of a country, but may be construed to include arrangements such as the European Union.

r. "*Manufactured product*" as it applies to "Buy American-Steel and Manufactured Products" means an item produced as a result of the manufacturing process.

s. "*Manufacturing process*" as it applies to "Buy American-Steel and Manufactured Products" means the application of processes to alter the form or function of materials or of elements of the product in a manner adding value and transforming those materials or elements so that they

represent a new end product functionally different from that which would result from mere assembly of the elements or materials.

t. "*Mexican end product*" means an article that (a) is wholly the growth, product, or manufacture of Mexico, or (b) in the case of an article which consists in whole or in part of materials from another country or instrumentality, has been substantially transformed in Mexico into a new and different article of commerce with a name, character, or use distinct from, that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to its supply; provided, that the value of those incidental services does not exceed that of the product itself.

u. "*North American Free Trade Agreement (NAFTA) country*" means Canada or Mexico.

v. "*NAFTA country construction material*" means a construction material that (a) is wholly the growth, product, or manufacture of a NAFTA country or (b) in the case of a construction material which consists in whole or in part of materials from another country or instrumentality, has been substantially transformed in a NAFTA country into a new and different construction material distinct from the materials from which it was transformed.

w. "*NAFTA country end product*" means a Canadian end product or a Mexican end product.

x. "*Person*" (1) Means-(i) A natural person;(ii) A corporation, business association, partnership, society, trust, financial institution, insurer, underwriter, guarantor, and any other business organization, any other nongovernmental entity, organization, or group, and any governmental entity operating as a business enterprise; and (iii) Any successor to any entity described in paragraph (1)(ii) of this definition; and (2) Does not include a government or governmental entity that is not operating as a business enterprise.

y. "*Petroleum terms*"

1. "*Crude oil*" means crude petroleum, as it is produced at the wellhead, and liquids (under atmospheric conditions) that have been recovered from mixtures of hydrocarbons that existed in a vaporous phase in a reservoir and that are not natural gas products.

2. "*Finished products*" means any one or more of the following petroleum oils, or a mixture or combination of these oils, to be used without further processing except blending by mechanical means:

(a) "*Asphalt*"-- a solid or semi-solid cementitious material that (1) gradually liquefies when heated, (2) has bitumens as its predominating constituents, and (3) is obtained in refining crude oil.

(b) "*Fuel oil*"--a liquid or liquefiable petroleum product burned for lighting or for the generation of heat or power and derived directly or indirectly from crude oil, such as kerosene, range oil, distillate fuel oils, gas oil, diesel fuel, topped crude oil, or residues.

(c) "*Gasoline*"--a refined petroleum distillate that, by its composition, is suitable for use as a carburant in internal combustion engines.

(d) "*Jet fuel*"--a refined petroleum distillate used to fuel jet propulsion engines.

(e) "*Liquefied gases*"--hydrocarbon gases recovered from natural gas or produced from petroleum refining and kept under pressure to maintain a liquid state at ambient temperatures.

(f) "*Lubricating oil*"--a refined petroleum distillate or specially treated petroleum residue used to lessen friction between surfaces.

(g) "*Naphtha*"--a refined petroleum distillate falling within a distillation range overlapping the higher gasoline and the lower kerosenes.

(h) "*Natural gas products*"--liquids (under atmospheric conditions), including natural gasoline, that:

(1) Are recovered by a process of absorption, adsorption, compression, refrigeration, cycling, or a combination of these processes, from mixtures of hydrocarbons that existed in a vaporous phase in a reservoir, and

(2) When recovered and without processing in a refinery, definitions of products contained in subdivision (b), (c), (d), and (g) of this definition.

(i) "*Residual fuel oil*"--a topped crude oil or viscous residuum that, as obtained in refining or after blending with other fuel oil, meets or is the equivalent of Military Specification MIL-F-859 for Navy Special Fuel Oil and any more viscous fuel oil, such as No. 5 or Bunker C.

3. "*Unfinished oils*" means one or more of the petroleum oils listed under the definition of finished oils, or a mixture or combination of these oils, that are to be further processed other than by blending by mechanical means.

z. "*Sanctioned European Union (EU) construction*" means construction to be performed in a sanctioned member state of the EU and the contract is awarded by a contracting activity located in the United States or its territories.

aa. "*Sanctioned EU end product*" means an article that (a) is wholly the growth product or manufacture of a sanctioned member state of the EU or (b) in the case of an article which consists in whole or in part of materials from another country or instrumentality, has been substantially transformed into a new and different article of commerce with a name, character or use distinct form that from which it was so transformed in a sanctioned member state of the EU. The term includes services (except transportation services) incidental to its supply; provided, that the value of these incidental services does not exceed that of the product itself. It does not include service contracts as such.

bb. "*Sanctioned EU services*" means services to be performed in a sanctioned member state of the EU when the contract is awarded by a contracting activity located in the United States or its territories.

cc. "*Sanctioned member state of the EU*" means Austria, Belgium, Denmark, Finland, France, Ireland, Italy, Luxembourg, the Netherlands, Sweden, and the United Kingdom.

dd. "*United States*" as it relates to the Buy American Act or the Balance of Payments Program means the United States, its possessions, Puerto Rico, and any other place subject to its jurisdiction, but does not include leased bases or trust territories.

B Clauses

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C Forms

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