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Part II

**Department of
Defense**

**General Services
Administration**

**National Aeronautics
and Space
Administration**

48 CFR Parts 25

**Federal Acquisition Regulation;
Nonavailable Articles-Policy; Proposed
Rule**

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Part 25**

[FAR Case 2003–021]

RIN 9000–AJ95

**Federal Acquisition Regulation;
Nonavailable Articles-Policy**

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are proposing to amend the Federal Acquisition Regulation (FAR) to clarify the intent of the list of items determined to be nonavailable for purposes of the Buy American Act, and emphasize the need to conduct market research, appropriate to the circumstances, for potential domestic sources.

DATES: Interested parties should submit comments in writing on or before July 23, 2004, to be considered in the formulation of a final rule.

ADDRESSES: Submit printed comments to General Services Administration, FAR Secretariat (MVA), 1800 F Street, NW., Room 4035, ATTN: Laurie Duarte, Washington, DC 20405. Submit electronic comments via the Internet to the U.S. Government's rulemaking website at <http://www.regulations.gov>, or to GSA's e-mailbox at farcase.2003-021@gsa.gov.

Please submit comments only and cite FAR case 2003–021 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat at (202) 501–4755 for information pertaining to status or publication schedules. For clarification of content, contact Ms. Cecelia Davis, Procurement Analyst, at (202) 219–0202. Please cite FAR case 2003–021.

SUPPLEMENTARY INFORMATION:**A. Background**

This rule proposes to amend FAR Subpart 25.1 in order to clarify the intent of the list of nonavailable items at FAR 25.104(a), and to emphasize the need to conduct market research, appropriate to the circumstances, for potential domestic sources, when acquiring an article on the list.

The Buy American Act (41 U.S.C. 10a–10d) restricts the purchase of articles for public use in the United States that are not mined, produced, or manufactured in the United States. The Buy American Act provides an exception for articles of a class or kind not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality. FAR 25.103(b)(1) provides a determination that articles listed at FAR 25.104(a) meet the conditions of this exception.

The established list of articles identified in FAR 25.104(a) is a wide-ranging mix of natural resources, compounds, materials, and other items of supply. Although some articles on the list have no known domestic production sources (e.g., quartz crystals or vanilla beans), many of the articles are known to have some domestic production sources, but those sources have been determined in the past to be inadequate to meet total U.S. Government and nongovernment demand. Examples of such articles range from goat and kidskins (negligible domestic production), to crude iodine (5 percent of U.S. demand), to bismuth (not in excess of 50 percent of U.S. demand). The Councils invite comment on the appropriateness of including items on the nonavailability list for which there are domestic sources that can meet 50 percent of total U.S. demand.

The proposed rule adds introductory text at 25.103(b) to explain that the nonavailability exception to the Buy American Act does not mean that these items are completely nonavailable from U.S. sources, but that they are of a class or kind that is not mined, produced or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.

The proposed rule also relocates the information on how to handle potential deletions from the list (currently at 25.104(b)) to the same section that discusses possible additions to the list (25.103(b)).

The current FAR allows the contracting officer to rely on the list, unless the contracting officer learns before the time designated for receipt of bids in sealed bidding or final offers in negotiation, that an article on the list is available in sufficient and reasonably available quantities of a satisfactory quality. The contracting officer must then amend the solicitation if purchasing the article, or if purchasing an end product that could contain such an article as a component, and must specify in all new solicitations that the

article is available domestically and that offerors and contractors may not treat foreign components of the same class or kind as domestic components. In addition, the contracting officer must submit a copy of supporting documentation to the appropriate council identified in 1.201–1 in accordance with agency procedures, for possible removal of the article from the list.

Because market conditions may change, and items on the list may be available in sufficient quantity and quality for a particular acquisition, even though not in a quantity sufficient to meet total U.S. demand, the proposed rule requires a more proactive role for the agency. It requires the agency to conduct a level of market research appropriate to the circumstances, including seeking of domestic sources, before acquisition of an article on the list as an end product, a significant component (valued at more than 50 percent of the value of all the components), or a construction material. The proposed rule does not require the contracting officer to do market research seeking domestic sources for articles on the list of nonavailable articles that are minor components of an end item.

The proposed rule also contains the requirements for publication of the nonavailability list at least once every 5 years, with an invitation to the public to submit unsolicited recommendations in the interim, with sufficient documentation to permit evaluation.

A FAR notice 2004–N1, List of Nonavailable Articles Under the Buy American Act, requesting public comment on the domestic availability of items on the list has recently been published in the **Federal Register** at 69 FR 28104, May 18, 2004.

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 Councils do not expect this proposed rule to 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 it is a clarification of existing policies, except for requiring a more proactive approach to market research by the Government. An Initial Regulatory Flexibility Analysis has, therefore, not been performed. We invite comments from small businesses and other interested parties. The Councils will

consider comments from small entities concerning the affected FAR part in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAR case 2003-021), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Part 25

Government procurement.

Dated: May 13, 2004.

Laura Auletta,

Director, Acquisition Policy Division.

Therefore, DoD, GSA, and NASA propose amending 48 CFR part 25 as set forth below:

1. The authority citation for 48 CFR part 25 is revised to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 25—FOREIGN ACQUISITION

2. Amend section 25.103 by revising paragraph (b) to read as follows:

25.103 Exceptions.

* * * * *

(b) *Nonavailability.* The Buy American Act does not apply with respect to articles, materials, or supplies if articles, materials, or supplies of the class or kind to be acquired, either as end items or components, are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.

(1) *Class determinations.* (i) A nonavailability determination has been

made for the articles listed in 25.104. This determination does not necessarily mean that there is no domestic source for the listed items, but that domestic sources can only meet 50 percent or less of total U.S. Government and nongovernment demand.

(ii) Before acquisition of an article on the list, the procuring agency is responsible to conduct market research appropriate to the circumstances, including seeking of domestic sources. This applies to acquisition of an article as—

(A) An end product; or

(B) A significant component (valued at more than 50 percent of the value of all the components).

(iii) The determination in paragraph (b)(1)(i) of this section does not apply if the contracting officer learns at any time before the time designated for receipt of bids in sealed bidding or final offers in negotiation that an article on the list is available domestically in sufficient and reasonably available commercial quantities of a satisfactory quality to meet the requirements of the solicitation. The contracting officer must—

(A) Ensure that the appropriate Buy American Act provision and clause are included in the solicitation (see 25.1101(a), 25.1101(b), or 25.1102);

(B) Specify in the solicitation that the article is available domestically and that offerors and contractors may not treat foreign components of the same class or kind as domestic components; and

(C) Submit a copy of supporting documentation to the appropriate council identified in 1.201-1 in accordance with agency procedures, for possible removal of the article from the list.

(2) *Individual determinations.* (i) The head of the contracting activity may make a determination that an article, material, or supply is not mined,

produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality.

(ii) If the contracting officer considers that the nonavailability of an article is likely to affect future acquisitions, the contracting officer may submit a copy of the determination and supporting documentation to the appropriate council identified in 1.201-1 in accordance with agency procedures, for possible addition to the list in 25.104.

(3) A written determination is not required if all of the following conditions are present:

(i) The acquisition was conducted through use of full and open competition.

(ii) The acquisition was synopsisized in accordance with 5.201.

(iii) No offer for a domestic end product was received.

* * * * *

3. Amend section 25.104 in paragraph (a) by removing “25.103(b)” and adding “25.103(b)(1)(i)” in its place; and revising paragraph (b) to read as follows:

25.104 Nonavailable articles.

* * * * *

(b) This list will be published in the **Federal Register** for public comment no less frequently than once every five years. Unsolicited recommendations for deletions from this list may be submitted at any time, and should provide sufficient data and rationale to permit evaluation (see FAR 1.502).

25.202 [Amended]

4. Amend section 25.202 in the last sentence of paragraph (a)(2) by removing “25.104(b)” and adding “25.103(b)(1)” in its place.

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