

**DEPARTMENT OF DEFENSE****GENERAL SERVICES  
ADMINISTRATION****NATIONAL AERONAUTICS AND  
SPACE ADMINISTRATION****48 CFR Parts 25 and 52**

[FAR Case 91-119]

RIN 9000-AG81

**Federal Acquisition Regulation; Buy  
American Act—Construction  
(Grimberg Decision)**

**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 are considering changes to the Federal Acquisition Regulation (FAR) to amend FAR Parts 25 and 52 to add guidance on requests for exceptions to the Buy American Act for construction. This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

**DATES:** *Comment due date:* To be considered in the formulation of a final rule, comments should be submitted on or before February 26, 1996.

**ADDRESSES:** Comments should be submitted to: General Services Administration, FAR Secretariat (VRS), 18th & F Streets NW., Room 4037, Washington, DC 20405.

**FOR FURTHER INFORMATION CONTACT:** Mr. Edward Loeb at (202) 501-4547 in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4037, GS Building, Washington, DC 20405 (202) 501-4755. Please cite FAR case 91-119.

**SUPPLEMENTARY INFORMATION:****A. Background**

In its decision in *John C. Grimberg Co., Inc. v. U.S.*, 869 F.2d 1475 (Fed. Cir. 1989), the Court of Appeals for the Federal Circuit in effect ruled that the current Department of Defense practice of generally denying post-award waivers of the Buy American Act for construction contracts is unreasonable. In light of this decision, FAR revisions are proposed to add guidance on exceptions to the Buy American Act.

**B. Regulatory Flexibility Act**

The proposed rule is not expected 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 contractors are required to either comply with the Buy American Act or seek exceptions. An Initial Regulatory Flexibility Analysis has, therefore, not been performed. Comments are invited from small businesses and other interested parties. Comments from small entities concerning the affected FAR subpart will also be considered in accordance with 5 U.S.C. 610. Such comments must be submitted separately and should cite 5 U.S.C. 601, *et seq.* (FAR case 91-119), in correspondence.

**C. Paperwork Reduction Act**

The Paperwork Reduction Act (Pub. L. 96-511) applies because the proposed revisions impose additional record-keeping requirements or information collection requirements or collection of information from offerors, contractors or members of the public which require the approval of the Office of Management and Budget (OMB) under 44 U.S.C. 3501, *et seq.* The proposed rule requires contractors proposing to use foreign construction materials to submit information on the foreign and domestic construction materials, as well as a justification for use of foreign materials. This information will be evaluated by the Government in determining if a request for a waiver of the Buy American Act should be granted. A request for approval of the new information collection requirement has been submitted to OMB.

**DATES:** Comments may be submitted on or before February 26, 1996.

**ADDRESSES:** Send comments regarding the burden estimate or any other aspect of the information collection requirement to Mr. Peter Weiss, FAR Desk Officer, OMB, Room 10102, NEOB, Washington, DC 20503, and a copy to the FAR Secretariat.

**Annual Reporting Burden**

Public reporting burden for this collection of information is estimated to average .5 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

The annual reporting burden is estimated to be \$37,500 as a result of the following estimated number of hours of labor for compliance: Respondents, 1,000; responses per respondent, 5; total annual responses, 5,000; preparation hours per response, .5; and total response burden hours, 2,500.

List of Subjects in 48 CFR Parts 25 and 52

Government procurement.

Dated: December 18, 1995.

Edward C. Loeb,

*Acting Director, Office of Federal Acquisition Policy.*

Therefore, it is proposed that 48 CFR parts 25 and 52 be amended as set forth below:

**PART 25—FOREIGN ACQUISITION**

1. The authority citation for 48 CFR Parts 25 and 52 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

**25.200 [Amended]**

2. Section 25.200 is amended to revise the cite "41 U.S.C. 10" to read "41 U.S.C. 10a-10d".

3. Section 25.202 is amended by revising paragraph (a)(1), redesignating paragraphs (b) through (c) as paragraphs (c) through (d), and adding a new paragraph (b) to read as follows:

**25.202 Policy.**

(a) \* \* \*

(1) The cost would be unreasonable (the cost of a particular domestic construction material shall be determined to be unreasonable when the cost of such material exceeds the cost of foreign material by more than 6 percent, unless the agency head determines a higher percentage to be appropriate; see Executive Order 10582);

\* \* \* \* \*

(b) Offerors should request an exception to the Buy American Act in time to allow determination before submission of offers so that, through competition, economic benefits of the exception are passed along to the Government. Officials making these determinations shall consider the feasibility of foregoing the acquisition or of acquiring a domestic substitute.

\* \* \* \* \*

**25.203, 25.204, and 25.205 [Redesignated as 25.204, 25.206, and 25.207]**

4. Sections 25.203, 25.204, and 25.205 are redesignated as 25.204, 25.206, and 25.207, respectively.

4A. A new 25.203 is added to read as follows:

**25.203 Exceptions requested before submission of offers.**

(a) Any request for exception to the Buy American Act made before receipt of offers shall be evaluated based on the information in the applicable clause at 52.225-5, Buy American Act—