

Construction Materials, paragraph (c) and (d) or 52.225-15, Buy American Act—Construction Materials under European Community and North American Free Trade Agreements, paragraphs (c) and (d) and may be supplemented by other information readily available to the contracting officer.

(b) If an exception to the Buy American Act is granted before receipt of offers, the excepted material shall be identified in the clause at 52.225-5 or 52.225-15.

5. Newly designated 25.204 is revised to read as follows:

**25.204 Evaluating offers of foreign construction material.**

(a) Offerors proposing to use foreign construction material other than that listed in the applicable clause at 52.225-5(b)(2) or 52.225-15(b)(3) must provide the information required by paragraphs (c) and (d) of the respective clauses.

(b) Unless agency regulations specify a higher percentage, the Government will add to the offer price 6 percent of the cost of any foreign construction material proposed for exception from the requirements of the Buy American Act based on the unreasonable cost of domestic construction materials. If the evaluation of offers results in a tie between an offer including foreign construction material, as evaluated, and an offer including solely domestic material, award shall be made on the offer including solely domestic material. This procedure does not apply to foreign construction material whose use is excepted by the Government under the clause at 52.225-5(b)(2) or 52.225-15(b)(3).

(c) Offerors also may submit alternate offers based on use of domestic construction material to avoid the possibility that denial of an exception permitting use of foreign construction material shall cause rejection of the entire offer.

(d) If an exception to the Buy American Act is granted, the excepted material shall be listed in the contract.

6. A new 25.205 is added to read as follows:

**25.205 Post award exceptions.**

(a) If a contractor requests an exception to the Buy American Act after contract award, the contractor shall explain why the exception could not have been requested before contract award or otherwise was not reasonably foreseeable. If the contractor does not submit a satisfactory explanation, an exception should not be granted unless it is in the Government's best interests.

(b) Any request for exception to the Buy American Act made after contract award shall be evaluated based on information similar to that required before award by the applicable clause at 52.225-5(c) and (d) or 52.225-15(c) and (d) and/or other information readily available to the contracting officer.

(c) If an exception to the Buy American Act is granted after contract award, the contract shall be modified to allow use of the foreign construction material, and adequate consideration shall be negotiated. However, when the basis for the exception is the unreasonable price of a domestic construction material, adequate consideration shall not be less than the differential established in 25.202(a)(1) or agency procedures.

7. Newly designated Section 25.206 is revised to read as follows:

**25.206 Noncompliance.**

(a) The contracting officer is responsible for conducting Buy American Act investigations when available information indicates such action is warranted.

(b) Unless fraud is suspected, the contracting officer shall notify the contractor of the apparent unauthorized use of foreign construction material and request a reply, to include proposed corrective action.

(c) If an investigation reveals that a contractor or subcontractor has used foreign construction material without authorization, the contracting officer shall take appropriate action, including one or more of the following:

(1) If granting an exception to the Buy American Act is appropriate, the contracting officer may process an exception in accordance with 25.205.

(2) If an exception to the Buy American Act is not appropriate:

(i) The contracting officer should consider requiring removal and replacement of the unauthorized foreign construction material.

(ii) 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 interests of the Government, the contracting officer may determine in writing that the foreign construction material need not be removed and replaced. Such a determination does not constitute approval of an exception and should be so stated in the determination. Further, such a determination does not affect the Government's right to suspend and/or debar a contractor, subcontractor or supplier for violation 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.

(iii) If the noncompliance is sufficiently serious, the contracting officer should consider exercising appropriate contractual remedies, such as terminating the contract for default. The contracting officer should also consider preparing and forwarding a report for suspension and/or debarment, including findings and supporting evidence in accordance with FAR subpart 9.4, Debarment, Suspension, and Ineligibility. In addition, if the noncompliance appears to be fraudulent, the contracting officer should consider referring the matter to other appropriate agency officials, such as the officer responsible for criminal investigation and prosecution.

8. Newly designated Section 25.207 is revised to read as follows:

**25.207 Solicitation provision and contract clause.**

(a) The contracting officer shall insert the provision at 52.225-X, Notice of Buy American Act—Construction Materials, in solicitations for construction when the clause at 52.225-5, Buy American Act—Construction Materials, is prescribed.

(b) The contracting officer shall insert the clause at 52.225-5, Buy American Act—Construction Materials, in solicitations and contracts for construction inside the United States, except when the clause at 52.225-15, Buy American Act—Construction Materials under European Community and North American Free Trade Agreements, is prescribed.

(c) The contracting officer shall insert the provision at 52.225-XX, Notice of Buy American Act Requirement—Construction Materials under European Community and North American Free Trade Agreements, in solicitations for construction when the clause at 52.225-15, Buy American Act—Construction Materials under European Community and North American Free Trade Agreements, is prescribed.

(d) The contracting officer shall insert the clause at 52.225-15, Buy American Act—Construction Materials under European Community and North American Free Trade Agreements, in solicitations and contracts for construction inside the United States with an estimated acquisition value of \$6,500,000 (\$8,000,000 for the Power Marketing Administrations) or more, to be awarded by agencies listed in 25.407.