

# Subpart 25.2 - Buy American-Construction Materials

**Parent topic:** [Part 25 - Foreign Acquisition](#)

## 25.200 Scope of subpart.

(a) This subpart implements-

(1) [41 U.S.C. chapter 83](#), Buy American;

(2) Executive Order 10582, December 17, 1954;

(3) Executive Order 13881, July 15, 2019;

(4) [Executive Order 14005](#), January 25, 2021; and

(5) Waiver of the domestic content test of the Buy American statute for *acquisitions* of commercially available off-the-shelf (COTS) items in accordance with 41 U.S.C. 1907, but see [25.201\(b\)\(2\)\(ii\)](#).

(b) It applies to contracts for the *construction*, alteration, or repair of any public building or public work in the *United States*.

(c) When using funds appropriated or otherwise provided by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5) (Recovery Act) for *construction*, see [subpart 25.6](#).

## 25.201 Policy.

(a) Except as provided in [25.202](#), use only *domestic construction materials* in *construction* contracts performed in the *United States*.

(b) The Buy American statute restricts the purchase of *construction materials* that are not domestic *construction materials*. For manufactured *construction materials*, the Buy American statute, [E.O. 13881](#), and [E.O. 14005](#) use a two-part test to define *domestic construction materials*.

(1) The article *must* be manufactured in the *United States*; and

(2)

(i) Except for *construction material* that consists wholly or predominantly of iron or *steel* or a combination of both, the cost of domestic *components must* exceed 60 percent of the cost of all the *components*, except that the percentage will be 65 percent for items delivered in calendar years 2024 through 2028 and 75 percent for items delivered starting in calendar year 2029, but see paragraph (c) of this section. In accordance with 41 U.S.C. 1907, this domestic content test of the Buy American statute has been waived for *acquisitions* of COTS items (see [12.505\(a\)](#)).

(ii) For *construction* material that consists wholly or predominantly of iron or *steel* or a combination

of both, the cost of *foreign iron and steel* must constitute less than 5 percent of the cost of all the *components* used in such *construction material* (see the definition of "foreign iron and steel" at [25.003](#)). The cost of foreign iron and steel includes but is not limited to the cost of foreign iron or steel mill *products* (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the *construction material* and a good faith estimate of the cost of all foreign iron or steel *components* excluding COTS *fasteners*. This domestic content test of the Buy American statute has not been waived for *acquisitions* of COTS items in this category, except for COTS *fasteners*.

(c)

(1) A contract with a period of performance that spans the schedule of domestic content threshold increases specified in paragraph (b)(2)(i) of this section *shall* be required to comply with each increased threshold for the items in the year of delivery, unless the *senior procurement executive* of the *contracting* agency allows for application of an *alternate* domestic content test for that contract under which the domestic content threshold in effect at time of contract award will apply to the entire period of performance for the contract. This authority is not delegable. The *senior procurement executive shall* consult the Office of Management and Budget's Made in America Office before allowing the use of the *alternate* domestic content test.

(2) When a *senior procurement executive* allows for application of an *alternate* domestic content test for a contract, see [25.1102\(a\)\(3\)](#) or (c)(4) for use of the appropriate *Alternate* clause to reflect the domestic content threshold that will apply to the entire period of performance for that contract.

## 25.202 Exceptions.

(a) When one of the following exceptions applies, the *contracting officer* may allow the contractor to acquire *foreign construction materials* without regard to the restrictions of the Buy American statute:

(1) *Impracticable or inconsistent with public interest*. The *head of the agency* may determine that application of the restrictions of the Buy American statute to a particular *construction material* would be impracticable or would be inconsistent with the public interest. The public interest exception applies when an agency has an agreement with a foreign government that provides a blanket exception to the Buy American statute.

(2) *Nonavailability*. The head of the *contracting activity* may determine that a particular *construction material* is not mined, produced, or manufactured in the *United States* in sufficient and reasonably available commercial quantities of a satisfactory quality. The determinations of nonavailability of the articles listed at [25.104\(a\)](#) and the procedures at [25.103\(b\)\(1\)](#) also apply if any of those articles are acquired as *construction materials*. A determination is not required before January 1, 2030, if there is an *offer* for a *foreign construction material* that exceeds 55 percent domestic content (see [25.204\(b\)\(1\)\(ii\)](#) and [25.204\(b\)\(2\)\(ii\)](#)).

(3) *Unreasonable cost*. The *contracting officer* concludes that the cost of *domestic construction material* is unreasonable in accordance with [25.204](#).

(4) *Information technology that is a commercial product*. The restriction on purchasing *foreign construction material* does not apply to the *acquisition* of *information technology* that is a *commercial product*, when using Fiscal Year 2004 or subsequent fiscal year funds (section 535(a) of

Division F, Title V, Consolidated Appropriations Act, 2004, and similar sections in subsequent appropriations acts).

(b) *Determination and findings.* When a determination is made for any of the reasons stated in this section that certain *foreign construction materials* may be used, the *contracting officer* must list the excepted materials in the contract. The agency *must* make the findings justifying the exception available for public *inspection*.

(c) *Acquisitions under trade agreements.* For *construction* contracts with an estimated *acquisition* value of \$6,708,000 or more, see [subpart 25.4](#).

## **25.203 Preaward determinations.**

(a) For any *acquisition*, an *offeror* may request from the *contracting officer* a determination concerning the inapplicability of the Buy American statute for specifically identified *construction materials*. The time for submitting the request is specified in the *solicitation* in paragraph (b) of either [52.225-10](#) or [52.225-12](#), whichever applies. The information and supporting data that *must* be included in the request are also specified in the *solicitation* in paragraphs (c) and (d) of either [52.225-9](#) or [52.225-11](#), whichever applies.

(b) Before award, the *contracting officer* *must* evaluate all requests based on the information provided and *may* supplement this information with other readily available information.

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

(a) *Offerors* proposing to use *foreign construction material* other than that listed by the Government in the applicable clause at [52.225-9](#), paragraph (b)(2), or [52.225-11](#), paragraph (b)(3), or covered by the *WTO GPA* or a Free Trade Agreement (paragraph (b)(2) of [52.225-11](#)), *must* provide the information required by paragraphs (c) and (d) of the respective clauses.

(b)

(1) *For construction material that is not a critical item and does not contain critical components.*

(i) Unless the *head of the agency* specifies a higher percentage, the *contracting officer* shall add to the offered price 20 percent of the cost of any *foreign construction material* proposed for exception from the requirements of the Buy American statute based on the unreasonable cost of *domestic construction materials*. In the case of a tie, the *contracting officer* shall give preference to an *offer* that does not include *foreign construction material* excepted at the request of the *offeror* on the basis of unreasonable cost.

(ii) For *construction material* that is not a COTS item and does not consist wholly or predominantly of iron or *steel* or a combination of both, if the procedures in paragraph (b)(1)(i) of this section result in an unreasonable cost determination for the *domestic construction material offer* or there is no *domestic construction material offer* received, and the low *offer* is for *foreign construction material* that does not exceed 55 percent domestic content, the *contracting officer* shall—

(A) Treat the lowest *offer* of *foreign construction material* that is manufactured in the *United States*

and exceeds 55 percent domestic content as a *domestic offer*; and

(B) Determine the reasonableness of the cost of this *offer* by applying the evaluation factor listed in paragraph (b)(1)(i) to the low *offer*.

(iii) The procedures in paragraph (b)(1)(ii) of this section will no longer apply as of January 1, 2030.

(2) *For construction material that is a critical item or contains critical components.*

(i) The *contracting officer shall* add to the offered price 20 percent, plus the additional preference factor identified for the *critical item* or *construction material* containing *critical components* listed at section 25.105, of the cost of any *foreign construction material* proposed for exception from the requirements of the Buy American statute based on the unreasonable cost of domestic *construction materials*. In the case of a tie, the *contracting officer shall* give preference to an *offer* that does not include *foreign construction material* excepted at the request of the *offeror* on the basis of unreasonable cost. See 25.105 for the list of *critical components* and *critical items*.

(ii) For *construction material* that is not a COTS item and does not consist wholly or predominantly of iron or *steel* or a combination of both, if the procedures in paragraph (b)(2)(i) of this section result in an unreasonable cost determination for the *domestic construction material offer* or there is no *domestic construction material offer* received, and the low *offer* is for *foreign construction material* that does not exceed 55 percent domestic content, the *contracting officer shall*—

(A) Treat the lowest *offer* of *foreign construction material* that is manufactured in the *United States* and exceeds 55 percent domestic content as a *domestic offer*; and

(B) Determine the reasonableness of the cost of this *offer* by applying the evaluation factors listed in this paragraph (b)(2) to the low *offer*.

(iii) The procedures in paragraph (b)(2)(ii) of this section will no longer apply as of January 1, 2030.

(c) *Offerors* also 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.

(d) If the *contracting officer* awards a contract to an *offeror* that proposed *foreign construction material* not listed in the applicable clause in the *solicitation* (paragraph (b)(2) of 52.225-9, or paragraph (b)(3) of 52.225-11), the *contracting officer must* add the excepted materials to the list in the *contract clause*.

## **25.205 Postaward determinations.**

(a) If a contractor requests a determination regarding the inapplicability of the Buy American statute after contract award, the contractor *must* explain why it could not request the determination before contract award or why the need for such determination otherwise was not reasonably foreseeable. If the *contracting officer* concludes that the contractor *should* have made the request before contract award, the *contracting officer may* deny the request.

(b) The *contracting officer must* base evaluation of any request for a determination regarding the inapplicability of the Buy American statute made after contract award on information required by paragraphs (c) and (d) of the applicable clause at 52.225-9 or 52.225-11 and/or other readily

available information.

(c) If a determination, under 25.202(a), is made after contract award that an exception to the Buy American statute applies, the *contracting officer must* negotiate adequate consideration and modify the contract to allow use of the *foreign construction material*. When the basis for the exception is the unreasonable price of a *domestic construction material*, adequate consideration is at least the differential established in 25.202(a) or in accordance with agency procedures.

## **25.206 Noncompliance.**

The *contracting officer must-*

(a) Review allegations of Buy American statute violations;

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

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

(1) Process a determination concerning the inapplicability of the Buy American statute in accordance with 25.205.

(2) Consider requiring the 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 interests of the Government, the *contracting officer may determine in writing* that the *foreign construction material* need not be removed and replaced. A determination to retain *foreign construction material* does not constitute a determination that an exception to the Buy American statute applies, and this *should* be stated in the determination. Further, a determination to retain *foreign construction material* does not affect the Government's right to suspend or debar a contractor, subcontractor, or supplier for violation of the Buy American statute, 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, consider exercising appropriate contractual remedies, such as terminating the contract for default. Also consider preparing and forwarding a report to the agency suspending or debarring official in accordance with subpart 9.4. If the noncompliance appears to be fraudulent, refer the matter to other appropriate agency officials, such as the officer responsible for criminal investigation.