

AMS/FAST CHANGE REQUEST (CR) COVERSHEET

Change Request Number: 21-41

Date Received: March 15, 2021

Title: Buy American Act Guidance Changes

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Policy and Guidance: (check all that apply)

- ☐ Policy
- ☒ Procurement Guidance
- ☐ Real Estate Guidance
- ☐ Other Guidance
- ☐ Non-AMS Changes

Summary of Change: (1) Increase in domestic content requirement for domestic end products and domestic construction material from 50% to 55%; a (2) Increase in price preferences for domestic offers from 12% to 30% for small businesses and from 6% to 20% for large businesses; and (3) Increase in percentage higher at which price of domestic construction material would be considered unreasonable from 6% to 20%.

Reason for Change: Consistency with Executive Order 13881 "Maximizing Use of American Made Goods, Products, and Materials" dated July 18, 2019 as implemented by AMS interim guidance effective February 22, 2021.

Development, Review, and Concurrence: Acquisition Policy, Contracts, and Procurement Legal.

Target Audience: Program office and contracting personnel

Briefing Planned: No.

ASAG Responsibilities: None.

Section / Text Location: T3.6.4A.2, T3.6.4A.3, and T3.6.4A.15

The redline version must be a comparison with the current published FAST version.

☒ I confirm I used the latest published version to create this change / redline

or

☐ This is new content

Links: <https://fast.faa.gov/docs/procurementGuidance/guidanceT3.6.4.pdf>

Attachments: Redline and final documents.

Other Files: N/A.

Redline(s):

Section Revised: T3.6.4A.2 – Buy American Act – Supplies

Section Revised: T3.6.4A.3 – Buy American Act – Construction Materials

Section Revised: T.3.6.4A.15 – Definitions

Procurement Guidance - (~~1/2021~~4/2021)

T3.6.4 Foreign Acquisition Revised 10/2007

A Foreign Acquisition

1 Applicability of Buy American Added 10/2014

2 Buy American Act - Supplies Revised ~~10/2019~~4/2021

3 Buy American Act - Construction Materials Revised ~~9/2009~~4/2021

4 FAA Buy American - Steel and Manufactured Products Revised 9/2020

5 Balance of Payments Program Revised 9/2020

6 Payment in Local Foreign Currency

7 Trade Agreements Revised 9/2020

8 Restrictions on Certain Foreign Purchases Revised 7/2006

9 Prohibition on Contracting with Entities that Engage in Certain Activities or Transactions Relating to Iran Revised 9/2020

10 Customs and Duties

11 International Agreements and Coordination Revised 1/2007

12 Examination of Records by Comptroller General

13 Inconsistency Between English Version and Translation of Contract

14 Export Control Revised 9/2020

15 Definitions Revised ~~9/2020~~4/2021

16 Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment Revised 1/2021

B Clauses

C Forms

T3.6.4 Foreign Acquisition Revised 10/2007

A Foreign Acquisition

1 Applicability of Buy American Added 10/2014

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. §§ 8301-8305) 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 ~~10/2014~~2021

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~~55 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 valued at the micro-purchase threshold 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) ~~620~~ percent, if the lowest domestic offer is from a large business concern; or

(b) ~~1230~~ 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 ~~1230~~% 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	1230 %	\$100.00	\$112130.00
B	Small		x	1230 %	170.00	190.40221.00
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 30%	\$100.00	\$112 130.00
B	Small	x		N/A	150.00	150.00
C	Small		x	12 30%	200.00	224 260.00
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	62 0%	\$100.00	\$106 120.00
B	Large	x		N/A	150.00	150.00
C	Small		x	62 0%	200.00	212 240.00
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.	Petroleum, crude oil, unfinished oils, and finished products.
Agar, bulk.	Ergot, crude.	Pine needle oil.
Anise.	Erythrityl tetranitrate.	Platinum and related group metals, refined, as sponge, powder, ingots, or cast bars.
Antimony, as metal or oxide.	Fair linen, altar.	Pyrethrum flowers.
Asbestos, amosite, chrysotile, and crocidolite.	Fibers of the following types: abaca, abace, agave, coir, flax, jute, jute burlaps, palmyra, and sisal.	Quartz crystals.
Bamboo shoots.	Goat and kidskins.	Quebracho.
Bananas.	Goat hair canvas.	Quinidine.
Bauxite.	Grapefruit sections, canned.	Quinine.
Beef, corned, canned.	Graphite, natural, crystalline, crucible grade.	Rabbit fur felt.
Beef extract.	Hand file sets (Swiss pattern).	Radium salts, source and special nuclear materials.
Bephenium hydroxynapthoate.	Handsewing needles.	Rosettes.
Bismuth.	Hemp yarn.	Rubber, crude and latex.
Books, trade, text, technical, or scientific; newspapers; pamphlets; magazines; periodicals; printed briefs and films; not printed in the United States and for which domestic editions are not available.	Hog bristles for brushes.	Rutile.
Brazil nuts, unroasted	Hyoscine, bulk.	Santonin, crude.
Cadmium, ores and flue dust.	Ipecac, root.	Secretin.
	Iodine, crude.	Shellac.

Calcium cyanamide.	Kaurigum.	Silk, raw and unmanufactured.
Capers.	Lac.	Spare and replacement parts for equipment of foreign manufacture, and for which domestic parts are not available.
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.	Nux vomica, crude.	Triprolidine hydrochloride.
Copra.	Oiticica oil.	Tungsten.
Cork, wood or bark and waste.	Olive oil.	Vanilla beans.
Cover glass, microscope slide.	Olives (green), pitted or unpitted, or stuffed, in bulk.	Venom, cobra.
Crane rail (85-pound per foot).	Opium, crude.	Water chestnuts.
Cryolite, natural.	Oranges, mandarin, canned.	Wax, carnauba.
Dammar gum.		Wire glass.

Diamonds, industrial, stones and abrasives.		Woods; logs, veneer, and lumber of the following species: Alaskan yellow cedar, angelique, balsa, ekki, greenheart, lignum vitae, mahogany, and teak. Yarn, 50 Denier rayon.
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3 Buy American Act - Construction Materials Revised 9/20094/2021

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 valued at the micro-purchase threshold 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 ~~620~~ 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 \$10,802,884 or more, Mexican construction materials may be treated as domestic for purposes of Buy American Act restrictions, pursuant to the USMCA 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 9/2020

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 Revised 9/2020

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 United States-Mexico-Canada Agreement (USMCA) 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 9/2020

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

(1) The United States-Mexico-Canada Agreement, (USMCA) as approved by Congress in the United States- Mexico-Canada Agreement Implementation Act (Government Procurement Agreement Applicable only to the United States and Mexico) (Pub. L. 116-113) (19 U.S.C. chapter 29 (sections 4501-4732)); 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	P.L. 108-77

Agreement Implementation Act	
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. United States- Mexico- Canada Agreement (USMCA).

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

(a) Mexican country construction materials under construction contracts with an estimated acquisition value equal to or exceeding \$10,802,884.

(b) Mexican end products under supply contracts with an estimated value equal to or exceeding \$83,099.

(c) Mexican end products under service contracts with an estimated value equal to or exceeding \$83,099.

(2) To determine whether USMCA 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 USMCA 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 (45FR 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, unless the source of the purchase under the small or small disadvantage business program is a large business subcontractor.

(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 9/2020

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 debarring 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 USMCA Implementation Act (Pub. L. 116-113) (19 U.S.C. chapter 29 (sections 4501-4732))) 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 Export Control Revised 9/2020

- a. All FAA employees, contractors and other agents working in support of the FAA must be familiar with export control requirements and seek appropriate guidance before transferring or disclosing items, services, or information to a foreign entity or foreign national, and must comply with U.S. export control requirements.
- b. *Foreign Nationals.* In addition to being subject to AMS Personnel Security Guidance, the use of foreign nationals on a contract may be considered an export and thus require a successful export control review to be conducted prior to the foreign national working on the contract.
- c. *Export Control Review Process.* Before transferring or disclosing items, services or information to a foreign entity or foreign national, the following process must be followed consistent with FAA Order 1240.13 and the FAA Export Control Compliance- Supplemental Guidance (“Supplemental Guidance”) found at https://my.faa.gov/content/dam/myfaa/org/staffoffices/apl/offices/api/media/Export_Control_Guidance.pdf (**FAA Only**). The export control review effort is a team effort between the Contracting Officers, FAA Lines of Business (LOBs)/program offices, and AGC-500. Depending on the foreign party (e.g. Government entity vs. private corporation), different types of contract vehicles (e.g. international agreement vs. contract) may be required and the transaction itself may fall under different FAA offices (e.g., ATO International). If there is a question as to the appropriate vehicle for the transaction with a foreign entity, contact the LOB international staff or the Office of International Affairs (API).

(1) Initial Determination.

Consistent with FAA Order 1240.13 and the Supplemental Guidance Key Questions, the COR must initially determine if the item, services or information to be provided under the contract or Other Transaction (OT) Agreement is export controlled. Examples of export controlled items include FAA equipment, parts and maintenance services delivered outside the United States even for FAA purposes. It also includes giving or sending items such as documents, CDs, key fobs, thumb drives, etc., to a foreign entity or

foreign national.

If the item, services, or information is initially determined to be export controlled, then a formal Export Control Review is required. The Export Control Review process is set forth in detail in the Supplemental Guidance. This review involves the following:

- (a) Completing the Export Control Workbook (“Workbook”) with all required information, including the Export Control Classification Number (found at www.bis.doc.gov). When completing the Workbook, be as detailed as possible. A Workbook should be completed for each export control review. The Workbook is available at <https://my.faa.gov/org/staffoffices/apl/offices/api.html> (**FAA only**).
- (b) Emailing the completed Export Control Workbook to AGC-500 at 9-AWA-AGC-Exports@faa.gov. In the email subject line, write: “[Country Name] Export Control [Item Description]” (e.g. Bermuda Export Control Mode-S).
- (c) When the Export Control Review is completed, AGC-500 will provide an email from the export control mailbox stating whether the transaction is “Export Eligible.”
 - (i) If the transaction is “Export Eligible” or “Not Controlled” then it may proceed (e.g., the documentation may be released at an industry day, for a vendor visit, or with a SIR; or a particular foreign national may work on the contract).
 - (ii) If the transaction is “Not Export Eligible,” or if an export license is required, then AGC-500 and the procurement team must discuss the issue before taking further action.

(2) *Name Checking.*

Name checking is an important part of the export control review process because some foreign nationals and entities are on what are commonly known as “prohibited persons lists.” People and entities on these lists are prohibited from receiving exports.

Instructions for completing a name check are included in the Workbook. Full name, organization and citizenship information is required to complete the name check against the Consolidated Screening List at https://2016.export.gov/ecr/eg_main_023148.asp.

Because of a slightly different focus between the two lists, checking the System for Award Management (SAM) “Exclusions” list cannot substitute for checking the Consolidated Screening List. Each list must be checked at the appropriate time for each

acquisition.

(3) *Documentation.*

Completed Export Control Workbooks and export eligibility determinations from AGC-500 must be retained in the contract file, either in hard copy or electronically.

(4) *Responsibilities.*

(a) *Contracting Officer.*

- (i) Identifying potential export control issues during acquisition planning activities, SIR/contract issuance, and contract administration;
- (ii) Checking foreign nationals identified in the- Workbook against the Consolidated Screening List to determine if recipients of the export controlled items are on the lists of prohibited persons/entities, and documenting the results of the name check and the date the check was conducted.
- (iii) Ensuring that appropriate export clauses are included in contracts and OT agreements either performed abroad, by foreign nationals, or involving deliveries to foreign locations.
- (iv) Ensuring that all required security reviews, initial export control determinations and any required export control reviews are performed for foreign nationals working on FAA contracts and OT Agreements.
- (v) Supporting CFIUS Reviews, as requested.
- (vi) Supporting AGC-500 during the export review process.

(b) *COR/Program Office.*

- (i) Identifying/anticipating export control issues in program activities, including, but not limited to, acquisition planning, contract administration, program industry days, and meeting with foreign entities and foreign nationals.
- (ii) Answering Supplemental Guidance Key Questions, make the initial export control review determination, and advise the Contracting Officer of such determination and its basis in writing.
- (iii) Supporting the Contracting Officer with respect to any export control issues that arise and relaying potential export controlled activities identified to the Contracting Officer.
- (iv) Completing the Workbook, including identifying the Export Control Classification Numbers (ECCN) and recipients.
- (v) Supporting CFIUS Reviews, as requested.
- (vi) Supporting AGC-500 during the Export Control Review process.

(c) *AGC-500.*

AGC-500 is responsible for conducting the export control review once a completed Export Control Workbook is submitted to the Export Control Mailbox, and providing an export eligibility determination to the CO.

d. *Committee on Foreign Investment in the United States Review (CFIUS).*

(1) *CFIUS Background.*

CFIUS is an inter-agency committee authorized to review transactions that could result in control of a U.S. business by a foreign person (“covered transaction”) in order to determine the effect of such transactions on the national security of the United States. CFIUS operates pursuant to section 721 of the Defense Production Act of 1950, as amended by the Foreign Investment and National Security Act of 2007 (FINSA) (section 721) and as implemented by Executive Order 11858, as amended, and regulations at 31 C.F.R. Part 800.

CFIUS issues arise when a non-U.S. company seeks to buy or merge with a U.S. company. CFIUS examines the covered transaction in order to identify and address, as appropriate, any national security concerns that arise as a result of the transaction. During the review period, CFIUS members, through the Department of the Treasury as Committee Chair, may request additional information on related FAA contracts.

(2) CFIUS Review Responsibilities.

(a) Contracting Officers: Contracting Officers are responsible for identifying all contracts (and any subcontract) that the FAA has with the U.S. business involved in the covered transaction that is subject to the CFIUS review and for identifying/producing any contract provisions affecting contractor roles access or duties.

(b) Contracting Officer’s Representative: The COR is responsible for identifying the contractor’s duties and data, software, systems, equipment, etc., that the contractor has delivered or has continuing access to and helping determine whether this could affect national security.

e. *Foreign Visitors.* Certain types of visits by foreign nationals to FAA facilities, and meetings with FAA personnel, regardless of the location, are subject to export control requirements. In particular, visits or meetings involving the demonstration of technology and/or software, and visits or meetings that involve the release of source code or other technical documentation to foreign nationals may require a review of the Supplemental Guidance Key Questions. Cognizant FAA LOBs and Staff Offices are responsible for ensuring that all information to be shared with foreign nationals during visits or meetings with the FAA has been reviewed. FAA Order 1600.74 Visitor Procedures for FAA Facilities contains guidelines for the conduct of visits by foreign nationals to FAA facilities.

f. *Foreign Travel.* See FAA International Travel Policy and FAA Order 1600.61B International Travel Security Briefing & Contact Reporting Requirements for FAA Employees and Contractors.

g. *Definitions.*

Note: These definitions are applicable to the export control review process only.

Business Process: Any explanation of the management, operational, and supporting processes that the FAA conducts to accomplish its mission. Examples of business processes include, but are not limited to, the following: how to create a flight procedure, how to redesign airspace, how to certify aircraft parts, how to conduct Safety Risk Management reviews, how to mobilize disaster relief efforts, and organizational charts with roles and responsibilities. Business process information is not export-controlled.

Consolidated Screening List: A list of entities and individuals for which the USG maintains restrictions on certain financial transactions, exports, re-exports or transfers of items, services or information.

Country of Concern: Countries subject to sanctions or embargoes, or countries that condone terrorist-supporting activities (e.g., Cuba, Iran, North Korea, Sudan, Syria). The EAR identifies countries of concern as “Country Group E” and lists them in the EAR at 15 CFR 740, Supplement 1. The U.S. Departments of State and Treasury track a broader list for countries of concern subject to their regulations. Transactions with countries of concern receive a higher degree of scrutiny and usually require a transaction-specific license. See the Additional Resources section of the Supplemental Guidance for more detail.

Export: Any item, service or information that is sent from the United States to a foreign destination is an export. Export means taking or sending an item, service or information out of the United States even if the item (e.g., test equipment) will be returned to the United States. Export also means giving an item, service or information to a foreign national or entity who might take it out of the United States. Items include commodities, software or technology, and technical data. Services include the furnishing of assistance (including training, design, maintenance, testing, installation, enhancement or use of item(s)) to a foreign national or entity whether in the United States or abroad. The release of technology or source code to a foreign national in the United States is “deemed” to be an export to the home country of the foreign national under the EAR.

For a definition of information, see Technical Data/Documentation.

Export Administration Regulations (EAR): U.S. Department of Commerce regulations for the export and re-export of most commercial items. The EAR does not control all items, services or information. Other U.S. government agencies may regulate other items not controlled by the EAR.

Export-Controlled: Items, services or information subject to U.S. export control requirements.

Export Control Classification Number (ECCN): A U.S. Department of Commerce alpha-numeric export code, e.g., 5A991, which describes the item, service or information being exported and indicates licensing requirements. All ECCNs are listed in the Commerce Control List (CCL) and can usually be obtained from a hardware/software manufacturer.

Export Control Review: An FAA process, including a legal review and a name check of foreign nationals and entities against the U.S. Government Consolidated Screening List, to determine whether a potential transaction is eligible for export.

Export Control Workbook: An FAA document that includes worksheets for equipment/hardware, software, and training, as well as contact information for API and/or FAA Line of Business (LOB) Points of Contact, and country information, and which highlights potential areas of concern and informs AGC-500 that foreign nationals involved in the transaction have been checked against the Consolidated Screening List. A completed Workbook is required for all export control reviews.

Note: In accordance with the Paperwork Reduction Act, the export control review process and Workbook have been established for the Government to complete. The Export Control Workbook is for internal FAA use and must be completed by FAA employees, contractors and other agents working in support of the Agency.

Export Eligible: A legal determination that the intended transaction would be a lawful export. The determination is based on an identification of an export code, whether a transaction-specific license is required, and a confirmation that the person(s) and organization(s) to which the export is being made are not identified on the list(s) of known or suspected export violators.

Foreign Entity: Any organization, corporation or government agency located, incorporated or organized to do business in a country other than the United States. Foreign entities also include foreign branches, subsidiaries, and affiliates of U.S. companies, as well as other U.S. entities located in foreign countries.

Foreign National: A non-U.S. citizen. Holders of U.S. green cards and those with permanent residency in the United States are not considered foreign nationals for export control purposes.

International Traffic in Arms Regulations (ITAR): Regulations that control the export and import of defense articles and defense services. The U.S. Department of State is responsible for the administration of the ITAR.

Name Check: A process that includes a review of foreign nationals and organizations involved in an international transaction against the Consolidated Screening List. The name check is part of the Export Control Workbook, which must be completed for all export control reviews.

Publicly Available/Public Domain: Information is publicly available or in the public domain when it is generally accessible to the interested public in any form. Examples of items that are publicly available include: Web Page Documents, Performance Specifications, and Business Process Information. Information that is publicly available or that exists in the public domain, with the exception of encryption software, is not export-controlled. Information related to commercial space transportation may be subject to ITAR and treated differently even if publicly available; consult the designated LOB Point of Contact or AGC-500.

Technical Data/Documentation: Information, other than software or items posted on public websites, which is required for the design, development, prototyping, production, manufacture, assembly, use, testing, maintenance (inspection, overhaul, repair, preservation, and replacement of parts), rebuild, preventative maintenance, enhancement or modification of NAS systems, mission support systems, administrative systems, aircraft, or commercial space or launch systems.

Training courses often involve the transfer of technical data. Examples of documentation include Maintenance Handbooks, Interface Control Documents, test plans, test procedures, schematics, configuration documents, software developers' kits, etc., regardless of medium or storage format. Characteristics of technical data include materials that usually are proprietary or sensitive. Most technical data is export-controlled.

Transaction: The transfer or disclosure of items, services or information to a foreign entity or foreign national. Transactions may also include allowing foreign nationals to visit FAA facilities or work on FAA contracts.

15 Definitions Revised 9/2020/2021

a. *"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.

b. "*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.

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

d. "*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.

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

f. "*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 5055 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).

g. "*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 5055 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.

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

i. "*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.

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

- k. "*Foreign construction material*" means a construction material other than a domestic construction material.
- l. "*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.
- m. "*Foreign end product*" means an end product other than a domestic end product.
- n. "*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).
- o. "*Foreign services*" means services other than domestic services.
- p. "*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.
- q. "*Manufactured product*" as it applies to "Buy American-Steel and Manufactured Products" means an item produced as a result of the manufacturing process.
- r. "*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.
- s. "*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.
- t. "*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.
- u. "*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.

v. *"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.

w. *"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 from 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.

x. *"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.

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

z. *"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.

16 Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment Revised 1/2021

- a. This section implements paragraph (a) (1) (A) and paragraph (a) (1) (B) of section 889 of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2019 (Pub. L. 115-232). As used in this section –

"Backhaul" means intermediate links between the core network, or backbone network, and the small subnetworks at the edge of the network (e.g., connecting cell phones/towers to the core telephone network). Backhaul can be wireless (e.g., microwave) or wired (e.g., fiber optic, coaxial cable, Ethernet).

"Covered foreign country" means The People's Republic of China.

"Covered telecommunications equipment or services" means–

(1) Telecommunications equipment produced by Huawei Technologies Company or ZTE Corporation, (or any subsidiary or affiliate of such entities);

(2) For the purpose of public safety, security of Government facilities, physical security surveillance of critical infrastructure, and other national security purposes, video surveillance and telecommunications

equipment produced by Hytera Communications Corporation, Hangzhou Hikvision Digital Technology Company, or Dahua Technology Company (or any subsidiary or affiliate of such entities);

(3) Telecommunications or video surveillance services provided by such entities or using such equipment; or

(4) Telecommunications or video surveillance equipment or services produced or provided by an entity that the Secretary of Defense, in consultation with the Director of National Intelligence or the Director of the Federal Bureau of Investigation, reasonably believes to be an entity owned or controlled by, or otherwise connected to, the government of a covered foreign country.

“Critical technology” means—

(1) Defense articles or defense services included on the United States Munitions List set forth in the International Traffic in Arms Regulations under subchapter M of chapter I of title 22, Code of Federal Regulations;

(2) Items included on the Commerce Control List set forth in Supplement No. 1 to part 774 of the Export Administration Regulations under subchapter C of chapter VII of title 15, Code of Federal Regulations, and controlled-

- (i) Pursuant to multilateral regimes, including for reasons relating to national security, chemical and biological weapons proliferation, nuclear nonproliferation, or missile technology; or
- (ii) For reasons relating to regional stability or surreptitious listening;

(3) Specially designed and prepared nuclear equipment, parts and components, materials, software, and technology covered by part 810 of title 10, Code of Federal Regulations (relating to assistance to foreign atomic energy activities);

(4) Nuclear facilities, equipment, and material covered by part 110 of title 10, Code of Federal Regulations (relating to export and import of nuclear equipment and material);

(5) Select agents and toxins covered by part 331 of title 7, Code of Federal Regulations, part 121 of title 9 of such Code, or part 73 of title 42 of such Code; or

(6) Emerging and foundational technologies controlled pursuant to section 1758 of the Export Control Reform Act of 2018 (50 U.S.C. 4817).

“Interconnection arrangements” means arrangements governing the physical connection of two or more networks to allow the use of another's network to hand off traffic where it is ultimately delivered (e.g., connection of a customer of telephone provider A to a customer of telephone company B) or sharing data and other information resources.

“Reasonable inquiry” means an inquiry designed to uncover any information in the entity's possession about the identity of the producer or provider of covered telecommunications equipment or services used by the entity that excludes the need to include an internal or third-party audit.

“Roaming” means cellular communications services (e.g., voice, video, data) received from a visited network when traveling outside the geographical coverage area of a home network.

“Substantial or essential component” means any component necessary for the proper function or performance of a piece of equipment, system, or service.

b. Prohibited equipment, systems, or services

(1) On or after August 13, 2019, agencies are prohibited from procuring or obtaining, or extending or renewing a contract to procure or obtain, any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system, unless an exception at paragraph b (3) of this section applies or the covered telecommunications equipment or services are covered by a waiver described in T.3.6.4 A 16 e.

(2) On or after August 13, 2020 agencies are prohibited from entering into a contract, or extending or renewing a contract, with an entity that uses any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system, unless an exception at paragraph b (3) of this section applies or the covered telecommunication equipment or services are covered by a waiver described in AMS T3.6.4A.16.e. This prohibition applies to the use of covered telecommunications equipment or services, regardless of whether that use is in performance of work under a Federal contract.

(3) *Exceptions.* This subpart does not prohibit agencies from procuring or contractors from providing-

(a) A service that connects to the facilities of a third-party, such as backhaul, roaming, or interconnection arrangements; or

(b) Telecommunications equipment that cannot route, redirect user data traffic, or permit visibility into any user data or packets that such equipment transmits or otherwise handles.

c. Unless an exception at (b)(3) above applies or the covered telecommunications or video surveillance services or equipment is covered by a waiver as described in T3.6.4A.16.e, Contracting officers and purchase cardholders will not-

(1) Procure or obtain, or extend or renew a contract (e.g., exercise an option) to procure or obtain, any equipment, system, or service that uses covered telecommunications equipment or services as a substantial or essential component of any system, or as critical technology as part of any system, or

(2) Enter into a contract, or extend or renew a contract, with an entity that uses any equipment, system, or services as a substantial or essential component of any system, or as critical technology as part of any system.

d. Procedures for Offeror/Vendor Representations and Reports

(1) Offeror/Vendor Representations.

(a) If an offeror selects “does not” in response to paragraphs (c) (1) and/or (c) (2) of provision 3.6.4-24 “Covered Telecommunications or Services – Representation”, the contracting officer

may rely on the representation unless the contracting officer has reason to question the representation. If the contracting officer has reason to question the representation, the contracting officer will follow agency procedures.

(b) If the offeror selects “does” in response to paragraph (c) (1) of provision 3.6.4-24, the offeror must complete the representation at paragraph (d) (1) of provision 3.6.4-22 “Representation Regarding Certain Telecommunications and Video Surveillance Services or Equipment”. If an offeror selects “does” in response to paragraph (d) (2) of provision 3.6.4-24, the offeror must complete the representation at paragraph (d) (2) of provision 3.6.4-22.

(c) If an offeror provides an affirmative response to the representations or discloses information in accordance with paragraphs (d) and (e) of the provision at 3.6.4-22 , the contracting officer/purchase cardholder must not make an award to the offeror unless the requiring activity provides a written determination that the covered telecommunications equipment or services included in their offer, in accordance with paragraph (e) of the provision, are not being used as a substantial or essential component of any system, or as critical technology as part of any system. If the requiring activity is unable to provide a written determination as described above and no other offerors provide a negative representation, then no award will be made unless a waiver is granted.

(d) If the apparently successful offeror provides a negative response to the representation in (d) of provision 3.6.4-22, the contracting officer/purchase cardholder may rely on the representation, unless the contracting officer/purchase cardholder has an independent reason to question the representation. If the contracting officer/purchase cardholder has an independent reason to question a negative representation of the otherwise successful offeror, the contracting officer/purchase cardholder must consult with the requiring activity and legal counsel on how to proceed to ensure that the procurement would not violate the statutory prohibition.

(2) If a contractor provides a report pursuant to paragraph (d) of the clause 3.6.4-23 “Prohibition on Contracting for Certain Telecommunications and Video Surveillance Services or Equipment”, the contracting officer/purchase cardholder will consult with the requiring activity and legal counsel on how to proceed using existing contractual remedies.

e. Waivers

(1) The head of an agency may, on a one-time basis, waive the prohibition at subsection (b) above for FY 2019 with respect to a Government entity (e.g., requirements office, contracting office) that requests such a waiver.

(a) The waiver may be provided, for a period not to extend beyond August 13, 2021 for the prohibition at paragraph b (1) or beyond August 13, 2022 for the prohibition at paragraph b (2), if the Government entity seeking the waiver submits to the head of the executive agency–

- (i) A compelling justification for the additional time to implement the requirements under T.3.6.4 A 16, as determined by the head of the executive agency; and
- (ii) A full and complete description of the presences of covered telecommunications or video surveillance equipment or services in the relevant supply chain and a phase-out

plan to eliminate such covered telecommunications or video surveillance equipment or services from the relevant systems.

(b) Before head of the agency can grant a waiver to the prohibition at paragraph b (2), the agency must

- (i) Have designated a senior agency official for supply chain risk management, responsible for ensuring the agency effectively carries out the supply chain risk management functions and responsibilities described in law, regulation, and policy;
- ii) Establish participation in an information-sharing environment when and as required by the Federal Acquisition Security Council (FASC) to facilitate interagency sharing of relevant acquisition supply chain risk information;
- (iii) Notify and consult with the Office of the Director of National Intelligence (ODNI) on the waiver request using ODNI guidance, briefings, best practices, or direct inquiry, as appropriate; and
- (iv) Notify the ODNI and the FASC 15 days prior to granting the waiver that it intends to grant the waiver

(2) Waivers for emergency acquisitions.

(a) In the case of an emergency, including a declaration of major disaster, in which prior notice and consultation with the ODNI and prior notice to the FASC is impracticable and would severely jeopardize performance of mission-critical functions, the head of an agency may grant a waiver without meeting the notice and consultation requirements under subparagraphs e (1)(b) (iii) and (iv) above to enable effective mission critical functions or emergency response and recovery.

(b) In the case of a waiver granted in response to an emergency, the head of an agency granting the waiver must—

- (i) Make a determination that the notice and consultation requirements are impracticable due to an emergency; and
- (ii) Within 30 days of award, notify the ODNI and FASC of the waiver issued under emergency conditions in addition to the waiver notice to Congress per paragraph e (3) below.

(3) Waiver Notice

(a) For waivers to the prohibition at paragraph b (1), the head of the executive agency will, not later than 30 days after approval—

- (i) Submit in accordance with agency procedures to the appropriate congressional committees the full and complete laydown of the presences of covered telecommunications or video surveillance equipment or services in the relevant supply chain; and

(ii) The phase-out plan to eliminate such covered telecommunications or video surveillance equipment or services from the relevant systems

(b) For waivers to the prohibition at paragraph b (2), the head of the executive agency will, not later than 30 days after approval submit in accordance with agency procedures to the appropriate congressional committee---

(i) An attestation by the agency that granting of the waiver would not, to the agency's knowledge having conducted the necessary due diligence as directed by statute and regulation, present a material increase in risk to U.S. national security;

(ii) The full and complete laydown of the presence of covered telecommunications or video surveillance equipment or services in the relevant supply chain, to include a description of each category of covered technology equipment or services discovered after reasonable inquiry, as well as each category of equipment, system, or service used by the entity in which covered technology is found, and after conducting a reasonable inquiry; and

(iii) The phase-out plan to eliminate such covered telecommunications or video surveillance equipment or services from relevant systems.

(4) Director of National Intelligence. The Director of National Intelligence may provide a waiver if the Director determines the waiver is in the national security interests of the United States.

B Clauses

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C Forms

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