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PART M825—FOREIGN ACQUISITION

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PART M825—FOREIGN ACQUISITION

M825.001 General.

VA has the responsibility for implementing the Veterans First Contracting Program (Vets First) in all of its procurements. Application of the Rule of Two and the setting aside of awards for Service-Disabled Veteran-Owned Small Businesses and Veteran-Owned Small Businesses makes compliance with the Buy American Act (BAA) and Trade Agreements Act (TAA) easier as those firms are already compliant with the Buy American Laws.

Subpart 825.1—Buy American Act—Supplies

M825.101 General.

(d) *Buy American Act – Supplies.* ([FAR subpart 25.1](#)). [FAR 25.102](#) establishes that except for the exceptions cited at [FAR 25.103](#), acquire only domestic end products for public use inside the United States. [FAR 25.103](#), Exceptions, provides five exceptions and waivers for acquisitions of supplies.

(e) *Small Business Set-Asides.* BAA applies to all small business set-aside contracts. However, TAA does not apply to small business set-asides. Contracting Officers (COs) are to ensure compliance with the Small Business Administration rules on small business manufacturing and non-manufacturing rules and required waivers. A waiver does not affect BAA requirements that may apply.

(i) *Reporting in eCMS/FPDS.* E.O. 13788 and OMB Memorandum M-17-27 require ongoing monitoring of VA's ability to maximize the use of goods and materials produced in the United States. As with all contract award data, the data elements that provide information on VA's use of goods and materials produced in or outside the United States must be accurate. Formal quarterly Federal Procurement Data System audits are conducted in accordance with OMB Memorandum 'Improving Federal Procurement Data Quality – Guidance for Annual Verification and Validation,' dated May 31, 2011, which currently includes Buy American data. VA's Risk Management and Compliance Service will conduct annual reviews to ensure compliance.

(j) *Implementing the Buy American Act—Job Aid.* COs are encouraged to use the Implementing Buy American Job Aid, [Attachment M825-A](#), when determining the proper provisions and clauses to include in solicitations and contracts. The job aid also helps determine whether a Buy American waiver may apply due to Trade Agreements.

M825.103 Exceptions.

(a) *Public interest.* For a determination under [FAR 25.103\(a\)](#), the CO shall submit the request containing all supporting facts and other pertinent information to the Senior Procurement Executive (SPE), who will, upon approval, forward the request to the Secretary.

(b) *Non-availability.*

(1) *Class determinations.*

(i) If the CO considers that the non-availability of an article is likely to affect future acquisitions, the CO shall forward the determination with supporting documentation to the SPE for approval along with a recommendation to the Civilian Agency Acquisition Council (CAAC) Chair to add the item(s) to the list of non-available articles in [FAR 25.104](#).

(f) *Approval Levels for Exercise of Exemptions and Waivers.*

(1) For a determination under [FAR 25.103\(a\)](#), the contracting officer shall submit the request, containing all supporting facts and other pertinent information to the SPE, who will upon approval, forward the request to the Secretary for approval.

(2) In accordance with [FAR 25.103\(b\)\(2\)\(i\)](#), the authority to make individual non-availability determinations has been formally delegated to VA Heads of Contracting Activities (HCA) by delegation memorandum and is not re-delegable.

(3) If the CO considers that the non-availability of an article is likely to affect future acquisitions, the CO shall forward the determination with supporting documentation to the SPE, through the HCA, for approval along with a recommendation to the CAAC Chair to add the item(s) to the list of non-available articles in [FAR 25.104](#). The application and approval processes for these exceptions shall be carefully conducted and documented in order to ensure that VA meets its goals of maximizing the use of domestic goods and materials and fully documenting any exceptions.

(4) In accordance with [FAR 25.202\(a\)\(2\)](#), the authority to determine if domestic construction materials are not available in sufficient quantity and quality has been formally delegated to VA HCAs by delegation memorandum and is not re-delegable.

(g) *Training on Buy American Laws.* [VA Acquisition Academy](#) (VAAA) offers courses that include discussion of the Buy American statutes. There are also online courses available through the [Federal Acquisition Institute Training Application System](#) (FAITAS). COs and other acquisition professionals obligating funds on behalf of VA shall take VAAA or FAITAS courses that cover implementation of the Buy American statute.

Subpart 825.2—Buy American Act—Construction Materials

M825.202 Exceptions.

[FAR subpart 25.2](#) defines specific requirements for construction materials and contains four exceptions and waivers. The levels of authority and requisite analysis for each of these exceptions are found at [FAR 25.202](#), Exceptions.

M825.202-70 Buy American Act—Construction Materials.

When a determination is required under [FAR 25.202\(a\)\(1\)](#), the CO must submit the request for determination to the HCA for submission to the SPE, who will forward the request to the Secretary. The submission must contain all the facts and other pertinent information necessary for the Secretary to make a determination.

(b) For each determination of non-availability that the HCA makes in accordance with [FAR 25.202\(a\)\(2\)](#), the HCA must do the following:

(1) Factually support the determination in writing and include the determination in the contract file.

(2) Forward a copy of the determination, along with supporting documentation, to the Director, Office of Construction and Facilities Management, through the SPE.

(3) If the HCA believes that the non-availability of an article is likely to affect future acquisitions, include a recommendation that a copy of the determination and supporting documentation be forwarded to the CAAC for possible addition to the list of non- available articles in [FAR 25.104](#). The SPE will decide whether to submit the material to the CAAC.

M825.205 Post-award determinations.

A post-award determination that an exception to the BAA applies, as provided in [FAR 25.205\(c\)](#), will be made in accordance with [FAR 25.202](#).

Subpart M825.4—Trade Agreements

825.402 General.

(c) *Trade Agreements.* ([FAR subpart 25.4](#)). Trade agreements with 'designated countries' establish specific exceptions to the Buy American statute. [FAR 25.003](#) defines a 'designated country' as those included in the World Trade Organization Government Procurement Agreement, U.S. Free Trade Agreements, certain least

developed countries or a Caribbean Basin country. COs shall confirm the current status prior to each award that contemplates use of the Buy American statutes and ensure that any required documentation for awards based on trade agreements is contained in the contract file.

(d) *Buy American and Trade Agreement Certificates.* The CO is responsible for complying with the BAA and TAA. Prior to contract award, CO should ensure the appropriate country of origin certificate is complete. Although COs may rely on the vendor's certification of BAA and TAA compliance, the CO should investigate incomplete certificates and any evidence or information that casts doubt on the veracity of the vendor's certification. If the CO does not rely on the vendor's certification, the CO shall ensure the decision is properly documented in the contract file.

COs can verify products' origins through various sources to include confirming missing or incomplete certifications with the vendor, verifying through various sources on the internet (e.g. vendors website, product search, System for Award Management, etc.), or looking at previous contracts where the same products were purchased.

(e) *Country of Origin test.* The CO is responsible for making their own product qualification decisions and are not bound by the country of origin determination issued by U.S. Customs and Border Protection. Unlike the substantial transformation rule the TAA imposes on foreign-made products, under the FAR a product need not be wholly manufactured or substantially transformed in the United States to be a 'U.S.-made end product.' Instead, such products may be 'manufactured' in the United States from foreign-made components.

Subpart M825.10—Additional Foreign Acquisition Regulations

M825.1001 Waiver of right to examination of records.

(a) COs, whenever possible, will insert the appropriate basic clauses in negotiated contracts with foreign contractors. The clause at [FAR 52.215-2](#), Audit and Records—Negotiation, prescribed at [FAR 15.209\(b\)](#), and paragraph (d) of the clause at [FAR 52.212-5](#), Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items, prescribed at [FAR 12.301\(b\)\(4\)](#), implement 10 U.S.C. 2313 and 41 U.S.C. 254d. The basic clauses authorize examination of records by the Comptroller General. If the basic clauses are not included, which authorize examinations of records by the Comptroller General, then the CO may use [FAR 52.215-2](#) with its Alternate III or [FAR 52.212-5](#) with its Alternate I; only after meeting the conditions at [FAR 25.1001\(a\)\(2\)](#). The CO must also prepare a determination and finding, as outlined at [FAR 25.1001\(b\)](#).

(b) The CO must submit the determination and finding to the HCA for submission to the SPE, who will forward the request to the Secretary for approval, as provided in [FAR 25.1001\(a\)\(2\)\(iii\)](#). The submission must include all appropriate documentation in accordance with [FAR 25.1001\(b\)](#).

(c) The Secretary, upon concurring with the CO's proposed determination and finding, will forward the document to the Comptroller General for concurrence. However, the execution of the determination and findings by the Secretary does not require concurrence of the Comptroller General if the contractor is a foreign government or agency thereof or is precluded by the laws of the country involved from making its records available for examination.

(d) The completed determination and finding will be made part of the contract file.

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