



SESSION GUIDE
SEASON 2023, EPISODE FIFTEEN
FAR PART 25:
FOREIGN ACQUISITION

I. Introduction

In previous chapters, we've mentioned that certain portions of the FAR do not apply outside the United States. We've also mentioned Subparts that specifically regulate the import of some goods, such as FAR Part 22's prohibition on products made using child labor and combatting human trafficking overseas. Since you've become pretty familiar with the FAR's emphasis on detail, we're sure you won't be surprised to learn that the FAR has an entire Part dedicated to "foreign" acquisition—**Part 25**.

So what exactly is foreign acquisition? If your first thought is "buying things outside the U.S.," you're mostly right. But it's more complicated than that. A significant piece of **Part 25** is devoted to regulating the makeup of an end product. This doesn't mean makeup like the stuff people put on their faces! Instead, it means the component parts of some finished whole good, which is called the "end product." For example, suppose your car—the end product—was assembled in the United States, but a number of its components were actually made outside the U.S. and were imported and used to assemble your car. If it was the U.S. Government that was buying the car, then the vendor would have to comply with an important law called the Buy American Act (BAA). **Part 25** also regulates the performance of contracts outside the U.S., and it incorporates various trade agreements, like NAFTA, into the FAR regime.

II. Foreign Acquisition

FAR Part 25 is titled "Foreign Acquisition." However, a large portion of **Part 25** deals with preferences for "domestic end products" imposed by the Buy American Act. That makes it very important to understand how to determine whether an end product is considered "domestic" or foreign. The FAR's discussion of the BAA takes up three of **Part 25**'s eleven Subparts.

The rest of **Part 25** discusses contract performance outside the U.S., prohibited sources, and how to incorporate international agreements into U.S. Government contracts. Note that (except where otherwise indicated) all other FAR Parts still apply under **Part 25** procurements. This means contractors can't avoid ethics or competition requirements, for example, by performing a contract outside the U.S. **Part 25** operates in concert with, not in place of, the rest of the FAR.

Question 1 – What is the definition of a “*Manufactured End Product*”? Provide an example of an item that might be considered a “*Manufactured End Product*”. [Hint: Check out **FAR 52.225-18**]

A. The Buy American Act

As we have noted, one of the major topics addressed in **Part 25** is how the U.S. Government distinguishes between domestic and foreign end products. But, within this topic, did you know there is an important distinction between a “domestic” and “U.S.-made” end product? The first term, “domestic end product,” is an important part of the Buy American Act and applies a “component test,” which we will discuss later. The “U.S.-made end product” definition is an important part of the Trade Agreements Act (“TAA”) and incorporates a different test, called the “substantial transformation test,” to determine country of origin.

Question 2 – What four statutes and/or executive orders are implemented by the rules set forth in FAR 25.1? When does an executive order expire/terminate?

The BAA states the general policy that the Government should procure only domestic end products if those products are going to be for public use inside the U.S. **25.102**. However, sometimes this simply isn’t practical. Moreover, the Act is not an absolute prohibition – instead it serves as a domestic price preference.

For purposes of compliance with the rules set forth in **FAR 25.1**, some supplies are deemed “non-available” as a domestic end product; **25.104(a)** contains an exhaustive list of those supplies. This list is published in the *Federal Register* for public comment at least once every five years. **25.104(b)**.

The mandate to buy only domestic end products may also be “waived” if the CO determines that the cost of the domestic end product will be “unreasonable.” **25.105** outlines the process a CO must use to determine cost reasonability, and sets forth the specific price differences that are considered “unreasonable.” Note that the BAA does not necessarily apply to *every* foreign offer! We will explore this topic more in Part C, but for now, just keep that little fact in the back of your mind.

Question 3 – For civilian agency procurements, if the lowest offer is not a **domestic** offer, and the restrictions of the BAA apply to that offer, what must the CO do to determine whether the domestic offer is reasonable? [Hint: check out **25.105(b)**]

Why did we limit the question to civilian agency procurements? Because the Department of Defense applies a much larger price differential to determine “reasonableness.” Specifically, the Defense FAR Supplement provides for a 50% increment to be added to the foreign offer before it can find the domestic offer unreasonable in comparison. That’s a pretty big impact! Clearly, for DoD, the domestic preference expressed the Buy American Act is supplemented by national defense concerns. **DFARS 225.105** (Most provisions in DoD and agency supplements are outside the scope of this manual, but we felt that the substantially higher price penalty imposed on foreign end products by DoD was important to mention.)

Subpart 25.5 delves deeply into the issues surrounding the evaluation of foreign offers for supply contracts. Interestingly, this Subpart applies to every single line item of an offer, unless the solicitation says otherwise. **25.501(a)**. Note that international agreements, which we will discuss later, change how this Subpart applies; if an international agreement is in place, this Subpart might not come into play at all. **25.502(b) and (c)**.

What happens if there’s a tie? In sporting events, the teams usually play an overtime period, or perhaps a shoot-out. But we don’t want to have to do that in a procurement, do we? Fortunately, the FAR provides guidance for us in this area in **25.502(d)**. The main thrust of that subsection is to prefer the domestic offer—a preference that probably doesn’t surprise you at this point. However, it also provides other tie-breaking processes, such as an impartial drawing when one low offer is domestic and the other low offer is from a country covered by an international agreement. **25.502(d)(2)**.

Question 4 – Unless agency regulations indicate otherwise, in what order must a CO perform when evaluating foreign offers? [Hint: check out **25.502(a)**]

Subpart 25.503 is all about something called a group offer. A group offer is what happens when a solicitation or offer specifies that award may be made only to a group of line items, or only to all line items in the solicitation or offer. In other words, the source selection authority may not pick and choose among offers or among line items in an offer. That doesn't sound so difficult by itself, but when we consider how other portions of **Part 25** play into this, it can get sticky. For example, COs have to determine whether the same evaluation factors apply to every single line item in the solicitation or offer. They can't just slap one evaluation factor on the entire solicitation or offer. **25.503(b)**. Additionally, COs have to reject any offer that incorporates prohibited end products or that steps on any international trade agreements. **25.503(a)**. In other circumstances, the CO might award parts of the contract to various offerors, but that is not the case here.

Subpart 25.504 is perhaps one of the most practical portions of **Part 25**, since it deals entirely with evaluation examples. We don't have the space to put the examples in here, but you should definitely read through them! They are extremely helpful when you have questions about how the evaluation factors actually work in practice.

To this point, we've talked solely about supplies, which do not include construction materials. The rules regarding construction materials are found in **25.2**. These rules are largely similar to those for supplies, which we've been discussing. However, there are additional requirements if a CO wants or needs to purchase foreign construction materials. If a CO needs to acquire foreign construction materials for use in a building on U.S. soil, the CO must make a written determination and findings which lists the specific materials that will be excepted from the domestic requirements. Additionally, the agency must make those findings available to the public for inspection. **25.202(b)**. If the CO ends up awarding the contract to an offeror that will be using foreign materials that were *not* in the original exception list, the CO must add those materials to that list using a contract clause. Otherwise, those materials will be considered unauthorized foreign materials and may be subject to removal or other penalties, in line with the noncompliance procedures in **25.206. 25.204(d)**.

Like other supplies, construction materials must be priced reasonably. Buying domestic materials is desirable, but not if it results in a terribly overpriced contract! COs evaluate price reasonableness for construction materials in the same way they evaluate other supplies, although for construction materials there is only one evaluation threshold, rather than a higher threshold when the domestic offeror is a small business concern. **25.204(b)**. Note that offerors can also submit alternate offers based on domestic construction materials that are equivalent to the foreign materials in their original offer. In that way, they can avoid having their offers rejected outright. **25.204(c)**.

Question 5 – Suppose the CO rejected Wreck-It Ralph’s offer, which was the lowest-price offer but used foreign construction materials, because the CO determined that the BAA applied and no exception was appropriate. Now Ralph has found out that the contract was awarded to Fix-It Felix, whose proposal promised to use only domestic construction materials, but at a much higher cost than Ralph’s offer. Ralph believes that the CO should have made a determination that the BAA exception for unreasonable cost applied, because a BAA exception normally applies in situations like this. What can Ralph do? Is he just out of luck? [Hint: check out **25.205**]

Final Note on the BAA. When speaking about the Buy American Act, it is important to include the “n” at the end of the word American. There is a separate body of transportation-specific trade regulations known as “Buy America” focused on ensuring that the metal used in transportation projects has a domestic source.

B. Contract Performance Outside the U.S.

The previous section dealt solely with using foreign materials in contracts performed inside the U.S. But what about contracts that will be performed outside the U.S.? **Subpart 25.3** outlines the rules to be used in those cases. It divides the potential situations into two categories: contractor personnel in designated operational areas or in support of diplomatic or consular missions, and contractor performance of private security functions.

We’ll start our discussion in **25.301**, which details the treatment of contractor personnel who are not performing security or paramilitary functions. **25.301-1** indicates that this subsection applies to any non-combat contractor personnel who are required to perform a contract in a designated operational area or another dangerous situation. Note that contractors are usually required to provide their own logistical and security support, which includes protecting their employees. However, in some cases, an agency may be markedly better equipped to deal with threats to the safety of contractor employees. In that case, the CO must specify how, when, and where agency support will be used. **25.301-2**.

Question 6 – Under what circumstances should the *Contractor Personnel in a Designated Operational Area or Support a Diplomatic or Consular Mission* clause be included in a contract? [Hint: check out **25.301-4**]

What about contractors who are performing private security functions? Some of us probably think of the Blackwater scandal when we think of private security contractors. That situation is indeed what this subsection addresses. **25.302**. Note, however, that this subsection does not apply to the intelligence community or to temporary arrangements between a non-DoD entity and individual indigenous personnel (e.g., an individual person not employed by any security company). **25.302-3(d)**. Any contractor performing private security functions has a laundry list of responsibilities it must fulfill. **25.302-4(a)(1)**. We can find those responsibilities, as well as training, equipment, and conduct criteria, at **32 C.F.R. 159**. Contractors are also required to comply with any Government-authorized investigation into incident reports and allegations of misconduct. **25.302-4(a)(2)**. Geographic combatant commanders provide guidance to DoD contractors that are performing private security functions. **25.302-4(b)(1)**. The relevant Chief of Mission provides guidance to non-DoD contractors which are performing private security functions. **25.302-4(b)(2)**.

C. Trade and Import Issues and International Agreements

We have briefly mentioned trade and other international agreements in the above sections. Here, we will explore what that actually means. The U.S. has a number of Free Trade Agreements (FTAs) with many other countries, which the TAA folds into U.S. law. We sometimes call these agreements “Most Favored Nation” agreements. Said simply, the U.S. has negotiated treaties that give products from certain “favored” countries equal footing with U.S. products, and the FAR includes provisions that implement these treaty obligations. Giving preference to U.S. products over offers from countries covered by an FTA would be a violation of the most basic principles of an FTA. Thus, different rules apply to those countries, as we have noted previously. **Subparts 25.4 and 25.8** deal with the interaction of FTAs and the rules in **Part 25**; **Subpart 25.9** deals with customs and duties. **Subparts 25.10 and 25.11** are sort of catch-all subparts that tie up additional loose ends.

Subsection **25.400** contains a list of countries and organizations with which the U.S. has an FTA or similar instrument, such as a trade initiative. **25.401** lists the situations in which **Subpart 25.4** does not apply. These situations include small business set-asides, acquisitions of war materials, and other acquisitions not using full and open competition (as long as they’re authorized by **Subpart 6.2 or 6.3!**). This subsection also has a handy table that indicates which agreements are not covered by **25.4**.

Interestingly, trade agreements only come into play at or above certain dollar thresholds. (For most of the agreements, the current threshold is approximately \$180,000, but it fluctuates with the exchange rate between the dollar and the Euro.) When we think about the Guiding Principles of the FAR, though, this makes sense; if COs had to consider FTAs for tiny little \$3000 acquisitions, that would be terribly inefficient, and certainly not in keeping with any of the FAR’s Guiding Principles! It is also a “carveout” in the FTAs we’ve mentioned. We can see the dollar thresholds for each trade agreement in **25.402**, in another handy table.

Question 7 – What are the specific trade agreements, initiatives, and priorities outlined in **25.403** through **25.407**? [Hint: check out the headings of each subsection!]

Question 8 – True or False? An offer cannot be submitted in a foreign language in an acquisition subject to FAR Part 25. Explain your answer.

Subpart 25.8 adds some other considerations to the trade agreements issue. Generally, it just tells COs to find out whether any international agreements exist that might affect a given procurement, and to plan the acquisition accordingly. **25.802(a)**. **Subpart 25.9** allows Government agencies to obtain exemptions from various import duties, because it doesn't really make sense for a U.S. Government agency to pay duties to the U.S. Government! That would be inefficient for a variety of reasons, all of them in direct conflict with the Guiding Principles of the FAR. We're sure you can think of several off the top of your head. **25.903** tells us where to find a list of supplies that are automatically exempted from U.S. duties and tariffs.

Question 9 – Where can we find this fabled list of exempted supplies?

Subpart 25.10 is, as we noted, mostly a big catch-all Subpart. It is simply called "Additional Foreign Acquisition Regulations," and details procedures to be used when waiving the right to examine records and when using foreign currency. **Subpart 25.11** tells us which contract clauses to insert in the contracts this Part has discussed.

D. Prohibited Sources

The Government has deemed certain sources so deleterious to the U.S. that it prohibits dealing with any of those sources. Such sources can include countries, companies, and even individual people. **Subpart 25.7** implements these prohibitions. The Office of Foreign Asset Control (OFAC), an office of the Department of the Treasury, administers economic sanctions against various sources. **25.700(a)**. The specific sanctions vary from time to time, so OFAC keeps [updated guidance](#) on its website, as well as a [comprehensive list of prohibited entities and individuals](#). In general, it's pretty safe to assume that any transaction involving Cuba, Iran, or Sudan will be prohibited, and so will most imports from Burma/Myanmar and North Korea. **25.701(b)**. But stay tuned and don't forget to check the official OFAC website – <http://www.treas.gov/offices/enforcement/ofac> – before entering into a contract with a foreign government, company, or individual as things change almost on a daily basis!

Question 10 – Identify one Russian company or individual who is currently on the OFAC Specially Designated Nationals or Blocked Person List.

Discussion Questions

1. What is “substantial transformation,” and how does it relate to foreign acquisition? [Hint: check out **25.001**]

2. How much of a cost preference do non-DOD contracts give to small businesses? What about large business (FUN FACT: DoD contracts use a different – and uniform – cost preference)? [Hint: check out **25.105**]

3. What is the TAA Service Contract threshold for a contract covered by the Australia FTA? How does that change if it’s a small business set-aside. [Hint: check out **25.401 & the charts at 25.402**]

4. Which Subpart of FAR Part 25 apply to contracts for services to be performed outside of the United States? [Hint: check out **25.002**]

5. How does Buy American’s evaluation factors handle a comparison between two foreign offers? [HINT: check out **25.501**]

6. What does one mean by the term “prohibited transactions” in the context of OFAC regulations?
[Hint: check out the Resources]

7. True or False? All federal government contracts require the submission of offers in U.S currency.
Explain your answer.

Answer Key

Answer 1 – Any end product in product and service codes (PSCs) 1000-9999. Includes home appliances or tools.

Answer 2 –

- (1) 41 U.S.C. chapter 83, Buy American;
- (2) Executive Order 10582, December 17, 1954;
- (3) Executive Order 13881, July 15, 2019; and
- (4) Waiver of the domestic content test of the Buy American statute for acquisition of commercially available off-the-shelf (COTS) items in accordance with 41 U.S.C. 1907

Executive orders, once issued, remain in force until they are canceled, revoked, adjudicated unlawful, or expire on their terms.

Answer 3 – If there is a domestic offer that is not the low offer, and the restrictions of the Buy American statute apply to the low offer, the contracting officer must determine the reasonableness of the cost of the domestic offer by adding to the price of the low offer, inclusive of duty-

- (1) 20 percent, if the lowest domestic offer is from a large business concern; or
- (2) 30 percent, if the lowest domestic offer is from a small business concern.

Answer 4 – Unless otherwise specified in agency regulations, perform the following steps in the order presented:

- (1) Eliminate all offers or offerors that are unacceptable for reasons other than price; e.g., nonresponsive, debarred or suspended, or a prohibited source (see subpart 25.7).
- (2) Rank the remaining offers by price.
- (3) If the solicitation specifies award on the basis of factors in addition to cost or price, apply the evaluation factors as specified in this section and use the evaluated cost or price in determining the offer that represents the best value to the Government.

Answer 5 – If a contractor requests a determination regarding the inapplicability of the Buy American statute after contract award, the contractor must explain why it could not request the determination before contract award or why the need for such determination otherwise was not reasonably foreseeable.

Answer 6 – When supporting a diplomatic or consular mission–

- (1) That has been designated by the Department of State as a danger pay post (see <https://aoprals.state.gov/>); or

(2) That the contracting officer determines is a post at which application of the clause FAR 52.225-19, Contractor Personnel in a Designated Operational Area or Supporting a Diplomatic or Consular Mission outside the United States, is appropriate

Answer 7 – The correct answer is the WTO GPA, the U.S. Free Trade Agreement, the Caribbean Trade Initiative, the Israeli Trade Act, and Agreement on Trade in Civil Aircraft.

Answer 8 – False. A proposal may be submitted in a foreign language provided it is not prohibited by the terms of a solicitation. See FAR 25.1103(b) and (c).

Answer 9 – Subchapters VIII and X of Chapter 98 of the Harmonized Tariff Schedule of the United States (19 U.S.C. 1202).

Answer 10 – 27TH SCIENTIFIC CENTER Brigadirskiy Pereulok 13.

Discussion Questions Answer Key

1. Under the trade agreements, the test to determine country of origin is "substantial transformation" (i.e., transforming an article into a new and different article of commerce, with a name, character, or use distinct from the original article).
2. (1) 20 percent, if the lowest domestic offer is from a large business concern; or
(2) 30 percent, if the lowest domestic offer is from a small business concern.
3. \$92,319. It does not apply to set asides for Small Business.
4. 25.3, 25.4, 25.5, 25.7, 25.8, 25.10, 25.11.
5. (a) Must apply the evaluation procedures of this subpart to each line item of an offer unless either the offer or the solicitation specifies evaluation on a group basis (see 25.503);
(b) May rely on the offeror's certification of end product origin when evaluating a foreign offer;
(c) Must identify and reject offers of end products that are prohibited in accordance with subpart 25.7; and
(d) Must not use the Buy American statute evaluation factors prescribed in this subpart to provide a preference for one foreign offer over another foreign offer.
6. They are trade or financial transactions or other dealing where US persons may not engage in unless authorized by OFAC.
7. False. Unless an international agreement or the WTO GPA (see 25.408(a)(4)) requires a specific currency, contracting officers must determine whether solicitations for contracts to be entered into and performed outside the United States will require submission of offers in U.S. currency or a specified foreign currency

APPENDIX

All of the following materials are linked and can be found via the Links Document or online.

[Crowell Moring Ongoing DoD Fraud Risk](#)

An article by Crowell Moring regarding a report by the GAO examining risks posed to the Department of Defense by contractors with “opaque ownership,” including financial and nonfinancial fraud and national security risks. The report found evidence that opaque ownership structures have been used to fraudulently inflate pricing and circumvent set-aside eligibility requirements in DoD procurements, as well as other serious risks.

[OFAC FAQs](#)

Basic information on the Office of Foreign Assets Control and the economic sanctions programs the office administers and enforces. The Frequently Asked Questions document goes through the basics of OFAC, how sanctions work, and specifics into how certain sanctions apply to specific nation-states.

Sheppard Mullin – [BAA](#) and [TAA/TAA](#) Guidance

This article proposes 15 tips for navigating the “Buy American Act” for government contractors. The Buy American Act has various requirements and the tips review the relevant law, regulations, and guidance including details regarding country of origin, certification, and differences with the Trade Agreements Act.

[Information on EO 13881](#)

[Information on EO 14005](#)

FUN WITH THE FAR
Episode 15
FAR Part 25
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