

Subchapter 3025.1 Buy American—Supplies

3025.103 Exceptions.

(a) *Public Interest.* The determination may only be made by the Secretary. The determination request shall be concurred by the HCA and submitted for CPO review and concurrence. The contracting officer shall submit the request using the DHS Buy American Reporting Tool. The request shall include a discussion of whether a significant portion of the cost advantage of a foreign-sourced product is the result of the use of dumped steel, iron, or manufactured goods or the use of injuriously subsidized steel, iron, or manufactured goods, and shall integrate any findings as appropriate.

(b) *Nonavailability (see FAR Class Deviation 22-04 Requirements for Nonavailability Determinations Under the Buy American Statute).*

(1) *Class nonavailability determinations.*

(iv) *Documentation requirements.* Before acquisition of an item on the list of nonavailable articles at FAR 25.104, contracting officers shall ensure the market research conducted to confirm the article is nonavailable, including actions taken to seek domestic sources, is documented in writing in the market research report or other appropriate document. This documentation is required to be included in the contract file.

(2) *Individual nonavailability waiver determinations.*

(i) The nonavailability waiver determination shall be concurred by the HCA, approved by the CPO, and reviewed by the Made in America Office (MIAO) within the Office of Management and Budget (OMB) before award is made. The determination shall be concurred by the HCA and approved by the CPO. The contracting officer shall submit the request for an approval using the DHS Buy American Reporting Tool.

(iii) Once approved by the CPO, Acquisition Policy and Legislation (APL) will submit the determination to the MIAO for review.

(D)(I) Nonavailability waiver determinations shall be submitted to the CPO for review and approval within 15 days of contract award to meet the 30-day waiver submission timeline required by the joint MIAO and Office of Federal Procurement Policy Memorandum titled “Improving the Transparency of Made in America Waivers,” dated October 26, 2021;

(c) *Unreasonable cost.* The determination shall be concurred by the HCA and approved by the CPO. The contracting officer shall submit the request for an approval using the DHS Buy American Reporting Tool.

(d) *Resale*. The determination shall be concurred by the HCA and approved by the CPO. The contracting officer shall submit the request for an approval using the DHS Buy American Reporting Tool.

3025.103-70 Documentation Requirements.

For documentation requirements applicable when the exception at 3025.103(b)(2) results in a justification for other than full and open competition under FAR 6.302 or a sole source justification under FAR 13.501(a), see HSAM 3006.304(e) and 3013.501(a)(3). When the exception at 3025.103(b)(2) does not result in a justification for other than full and open competition under FAR 6.302 or a sole source justification under FAR 13.501(a), the determination shall be documented using Appendix AA Template for Individual or Class Determination and Findings (D&F) For Domestic Nonavailability Exceptions to the Buy American Act. Determinations required for the exceptions in HSAM 3025.103(a), (c) and (d) shall be documented using the Determination and Findings format in FAR 1.704.

3025.104 Reserved.

3025.105 Determining reasonableness of cost.

(a)(1) The HCA is delegated the authority to determine that the use of factors higher than 6% and 12% for FAR 25.105(b)(1) and (2), respectively, is more appropriate for an acquisition. Once approved by the HCA, the contracting officer shall transmit the determination to use the higher factors to the CPO using the DHS Buy American Reporting Tool. If a higher factor is used, the contracting officer shall note the use of the higher factor by altering paragraph (c) of the provision at FAR 52.225-2, Buy American Certificate, or paragraph (d) of the provision at FAR 52.225-4, Buy American—Free Trade Agreements—Israeli Trade Act Certificate, to identify the factor(s) that will be used instead of the factors shown in FAR 25.105(b)(1) and (2).