



DHS Compliance with the Buy American Act and Kissell Amendment

October 15, 2018

Fiscal Year 2018 Report to Congress



**Homeland
Security**

Under Secretary for Management

Message from the Deputy Under Secretary for Management

October 15, 2018

I am pleased to present the following report, “DHS Compliance with the Buy American Act and Kissell Amendment,” which has been prepared by the Department of Homeland Security (DHS) Office of the Chief Procurement Officer (CPO).



This report responds to language in the Joint Explanatory Statement and House Report 115-239, both of which accompany the Fiscal Year 2018 DHS Appropriations Act (P.L. 115-141). DHS is committed to ensuring compliance with the Buy American Act (BAA) and the Kissell Amendment. In fact, although the U.S. Government Accountability Office (GAO) confirmed DHS compliance with the Kissell Amendment in its most recent report, DHS reinforced its oversight and accountability to emphasize the importance of both the BAA and Kissell Amendment.

Pursuant to congressional requirements, this report is being provided to the following Members of Congress:

The Honorable Kevin Yoder
Chairman, House Appropriations Subcommittee on Homeland Security

The Honorable Lucille Roybal-Allard
Ranking Member, House Appropriations Subcommittee on Homeland Security

The Honorable Shelley Moore Capito
Chairman, Senate Appropriations Subcommittee on Homeland Security

The Honorable Jon Tester
Ranking Member, Senate Appropriations Subcommittee on Homeland Security

Inquiries relating to this report may be directed to the DHS Office of Legislative Affairs, at (202) 447-5890.

Sincerely,

A handwritten signature in black ink, appearing to read 'Chip Fulghum', followed by a long horizontal line extending to the right.

Chip Fulghum
Deputy Under Secretary for Management

Executive Summary

DHS adheres to U.S. Government-wide policies and procedures in Federal Acquisition Regulation Part 25, *Foreign Acquisition*, which implement the BAA, the World Trade Organization (WTO) Government Procurement Agreement (GPA) approved by Congress, the various free trade agreements (FTA), and other related initiatives and agreements. The Homeland Security Acquisition Regulation implements statutes and other matters unique to DHS, such as the Kissell Amendment, which addresses textiles. It is important to note that GAO recently assessed DHS's compliance with the Kissell Amendment. The final report, titled *Government Procurement: Effect of Restriction on DHS's Purchasing of Foreign Textiles Is Limited* (GAO-18-116, dated November 21, 2017), did not identify any findings or recommendations to improve DHS's implementation of the Kissell Amendment. Nevertheless, in recognition of the importance and complexity of the BAA, Kissell Amendment, and associated laws and regulations, DHS has taken significant steps over the past year to strengthen further its acquisition practices and oversight. Although these steps are discussed in detail later in this report, a high-level summary is provided below:

- Developed and delivered two comprehensive webinars covering BAA, WTO GPA, FTAs, the Kissell Amendment, regulations applicable to DHS, proper identification of applicable contract clauses, and accurate reporting of BAA waivers in the Federal Procurement Data System-Next Generation.
- Updated Chapter 3025, *Foreign Acquisition*, of the Homeland Security Acquisition Manual to:
 - Elevate approval levels of certain BAA waivers from the Head of the Contracting Activity or Contracting Officer to the DHS CPO;
 - Require Secretary approval for use of the public interest waiver; and
 - Create an electronic repository where all BAA waivers that require review and approval by the CPO or Secretary will be maintained.



DHS Compliance with the Buy American Act and Kissell Amendment

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I. Legislative Language

This report has been prepared pursuant to language in both the Joint Explanatory Statement and House Report 115-239, both of which accompany the Fiscal Year (FY) 2018 Department of Homeland Security (DHS) Appropriations Act (P.L. 115-141).

The Joint Explanatory Statement states:

The Secretary is directed to take immediate steps to increase the share of American-made products in its procurements and to provide a report to the Committees, not later than 180 days after the date of enactment of this Act, on any obstacles to the Department's ability to transition to procuring 100 percent American-manufactured goods. The report should also propose solutions to any such obstacles and detail progress the Department is making toward increasing its utilization of American goods.

The Joint Explanatory Statement also states:

Additionally, the Department shall provide a report not later than 90 days after the date of enactment of this Act on DHS's compliance with the Buy American Act and Kissell Amendment, as detailed in the House report.

House Report 115-239 states:

The Committee directs DHS to provide a report not later than 90 days after the date of enactment of this Act describing in detail how it is complying with the Buy American Act and Kissell Amendment including what measures it is taking to ensure compliance. The report shall also include the following: the total number of uniforms purchased in fiscal year 2016 and fiscal year 2017; the estimated cost for uniforms to be manufactured and produced outside and inside the United States; and status of all contracts for uniform procurement.

II. BAA Compliance and Training

DHS adheres to Federal Acquisition Regulation (FAR) Part 25, *Foreign Acquisition*, which details the application of the Buy American Act (BAA) and Trade Agreements Act (TAA), including the dollar thresholds at which the TAA supersedes the BAA and nondomestic trading partners receive equal treatment with domestic sources. DHS has a supplement to the FAR, known as the Homeland Security Acquisition Regulation (HSAR), which addresses statutes and other matters unique to DHS, such as the Kissell Amendment. The Homeland Security Acquisition Manual (HSAM)—DHS’s internal acquisition policies and procedures—implements or supplements requirements of the FAR and HSAR. The related HSAR and HSAM sections are provided as appendices to this report.

In recognition of the importance and complexity of the BAA and associated laws and regulations, DHS has taken several significant steps to strengthen its acquisition practices and oversight in this area. In December 2017, DHS updated Chapter 3025, *Foreign Acquisition*, of the HSAM. The update increases the FAR approval level for BAA exceptions from the contracting officer or Head of Contracting Activity to the DHS Chief Procurement Officer (CPO) for purchases from a nondomestic source when, for instance, domestic sources either are not available or are available at an unreasonable cost. Also, the HSAM now requires CPO concurrence and Secretary approval of any determination that domestic preferences would be inconsistent with the public interest. To enhance oversight further, the CPO established the DHS BAA reporting tool as the repository for all DHS BAA exceptions requiring approval by the CPO.

Furthermore, to ensure that the DHS acquisition workforce is fully aware of the BAA and associated laws and regulations, DHS has created comprehensive training. The training is mandatory for all individuals in the contracting job series. More than 94 percent of the DHS contracting workforce completed the training in FY 2018. DHS also developed the online training *Buy American Laws Awareness Training for Purchase Card Holders and Supervisors*. The training promotes basic awareness of and compliance with BAA laws and regulations. The target audience for this training is purchase card holders, their supervisors, and other personnel in a noncontracting job series.

III. Kissell Amendment Compliance

In August 2009, DHS updated the HSAR to incorporate the requirements of the Kissell Amendment. The HSAR details the restriction on procurements of foreign textiles, provides a list of the types of textile items included in the restriction (e.g., yarn, wool, and cotton), identifies the exceptions noted in the Kissell Amendment, and provides details on the specific application of trade agreements. Additionally, HSAR clause 3052.225-70, Requirement of Use of Certain Domestic Commodities, was added to require the use of domestic goods for any procurement of a Kissell-covered item. The clause must be included in solicitations, the exercise of an option, contract modifications that add new items (or that make a significant change), and contracts with a value exceeding the simplified acquisition threshold unless an exception applies.

In addition to updating the HSAR, DHS issued two HSAR Class Deviations on the applicability of the Kissell Amendment. HSAR Class Deviation, *Applicability of the “Kissell Amendment” to Department of Homeland Security Acquisitions*, dated March 5, 2013, communicates that DHS interprets the Kissell Amendment to be permanent and not just applicable to American Recovery and Reinvestment Act awards. HSAR Class Deviation 13-01, *Amendment 1 - Homeland Security Acquisition Regulation 3052.225-70, Requirement for Use of Certain Domestic Commodities*, dated March 14, 2013, provides additional clarifications on the implementation of the Kissell Amendment. Both deviations are provided as appendices to this report.

The U.S. Government Accountability Office (GAO) recently assessed DHS’s implementation of and compliance with the Kissell Amendment and did not identify any findings or recommendations to improve DHS’s implementation of the Kissell Amendment. In its final report titled, *Effect of Restriction on DHS’s Purchasing of Foreign Textiles Is Limited* (GAO-18-116, dated November 21, 2017), GAO found that DHS has updated its policies and procedures appropriately to incorporate the Kissell Amendment and found that the Kissell Amendment restrictions were included in the files that they reviewed. Furthermore, compliance is reinforced through DHS’s acquisition review process (a requirement for all DHS Components to use Department-wide contracts), verification procedures, and training for contracting personnel.

IV. Uniform Purchases

The Kissell Amendment generally requires DHS to procure textile items, including uniforms directly related to national security interests, from domestic sources. However, it includes a significant caveat that requires DHS to apply the Kissell Amendment “...in a manner consistent with United States obligations under international agreements.” The free trade agreements (FTA) entitle parties to the agreements nondiscriminatory treatment and access to U.S. Government procurement contracts. All DHS Components, including the Transportation Security Administration (TSA) and U.S. Customs and Border Protection (CBP), are covered under multiple international trade agreements. As a result, DHS uniforms include items that are manufactured domestically and other items that are manufactured nondomestically.

To ensure compliance with the Kissell Amendment, DHS uses a strategically sourced single award, indefinite-delivery/indefinite-quantity (IDIQ) contract, managed by CBP, to fulfill the uniform needs of the Department. The contract is mandatory for use (with limited exceptions) by CBP, the Federal Emergency Management Agency, the Federal Law Enforcement Training Centers, U.S. Immigration and Customs Enforcement, the National Protection and Programs Directorate (which includes the Federal Protective Service), TSA (which includes the Federal Air Marshal Service), U.S. Coast Guard, and U.S. Secret Service. The U.S. Food and Drug Administration also may use this contract for its uniform purposes. The FY 2016 and 2017 uniform cost data provided in this report represent the Department’s estimated spending under this contract.

A. Total Number of Uniforms Purchased in FY 2016 and FY 2017

DHS does not purchase uniforms on a “total uniform” basis under its strategically sourced uniform contract. Instead, DHS allows its officers and agents to order the specific uniform items needed. For example, an officer or agent can order a single uniform item in multiple quantities or any combination of uniform items in varying quantities. Currently, 1,400 different uniform items are under the contract, and, on average, 2,256,500 uniform items are ordered annually. Of these items, approximately 44 percent are manufactured in the United States with the remaining 56 percent manufactured outside the United States.¹ Generally, a uniform item offered under the contract is manufactured either domestically or nondomestically. This is because DHS includes the best-priced item that meets DHS needs on the contract. Therefore, a complete uniform will be made up of both domestically and nondomestically manufactured items. Additionally, per-unit costs vary greatly from uniform item to uniform item. For example, customized or more complex uniform items require more labor hours to produce and are therefore priced higher. As a result, any bulk cost per item computations using the spending data in sections B and C below will be distorted. In other words, it would be inaccurate to conclude, based on the spending data below, that uniforms manufactured in the United States are less expensive than uniforms manufactured outside the United States.

¹ It is estimated that for uniform items manufactured outside the United States, 80 percent of the fabric is from the United States.

B. Estimated Cost of Uniforms Manufactured In the United States

Fiscal Year	Estimated Cost ²
2016	\$24,577,770
2017	\$30,928,634

C. Estimated Cost of Uniforms Manufactured Outside the United States

Fiscal Year	Estimated Cost ³
2016	\$39,490,511
2017	\$40,237,101

D. Status of Uniform Contract

The current uniform contract awarded to VF Imagewear Inc. expires on September 11, 2019. The contractor is meeting the needs of DHS. DHS is recompeting the DHS-wide uniform contract and is on track to award it prior to the expiration of the current contract.

² Source: Current uniform contract spend data.

³ Source: Current uniform contract spend data.

V. BAA and Kissell Amendment - Obstacles and Solutions

DHS procurements of personal protective equipment, organizational clothing, and individual equipment are compliant with both governmentwide and Department-specific requirements. These requirements include the FAR that implements the BAA and TAA, the HSAR that implements the Kissell Amendment, and the Department's internal acquisition policies and procedures known as the HSAM. The requirement to comply with the BAA is superseded by the TAA at certain thresholds. The TAA requires nonpreferential treatment between U.S. products and products of countries participating in the World Trade Organization (WTO) Government Procurement Agreement (GPA) and FTAs. Because the thresholds at which the WTO GPA and FTAs apply are relatively low, the TAA is often applicable to DHS procurements. Even the Kissell Amendment directs DHS to apply it to textile procurements, such as uniforms, "...in a manner consistent with United States obligations under international agreements." As a result of the application of the TAA, DHS generally awards the procurement to the vendor that supplies the product that meets DHS's needs at the best price.

Despite the complex statutory construct that drives many federal procurements to compliance with the TAA, the Department has taken significant steps to increase the share of American-made goods in its procurements. For example, the TAA does not apply to small business set-asides, so these contracts are restricted to domestic manufacturers. Therefore, when appropriate, DHS seeks to establish small business set-asides to fulfill its needs. DHS issued a multiple-award IDIQ contract for body armor where all of the items available for purchase are manufactured in the United States. These contracts were awarded under a small business set-aside to three U.S. small businesses and provide DHS Components with soft, torso-protecting, concealable body armor; carry bags; outer carriers; modular pouches; and moisture-wicking undergarments. Other federal agencies approved by CBP may purchase items from these contracts as well.

While the DHS uniform contract is not appropriate for a small business set-aside, DHS remains interested in domestically sourcing a larger percentage of DHS uniforms. Therefore, DHS engaged in extensive market research to understand U.S.-based uniform manufacturing capabilities better. As part of the market research, DHS hosted meetings with uniform manufacturers, distributors, and fabric mills with domestic production and sourcing knowledge. These meetings, held with both large and small businesses, were designed to expand DHS's understanding of the capabilities, capacity, and interest of domestic uniform manufacturers to support more domestic sourcing of DHS uniform requirements, without compromising operational readiness. Participants were provided uniform specifications, photos, and volume data for representative uniform items from the current uniform contract.

Several key themes emerged from the discussions. While the companies generally indicated that they had the capability to provide domestically manufactured uniform items, they also indicated that domestic manufacturing would increase labor costs substantially over nondomestic manufacturing labor costs. Companies also identified some factors that might offset the

potentially higher costs of domestic manufacturing, including automation as well as tariffs, which add to the cost of nondomestic finished goods. The companies explained that the more complex the uniform item or the more customization required to meet DHS needs, the more that labor, a significant cost-driver, is involved. Companies expressed significant concern regarding low-volume uniform items and inconsistent demand across DHS. Unpredictable demand coupled with low volume posed a serious concern to companies with respect to maintaining a production line. There was also discussion as to whether they could make the case within their company that the contract would be sufficiently lucrative.

DHS would welcome the opportunity to brief committee and subcommittee staff on its market research. DHS will continue to explore ways to increase the share of American-made uniforms and other goods in its procurements, while complying with the BAA, WTO, TAA, and Kissell Amendment.

VI. Appendices

Appendix A. HSAR Part 3025 *Foreign Acquisition*

PART 3025 FOREIGN ACQUISITION

Subpart 3025.70 American Recovery and Reinvestment Act Restrictions on Foreign Acquisition

3025.7000	Scope of subpart.
3025.7001	Definitions.
3025.7002	Restrictions on clothing, fabrics, and related items.
3025.7002-1	Restrictions.
3025.7002-2	Exceptions.
3025.7002-3	Specific application of trade agreements.
3025.7003	Contract clauses.

Subpart 3025.70 American Recovery and Reinvestment Act Restrictions on Foreign Acquisition

3025.7000 Scope of subpart

This subpart contains restrictions on the acquisition of certain foreign textile products imposed by the American Recovery and Reinvestment Act of 2009 on contracts, exercising of an option and orders entered into on or after August 16, 2009 with funds appropriated or otherwise provided on or before February 17, 2009.

3025.7001 Definitions

As used in this subpart—

- (a) "Commercial," as applied to an item described in (HSAR) 48 CFR 3025.7002-1, means an item of supply, whether an end product or component, that meets the definition of "commercial item" set forth in (FAR) 48 CFR 2.101.
- (b) "Component" means any item supplied to the Government as part of an end product or of another component.
- (c) "End product" means supplies delivered under a line item of a contract.
- (d) "Non-commercial," as applied to an item described in (HSAR) 48 CFR 3025.7002-1, means an item of supply, whether an end product or component, that does not meet the definition of "commercial item" set forth in (FAR) 48 CFR 2.101.

(e) “Item directly related to national security interests” means an item intended for use in a Department of Homeland Security action protecting the nation from internal or external threats, including protecting the nation's borders, transportation system, maritime domain or critical infrastructure, as determined by the contracting officer.

3025.7002 Restrictions on clothing, fabrics, and related items.

3025.7002-1 Restrictions

The following restrictions implement section 604 of the American Recovery and Reinvestment Act of 2009 and they apply to all types of actions, orders, exercising of an option and contracts. Except as provided in subsection (HSAR) 48 CFR 3025.7002-2, do not acquire, either as end products or components, any item listed in paragraphs (a) or (b) of this section, if the item is directly related to the national security interests of the United States and the item has not been grown, reprocessed, reused, or produced in the United States:

(a) Commercial or non-commercial items--(1) Clothing and the materials and components thereof, other than sensors, electronics, or other items added to, and not normally associated with, clothing (and the materials and components thereof); or (2) Tents, tarpaulins, covers, textile belts, bags, protective equipment (such as body armor), sleep systems (sleeping bags), load carrying equipment (such as field packs), textile marine equipment, parachutes or bandages.

(b) Non-commercial items--

(1) Cotton and other natural fiber products.

(2) Woven silk or woven silk blends.

(3) Spun silk yarn for cartridge cloth.

(4) Synthetic fabric or coated synthetic fabric (including all textile fibers and yarns that are for use in such fabrics).

(5) Canvas products.

(6) Wool (whether in the form of fiber or yarn or contained in fabrics, materials, or manufactured articles).

(7) Any item of individual equipment manufactured from or containing any of the fibers, yarns, fabrics, or materials listed in this paragraph (b).

3025.7002-2 Exceptions

Acquisitions in the following categories are not subject to the restrictions in (HSAR) 48 CFR 3025.7002-1:

(a) Acquisitions at or below the simplified acquisition threshold.

(b) Acquisition of items not directly related to national security interests of the United States.

(c) Acquisitions of any of the items otherwise covered by (HSAR) 48 CFR 3025.7002-1, if the Chief Procurement Officer determines that the item grown, reprocessed, reused, or produced in

the United States cannot be acquired as and when needed in a satisfactory quality and sufficient quantity at United States market prices. When this exception is used--

(1) Only the DHS Chief Procurement Officer is authorized to make the domestic nonavailability determination.

(2) The DHS Component, not later than 7 days after the award of the contract, must post a notification that the exception has been applied on the Government-wide point of entry, which may be combined with any synopsis of award.

(3) The supporting documentation for the CPO determination prepared by the DHS Component(s) shall include--

(i) An analysis of alternatives that would not require a domestic nonavailability determination; and

(ii) A written justification by the requiring activity, with specificity, why such alternatives are unacceptable.

(d) Acquisitions of items listed in FAR 48 CFR 25.104.

(e) Emergency acquisitions by activities located outside the United States.

(f) Acquisitions by vessels in foreign waters.

(g) Acquisitions of incidental amounts of cotton, other natural fibers, wool or other item covered by (HSAR) 48 CFR 3025.7002-1(a)-(b) incorporated in an end product, for which the estimated value of the item so covered is not more than 10 percent of the total price of the end product.

(h) Acquisitions of items otherwise covered by (HSAR) 48 CFR 3025.7002-1(a) and (b) for which restricting a procurement of the items to those that have been grown, reprocessed, reused, or produced in the United States would be inconsistent with United States obligations under international agreements. Acquisitions of products that are eligible products per (FAR) 48 CFR Subpart 25.4 are not covered by these restrictions; see (HSAR) 48 CFR 3025.7003-2 for specific application of trade agreements.

3025.7002-3 Specific application of trade agreements.

(a) For covered items entitled to non-discriminatory treatment under the World Trade Organization Agreement on Government Procurement (WTO GPA), or any Free Trade Agreement (FTA) listed in (FAR) 48 CFR Subpart 25.4, this subpart is applied as follows--

(1) For solicitations, orders, exercising of an option and contracts issued by any component other than Transportation Security Administration (TSA), in which any covered items will be procured with a value that is both above the simplified acquisition threshold, and below the applicable trade agreement threshold in (FAR) 48 CFR 25.402, apply (HSAR) 48 CFR 3025.7002-1.

Section 3025.7002-2(h) will exclude eligible products of designated countries with FTA thresholds beneath the simplified acquisition threshold from coverage of section 604.

(2) For solicitations, orders, exercising of an option and contracts issued by any component other than Transportation Security Administration (TSA), in which any covered items will be procured with a value exceeding \$194,000 (or the superseding threshold upon updating of (FAR) 48 CFR 25.402), (HSAR) 48 CFR 3025.7002-1 does not apply if the items are eligible products per FAR 48 CFR Subpart 25.4; follow (FAR) 48 CFR part 25 instead.

(3) For solicitations, orders, exercising of an option and contracts issued by TSA in which any covered items will be procured with a value exceeding the simplified acquisition threshold, (HSAR) 48 CFR 3025.7002 applies to all covered items except those from Mexico, Canada or Chile because TSA is listed as a covered governmental entity in the North American Free Trade Agreement (NAFTA) and the U.S.-Chile Free Trade Agreement but TSA is excluded from all other trade agreements.

(b) For covered items from a country that is not entitled to non-discriminatory treatment under the WTO GPA, or any FTA listed in (FAR) 48 CFR subpart 25.4, apply the restrictions of (HSAR) 48 CFR 3025.7002 to all solicitations, orders, exercising of an option and contracts exceeding the simplified acquisition threshold in place of the Buy America Act policies at (FAR) 48 CFR Subpart 25.1.

3025.7003 Contract clauses.

Unless an exception under (HSAR) 48 CFR 3025.7002-2(a), (b), (e) or (f) applies, insert the clause at (HSAR) 48 CFR 3052.225-70, Requirement for Use of Certain Domestic Commodities, in solicitations, exercising of an option, contract modifications that add new items (or which make a cardinal change) and contracts with a value exceeding the simplified acquisition threshold when procuring any item covered under (HSAR) 48 CFR 3025.7002-1(a) or (b).

Appendix B. HSAR Clause 3052.225-70 *Requirement for Use of Certain Domestic Commodities*

3052.225-70 Requirement for Use of Certain Domestic Commodities.

As prescribed in (HSAR) 48 CFR 3025.7003, use the following clause:

REQUIREMENT FOR USE OF CERTAIN DOMESTIC COMMODITIES (AUG 2009)

(a) Definitions. As used in this clause--

(1) "Commercial" as applied to an item described in subsection (b) of this clause, means an item of supply, whether an end product or component, that meets the definition of "commercial item" set forth in (FAR) 48 CFR 2.101.

(2) "Component" means any item supplied to the Government as part of an end product or of another component.

(3) "End product" means supplies delivered under a line item of this contract.

(4) "Non-commercial," as applied to an item described in subsections (b) or (c) of this clause, means an item of supply, whether an end product or component, that does not meet the definition of "commercial item" set forth in (FAR) 48 CFR 2.101.

(5) "Qualifying country" means a country with a memorandum of understanding or international agreement with the United States under which DHS procurement is covered.

(6) "United States" includes the possessions of the United States.

(b) The Contractor shall deliver under this contract only such of the following commercial or non-commercial items, either as end products or components, that have been grown, reprocessed, reused, or produced in the United States:

(1) Clothing and the materials and components thereof, other than sensors, electronics, or other items added to, and not normally associated with, clothing and the materials and components thereof; or

(2) Tents, tarpaulins, covers, textile belts, bags, protective equipment (such as body armor), sleep systems, load carrying equipment (such as fieldpacks), textile marine equipment, parachutes or bandages.

(c) The Contractor shall deliver under this contract only such of the following noncommercial items, either as end products or components, that have been grown, reprocessed, reused, or produced in the United States:

- (1) Cotton and other natural fiber products.
- (2) Woven silk or woven silk blends.
- (3) Spun silk yarn for cartridge cloth.
- (4) Synthetic fabric or coated synthetic fabric (including all textile fibers and yarns that are for use in such fabrics).
- (5) Canvas products.
- (6) Wool (whether in the form of fiber or yarn or contained in fabrics, materials, or manufactured articles).
- (7) Any item of individual equipment manufactured from or containing any of the fibers, yarns, fabrics, or materials listed in this paragraph (c).

(d) This clause does not apply--

- (1) To items listed in (FAR) 48 CFR 25.104, or other items for which the Government has determined that a satisfactory quality and sufficient quantity cannot be acquired as and when needed at United States market prices;
- (2) To incidental amounts of cotton, other natural fibers, or wool incorporated in an end product, for which the estimated value of the cotton, other natural fibers, or wool is not more than 10 percent of the total price of the end product; or
- (3) To items that are eligible products per (FAR) 48 CFR Subpart 25.4.

(End of clause.)

Appendix C. HSAM Chapter 3025 *Foreign Acquisition*

CHAPTER	3025	FOREIGN ACQUISITION
	3025.001	General
Subchapter	3025.1	Buy American--Supplies
	3025.103	Exceptions.
	3025.104	Reserved.
	3025.105	Determining reasonableness of cost.
Subchapter	3025.2	Buy American—Construction Materials
	3025.202	Exceptions.
	3025.204	Evaluating offers of foreign construction material.
Subchapter	3025.10	Additional Foreign Acquisition Regulations
	3025.1001	Waiver of right to examination of records.
Subchapter	3025.11	Solicitation Provisions and Contract Clauses
	3025.1101	Acquisition of supplies.
Subchapter	3025.70	American Recovery and Reinvestment Act Restrictions on Foreign Acquisition
	3025.7000	Scope of subpart.
	3025.7003	Contract clauses.

3025.001 General

(c)

(70) *FPDS-NG*. When a contract action requires reporting in FPDS-NG (see FAR Subpart 4.6), the contracting officer shall accurately enter data for fields "Country of Product or Service Origin" and "Place of Manufacture." For a service contract, field "Country of Product or Service Origin" should show the country in which the firm providing the services is established.

(71) *Contracting officer discretion*. Although the Buy American Act (BAA) is not applicable to purchases at or below the micro-purchase threshold (see FAR 25.100(b)(1) and 25.1101(a)(1)), a contracting officer, under either of these circumstances, may exercise his or her discretion to purchase a reasonably-available and reasonably-priced domestic end product.

(72) *Construction materials versus construction*. FAR Subpart 25.1, Buy American—Supplies applies when supplies (including construction materials) are being acquired under a contract for supplies or a contract for services that involves the furnishing of supplies. In contrast, FAR Subpart 25.2, Buy American—Construction Materials applies

to contracts for construction, and addresses the use of foreign construction materials by the construction contractor in the work.

(73) *Annual Posting.* No later than March 31 of each fiscal year, in coordination with the Acquisition Policy and Legislation Branch within the Office of the Chief Procurement Officer (OCPO), the Head of the Contracting Activity (HCA) shall publish a list of domestically nonavailable articles acquired by the Component using Buy American Act waivers, and the dollar values associated with those articles during the previous fiscal year, in the Federal Business Opportunities site to promote and enhance public awareness and visibility.

(74) *DHS BAA Reporting Tool.* The DHS BAA Reporting Tool serves as a repository of all DHS BAA waivers requiring approval by the CPO or the Secretary. It is located in the OCPO Enterprise Reporting Application (ERA).

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 BAA 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.*

(2) Individual Determinations.

(i) 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 BAA Reporting Tool.

(3) The contracting officer shall transmit to the CPO a notice to make an award without a written nonavailability determination promptly upon realizing that the conditions in FAR 25.103(b)(3)(i) through (iii) apply, but in any case at least five calendar days before award. The transmittal shall be made using the DHS BAA Reporting Tool. All of the conditions in FAR 25.103(b)(3)(i) – (iii) must be satisfied, the acquisition must have been unrestricted (not set-aside), and the period for submission of offers must have been at least thirty calendar days.

(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 BAA 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 BAA Reporting Tool.

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 BAA 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).

Subchapter 3025.2 Buy American—Construction Materials

3025.202 Exceptions.

(a)

(1) *Impractical or inconsistent with 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 BAA 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.

(2) *Nonavailability*. 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 BAA Reporting Tool.

(3) *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 BAA Reporting Tool.

3025.204 Evaluating offers of foreign construction material.

(b) The HCA is delegated the authority to determine that the use of a factor higher than 6% is more appropriate for an acquisition. Once approved by the HCA, the contracting officer shall transmit the determination to use the higher factor to the CPO using the DHS BAA Reporting Tool. If a higher factor is used, the contracting officer shall note the use of the higher factor in

the solicitation and contract by altering paragraph (b)(3)(i) of the clause at FAR 52.225-9, Buy American—Construction Materials, or paragraph (b)(4)(i) of the clause at FAR 52.225 11, Buy American—Construction Materials under Trade Agreements, to identify the factor that will be used (instead of 6%).

Subchapter 3025.10 Additional Foreign Acquisition Regulations

3025.1001 Waiver of right to examination of records.

(a)(2)(iii) The HCA, without redelegation, is authorized to make the determination.

Subchapter 3025.11 Solicitation Provisions and Contract Clauses

3025.1101 Acquisition of supplies.

(c)(1) Consistent with the General Services Board of Contract Appeals (GSBCA) decision in the protest of International Business Machines Corporation, GSBCA No. 10532-P, May 18, 1990, for acquisitions covered by the World Trade Organization (WTO) Agreement on Government Procurement (GPA), the restrictions of the Buy American statute are not applicable to U.S.-made end products.

Subchapter 3025.70 American Recovery and Reinvestment Act Restrictions on Foreign Acquisition

(Note: This subchapter may be deleted once the HSAR is changed to accommodate the HSAR deviations of 3/5/2013 and 3/14/2013.)

3025.7000 Scope of subpart.

HSAR class deviation, Applicability of the “Kissell Amendment” to Department of Homeland Security Acquisitions, dated March 5, 2013 (available at [http://www.dhs.gov/xacquisitions/HSAR/HSAR%20Class%20Deviations/HSAR%20Class%20Deviations%20-%20Kissell%20Amendment%20-%20March%205%202013.pdf](#)), makes permanent and extends the restrictions on the acquisition of certain foreign textile products, directly related to national security interests, described in HSAR Subpart 3025.70 to all DHS acquisitions. A contracting officer with an acquisition involving items such as clothing, clothing components, tents, tarpaulins, covers, textile belts, bags, body armor, sleeping bags, fieldpacks, textile marine equipment, parachutes, bandages, or any other products containing natural fiber products, woven silk or blends, spun silk yarn, synthetic fabric or coated synthetic fabric, canvas, or wool should carefully consider the class deviation. The class deviation indicates it is applicable until the HSAR is appropriately changed.

3025.7003 Contract clauses.

HSAR class deviation 13-01, Amendment 1, Requirement for Use of Certain Domestic Commodities, dated March 14, 2013 (available at [http://www.dhs.gov/xacquisitions/HSAR/HSAR%20Class%20Deviations/HSAR%20Class%20Deviations%20-%20March%2014%202013.pdf](#)), amends the clause at HSAR 3052.225-70, Requirement for Use of Certain Domestic Commodities (AUG 2009). Accordingly, the new

amended clause in the deviation (with a date of MAR 2013) shall be used. The deviation version is reprinted below for the convenience of the contracting officer.

**REQUIREMENT FOR USE OF CERTAIN DOMESTIC COMMODITIES (MAR 2013)
(DEVIATION 13-01)**

(a) Definitions. As used in this clause-

- (1) "Commercial," as applied to an item described in subsection (b) of this clause, means an item of supply, whether an end product or component, that meets the definition of "commercial item" set forth in (FAR) 48 CFR 2.101.
- (2) "Component" means any item supplied to the Government as part of an end product or of another component.
- (3) "End product" means supplies delivered under a line item of this contract.
- (4) "Non-commercial," as applied to an item described in subsections (b) or (c) of this clause, means an item of supply, whether an end product or component, that does not meet the definition of "commercial item" set forth in (FAR) 48 CFR 2.101.
- (5) "Qualifying country" means a country with a memorandum of understanding or international agreement with the United States under which DHS procurement is covered.
- (6) "United States" includes the possessions of the United States.

(b) The Contractor shall deliver under this contract only such of the following commercial or non-commercial items, either as end products or components, that have been grown, reprocessed, reused, or produced in the United States:

- (1) Clothing and the materials and components thereof, other than sensors, electronics, or other items added to, and not normally associated with, clothing and the materials and components thereof; or
- (2) Tents, tarpaulins, covers, textile belts, bags, protective equipment (such as body armor), sleep systems, load carrying equipment (such as fieldpacks), textile marine equipment, parachutes or bandages.

(c) The Contractor shall deliver under this contract only such of the following non-commercial items, either as end products or components, that have been grown, reprocessed, reused, or produced in the United States:

- (1) Cotton and other natural fiber products.
- (2) Woven silk or woven silk blends.
- (3) Spun silk yarn for cartridge cloth.
- (4) Synthetic fabric or coated synthetic fabric (including all textile fibers and yarns that are for use in such fabrics).
- (5) Canvas products.
- (6) Wool (whether in the form of fiber or yarn or contained in fabrics, materials, or manufactured articles).
- (7) Any item of individual equipment manufactured from or containing any of the fibers, yarns, fabrics, or materials listed in this paragraph (c).

(d) This clause does not apply-

- (1) To items listed in (FAR) 48 CFR 25.104, or other items for which the Government has determined that a satisfactory quality and sufficient quantity cannot be acquired as and when needed at United States market prices;
- (2) To incidental amounts of non-compliant fibers if the total value of non-compliant fibers contained in the end item does not exceed 10 percent of the total purchase price of the end item; or
- (3) To items that are eligible products per (FAR) 48 CFR Subpart 25.4.

(End of clause)

Appendix D. HSAR Class Deviation Applicability of the "Kissell Amendment" to Department of Homeland Security Acquisitions


U.S. Department of Homeland Security
Washington, DC 20528

MAR - 5 2013



**Homeland
Security**

MEMORANDUM FOR: Distribution

FROM: Ashley Lewis 
Executive Director, Policy and
Homeland Security Acquisition Institute

SUBJECT: Applicability of the "Kissell Amendment" to Department of Homeland Security Acquisitions

This is a class deviation from the requirements related to "funds appropriated on or before February 17, 2009" of the Homeland Security Acquisition Regulation (HSAR) paragraph 3025.7000, Scope of Subpart. That paragraph states:

3025.7000 Scope of subpart.

This subpart contains restrictions on the acquisition of certain foreign textile products imposed by the American Recovery and Reinvestment Act of 2009 on contracts, exercising of an option and orders entered into on or after August 16, 2009 with funds appropriated or otherwise provided on or before February 17, 2009.

Effective immediately, the scope of the subpart 3025.70 shall apply as follows to the actions described below.

3025.7000 Scope of subpart.

This subpart contains restrictions on the acquisition of certain foreign textile products imposed by the American Recovery and Reinvestment Act of 2009 on contracts, exercising of an option and orders entered into on or after August 16, 2009.

All outstanding solicitations for covered products must comply, or be amended to comply, with the revised HSAR Subpart 3025.70. All solicitations issued after the date of this deviation and all covered contracts awarded after the date of this deviation must comply with the requirements the revised HSAR Subpart 3025.70. Contracts awarded prior to the date of this class deviation shall not be amended to comply with the revised HSAR Subpart 3025.70.

This class deviation is applicable until the HSAR is changed by publication of the revised HSAR Subpart 3025.70 in the code of Federal Regulations.

Questions regarding this class deviation should be directed to Jeremy Olson,
jerry.olson@hq.dhs.gov, (202) 447-5197.

Appendix E. HSAR Class Deviation HSAR Class Deviation 13-01, Amendment 1 - Homeland Security Acquisition Regulation 3052.225-70, *Requirement for Use of Certain Domestic Commodities*

U.S. Department of Homeland Security
Washington, DC 20528



**Homeland
Security**

MAR 14 2013

MEMORANDUM FOR: Distribution

FROM: Ashley Lewis
Executive Director, Policy and
Homeland Security Acquisition Institute

SUBJECT: Class Deviation 13-01, Amendment 1 - Homeland Security Acquisition
Regulation 3052.225-70, Requirement for Use of Certain Domestic
Commodities

This is a class deviation from the Homeland Security Acquisition Regulation (HSAR) which amends paragraph (d)(2) of the clause at HSAR 3052.225-70, Requirement for Use of Certain Domestic Commodities. The changes made by this deviation are in addition to the change to section 3025.7000 of the Homeland Security Acquisition Regulation (HSAR) provided in Class Deviation 13-01 issued on March 5, 2013. The amended clause is attached to this memorandum.

The original HSAR clause paragraph (d)(2) reads as follows:

(2) To incidental amounts of cotton, other natural fibers, or wool incorporated in an end product, for which the estimated value of the cotton, other natural fibers, or wool is not more than 10 percent of the total price of the end product; or

The amended paragraph (d)(2) reads as follows:

(2) To incidental amounts of non-compliant fibers if the total value of non-compliant fibers contained in the end item does not exceed 10 percent of the total purchase price of the end item; or

The purpose of this deviation is to ensure that contract actions covered by HSAR 3035.70, American Recovery and Reinvestment Act Restrictions on Foreign Acquisition, awarded after the date of this class deviation include the clause required by this deviation. All outstanding solicitations for covered products must comply, or be amended to comply, with the revised HSAR clause 3052.225-70. All solicitations issued after the date of this class deviation and all covered contracts awarded after the date of this deviation must comply with the requirements of the revised clause. Contracts awarded prior to the date of this class deviation may be amended to comply with the revised clause provided adequate consideration is obtained.

Contract writing systems should be modified to use the clause required by this class deviation for covered contract actions.

This class deviation remains in effect until the HSAR is changed by publication of the revised HSAR Subpart 3025.70 and clause 3052.225-70 in the Code of Federal Regulations.

Questions regarding this class deviation should be directed to Jeremy Olson,
jerry.olson@hq.dhs.gov, (202) 447-5197.

Attachment

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Attachment – HSAR Class Deviation 13-01, Amendment 1

3052.225-70 Requirement for Use of Certain Domestic Commodities (DEVIATION 13-01).
As prescribed in (HSAR) 48 CFR 3025.7003, use the following clause:

**REQUIREMENT FOR USE OF CERTAIN DOMESTIC COMMODITIES (MAR 2013)
(DEVIATION 13-01)**

(a) Definitions. As used in this clause--

(1) "Commercial," as applied to an item described in subsection (b) of this clause, means an item of supply, whether an end product or component, that meets the definition of "commercial item" set forth in (FAR) 48 CFR 2.101.

(2) "Component" means any item supplied to the Government as part of an end product or of another component.

(3) "End product" means supplies delivered under a line item of this contract.

(4) "Non-commercial," as applied to an item described in subsections (b) or (c) of this clause, means an item of supply, whether an end product or component, that does not meet the definition of "commercial item" set forth in (FAR) 48 CFR 2.101.

(5) "Qualifying country" means a country with a memorandum of understanding or international agreement with the United States under which DHS procurement is covered.

(6) "United States" includes the possessions of the United States.

(b) The Contractor shall deliver under this contract only such of the following commercial or non-commercial items, either as end products or components, that have been grown, reprocessed, reused, or produced in the United States:

(1) Clothing and the materials and components thereof, other than sensors, electronics, or other items added to, and not normally associated with, clothing and the materials and components thereof; or

(2) Tents, tarpaulins, covers, textile belts, bags, protective equipment (such as body armor), sleep systems, load carrying equipment (such as fieldpacks), textile marine equipment, parachutes or bandages.

(c) The Contractor shall deliver under this contract only such of the following noncommercial items, either as end products or components, that have been grown, reprocessed, reused, or produced in the United States:

(1) Cotton and other natural fiber products.

(2) Woven silk or woven silk blends.

(3) Spun silk yarn for cartridge cloth.

(4) Synthetic fabric or coated synthetic fabric (including all textile fibers and yarns that are for use in such fabrics).

(5) Canvas products.

(6) Wool (whether in the form of fiber or yarn or contained in fabrics, materials, or manufactured articles).

(7) Any item of individual equipment manufactured from or containing any of the fibers, yarns, fabrics, or materials listed in this paragraph (c).

(d) This clause does not apply--

(1) To items listed in (FAR) 48 CFR 25.104, or other items for which the Government has determined that a satisfactory quality and sufficient quantity cannot be acquired as and when needed at United States market prices;

(2) To incidental amounts of non-compliant fibers if the total value of non-compliant fibers contained in the end item does not exceed 10 percent of the total purchase price of the end item; or

(3) To items that are eligible products per (FAR) 48 CFR Subpart 25.4.

(End of clause)

VII. Abbreviations

Abbreviation	Definition
BAA	Buy American Act
CBP	U.S. Customs and Border Protection
CPO	Chief Procurement Officer
DHS	U.S. Department of Homeland Security
FAR	Federal Acquisition Regulation
FTA	Free Trade Agreement
FY	Fiscal Year
GAO	U.S. Government Accountability Office
GPA	Government Procurement Agreement
GSBCA	General Services Board of Contract Appeals
HSAM	Homeland Security Acquisition Manual
HSAR	Homeland Security Acquisition Regulation
IDIQ	Indefinite delivery/indefinite quantity
FPDS-NG	Federal Procurement Data System-Next Generation
OCPO	Office of the Chief Procurement Officer
TAA	Trade Agreements Act
TSA	Transportation Security Administration
WTO	World Trade Organization