

memorandum

DATE: 10/25/2022

REPLY TO: CP
ATTN OF:

SUBJECT: BPI Interim Policy FY 2023-01 Part 9 Foreign Acquisitions
Buy American Act - Supplies and Construction

to: Lynnial Trusty – NSS
Bill Cochenour – NSS

The purpose of this memorandum is to provide detailed guidance (referred to as the "Interim Policy") to the Bonneville Purchasing Instructions (BPI) incorporating Executive Order (EO) 14005 Ensuring the Future is Made in all America by All America's Workers. In addition, administrative changes have been incorporated to the Trade Agreement Thresholds.

Summary of changes

- The current domestic content threshold of 55% has been increased to 60%; and
 - In 2024 calendar year the content threshold increases to 65%; and
 - In 2029 calendar year the content threshold increases to 75%.
- When a supplier is awarded a contract with a period of performance that spans the schedule of domestic content, the supplier is required to comply with each increase for the items in the year of delivery.
- Creates a fallback threshold that would allow for products and construction materials meeting the 55% domestic threshold to qualify as domestic under certain circumstances.
- Trade Agreement Thresholds have increased.
- Clauses updated 9-1, 9-3, 9-4, 9-5, 9-48 and 9-48 Alternative 1.

The subsequent policy and clauses implement Executive Order 14005, Section 8. The attached conformed policy and clauses supersedes BPI 22-1, dated February 28, 2022. This Interim Policy will remain in place until further notice.

1. **Applicability and effective dates.** Bonneville is required to include the applicable clauses in solicitations and contracts for end products and construction materials as follows;

- New contracts awarded on or after December 27, 2022; and
- New solicitations issued on or after November 28, 2022; and
- Options, Extensions or Modifications of existing contracts including Task/Delivery Orders awarded on or after April 28, 2023.

2. **Exclusions.** These clauses shall not be applied to:

- Financial Assistance (Grants or Cooperative Agreements); or
- Contracts and subcontracts with Indian Tribes under the Indian Self-Determination and Education Assistance Act (the exclusion would not apply to a procurement contract or subcontract under the BPI to an Indian-owned or tribally-owned business entity); or
- Contracts not subject to the Bonneville Purchasing Instructions (BPI).

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cc:

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9 FOREIGN ACQUISITIONS

9.1 BUY AMERICAN ACT – SUPPLIES

This subpart implements the Buy American Act (41 U.S.C. chapter 83) obligations of the United States under certain international agreements regarding government procurement, and under Executive Orders 10582 and 13881, 14005 as amended, January 25, 2021. It applies to supply contracts and to the supply portion of contracts for services that involve the furnishing of supplies.

9.1.1 Policy

- (a) The Buy American Act requires that only domestic end products be acquired for public use, except articles, material and supplies:
- (1) Where award is based on price only and the cost would be unreasonable after application of the differentials in BPI 9.1.4(a)(1) and (2);
 - (2) For which the HCA determines that domestic preference would be inconsistent with the public interest;
 - (3) That are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality.
 - (4) Except when an end product that consists wholly or predominantly of iron or steel or combination of both the cost of all the components shall exceed 60 percent of all the components, except that the percentage for items delivered in calendar years 2024 through 2028 and 75 percent for items delivered starting in 2029.
 - (i) A contract with a period of performance that spans the schedule of domestic content threshold increases specified in paragraph (a)(4) of this section shall be required to comply with each increased threshold for the items in the year of delivery.
 - (ii) Unless the Head of the Contracting Activity (HCA) allows for an alternative clause allowing for the same threshold that will apply to the entire period of performance for that contract, requiring an approved HCA waiver.
 - (iii) To help prevent scheduled increases in the content threshold from taking work away from domestic suppliers who are actively adjusting their supply chains; and avoid unintentionally raising the foreign content of Federal purchases through increased use of waivers while domestic suppliers adjust. The fallback threshold will be a temporary measure designed to limit foreign content while contractors transition to U.S.- based supply chains. A determination is not required before January 1, 2030, if there is an offer for a foreign end product that exceeds 55 percent domestic content.
- (b) The Buy American Act does not apply to acquisitions subject to certain trade agreements as outlined in BPI 9.4.
- (c) The Buy American Act shall not be applied to the purchase of information technology products that are commercial items.
- (d) In accordance with 41 U.S.C. § 1907, the component test of the Buy American Act is waived for an end product that is a COTS item.

9.1.2 Definitions

As used in this subpart –

Component means an article, material, or supply incorporated directly into the end product or construction material.

Cost of components means –

- (1) For components purchased by the contractor, the acquisition cost, including transportation costs to the place of incorporation into the end product or construction material (whether or not such costs are paid to a domestic firm), and any applicable duty (whether or not a duty-free entry certificate is issued); or
- (2) For components manufactured by the contractor, all costs associated with the manufacture of the component, including transportation costs are described in paragraph (1) of this definition, plus allocable overhead costs, but excluding profit. Cost of components does not include any costs associated with the manufacture of the end product.

Critical Component means a component that is mined, produced, or manufactured in the United States and deemed critical to the US supply chain.

Critical Item means a domestic construction material or domestic end product that is deemed critical to the US supply chain.

Domestic end product means:

- (1) For an end product that does not consist wholly or predominantly of iron or steel or a combination of both -
 - i. An unmanufactured construction material mined or produced in the United States; or
 - ii. An end product manufactured in the United States, if –
 - (A) The cost of its components mined, produced, or manufactured in the United States exceeds 60 percent of the cost of all its components, except that the percentage will be 65 percent for items delivered in the calendar years of 2024 through 2028 and 75 percent for items delivered starting in calendar year 2029. Components of foreign origin of the same class or kind for which nonavailability determinations have been made are treated as domestic. Components of unknown origin are treated as foreign. Scrap generated, collected, and prepared for processing in the United States is considered domestic; or
 - (B) The end product is a commercially available off-the-shelf (COTS) item; or
- (2) For an end product that consists wholly or predominantly of iron or steel or a combination of both, an end product manufactured in the United States, if the cost of foreign iron and steel constitutes less than 5 percent of the cost of all the components used in the end product. The cost of foreign iron and steel includes but is not limited to the cost of foreign iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the construction material and a good faith estimate of the cost of all foreign iron or steel components excluding COTS fasteners. Iron or steel components of unknown origin are treated as foreign. If the end product contains multiple components, the cost of all the materials used in such construction material is calculated in accordance with the definition of “cost of components” in this section.

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

Eligible offer means an offer of an eligible product. When the solicitation specifies that award will be made on a group of line items, an eligible offer means a foreign offer where the combined

proposed price of the eligible products and the domestic end products exceeds 50 percent of the total proposed price of the group.

Eligible product means a foreign end product, construction material, or service that, due to applicability of a trade agreement to a particular acquisition, is not subject to discriminatory treatment.

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

Fallback threshold means a temporary measure designed to limit foreign content while contractors transition to U.S.- based supply chains.

Foreign end product means an end product other than a domestic end product.

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).

9.1.3 Acquisition of Civil Aircraft and Related Articles

Under the authority of Section 303 of the Trade Agreements Act, the U.S. Trade Representative has waived the Buy American statute for civil aircraft and related articles that meet the substantial transformation test of the Trade Agreements Act, from countries that are parties to the Agreement on Trade in Civil Aircraft. Those countries are: Albania, Austria, Belgium, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Ireland, Italy, Japan, Latvia, Lithuania, Luxembourg, Macao China, Malta, Montenegro, the Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, Switzerland, Taiwan (Chinese Taipei), and the United Kingdom. See Provision 9-2, Waiver of Buy American Act for Civil Aircraft and Related Articles, for details.

9.1.4 Evaluation Procedure

- (a) The contracting officer must not apply the evaluation procedure to offers of eligible products if the acquisition is subject to a trade agreement under subpart 9.4.
- (b) For end products that are not critical items and do not contain critical components. 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 (foreign offer), the contracting officer must determine the reasonableness of the cost of the domestic offer by adding to the price of the low offer (foreign 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.
- (c) The evaluation in (a) or (b) above shall be applied on an item-by-item basis or to any group of items on which award may be made as specifically provided by the solicitation. If the proposed price of domestic end products exceeds 50 percent of the total proposed price of the group, evaluate the entire group as a domestic offer. Evaluate all other groups as foreign offers.
- (d) The Provision at 9-1, Buy American Certificate, constitutes a certification by the offeror that each end product, except as noted by the offeror beneath the certification, is a domestic source end product as defined by the Buy American Act clause. When an offeror makes no entry under the certificate and does not otherwise exclude any end products from the representation and the solicitation also includes the Buy American Act clause, the offer is regarded as a domestic offer.

- (e) Where the offeror indicates that it intends to furnish both foreign and domestic articles, Bonneville shall apply the appropriate differential to each item determined to be an end product. Bonneville evaluates the purpose of the particular solicitation to determine whether an item is an end product as distinguished from a component. When the purpose of the solicitation is to acquire a particular article, material or supply, that item is an end product. Components are those articles, materials, or supplies which are directly incorporated in the end product, but which would not be useful separately for the purpose of the solicitation. The offeror's representations as to components of foreign origin must be carefully analyzed to assure that the items listed are components and not end products, as the offeror's judgment in these matters is not controlling. Where the solicitation is oral, the offeror will be asked about foreign content if any doubt exists as to whether the product offered is of domestic origin.
- (f) The origin of a component of a manufactured product will be considered (for purposes of determining whether an item qualifies as a domestic source end product) only in those cases where that component is directly incorporated in the end product by the offeror. The origin of materials used in domestic components furnished to the offeror by other manufacturers or producers will not be so considered.
- (g) Where an offeror fails to identify the origin of the product, and in the absence of any previous experience with the offeror or information to the contrary, Bonneville shall assume that domestic firms intend to furnish domestic products and that foreign firms intend to furnish products of foreign origin.
- (h) Since contracts are awarded based on the evaluated price and not on the offered price, the applicable Buy American differential shall be applied only after all other product evaluation factors set forth in the solicitation have been applied. The Buy American differential shall not be applied to any domestic end product or Bonneville-furnished property (such as transformer oil) or to award evaluation factors such as multiple award or cost of inspection evaluation factors.
- (i) To determine whether a trade agreement (see BPI 9.4) applies to the purchase of products by lease, rental, or lease-purchase contract (including lease-to-ownership, or lease-with-option-to-purchase), the estimated purchase value shall be calculated as follows:
 - (1) If a fixed-term contract of 12 months or less is contemplated, use the total estimated value of the purchase;
 - (2) If a fixed-term contract of more than 12 months is contemplated, use the total estimated value of the purchase plus the estimated residual value of the leased equipment at the conclusion of the contemplated term of the contract;
 - (3) If an indefinite-term contract is contemplated, use the estimated monthly payment multiplied by 48; or
 - (4) If there is any doubt as to the contemplated term of the contract, use the estimated monthly payment multiplied by 48.
- (j) If a contemplated purchase includes an option clause, when calculating the threshold for the application of a trade agreement, include the value of all options.
- (k) When offers are obtained orally, offerors shall be informed that if an offer of foreign products is made, the factors in 9.1.4(a) will be applied.

9.1.5 [Reserved]

9.1.6 Solicitation Provisions and Contract Clauses

The following clauses are to be used when the origin of materials and supplies is not known. If the CO knows that the offers received will be all foreign or all domestic products, these clauses

need not be used, but a note should be placed in the file to indicate the nature of the offers expected.

- (a) The CO shall include the provision 9-1, Buy American Certificate, in all solicitations for the acquisition of supplies, or for services involving the furnishing of supplies that are expected to exceed \$50,000, except those for the purchase of:
 - (1) Civil aircraft and related articles (see Provision 9-2);
 - (2) Supplies subject to a trade agreement and expected to exceed the thresholds established in BPI 9.4; and
 - (3) Information technology equipment or supplies that are commercial items.
- (b) The CO shall include the provision 9-2, Waiver of Buy American Act for Civil Aircraft and Related Articles, in solicitations for the acquisition of civil aircraft and related articles if the acquisition is less than \$183,000.
- (c) The CO shall include the clause 9-3, Buy American Act – Supplies, in all solicitations and contracts for supplies, or for services involving the furnishing of supplies, except those for the purchase of:
 - (1) Civil aircraft and related articles (see provision 9-2);
 - (2) Supplies subject to a trade agreement and expected to exceed the thresholds established in BPI 9.4; and
 - (3) Information technology equipment or information technology supplies that are commercial products.
- (d) The CO shall include the provision 9-4, Foreign Offers, in solicitations where foreign firms may submit offers, or offers may be received that will offer foreign end products and which are expected to exceed \$50,000, except those for the purchase of civil aircraft and related articles (see provision 9-2, Waiver of Buy American Act for Civil Aircraft and Related Articles) and those for purchase of supplies subject to certain trade agreements as outlined in BPI 9.4.

9.2 BUY AMERICAN ACT – CONSTRUCTION MATERIALS

This subpart implements the Buy American Act (41 U.S.C. chapter 83) and obligations of the United States under trade agreements (see BPI 9.4) and under Executive Orders 10582, 13881, 14005 as amended, January 25, 2021. It applies to contracts for the construction, alteration, or repair of any public building or public work in the United States. For construction projects attributed in whole or in part to Recovery Act funds, refer to BPI 9.2.5.

9.2.1 Policy

- (a) The Buy American Act requires that only domestic construction materials be used in construction in the United States, except when --
 - (1) The contract is evaluated as described in BPI 9.1.1(a),
 - (2) The HCA determines that use of a particular domestic construction material would be impracticable; or
 - (3) The construction material is not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality;
 - (4) Except for construction material that consists wholly or predominantly of iron or steel or combination of both, the cost of domestic components must exceed 60 percent of the cost of all the components, except that the percentage will be 65 percent for items delivered in calendar years 2024 through 2028 and 75 percent for items delivered starting in calendar year 2029.
 - (i) A contract with a period of performance that spans the schedule of domestic content threshold increases specified in paragraph (a)(4) of this section shall be

required to comply with each increased threshold for the items in the year of delivery.

- (ii) Unless the Head of the Contracting Activity (HCA) allows for an alternative clause allowing for the same threshold that will apply to the entire period of performance for that contract, requiring an approved HCA waiver.
 - (iii) To help prevent scheduled increases in the content threshold from taking work away from domestic suppliers who are actively adjusting their supply chains; and avoid unintentionally raising the foreign content of Federal purchases through increased use of waivers while domestic suppliers adjust. The fallback threshold will be a temporary measure designed to limit foreign content while contractors transition to U.S.- based supply chains. A determination is not required before January 1, 2030, if there is an offer for a foreign construction material that exceeds 55 percent domestic content.
- (b) The Buy American Act does not apply to the purchase of construction materials that is subject to certain trade agreements as outlined in section BPI 9.4.
- (c) When it is determined for any of the reasons stated in this section that certain foreign construction materials may be used, the excepted materials shall be listed in the contract.

9.2.2 Definitions

As used in this subpart–

Component means an article, material, or supply incorporated directly into the end product or construction material.

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

Construction materials means articles, materials, and supplies brought to the construction site by a contractor or subcontractor for incorporation into the building or work. The term also includes an item brought to the site preassembled from articles, materials, or supplies. However, emergency life safety systems, such as emergency lighting, fire alarm, and audio evacuation systems, that are discrete systems incorporated into a building or work and that are produced as complete systems, are evaluated as a single and distinct construction material regardless of when or how the individual parts or components of those systems are delivered to the construction site. Materials purchased directly by Bonneville are supplies, not construction material.

Domestic construction material means:

- (1) For construction material that does not consist wholly or predominantly of iron or steel or a combination of both -
 - i. An unmanufactured construction material mined or produced in the United States; or
 - ii. A construction material manufactured in the United States, if –
 - (A) The cost of its components mined, produced, or manufactured in the United States exceeds 55 percent of the cost of all its components. Components of foreign origin of the same class or kind for which nonavailability determinations have been made are treated as domestic. Components of unknown origin are treated as foreign; or
 - (B) The construction material is a commercially available off-the-shelf (COTS) item; or

- (2) For construction material that consists wholly or predominantly of iron or steel or a combination of both, a construction material manufactured in the United States if the cost of foreign iron and steel constitutes less than 5 percent of the cost of all the components used in such construction material. The cost of foreign iron and steel includes but is not limited to the cost of foreign iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the construction material and a good faith estimate of the cost of all foreign iron or steel components excluding COTS fasteners. Iron or steel components of unknown origin are treated as foreign. If the construction material contains multiple components, the cost of all the materials used in such construction material is calculated in accordance with the definition of “cost of components” in this section.

Foreign construction material means a construction material other than a domestic construction material.

9.2.3 Evaluation Procedures

- (a) For construction material that is not a critical item and does not contain critical components. Unless the Head of the Contracting Activity (HCA) specifies a higher percentage. The contracting officer shall add to the offered price 20 percent of the cost of any foreign construction material proposed for exception from the requirements of the Buy American Statute based on the unreasonable costs of domestic construction materials. In the case of a tie, the contracting officer shall give preference to an offer that does not include foreign construction material accepted at the request of the offer or on the basis of unreasonable cost.
- (b) The Provision 9-7, Buy American Act Notice, requires offerors proposing to use foreign construction materials to provide adequate data for evaluation under paragraph (a) above, and permits alternative offers for comparable domestic construction materials at stated prices. When a foreign construction material is not acceptable under paragraph (a) above, evaluation of the offer shall proceed on the basis of the stated price for a comparable domestic construction material, if offered. If the offer does not state a price for a comparable domestic construction material, the offer may be rejected.
- (c) The acceptable offer that remains low after adding (for evaluation purposes only) 20 percent of the cost of all foreign construction materials, determined acceptable under paragraph (a) above and, after considering all other evaluation factors, shall be considered the successful offer.
- (d) In making evaluations under this section, the cost of both foreign and domestic construction material shall include all cost of delivery to the construction site including offsite storage facilities. The cost of foreign construction material shall include any applicable duty (whether or not a duty-free entry certificate is issued).
- (e) The evaluation in (a) above shall not be applied to offers of construction materials subject to certain trade agreements as outlined in subpart 9.4.

9.2.4 Contract Clauses and Solicitation Provisions

- (a) The CO shall include the clause 9-5, Buy American Act – Construction Materials, in solicitations and contracts which are for construction which are expected to exceed \$50,000. Clause 9-5 shall not be included in solicitations and contracts for construction materials subject to certain trade agreements as outlined in subpart 9.4.
- (b) The CO shall include the Provision 9-6, Buy American Act Representations, in solicitations for construction expected to exceed \$50,000. The clause shall not be included in solicitations and contracts for construction materials subject to certain trade agreements as outlined in subpart 9.4.

- (c) The CO shall include the Provision 9-7, Buy American Act Notice, in solicitations for construction expected to exceed \$50,000. The clause shall not be included in solicitations and contracts for construction materials subject to certain trade agreements as outlined in subpart 9.4.
- (d) For construction projects which are attributed, in whole or in part, to the American Reinvestment and Recovery Act of 2009 (Pub. L. 111-5) "Recovery Act" funds, the CO shall not include clauses 9-5, 9-6 and 9-7 as prescribed in (a) through (c) of this subpart. The CO shall instead include the ARRA specific clauses prescribed in 9.2.5.9.

9.2.5 American Recovery and Reinvestment Act Requirements for Buy American Act – Construction Matters

This section implements the requirements for application of the Buy American Act when project funding is attributed to, in whole or in part, the American Recovery and Reinvestment Act.

9.2.5.1 Policy

Bonneville shall comply with the unique requirements for Buy American Act as imposed by the American Reinvestment and Recovery Act of 2009 (ARRA).

9.2.5.2 Definitions

As used in this subsection –

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.

Foreign construction material means a construction material other than a domestic construction material.

Manufactured construction material means any construction material that is not unmanufactured construction material.

Public building or public work means building or work, the construction, prosecution, completion, or repair of which, as defined in this section, is carried on directly by authority of, or with funds of, a Federal agency to serve the interest of the general public regardless of whether title thereof is in a Federal agency.

Recovery Act designated country means a World Trade Organization Government Procurement Agreement country, a Free Trade Agreement country, or a least developed country.

Steel means an alloy that includes at least 50 percent iron, between .02 and 2 percent carbon, and may include other elements.

Unmanufactured construction material means raw material brought to the construction site for incorporation into the building or work that has not been:

- (a) Processed into a specific form and shape; or
- (b) Combined with other raw material to create a material that has different properties than the properties of the individual raw materials.

9.2.5.3 Policy

Except as provided in 9.2.5.4. –

- (a) None of the funds made available by ARRA may be used for a project for the construction, alteration, maintenance, or repair of a public building or public work; as defined in BPI 9.2.5.2, unless –
 - (1) The public building or public work is located in the United States; and
 - (2) All of the iron, steel, and other manufactured goods used as construction material in the project are produced or manufactured in the United States.
 - (i) Production in the United States of the iron or steel used as construction material requires that all manufacturing processes must take place in the United States, except metallurgical processes involving refinement of steel additives. These requirements do not apply to steel or iron used as components or subcomponents of other manufactured construction material.
 - (ii) There is no requirement with regard to the origin of components or subcomponents in other manufactured construction material, as long as the manufacture of the construction material occurs in the United States.
- (b) Use only domestic unmanufactured construction material, as required by the Buy American Act.

9.2.5.4 Exceptions

- (a) When one of the following exceptions applies, the CO may allow the contractor to incorporate foreign construction materials without regard to the restrictions of section 1605 of the ARRA or the Buy American Act:
 - (1) Non-availability. The HCA may determine that a particular construction material is not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality.
 - (2) Unreasonable cost. The CO concludes that the cost of domestic construction material is unreasonable in accordance with 9.2.5.7.
 - (3) Inconsistent with public interest. The HCA may determine that application of the restriction of section 1605 of the ARRA or Buy American Act to a particular construction material would be inconsistent with public interest.
- (b) Determinations. When a determination is made, for any of the reasons stated in this section, that certain foreign construction materials may be used –
 - (1) The CO shall list the excepted materials in the contract; and
 - (2) The HCA shall publish a notice in the Federal Register within two (2) weeks after the determination is made, unless the construction material has already been determined to be domestically non-available. See 9.2.5.5. The Notice shall include:
 - (i) The title “Buy American Exception under the American Recovery and Reinvestment Act of 2009”;
 - (ii) The dollar value and brief description of the project; and
 - (iii) A detailed justification as to why the restriction is being waived.
- (c) Acquisitions under trade agreements.
 - (1) For construction contracts with an estimated acquisition value of \$7,008,000 or more, also see subpart 9.4. Offers of products determined to be eligible products per subpart 9.4 shall receive equal consideration with domestic offers per subpart 9.4.
 - (2) For purposes of ARRA, designated countries do not include the Caribbean Basin Countries.
 - (3) Canada is identified by the US Federal Government as a trade agreement country. However, for Bonneville as a Power Marketing Agency of the Department of Energy, Canada is currently excluded as to the trade agreement exemption from the Buy American Act.

9.2.5.5 Preaward Determination Concerning the Inapplicability of Section 1605 of the Recovery Act of the Buy American Act

- (a) For any acquisition, an offeror may request from the CO a determination concerning the inapplicability of section 1605 of the Recovery Act or the Buy American Act for specifically identified construction materials. The time for submitting the request is specified in the solicitation in paragraph (b) of either Provision 9-47 or 9-49, as appropriate to the subject procurement. The information and supporting data that must be included in the request are also specified in the solicitation in paragraphs (c) and (d) of either clause 9-46 or 9-48.
- (b) Before award, the CO must evaluate all requests based on the information provided and may supplement this information with other readily available information.
- (c) Determination based on unreasonable cost of domestic construction material.
 - (1) Iron, steel, and other manufactured construction material. The CO must compare the offered price of the contract using foreign manufactured construction material to the estimated price if all domestic manufactured construction material were used. If use of domestic manufactured construction material would increase the overall offered price of the contract by more than 25 percent, then the CO shall determine that the cost of the domestic manufactured construction material is unreasonable.
 - (2) Unmanufactured construction material. The CO must compare the cost of each foreign unmanufactured construction material to the cost of domestic unmanufactured construction material. If the cost of the domestic unmanufactured construction material exceeds the cost of the foreign unmanufactured construction material by more than 6 percent, then the CO shall determine that the cost of the unmanufactured construction material is unreasonable.

9.2.5.6 Procedure for Evaluating Offers of Foreign Construction Material

- (a) To ensure receipt of all information necessary to perform evaluation of offers, the CO must inform the offerors to complete and submit the information as requested in contract Clauses 9-46 or 9-48, as appropriate to the subject procurement, of the draft contract as sent to offerors during solicitation phase.
- (b) If the CO has determined that an exception applies because the cost of certain domestic construction material is unreasonable, in accordance with BPI 9.2.3., the CO shall apply evaluation factors to the offer incorporating the use of such foreign construction material as follows:
 - (1) Use an evaluation factor of 25 percent, applied to the total offered price of the contract, if foreign iron, steel, or other manufactured goods are incorporated in the offer as construction material based on an exception for unreasonable cost requested by the offeror.
 - (2) In addition, use an evaluation factor of 20 percent applied to the cost of foreign unmanufactured construction material incorporated in the offer based on an exception for unreasonable cost requested by the offeror.
 - (3) Total evaluated price = offered price + (.25 x offered price, if (a)(1) applies) + (.20 x cost of foreign unmanufactured construction material, if (a)(2) applies).
- (c) If two or more offers are equal in price, the CO must give preference to an offer that does not include foreign construction material excepted at the request of the offeror on the basis of unreasonable cost.
- (d) Offerors also 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.
- (e) If the CO awards a contract to an offeror that proposed foreign construction material not listed in the applicable clause in the solicitation (paragraph (b)(3) of clause 9-46, or

paragraph (b)(3) of clause 9-48, the CO must add the excepted materials to the list in the contract clause.

9.2.5.7 Postaward Determinations

- (a) If a contractor requests a determination regarding the inapplicability of section 1605 of the Recovery Act or the Buy American Act 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. If the CO concludes that the contractor should have made the request before contract award, the CO may deny the request.
- (b) The CO must base evaluation of any request for a determination regarding the inapplicability of section 1605 of the Recovery Act or the Buy American Act made after contract award on information required by paragraphs (c) and (d) of the applicable clause at 9-46 or 9-48 and/or other readily available information.
- (c) If a determination, under 9.2.5.4(a) is made after contract award that an exception to section 1605 of the Recovery Act or to the Buy American Act applies, the CO must negotiate adequate consideration and modify the contract to allow use of the foreign construction material. When the basis for the exception is the unreasonable cost of a domestic construction material, adequate consideration is at least the differential established in BPI 9.2.5.6(b).

9.2.5.8 Non-compliance

The CO must –

- (a) Review allegations of violations of section 1605 of the Recovery Act or Buy American Act;
- (b) Unless fraud is suspected, notify the contractor of the apparent unauthorized use of foreign construction material and request a reply, to include proposed corrective action; and
- (c) If the review reveals that a contractor or subcontractor has used foreign construction material without authorization, take appropriate action, including one or more of the following:
 - (1) Process a determination concerning the inapplicability of section 1605 of the Recovery Act or the Buy American Act in accordance with 9.2.5.7.
 - (2) Consider requiring the 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 interests of the Government, the CO may determine in writing that the foreign construction material need not be removed and replaced. A determination to retain foreign construction material does not constitute a determination that an exception to section 1605 of the Recovery Act or the Buy American Act applies, and this should be stated in the determination. Further, a determination to retain foreign construction material does not affect the Government's right to suspend or debar a contractor, subcontractor, or supplier for violation of section 1605 of the Recovery Act or 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, consider exercising appropriate contractual remedies, such as terminating the contract for default. Also consider preparing and forwarding a report to the HCA and Office of General Counsel for agency suspension or debarment decision and procedures. If the noncompliance appears to be fraudulent,

refer the matter to other appropriate agency officials, such as the officer responsible for criminal investigation.

9.2.5.9 Solicitation Provisions and Contract Clauses

The CO shall include the following clauses in solicitations and contracts for construction, that are funded with increased borrowing authority attributed to the Recovery Act, or funded in whole or in part with an appropriations under the Recovery Act.

- (a) The CO shall include the clause 9-46, Required Use of American Iron, Steel, and Other Manufactured Goods – Buy American Act – Construction Materials, in solicitations and contracts for construction that is performed in the United States, valued at less than \$7,032,000.
 - (1) List in paragraph (b)(3) of the basic clause all foreign construction material excepted from the requirements of the Buy American Act.
 - (2) If the HCA determines that a higher percentage is appropriate, substitute the higher evaluation in paragraph (b)(4)(i) of the clause.
- (b) The CO shall include the provision 9-47, Notice of Required Use of American Iron, Steel, and Other Manufactured Goods – Buy American Act – Construction Materials, in solicitations for construction that include the clause 9-46. COs shall use Alternate I to replace paragraph (b) if insufficient time is available to process a determination regarding the inapplicability of the Buy American Act before receipt of offers.
- (c) The CO shall include the clause 9-48, Required Use of American Iron, Steel, and Other Manufactured Goods – Buy American Act – Construction Materials Under Trade Agreements in solicitations and contracts for construction that is performed in the United States, valued at \$7,032,000 or more.
 - (1) In the basic clause, the CO shall list in paragraph (b)(3) all foreign construction materials excepted from the Buy American Act or section 1605 of the Recovery Act, other than Recovery Act designated country construction material.
 - (2) If the HCA determines that a higher percentage is appropriate, substitute the higher evaluation in paragraph (b)(4)(i) of the clause.
 - (3) The CO shall use Alternate I of the clause when the acquisition is valued between at \$7,032,000 or more but less than \$10,802,884. List in paragraph (b)(3) of the clause all foreign construction material excepted from the Buy American Act or section 1605 of the Recovery Act, unless the excepted foreign construction material is from a Recovery Act designated country other than Bahrain, Mexico, or Oman.
- (d) The CO shall include the provision 9-49, Notice of Required Use of American Iron, Steel, and Other Manufactured Goods – Buy American Act – Construction Materials Under Trade Agreements, in solicitations that include Clause 9-48.
 - (1) COs shall use Alternate I to replace paragraph (b) if insufficient time is available to process a determination regarding the inapplicability of the Buy American Act before receipt of offers.
 - (2) The CO shall use Alternate II to replace paragraph (d) Alternate Offers, if the acquisition is valued at \$7,032,000 or more, but less than \$10,802,884. List in paragraph (b)(3) of the clause all foreign construction material excepted from the Buy American Act or section 1605 of the Recovery Act, unless that excepted foreign construction material is from a Recovery Act designated country other than Bahrain, Mexico, or Oman.
 - (3) If the conditions of Alternate I and II both exist, the CO shall use Alternate III to replace basic clause paragraphs with Alternate I paragraph (b), and Alternate II paragraph (d).

9.3 ADDITIONAL FOREIGN ACQUISITION POLICIES

9.3.1 [Reserved]

9.3.2 Restricted Foreign Purchases

- (a) The Office of Foreign Assets Control (OFAC) maintains a database of those persons and entities that are prohibited from transacting under U.S. jurisdiction. Except as authorized by Office of Foreign Assets Control (OFAC), agencies and their 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. COs shall contact the HCA to obtain advice and approval to solicit or award to any firm identified in (b) below.
- (b) As part of its enforcement efforts, OFAC publishes a list of individuals and companies owned or controlled by, or acting for or on behalf of, targeted countries. It also lists individuals, groups, and entities, such as terrorists and narcotics traffickers designated under programs that are not country-specific. Collectively, such individuals and companies are called "Specially Designated Nationals" or "SDNs." Their assets are blocked and U.S. persons are generally prohibited from dealing with them. Except as authorized by OFAC, most transactions involving Cuba, Iran, and Sudan are prohibited, as are most imports from Burma or North Korea into the United States or its outlying areas. In addition, lists of entities and individuals subject to economic sanctions are included in OFAC's List of Specially Designated Nationals and Blocked Persons at <http://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx>. 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 at <http://www.treasury.gov/resource-center/sanctions/CivPen/Pages/civpen-index2.aspx>. COs shall coordinate with the HCA to submit questions concerning the restrictions in paragraphs (a) or (b) of this section to the Department of the Treasury Office of Foreign Assets Control.
- (c) Iran Sanctions Act – Prohibition on Contracting with Certain Entities
- (1) The CO is prohibited from awarding or extending a contract with a person that exports certain sensitive technology to Iran, as determined by the President and listed in the System for Award Management Exclusions at <http://www.sam.gov> (22 U.S.C. § 8515).
- (2) In this section and clause 9-9, "Person" means a natural person; a corporation, and any other business organization, including any governmental entity that is operating as a business enterprise.
- (3) Certification
- (i) The Iran Sanction Act (PL 104-172, PL 111-195) requires each offeror to certify that the offeror and any person owned or controlled by the offeror does not engage in any activity for which sanctions may be imposed under section 5 of the Iran Sanctions Act.
- (ii) The Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010 PL 111-195 Section 106 requires each offeror to certify that the offeror does not export any sensitive technology to the government of Iran or any individuals or entities controlled by or acting on behalf or at the direction of the government of Iran. Offerors shall address any questions concerning sensitive technology to the Department of State at CISADA106@state.gov.
- (4) Exemption for trade agreements: The certification requirements in BPI 9.3.2(c)(iii) and Clause 9-9(b)(1)-(b)(3) do not apply if the procurement is subject to trade agreements and the offeror certifies that all the offered products are designated country end products or designated country construction materials.

- (5) Remedies: False certification may result in termination of the contract, suspension of the contractor, and debarment of the contractor.
- (d) Restricted Business Operations in Sudan
 - (1) The CO is prohibited from awarding a contract to an entity that conducts restricted business operations in Sudan as defined in the Sudan Accountability and Divestment Act of 2007 (PL 110-174).
 - (2) Certification: The Act requires each offeror to certify that it does not conduct restricted business operations in Sudan.
 - (3) Remedies: False certification may result in termination of the contract, suspension of the contractor, and debarment of the contractor.

9.3.2.1 Solicitation Provision and Contract Clause

- (a) The CO shall include the clause 9-8, Restrictions on Certain Foreign Purchases, in all solicitations and contracts.
- (b) The CO shall include the provision 9-9, Offeror Representation and Certifications – Prohibited Foreign Transactions in all solicitations.

9.3.3 NAFTA Patent Notification Requirements

Contractors from a country that is a party to the North American Free Trade Agreement (NAFTA) are required by Article 1709(10) of NAFTA to obtain authorization prior to use of patented technology covered by a valid United States patent. If the CO has reason to believe that a NAFTA contractor is or will be using a patent without authorization in the performance of a Bonneville contract, contact the HCA or General Counsel for instructions.

9.3.4 Services

- (a) The evaluation of offers of: (1) covered services; or (2) construction that are subject to certain trade agreements shall be in accordance with the provisions of BPI 9.4.
- (b) The term “covered services” does not include transportation services, dredging, services purchases in support of military forces overseas, management and operating contracts of certain government or privately-owned facilities used for government purposes, including federally-funded research and development centers, research and development services, or printing services.

9.4 TRADE AGREEMENTS

- (a) This subpart implements the obligations of the United States under agreements regarding government procurement, and the Trade Agreements Act (19 U.S.C. § 2501 *et seq.*), which provides the authority to waive the Buy American Act as delegated to the U.S. Trade Representative (USTR) by the President.
- (b) The agreements covered by this section are:
 - (1) The World Trade Organization Government Procurement Agreement (WTO GPA), as approved by Congress in the Uruguay Round Agreements Act (Pub. L. 103-465);
 - (2) Free Trade Agreements (FTA), consisting of –
 - (i) NAFTA (the North American Free Trade Agreement, as approved by Congress in the North American Free Trade Agreement Implementation Act of 1993 (Pub. L. 103-182)(19 U.S.C § 3301 note);
 - (ii) Chile FTA (the United States – Chile Free Trade Agreement, as approved by Congress in the United States-Chile Free Trade Implementation Act (Public Law 108-77);

- (iii) Singapore FTA (the United States-Singapore Free Trade Agreement, as approved by Congress in the United States-Singapore Free Trade Agreement Implementation Act (Pub. L. 108-78) (19 U.S.C. § 3805 note);
 - (iv) Australia FTA (the United States-Australia Free Trade Agreement, as approved by Congress in the United States-Australia Free Trade Agreement Implementation Act (Pub. L. 108-286) (19 U.S.C. § 3805 note);
 - (v) Morocco FTA (The United States-Morocco Free Trade Agreement, as approved by Congress in the United States-Morocco Free Trade Agreement Implementation Act (Pub. L. 108-302) (19 U.S.C. § 3805 note);
 - (vi) DR-CAFTA (The Dominican Republic-Central America-United States Free Trade Agreement, as approved by Congress in the Dominican Republic-Central America-United States Free Trade Agreement Implementation Act (Pub. L. 109-53) (19 U.S.C. § 4001 note);
 - (vii) Bahrain FTA (the United States-Bahrain Free Trade Agreement, as approved by Congress in the United States-Bahrain Free Trade Agreement Implementation Act (Pub. L. 109-169) (19 U.S.C. § 3805 note);
 - (viii) Oman FTA (the United States-Oman Free Trade Agreement, as approved by Congress in the United States-Oman Free Trade Agreement Implementation Act (Pub. L. 109-283) (19 U.S.C. § 3805 note);
 - (ix) Peru FTA (the United States-Peru Trade Promotion Agreement, as approved by Congress in the United States-Peru Trade Promotion Agreement Implementation Act (Pub. L. 110-138) (19 U.S.C. § 3805 note);
 - (x) Korea FTA (the United States-Korea Free Trade Agreement Implementation Act (Pub. L. 112-41) (19 U.S.C. § 3805 note);
 - (xi) Colombia FTA (the United States-Colombia Trade Promotion Agreement Implementation Act (Pub. L. 112-42) (19 U.S.C. § 3805 note); and
 - (xii) Panama FTA (the United States-Panama Trade Promotion Agreement Implementation Act (Pub. L. 112-43)(19 U.S.C. § 3805 note).
- (3) 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)), in acquisitions covered by the WTO GPA.
- (4) The Caribbean Basin Trade Initiative (CBTI) (determination of the U.S. Trade Representative that end products or construction material granted duty-free entry from countries designated as beneficiaries under the Caribbean Basin Economic Recovery Act (19 U.S.C. § 2701, et seq.), with the exception of Panama, must be treated as eligible products in acquisitions covered by the WTO GPA);
- (5) The Israeli Trade Act (the U.S.-Israel Free Trade Area Agreement, as approved by Congress in the United States-Israel Free Trade Area Implementation Act of 1985 (19 U.S.C. § 2112 note); or
- (6) The Agreement on Trade in Civil Aircraft (U.S. Trade Representative waiver of the Buy American Act for signatories of the Agreement on Trade in Civil Aircraft, as implemented in the Trade Agreements Act of 1979 (19 U.S.C. § 2513)(see BPI 9.1.3).
- (c) The value of the acquisition is a determining factor in the applicability of trade agreements. The trade agreements and thresholds for applicability to Bonneville procurements are listed in BPI 9.4.2.

9.4.1 Definitions

As used in this subpart –

Caribbean Basin country means any of the following countries: Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, Bonaire, British Virgin Islands, Curacao, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saba, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Sint Eustatius, Sint Maarten, or Trinidad and Tobago. These countries are covered by the WTO GPA.

Free Trade Agreement country means any of the following countries: Australia, Bahrain, Chile, Columbia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Korea (Republic of), Mexico, Morocco, Nicaragua, Oman, Panama, Peru, or Singapore. Procurements between Bonneville and Canada are excluded from coverage until Canada covers provinces and hydro utilities.

Least developed country means any of the following countries: Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, Laos, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Nepal, Niger, Rwanda, Samoa, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, Somalia, South Sudan, Tanzania, Timor-Leste, Togo, Tuvalu, Uganda, Vanuatu, Yemen, or Zambia. These countries are covered by the WTO GPA.

North American Free Trade Agreement country means: Mexico. Procurements between Bonneville and Canada are excluded from coverage until Canada covers provinces and hydro utilities.

A World Trade Organization Government Procurement Agreement (WTO GPA) country means any of the following countries: Armenia, Aruba, Austria, Belgium, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea (Republic of), Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Montenegro, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Taiwan (known in the World Trade Organization as “the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei)”), Ukraine, or United Kingdom. Procurements between Bonneville and Canada are excluded from coverage until Canada covers provinces and hydro utilities.

9.4.2 Trade Agreements Thresholds

- (a) The various thresholds for supplies, services, and construction under trade agreements are summarized in the table below. See BPI 9.4.1 for the list of parties to the WTO GPA, DR-CAFTA, and NAFTA, and for the list of least developed countries.
- (b) If the value equals or exceeds the amount listed, the offer shall receive equal treatment with U.S. domestic offers. All values are in U.S. Dollars. The CO shall specify that offerors must submit offers in the English language and in U.S. dollars.

Trade Agreement	Supply Contract (equal to or exceeding)	Service Contract (equal to or exceeding)	Construction Contract (equal to or exceeding)
World Trade Organization Government Procurement Agreement (WTO GPA) [also covers least developed countries and Caribbean Basin countries] [Canada is excluded from coverage until it covers its provinces and hydro utilities]	\$183,000	\$183,000	\$7,032,000
Dominican Republic-Central American-United States Free Trade Agreement (DR-CAFTA)	\$92,319	\$92,319	\$7,032,000
North American Free Trade Agreement (NAFTA)			
- Canada [Canada is excluded from coverage until it covers its provinces and hydro utilities]	\$25,000	\$83,099	\$10,802,884
	\$92,319 – \$92,319		
- Mexico	\$12,001,460		
U.S. – Australia Free Trade Agreement	\$92,319	\$92,319	\$7,032,000
U.S. – Bahrain Free Trade Agreement	\$183,000	\$183,000	\$12,001,460
U.S. – Columbia Free Trade Agreement	\$92,319	\$92,319	\$7,032,000
U.S. – Chile Free Trade Agreement	\$92,319	\$92,319	\$7,032,000
U.S. – Israel Free Trade Agreement	\$50,000	N/A	N/A
U.S. – Korea Free Trade Agreement	\$100,000	\$100,000	\$7,032,000
U.S. – Morocco Free Trade Agreement	\$183,000	\$183,000	\$7,032,000
U.S. – Oman Free Trade Agreement	\$183,000	\$183,000	\$12,001,460

U.S. – Panama Free Trade Agreement	\$183,000	\$183,000	\$7,032,000
U.S. – Peru Trade Promotion Agreement	\$183,000	\$183,000	\$7,032,000
U.S. – Singapore Free Trade Agreement	\$92,319	\$92,319	\$7,032,000

35.2.68 Provision 9-1 Buy American Certificate – Supplies and Services

As prescribed in 9.1.6, insert the following provision in all solicitations for supplies, or for services involving the furnishing the supplies, expected to exceed \$50,000, except for the purchase of (1) civil aircraft and related articles, (2) supplies subject to trade agreement thresholds; and (3) commercial IT equipment and supplies.

BUY AMERICAN CERTIFICATE – SUPPLIES AND SERVICES (OCT 2022)

- (a) The Offeror certifies the product and that each domestic end product listed below in this provision contains a critical component, except the end products listed below, is a domestic end product (as defined in the clause entitled "Buy American Act - Supplies"); and that components of unknown origin have been considered to have been mined, produced, or manufactured outside the United States.

FOREIGN END PRODUCTS

Line Item No. (Contains Critical Component)	Country of Origin	Exceeds 55%domestic content (yes/no)

(List as necessary)

- (b) An Offeror who proposes to furnish domestic source end products containing components of foreign origin the cost of which exceeds 15 percent of the domestic content of the offered price, shall furnish in the spaces below a complete list of components of foreign origin in sufficient detail to clearly identify each.

FOREIGN COMPONENTS AND POINT OF ORIGIN

- (c) The Offeror represents that the total cost of the above components of foreign origin, including applicable duty and transportation costs constitutes ___ percent of the cost of all components to be incorporated in the end products being furnished. The Offeror agrees to furnish, for the exclusive use of Bonneville, such additional information as the Contracting Officer may request in order to verify the foregoing in evaluating the offer.
- (d) The Offeror agrees that no components of foreign origin, other than those listed above, will be incorporated in the end products being furnished without written approval of the Contracting Officer.
- (e) Where an Offeror fails to complete the representation of foreign content provision above, and in the absence of any previous experience with the offeror or information to the contrary, Bonneville assumes that domestic firms intend to furnish domestic end products and that foreign firms intend to furnish products of foreign origin.
- (f) Bonneville will evaluate offers in accordance with the policies and procedures of part 9 of the Bonneville Purchasing Instructions.

(End of provision)

35.2.69 Provision 9-2 Waiver of Buy American Act for Civil Aircraft and Related Articles

As prescribed in 9.1.6, insert the following provision in solicitations for the acquisition of civil aircraft and related articles:

WAIVER OF BUY AMERICAN ACT FOR CIVIL AIRCRAFT AND RELATED ARTICLES (FEB 2016)

- (a) "Civil aircraft and related articles", as used in this provision, means –
 - (1) All aircraft other than aircraft to be purchased for use by the Department of Defense or the U.S. Coast Guard;
 - (2) The engines (and parts and components for incorporation into the engines) of these aircraft;
 - (3) Any other parts, components and subassemblies for incorporation into the aircraft; and
 - (4) Any ground flight simulators, and parts and components of these simulators, for use with respect to the aircraft, whether 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) The U.S. Trade Representative has waived application of the Buy American Act to the acquisition of civil aircraft and related articles (as defined in paragraph (a) above) of countries or instrumentalities that are parties to the Agreement on Trade in Civil Aircraft. Those countries and instrumentalities include Albania, Austria, Belgium, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Ireland, Italy, Japan, Latvia, Lithuania, Luxembourg, Macao, Montenegro, the Netherlands, Norway, Poland, Portugal, Romania, Slovakia, Spain, Sweden, Switzerland, Taiwan (Chinese Taipei), and the United Kingdom.
- (c) For the purpose of this waiver, an article is a product of a country or instrumentality only if –
 - (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 of instrumentality, that 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.
- (d) The waiver is subject to modification or withdrawal by the U.S. Trade Representative.

(End of provision)

35.2.70 Clause 9-3 Buy American Act – Supplies

As prescribed in 9.1.6, insert the following clause in all solicitations and contracts for supplies, or for services involving the furnishing the supplies, expected to exceed \$50,000, except for the purchase of (1) civil aircraft and related articles, (2) supplies subject to trade agreement thresholds; and (3) commercial IT equipment and supplies.

BUY AMERICAN ACT – SUPPLIES (OCT 2022)

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

“Commercially available off-the-shelf (COTS) item” –

- (1) Means any item of a supply (including construction material) that is:
 - (i) A commercial item (as defined in BPI subpart 2.2);
 - (ii) Sold in substantial quantities in the commercial marketplace; and

- (iii) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and
- (2) Does not include bulk cargo, as defined in 46 U.S.C. 40102(4), such as agricultural products and petroleum products.

"Component" means those articles, materials, and supplies, which are incorporated directly into the end products.

"Cost of components" means –

- (1) For components purchased by the Contractor, the acquisition cost, including transportation costs to the place of incorporation into the end product (whether or not such costs are paid to a domestic firm), and any applicable duty (whether or not a duty-free entry certificate is issued); or
- (2) For components manufactured by the Contractor, all costs associated with the manufacture of the component, including transportation costs as described in paragraph (1) of this definition, plus allocable overhead costs, but excluding profit. Cost of components does not include any costs associated with the manufacture of the end product.

"Critical Component" means a component that is mined, produced, or manufactured in the United States and deemed critical to the U.S. supply chain.

Domestic end product means –

- (1) For an end product that does not consist wholly or predominantly of iron or steel or a combination of both -
 - i. An unmanufactured construction material mined or produced in the United States; or
 - ii. An end product manufactured in the United States, if –
 - (A) The cost of its components mined, produced, or manufactured in the United States exceeds 60 percent of the cost of all its components, except that the percentage will be 65 percent for items delivered in calendar years 2024 through 2028 and 75 percent for items delivered starting in calendar year 2029. Components of foreign origin of the same class or kind for which nonavailability determinations have been made are treated as domestic. Components of unknown origin are treated as foreign. Scrap generated, collected, and prepared for processing in the United States is considered domestic; or
 - (B) The end product is a commercially available off-the-shelf (COTS) item; or
- (2) For an end product that consists wholly or predominantly of iron or steel or a combination of both, an end product manufactured in the United States, if the cost of foreign iron and steel constitutes less than 5 percent of the cost of all the components used in the end product. The cost of foreign iron and steel includes but is not limited to the cost of foreign iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the construction material and a good faith estimate of the cost of all foreign iron or steel components excluding COTS fasteners. Iron or steel components of unknown origin are treated as foreign. If the end product contains multiple components, the cost of all the materials used in such construction material is calculated in accordance with the definition of "cost of components" in this section.

"End products" means those articles, materials, and supplies to be acquired for public use under this contract.

"Fastener" means a hardware device that mechanically joins or affixes two or more objects together. Examples of fasteners are nuts, bolts, pins, rivets, nails, clips and screws.

"Foreign end product" means an end product other than a domestic end product.

"Foreign iron and steel" means iron or steel products not produced in the United States. Produced in the United States means that all manufacturing processes of the iron or steel must take place in the United States, from the initial melting stage through the application of coatings, except metallurgical processes involving refinement of steel additives. The origin of the elements of the iron or steel is not relevant to the determination of whether it is domestic or foreign.

"Predominantly of iron or steel or a combination of both" means that the cost of the iron and steel content exceeds 50 percent of the total cost of all its components. The cost of iron and steel is the cost of the iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the product and a good faith estimate of the cost of iron or steel components excluding COTS fasteners.

"Steel" means an alloy that includes at least 50 percent iron, between 0.02 and 2 percent carbon, and may include other elements.

"United States" means the 50 States, the District of Columbia, and outlying areas.

- (b) 41 U.S.C. chapter 83, Buy American, provides a preference for domestic end products for supplies acquired for use in the United States. In accordance with 41 U.S.C. 1907, the domestic content test of the Buy American statute is waived for an end product that is a COTS item, except that for an end product that consists wholly or predominantly of iron or steel or a combination of both, the domestic content test is applied only to the iron and steel content of the end products, excluding COTS fasteners.
- (c) The Contractor shall deliver only domestic end products, except those
 - (1) That Bonneville determines are not mined, produced or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality;
 - (2) For which Bonneville determines that domestic preference would be inconsistent with the public interest; or
 - (3) For which Bonneville determines the cost to be unreasonable.
- (d) The Contractor shall deliver only domestic end products except to the extent that it specified delivery of foreign end products in the provision of the solicitation entitled "Buy American Certificate".

(End of clause)

35.2.71 Provision 9-4 Foreign Offers

As prescribed in 9.1.6, insert the following provision in solicitations where foreign firms may submit offers, or offers contain foreign end products which will exceed \$50,000; except for

solicitations for civil aircraft and related articles or purchases which exceed the trade agreement thresholds:

FOREIGN OFFERS (OCT 2022)

- (a) Offers proposing to furnish material or equipment produced or manufactured outside the United States will be considered on a DAP or DDP basis only, cleared through U.S. customs and with all import duties and charges paid.
- (b) When comparing foreign offers with the low domestic offer under the Buy American Act, an evaluation differential of 20 percent will be added to the price of each foreign end item delivered at destination, but excluding the price of any additional work to be performed at the site such as installation or testing; provided that the differential will be doubled to 30 percent in the event that the low domestic Offeror qualifies as a small business concern.

(End of provision)

35.2.72 Clause 9-5 Buy American Act – Construction Materials

As prescribed in 9.2.4, insert the following clause in solicitations and contracts over \$50,000 for construction, unless subject to certain trade agreement:

BUY AMERICAN ACT – CONSTRUCTION MATERIALS (OCT 2022)

- (a) Definitions. As used in this clause –
 - “Commercially available off-the-shelf (COTS) item” –
 - (1) Means any item of supply (including construction material) that is –
 - i. A commercial product as defined in paragraph (1) of the definition of “commercial product” at Bonneville Purchasing Instruction (BPI) 2.2;
 - ii. Sold in substantial quantities in the commercial marketplace; and
 - iii. Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and
 - (2) Does not include bulk cargo, as defined in 46 U.S.C. 40102(4), such as agricultural products and petroleum products.

“Construction material” means an article, material, or supply brought to the construction site by the Contractor or a subcontractor for incorporation into the building or work. The term also includes an item brought to the site preassembled from articles, materials, or supplies. However, emergency life safety systems, such as emergency lighting, fire alarms, and audio evacuation systems, that are discrete systems incorporated into a public building or work and that are produced as complete systems, are evaluated as a single and distinct construction material regardless of when or how the individual parts or components of those systems are delivered to the construction site. Materials purchased directly by the Government are supplies, not construction material.

“Cost of components” means –

- (1) For components purchased by the Contractor, the acquisition cost, including transportation costs to the place of incorporation into the construction material (whether or not such costs are paid to a domestic firm), and any applicable duty (whether or not a duty-free entry certificate is issued); or
- (2) For components manufactured by the Contractor, all costs associated with the manufacture of the component, including transportation costs as described in paragraph (1) of this definition, plus allocable overhead costs, but excluding profit. Cost of

components does not include any costs associated with the manufacture of the construction material.

“Critical Component” means a component that is mined, produced, or manufactured in the United States and deemed critical to the U.S. supply chain.

“Critical Item” means a domestic construction material or domestic end product that is deemed critical U.S. supply chain resiliency.

“Domestic construction material” means –

- (1) For construction material that does not consist wholly or predominantly of iron or steel or a combination of both-
 - i. An unmanufactured construction material mined or produced in the United States; or
 - ii. A construction material manufactured in the United States, if –
 - (a) The cost of its components mined, produced, or manufactured in the United States exceeds 60 percent of the cost of all its components, except that the percentage will be 65 percent for items delivered in calendar years 2024 through 2028 and 75 percent for items delivered starting in calendar year 2029. Components of foreign origin of the same class or kind for which nonavailability determinations have been made are treated as domestic. Components of unknown origin are treated as foreign; or
 - (b) The construction material is a COTS item; or
- (2) For construction material that consists wholly or predominantly of iron or steel or a combination of both, a construction material manufactured in the United States if the cost of foreign iron and steel constitutes less than 5 percent of the cost of all components used in such construction material. The cost of foreign iron and steel includes but is not limited to the cost of foreign iron or steel mill products (such as bar, billet, slab, wire, plate, or sheet), castings, or forgings utilized in the manufacture of the construction material and a good faith estimate of the cost of all foreign iron or steel components excluding COTS fasteners. Iron or steel components of unknown origin are treated as foreign. If the construction material contains multiple components, the cost of all the materials used in such construction material is calculated in accordance with the definition of "cost of components".

“Fastener” means a hardware device that mechanically joins or affixes two or more objects together. Examples of fasteners are nuts, bolts, pins, rivets, nails, clips, and screws.

“Foreign construction material” means a construction material other than a domestic construction material.

“Foreign iron and steel” means iron or steel products not produced in the United States. Produced in the United States means that all manufacturing processes of the iron or steel must take place in the United States, from the initial melting stage through the application of coatings, except metallurgical processes involving refinement of steel additives. The origin of the elements of the iron or steel is not relevant to the determination of whether it is domestic or foreign.

“Predominantly of iron or steel or a combination of both” means that the cost of the iron and steel content exceeds 50 percent of the total cost of all its components. The cost of iron and steel is the cost of the iron or steel mill products (such as bar, billet, slab, wire, plate, or

sheet), castings, or forgings utilized in the manufacture of the product and a good faith estimate of the cost of iron or steel components excluding COTS fasteners.

“Steel” means an alloy that includes at least 50 percent iron, between 0.02 and 2 percent carbon, and may include other elements.

"United States" means the 50 States, the District of Columbia, and outlying areas.

- (b) Domestic preference. (1) This clause implements 41 U.S.C. chapter 83, Buy American, by providing a preference for domestic construction material, in accordance with 41 U.S.C. 1907, the domestic content test of the Buy American statute is waived for construction material that is a COTS item, except that for construction material that consists wholly or predominantly of iron or steel or a combination of both, the domestic content test is applied only to the iron and steel content of the construction materials, excluding COTS fasteners. The Contractor shall use only domestic construction material in performing this contract, except as provided in paragraphs (b)(2) and (b)(3) of this clause.
- (2) This requirement does not apply to information technology that is a commercial product or to the construction materials or components listed by the Government as follows:

[Contracting Officer to list applicable excepted materials or indicate “none”]

- (3) The Contracting Officer may add other foreign construction material to the list in paragraph (b)(2) of this clause if the Government determines that –
- (i) The cost of domestic construction material would be unreasonable. For domestic construction material that is not a critical item or does not contain critical components. The cost of a particular domestic construction material subject to the requirements of the Buy American statute is unreasonable when the cost of such material exceeds the cost of foreign material by more than 20 percent;
 - (ii) The application of the restriction of the Buy American statute to a particular construction material would be impractical or inconsistent with the public interest; or
 - (iii) The construction material is not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality.
- (c) Request for determination of inapplicability of the Buy American statute. Any Contractor request to use foreign construction material in accordance with the paragraph (b)(3) of this clause shall include adequate information for Government evaluation of the request, including –
- (A) A description of the foreign and domestic construction materials;
 - (B) Unit of measure;
 - (C) Quantity;
 - (D) Price;
 - (E) Time of delivery or availability;
 - (F) Location of the construction project;
 - (G) Name and address of the proposed supplier; and
 - (H) A detailed justification of the reason for use of foreign construction materials cited in accordance with paragraph (b)(3) of this clause.
- (i) A request based on unreasonable cost shall include a reasonable survey of the market and a completed price comparison table in the format in paragraph (d) of this clause.

- (ii) The price of construction material shall include all delivery costs to the construction site and any applicable duty (whether or not a duty-free certificate may be issued).
 - (iii) Any Contractor request for a determination submitted after contract award shall explain why the Contractor could not reasonably foresee the need for such determination and could not have requested the determination before contract award. If the Contractor does not submit a satisfactory explanation, the Contracting Officer need not make a determination.
- (2) If the Government determines after contract award that an exception to the Buy American statute applies the Contracting Officer and the Contractor negotiate adequate consideration, the Contracting Officer will modify the contract to allow use of the foreign construction material. However, when the basis for the exception is the unreasonable price of a domestic construction material, adequate consideration is not less than the differential established in paragraph (b)(3)(i) of this clause.
- (3) Unless the Government determines that an exception to the Buy American statute applies, use of foreign construction material is noncompliant with the Buy American statute.
- (d) Data. To permit evaluation of requests under paragraph (c) of this clause based on unreasonable cost, the Contractor shall include the following information any applicable supporting data based on the survey of suppliers:

Foreign and Domestic Construction Materials Price Comparison					
Item No.	Construction Material Description	Unit of Measure	Quantity	Price (dollars)*	
	Item1:				
	Foreign construction material				
	Domestic construction material				
	Item2:				
	Foreign construction material				
	Domestic construction material				

[Include all delivery costs to the construction site and any applicable duty (whether or not a duty-free entry certificate is issued)].*
[List name, address, telephone number, and contact for suppliers surveyed. Attach copy of response; if oral, attach summary]
[Include other applicable supporting information]

(End of clause)

35.2.73 Provision 9-6 Buy American Act Representations

As prescribed in 9.2.4, insert the following provision in solicitations for construction expected to exceed \$50,000, unless the materials are subject to certain trade agreements:

BUY AMERICAN ACT REPRESENTATIONS (JUL 1994)

- (a) Offeror represents that all construction materials to be used will be domestic materials conforming to the Buy American Act clause except as noted below:

<u>Name of each item of nondomestic material</u>	<u>Quantity and Units</u>	<u>Cost Delivered</u>
_____	_____	_____
_____	_____	_____
_____	_____	_____
	Total	\$ _____

(b) The contractor will be limited in the use of nondomestic materials to those listed above and those specifically exempt from the requirements of the Buy American Act as listed in clause 9-7, Buy American Act Notice. List below the lowest cost of domestic material comparable to each item of nondomestic material shown above, based upon offeror's canvass of domestic suppliers:

<u>Name of item of domestic material comparable to offered foreign material</u>	<u>Quantity and Unit (Weight, feet, etc.)</u>	<u>Cost Delivered</u>
_____	_____	_____
_____	_____	_____
_____	_____	_____

(c) If nondomestic construction materials are listed above, an alternate offer may be submitted offering comparable domestic materials. However, unless the offeror specifically states alternate prices for specific items of the schedule, based upon use of comparable domestic materials, the offeror will be evaluated only on the basis of the foreign materials listed above.

(End of provision)

35.2.74 Provision 9-7 Buy American Act Notice

As prescribed in 9.2.4, insert the following provision in solicitations for construction expected to exceed \$50,000, unless the materials are subject to certain trade agreements:

BUY AMERICAN ACT NOTICE (FEB 2022)

(a) The Buy American Act (41 U.S.C. chapter 83) generally requires that only domestic construction material be used in the performance of this contract (see the clause entitled "Buy American Act - Construction Materials"). This requirement does not apply to the following construction materials:

[Contracting Officer to list applicable excepted materials or indicate "none"]

(b) Offers based on the use of other foreign construction material may be acceptable for award if the Government determines that –

(1) Comparable domestic construction material in sufficient and reasonably available commercial quantities, and of a satisfactory quality, is unavailable, or

- (2) Use of comparable domestic construction material is impracticable or would unreasonably increase the cost.
- (c) When an offer is based on the use of one or more other foreign construction materials the offer shall include data clearly demonstrating, for each particular foreign construction material, that the cost thereof, plus 20 percent, is less than the cost of comparable domestic construction material. The cost of construction material shall be computed as including all cost of delivery to the construction site, and the cost of foreign construction material shall also include any applicable duty (whether or not a duty-free entry certificate may be issued).
- (d) For evaluation purposes, Bonneville shall add to the offer 20 percent of the cost of the foreign construction material qualifying under paragraph (c) above.
- (e) When offering other foreign construction material, offerors may also offer, at stated prices, any available comparable domestic construction material, in order to avoid the possibility that failure of a foreign construction material to be acceptable under this provision will cause rejection of the entire offer.

(End of provision)

35.2.75 Clause 9-8 Restrictions on Certain Foreign Purchases

As prescribed in 9.3.2.1, insert the following clause in all solicitations and contracts:

RESTRICTIONS ON CERTAIN FOREIGN PURCHASES (JUL 2013)

- (a) Except as authorized by the Office of Foreign Assets Control (OFAC) in the Department of the Treasury, the Contractor shall not acquire, for use in the performance of this contract, 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 Burma or North Korea, into the United States or its outlying areas. Lists of entities and individuals subject to economic sanctions are included in OFAC's List of Specially Designated Nationals and Blocked Persons at <http://www.treas.gov/offices/enforcement/ofac/sdn>. More information about these restrictions, as well as updates, is available in the OFAC's regulations at 31 CFR Chapter V and/or on OFAC's website at <http://www.treas.gov/offices/enforcement/ofac>.
- (c) The contractor shall insert this clause, including this paragraph (c), in all subcontracts.

(End of clause)

35.2.76 Provision 9-9 Offeror Representation and Certifications – Prohibited Foreign Transactions

As prescribed in 9.3.2.1, insert the following provision in all solicitations:

OFFEROR REPRESENTATION AND CERTIFICATIONS – PROHIBITED FOREIGN TRANSACTIONS (MAR 2018)

- (a) The representations in (b)(1) and certifications in (b)(2) and b(3) do not apply if the procurement is covered by a trade agreement as defined in BPI 9.4.2 and the offeror has certified that all the offered products are designated country end products or designated country material.
- (b) By submission of its offer, the offeror:

- (1) Represents, to the best of its knowledge that the offeror does not export any sensitive technology as defined in Pub. L. 111-195 Section 106 to the government of Iran or any entities or individuals owned or controlled by, or acting on the behalf of the government of Iran.
- (2) Certifies that the offeror, or any person owned of controlled by the offeror, does not engage in activities that may result in sanctions under Section 5 of the Iran Sanctions Act (Pub. L. 111-195 et seq.).
- (3) Certifies that the offeror, and any person owned or controlled by the offeror, does not knowingly engage in any transaction that exceeds \$3,000 with Iran's Revolutionary Guard Corps or any of its officials, agents, or affiliates, the property and interests in property of which are blocked pursuant to the International Emergency Economic Powers Act (50 U.S.C. 1701 et seq.)
- (4) Certifies that the offeror does not conduct any restricted business operations in Sudan as defined in in the Sudan Accountability and Divestment Act of 2007 (Pub. L. 110-174).

(End of provision)

35.2.77 Clause 9-46 Required Use of American Iron, Steel, and Other Manufactured Goods – Buy American Act – Construction Materials

As prescribed in 9.2.5.9, insert the following clause in solicitation and contracts for construction, funded in whole or in part to the Recovery Act that is performed in the United States and valued less than \$7,008,000:

REQUIRED USE OF AMERICAN IRON, STEEL, AND OTHER MANUFACTURED GOODS – BUY AMERICAN ACT – CONSTRUCTION MATERIALS (FEB 2022)

(a) Definitions. As used in this clause—

Construction material means an article, material, or supply brought to the construction site by the Contractor or a subcontractor for incorporation into the building or work. The term also includes an item brought to the site preassembled from articles, materials, or supplies. However, emergency life safety systems, such as emergency lighting, fire alarm, and audio evacuation systems, that are discrete systems incorporated into a public building or work and that are produced as complete systems, are evaluated as a single and distinct construction material regardless of when or how the individual parts or components of those systems are delivered to the construction site. Materials purchased directly by the Government are supplies, not construction material.

Domestic construction material means—

- (1) An unmanufactured construction material mined or produced in the United States; or
- (2) A construction material manufactured in the United States.

Foreign construction material means a construction material other than a domestic construction material.

Manufactured construction material means any construction material that is not unmanufactured construction material.

Steel means an alloy that includes at least 50 percent iron, between .02 and 2 percent carbon, and may include other elements.

United States means the 50 States, the District of Columbia, and outlying areas.

Unmanufactured construction material means raw material brought to the construction site for incorporation into the building or work that has not been—

- (1) Processed into a specific form and shape; or
- (2) Combined with other raw material to create a material that has different properties than the properties of the individual raw materials.

(b) Domestic preference.

(1) This clause implements—

- (i) Section 1605 of the American Recovery and Reinvestment Act of 2009 (Recovery Act) (Pub. L. 111-5), by requiring, unless an exception applies, that all iron, steel, and other manufactured goods used as construction material in the project are produced in the United States; and
- (ii) The Buy American Act (41 U.S.C. 10a-10d) by providing a preference for unmanufactured domestic construction material.

(2) The Contractor shall use only domestic construction material in performing this contract, except as provided in paragraph (b)(3) and (b)(4) of this clause.

(3) This requirement does not apply to the construction material or components listed by the Government as follows:

[Contracting Officer to list applicable excepted materials or indicate "none"]

(4) The Contracting Officer may add other foreign construction material to the list in paragraph (b)(3) of this clause if the Government determines that—

- (i) The cost of domestic construction material would be unreasonable.
 - (A) The cost of domestic iron, steel, or other manufactured goods used as construction material is unreasonable when the cumulative cost of such material will increase the cost of the contract by more than 25 percent;
 - (B) The cost of unmanufactured construction material is unreasonable when the cost of such material exceeds the cost of foreign material by more than 20 percent;
- (ii) The construction material is not mined, produced, or manufactured in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or
- (iii) The application of the restriction of section 1605 of the Recovery Act or the Buy American Act to a particular construction material would be inconsistent with the public interest.

(c) Request for determination of inapplicability of Section 1605 of the Recovery Act or the Buy American Act.

(1) (i) Any Contractor request to use foreign construction material in accordance with paragraph (b)(4) of this clause shall include adequate information for Government evaluation of the request, including—

- (A) A description of the foreign and domestic construction materials;
- (B) Unit of measure;
- (C) Quantity;
- (D) Cost;
- (E) Time of delivery or availability;
- (F) Location of the construction project;
- (G) Name and address of the proposed supplier; and
- (H) A detailed justification of the reason for use of foreign construction materials cited in accordance with paragraph (b)(4) of this clause.

- (ii) A request based on unreasonable cost shall include a reasonable survey of the market and a completed cost comparison table in the format in paragraph (d) of this clause.
 - (iii) The cost of construction material shall include all delivery costs to the construction site and any applicable duty.
 - (iv) Any Contractor request for a determination submitted after contract award shall explain why the Contractor could not reasonably foresee the need for such determination and could not have requested the determination before contract award. If the Contractor does not submit a satisfactory explanation, the Contracting Officer need not make a determination.
- (2) If the Government determines after contract award that an exception to section 1605 of the Recovery Act or the Buy American Act applies and the Contracting Officer and the Contractor negotiate adequate consideration, the Contracting Officer will modify the contract to allow use of the foreign construction material. However, when the basis for the exception is the unreasonable cost of a domestic construction material, adequate consideration is not less than the differential established in paragraph (b)(4)(i) of this clause.
- (3) Unless the Government determines that an exception to section 1605 of the Recovery Act or the Buy American Act applies, use of foreign construction material is noncompliant with section 1605 of the American Recovery and Reinvestment Act or the Buy American Act.
- (d) Data. To permit evaluation of requests under paragraph (c) of this clause based on unreasonable cost, the Contractor shall include the following information and any applicable supporting data based on the survey of suppliers:

Foreign and Domestic Construction Materials Cost Comparison

Construction Material Description	Unit of Measure	Quantity	Cost (dollars)*
Item 1:			
Foreign construction material			
Domestic construction material			
Item 2:			
Foreign construction material			
Domestic construction material			

[List name, address, telephone number, and contact for suppliers surveyed. Attach copy of response; if oral, attach summary. Include other applicable supporting information, as necessary]

*Include all delivery costs to the construction site.

(End of clause)

35.2.78 Provision 9-47 Notice of Required Use of American Iron, Steel, and Other Manufactured Goods – Buy American Act – Construction Materials

As prescribed in 9.2.5.9, insert the following provision in solicitations for construction, funded in whole or in part to the Recovery Act, when Clause 9-46 is used.

NOTICE OF REQUIRED USE OF AMERICAN IRON, STEEL, AND OTHER

**MANUFACTURED GOODS – BUY AMERICAN ACT – CONSTRUCTION MATERIALS
(FEB 2022)**

- (a) Definitions. “Construction material,” “domestic construction material,” “foreign construction material,” “manufactured construction material,” “steel,” and “unmanufactured construction material,” as used in this clause, are defined in the clause of this solicitation entitled “Required Use of Iron, Steel, and Other Manufactured Goods--Buy American Act--Construction Materials” (BPI Clause 9-46).
- (b) Requests for determinations of inapplicability. An offeror requesting a determination regarding the inapplicability of section 1605 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5) (Recovery Act) or the Buy American Act should submit the request to the Contracting Officer in time to allow a determination before submission of offers. The offeror shall include the information and applicable supporting data required by paragraphs (c) and (d) of BPI Clause 9-46 in the request. If an offeror has not requested a determination regarding the inapplicability of 1605 of the Recovery Act or the Buy American Act before submitting its offer, or has not received a response to a previous request, the offeror shall include the information and supporting data in the offer.
- (c) Evaluation of offers.
 - (1) if the Government determines that an exception based on unreasonable cost of domestic construction material applies, the Government will evaluate an offer requesting exception to the requirements of section 1605 of the Recovery Act or the Buy American Act by adding to the offered price of the contract—
 - (i) 25 percent of the offered price of the contract, if foreign iron, steel, or other manufactured goods are used as construction material based on unreasonable cost of comparable manufactured domestic construction material; and
 - (ii) 20 percent of the cost of foreign unmanufactured construction material included in the offer based on unreasonable cost of comparable domestic unmanufactured construction material. (d) Alternate offers.
 - (2) If two or more offers are equal in price, the Contracting Officer will give preference to an offer that does not include foreign construction material excepted at the request of the offeror on the basis of unreasonable cost.
- (b) Alternate Offers
 - (1) When an offer includes foreign construction material not listed by the Government in this solicitation in paragraph (b)(2) of the clause at BPI Clause 9-46, the offeror also may submit an alternate offer based on use of equivalent domestic construction material.
 - (2) If an alternate offer is submitted, the offeror shall submit a separate Cover/Signature Page for the alternate offer and a separate cost comparison table prepared in accordance with paragraphs (c) and (d) of BPI Clause 9-46 if the offer that is based on the use of any foreign construction material for which the Government has not yet determined an exception applies.
 - (3) If the Government determines that a particular exception requested in accordance with paragraph (c) of the clause at Bonneville Clause 9-46 does not apply, the Government will evaluate only those offers based on use of the equivalent domestic construction material, and the offeror shall be required to furnish such domestic construction material. An offer based on use of the foreign construction material for which an exception was requested—
 - (i) Will be rejected as nonresponsive if this acquisition is conducted by sealed bidding; or
 - (ii) May be accepted if revised during negotiations.

(End of provision)

Alternate I (FEB 2022). If insufficient time is available to process a determination, substitute the following paragraph (b) for paragraph (b) of the basic clause:

- (b) Requests for determinations of inapplicability. An offeror requesting a determination regarding the inapplicability of section 1605 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5) (Recovery Act) or the Buy American Act shall submit the request with its offer, including the information and applicable supporting data required by paragraphs (c) and (d) of the clause at BPI Clause 9-46.

35.2.79 Clause 9-48 Required Use of American Iron, Steel, and Other Manufactured Goods – Buy American Act – Construction Materials Under Trade Agreements

As prescribed in 9.2.5.9, insert the following clause in solicitations and contracts for construction, funded in whole or in part to the Recovery Act that is performed in the United States and valued at \$7,008,000 or more.

REQUIRED USE OF AMERICAN IRON, STEEL AND OTHER MANUFACTURED GOODS – BUY AMERICAN ACT – CONSTRUCTION MATERIALS UNER TRADE AGREEMENTS (OCT 2022)

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

“Caribbean Basin country construction material” means a construction material that –

- (1) Is wholly growth, product, or manufacture of a Caribbean Basin country; or
- (2) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in a Caribbean Basin country into a new and different construction material distinct from the materials from which it was transformed.

“Commercially available off-the-shelf (COTS) item” –

- (1) Means any item of supply (including construction material) that is –
 - (i) A commercial item (as defined in BPI subpart 2.2);
 - (ii) Sold in substantial quantities in the commercial marketplace; and
 - (iii) Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and
- (2) Does not include bulk cargo, as defined in section 3 of the Shipping Act of 1984 (46 U.S.C. App. 1702), such as agricultural products and petroleum products.

“Component” means an article, material, or supply incorporated directly into a construction material.

“Construction material” means an article, material, or supply brought to the construction site by the Contractor or subcontractor for incorporation into the building or work. The term also includes an item brought to the site preassembled from articles, materials, or supplies. However, emergency life safety systems, such as emergency lighting, fire alarm, and audio evacuation systems, that are discrete systems incorporated into a public building or work and that are produced as complete systems, are evaluated as a single and distinct construction material regardless of when or how the individual parts or components of those systems are delivered to the construction site. Materials purchased directly by the Government are supplies, not construction material.

“Critical Component” means a component that is mined, produced, or manufactured in the United States and deemed critical to the U.S. supply chain.

“Critical Item” means a domestic construction material or domestic end product that is deemed critical U.S. supply chain resiliency.

“Designated country” means any of the following countries:

- (1) A World Trade Organization Government Procurement Agreement (WTO GPA) country (Armenia, Aruba, Austria, Belgium, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea (Republic of), Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Montenegro, the Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Taiwan, Ukraine, or United Kingdom);
- (2) A Free Trade Agreement country (FTA)(Australia, Bahrain, Chile, Columbia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Korea (Republic of), Mexico, Morocco, Nicaragua, Oman, Panama, Peru, or Singapore);
- (3) A least developed country (Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, Laos, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Nepal, Niger, Rwanda, Samoa, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, Somalia, South Sudan, Tanzania, Timor Leste, Togo, Tuvalu, Uganda, Vanuatu, Yemen, or Zambia); or
- (4) A Caribbean Basin country (Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, Bonaire, British Virgin Islands, Curacao, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saba, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Sint Eustatius, Sint Maarten, or Trinidad and Tobago).

“Domestic construction material” means –

- (1) An unmanufactured construction material mined or produced in the United States; or
- (2) A construction material manufactured in the United States if –
 - (i) The cost of its components mined, produced, or manufactured in the United States exceeds 60 percent of the cost of all its components, except that the percentage will be 65 percent for items delivered in calendar years 2024 through 2028 and 75 percent for items delivered starting in calendar year 2029.; or
 - (ii) The construction material is a COTS item.

“Foreign construction material” means a construction material other than a domestic construction material.

“Free trade agreement (FTA) country construction material” means a construction material that –

- (1) Is wholly the growth, product, or manufacture of a FTA country; or
- (2) In the case of construction material that consists in whole or in part of materials from another country, has been substantially transformed in a FTA country into a new and different construction material distinct from the materials from which it was transformed.

“Least developed country construction material” means a construction material that –

- (1) Is wholly the growth, product, or manufacture of a least developed country; or
- (2) In the case of construction material that consists in whole or in part of materials from another country, has been substantially transformed in a least developed country into a

new and different construction material distinct from the materials from which it was transformed.

“Manufactured construction material” means any construction material that is not unmanufactured construction material.

“Steel” means an alloy that includes at least 50 percent iron, between .02 and 2 percent carbon, and may include other elements.

“United States” means the 50 States, the District of Columbia, and outlying areas.

“Unmanufactured construction material” means raw material brought to the construction site for incorporation into the building or work that has not been –

- (1) Processed into a specific form and shape or
- (2) Combined with other raw material to create a material that has different properties than the properties of the individual raw materials.

“WTO GPA country construction material” means a construction material that –

- (1) Is wholly the growth, product, or manufacture of a WTO GPA country; or
- (2) In the case of construction material that consists in whole or in part of materials from another country, has been substantially transformed in a WTO GPA country into a new and different construction material distinct from the materials from which it was transformed.

(b) Construction materials.

(1) The restrictions of section 1605 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5)(Recovery Act) and the Buy American Act (41 U.S.C. 10a-10d) do not apply to Recovery Act designated country construction material. Consistent with U.S. obligations under international agreements, this clause implements –

- (i) Section 1605 of the Recovery Act by requiring, unless an exception applies, that all iron, steel, and other manufactured goods used as construction material in the project are produced in the United States; and
- (ii) The Buy American Act by providing a preference for unmanufactured domestic construction material.

(2) The Contractor shall use only domestic or Recovery Act designated country construction material in performing this contract, except as provided in paragraphs (b)(3) and (b)(4) of this clause.

(3) The requirement in paragraph (b)(2) of this clause does not apply to the construction materials or components listed by the government as follows:

[Contracting Officer to list applicable excepted materials or indicate “none”]

(4) The Contracting officer may add other construction material to the list in paragraph (b)(3) of this clause if the Government determines that –

- (i) The cost of domestic construction material would be unreasonable.
 - (A) For domestic construction material that is not a critical item or does not contain critical components. The cost of a particular domestic construction material subject to the restrictions of the buy American statute is unreasonable when the cost of such material exceeds the cost of foreign material by more than 20 percent;
 - (B) For construction material that is not COT item and does not consist wholly or predominantly of iron or steel or a combination of both, if the cost of a particular domestic construction material is determined to be unreasonable or there is not domestic offer received, and the low offer is for foreign construction material that does not exceed 55 percent domestic content, the

- contracting officer will treat the lowest offer of the foreign construction material. That is manufactured in the United States and exceed 55 percent domestic content as a domestic offer and determine whether of that offer is unreasonable by applying the evaluation listed in this clause under (c)(1)(i)
- (C) For domestic construction material that IS a critical item or contains critical components. The cost of the particular domestic contraction material that is critical item or contains critical components, subject to the requirement to the Buy American Statue, is unreasonable when the cost of such material that exceed the cost of foreign material by more than 20 percent plus the additional preference factor identified in the critical item or construction material containing critical components.
 - (D) For construction material that does not consist wholly or predominantly of iron or steel or combination of both, if the cost of a particular domestic construction material is determined to be unreasonable or there is no domestic offer received, and the low offer is for foreign construction material that does not exceed 55 percent domestic content, the contracting officer will treat the lowest offer of foreign construction material that is manufactured in the United States and exceeds 55 percent domestic content as a domestic offer, and determined whether the cost of that offer is unreasonable by applying the evaluation listed in this clause under (c)(1)(i)
- (ii) The construction material is not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality; or
 - (iii) The application of the restriction of section 1605 of the Recovery Act or the Buy American Act to a particular construction material would be inconsistent with the public interest.
- (c) Request for determination of inapplicability of section 1605 of the Recovery Act or the Buy American Act.
- (1)
- (i) Any contractor request to use foreign construction material in accordance with paragraph (b)(4) of this clause shall include adequate information for Government evaluation of the request, including –
 - (A) A description of the foreign and domestic construction materials;
 - (B) Unite of measure;
 - (C) Quantity;
 - (D) Cost;
 - (E) Time of delivery or availability;
 - (F) Location of the construction project;
 - (G) Name and address of the proposed supplier; and
 - (H) A detailed justification of the reason for use of foreign construction materials cited in accordance with paragraph (b)(4) of this clause.
 - (ii) A request based on unreasonable cost shall include a reasonable survey of the market and a completed cost comparison table in the format in paragraph (d) of this clause.
 - (iii) The cost of construction material shall include all delivery costs to the construction site and any applicable duty.
 - (iv) Any contractor request for a determination submitted after contract award shall explain why the contractor could not reasonably foresee the need for such determination and could not have requested the determination before contract

award. If the contractor does not submit a satisfactory explanation, the contracting officer need not make a determination.

- (2) If the Government determines after contract award that an exception to section 1605 of the Recovery Act or the Buy American Act applies and the contracting officer and the contractor negotiate adequate consideration, the contracting officer will modify the contract to allow use of the foreign construction material. However, when the basis for the exception is the unreasonable cost of a domestic construction material, adequate consideration is not less than the differential established in paragraph (b)(4)(i) of this clause.
- (3) Unless the Government determines that an exception to the section 1605 of the Recovery Act or the Buy American Act applies, use of foreign construction material other than that covered by trade agreements is noncompliant with the applicable Act.
- (d) Data. To permit evaluation of requests under paragraph (c) of this clause based on unreasonable costs, the Contractor shall include the following information and any applicable supporting data based on the survey of suppliers:

Foreign and Domestic Construction Materials Cost Comparison

Construction Material Description	Unit of Measure	Quantity	Cost (dollars)*
Item 1:			
Foreign construction material			
Domestic construction material			
Item 2:			
Foreign construction material			
Domestic construction material			

[List name, address, telephone number, and contact for suppliers surveyed. Attach copy of response; if oral, attach summary. Include other applicable supporting information, as necessary]

*Include all delivery costs to the construction site.

(End of clause)

Alternate I (OCT 2022). If the acquisition is valued between \$7,032,000 but less than \$12,001,460, adding *Bahrainian, Mexican, and Omani* construction material definition to paragraph (a) and substitute the following paragraph (d) for paragraph (b) of the basic clause:

“Bahrainian, Mexican, or Omani construction material” means a construction material that—

- (1) Is wholly the growth, product, or manufacture of Bahrain, Mexico, or Oman; or
- (2) In the case of a construction material that consists in whole or in part of materials from another country, has been substantially transformed in Bahrain, Mexico, or Oman into a new and different construction material distinct from the materials from which it was transformed.

(d) Construction materials

- (1) This clause implements 41 U.S.C. chapter 83, Buy American, by providing a preference for domestic construction material. In accordance with 41 U.S.C. 1907, the domestic content test of the Buy American statute is waived for construction material that is a COTS item, except that for construction material that consists wholly or predominantly of iron or steel or a combination of both, the domestic content test is applied only to the iron

and steel content of the construction material, excluding COTS fasteners. In addition, the Contracting Officer has determined that the WTO GPA and all the Free Trade Agreements except the Bahrain FTA, NAFTA, and the Oman FTA apply to this acquisition. Therefore, the Buy American statute restrictions are waived for designated country construction materials other than Bahrainian, Mexican, or Omani construction materials.

- (2) The Contractor shall use only domestic or designated country construction material other than Bahrainian, Mexican, or Omani construction material in performing this contract, except as provided in paragraphs (b)(3) and (b)(4) of this clause.

35.2.80 Provision 9-49 Notice of Required Use of American Iron, Steel, and Other Manufactured Goods – Buy American Act – Construction Materials Under Trade Agreements

As prescribed in 9.2.5.9, insert the following provision in solicitations which include Clause 9-48.

**NOTICE OF REQUIRED USE OF AMERICAN IRON, STEEL AND OTHER
MANUFACTURED GOODS – BUY AMERICAN ACT – CONSTRUCTION MATERIALS
UNDER TRADE AGREEMENTS (FEB 2022)**

- (a) Definitions. “Commercially available off-the-shelf (COTS) item,” “construction material,” “designated country construction material,” “domestic construction material,” “foreign construction material,” “manufactured construction material,” “steel,” and “unmanufactured construction material,” as used in this clause, are defined in the clause of this solicitation entitled “Required Use of Iron, Steel, and Other Manufactured Goods--Buy American Act--Construction Materials Under Trade Agreements” (BPI Clause 9-48).
- (b) Requests for determination of inapplicability. An offeror requesting a determination regarding the inapplicability of section 1605 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5) (Recovery Act) or the Buy American Act should submit the request to the Contracting Officer in time to allow a determination before submission of offers. The offeror shall include the information and applicable supporting data required by paragraphs (c) and (d) of BPI Clause 9-48 in the request. If an offeror has not requested a determination regarding the inapplicability of section 1605 of the Recovery Act or the Buy American Act before submitting its offer, or has not received a response to a previous request, the offeror shall include the information and supporting data in the offer.
- (c) Evaluation of offers.
 - (1) If the Government determines that an exception based on unreasonable cost of domestic construction material applies, the Government will evaluate an offer requesting exception to the requirements of section 1605 of the Recovery Act or the Buy American Act by adding to the offered price of the contract—
 - (ii) 25 percent of the offered price of the contract, if foreign iron, steel, or other manufactured goods are used as construction material based on unreasonable cost of comparable manufactured domestic construction material; and
 - (iii) 20 percent of the cost of foreign unmanufactured construction material included in the offer based on unreasonable cost of comparable domestic unmanufactured construction material.
 - (2) If two or more offers are equal in price, the Contracting Officer will give preference to an offer that does not include foreign construction material excepted at the request of the offeror on the basis of unreasonable cost.
- (d) Alternate offers.

- (1) When an offer includes foreign construction material, other than Recovery Act designated country construction material, that is not listed by the Government in this solicitation in paragraph (b)(3) of BPI clause 9-48, the offeror also may submit an alternate offer based on use of equivalent domestic or Recovery Act designated country construction material.
- (2) If the Government determines that a particular exception requested in accordance with paragraph (c) of BPI Clause 9-48 does not apply, the Government will evaluate only those offers based on use of the equivalent domestic or Recovery Act designated country construction material, and the offeror shall be required to furnish such domestic or Recovery Act designated country construction material. An offer based on use of the foreign construction material for which an exception was requested may be accepted if revised during negotiations.
- (3) If an alternate offer is submitted, the offeror shall submit a separate Cover/Signature Page for the alternate offer and a separate cost comparison table prepared in accordance with paragraphs (c) and (d) of BPI Clause 9-48 for the offer that is based on the use of any foreign construction material for which the Government has not yet determined an exception applies.

(End of provision)

Alternate I (FEB 2022). If insufficient time is available to process a determination, substitute the following paragraph (b) for paragraph (b) of the basic clause:

- (b) Requests for determinations of inapplicability. An offeror requesting a determination regarding the inapplicability of section 1605 of the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5) (Recovery Act) or the Buy American Act shall submit the request with its offer, including the information and applicable supporting data required by paragraphs (c) and (d) of the clause at BPI Clause 9-48.

Alternate II (FEB 2022). If the acquisition value more than \$7,008,000, but less than \$10,802,884, substitute the following paragraph (d) for paragraph (d) of the basic clause:

- (d) Alternate offers.
 - (1) When an offer includes foreign construction material, except foreign construction material from a Recovery Act designated country other than Bahrain, Mexico, or Oman that is not listed by the Government in this solicitation in paragraph (b)(3) of BPI clause 9-48, the offeror also may submit an alternate offer based on use of equivalent domestic or Recovery Act designated country construction material other than Bahrainian, Mexican, or Omani construction material.
 - (2) If an alternate offer is submitted, the offeror shall submit a separate Cover/Signature Page for the alternate offer and a separate cost comparison table prepared in accordance with paragraphs (c) and (d) of BPI Clause 9-48 for the offer that is based on the use of any foreign construction material for which the Government has not yet determined an exception applies.
 - (3) If the Government determines that a particular exception requested in accordance with paragraph (c) of the BPI Clause 9-48 does not apply, the Government will evaluate only those offers based on use of the equivalent domestic or Recovery Act designated country construction material other than Bahrainian, Mexican, or Omani construction material. An offer based on use of the foreign construction material for which an exception was requested may be accepted if revised during negotiations.

Alternate III (FEB 2022). If the conditions of Alternate I and Alternate II both exist, substitute paragraphs (b) and (d) of the basic clause with paragraph (b) at Alternate I and paragraph (d) at Alternate II.