

**PART 9  
CONTRACTING WITH FOREIGN BUSINESSES**

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**9.1 BUY AMERICAN ACT - SUPPLIES.**

**INFORMATION:** This subpart implements the Buy American Act (41 U.S.C. § 10a et seq.), obligations of the United States under certain international agreements regarding government procurement, and under Executive Order 10582, as amended. 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 9.1.4(a)(1) and (2);

(2) For which the HCA determines that domestic preference would be inconsistent with the public interest;

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(3) That are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality.

(b) The Buy American Act does not apply to acquisitions subject to certain trade agreements as outlined in section 9.4.

(c) The Buy American Act shall not be applied to the purchase of information technology equipment and supplies that are commercial products.

#### **9.1.2 Definitions.**

"Components" means those articles, materials, and supplies incorporated directly into the end products.

"Domestic end product" means;

(a) An unmanufactured end product mined or produced in the United States, or;

(b) An end product manufactured in the United States, if the cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. (In determining whether an end product is domestic, only the end product and its components shall be considered.) The cost of each component includes transportation costs to the place of incorporation into the end product and any applicable duty (whether or not a duty-free entry certificate is issued). Components of foreign origin of the same class or kind for which determinations have been made in accordance with 9.1.1 (b) and (c) are treated as domestic.

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

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

"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.**

**INFORMATION:** The U. S. Trade Representative has waived the application of the Buy American Act to the purchase of civil aircraft and related articles manufactured in certain countries. See clause 9-2, Waiver of Buy American Act for Civil Aircraft and Related Articles, for details. That clause is to be inserted into contracts for aircraft and related articles.

#### **9.1.4 Evaluation Procedure.**

(a) The following price differentials shall be computed and used in the evaluation of domestic and foreign offers. After computation and addition of the resulting differentials to the offered price of a domestic end product as a basis for comparison with any foreign offer, price evaluation shall be considered as otherwise stated in the solicitation. The offered price of a domestic end product is unreasonable when the lowest acceptable domestic offer exceeds the lowest acceptable foreign offer (including duty), by--

(1) More than 6 percent, if the domestic offer is from a large business concern; or

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(2) More than 12 percent, if the domestic offer is from a small business concern.

(b) The evaluation in (a) 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.

(c) The clause 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.

(d) Where the offeror indicates that it intends to furnish both foreign and domestic articles, BPA shall apply the appropriate differential to each item determined to be an end product. BPA 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.

(e) 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.

(f) 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, BPA shall assume that domestic firms intend to furnish domestic products and that foreign firms intend to furnish products of foreign origin.

(g) 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 BPA-furnished property (such as transformer oil) or to award evaluation factors such as multiple award or cost of inspection evaluation factors.

(h) To determine whether a trade agreement (see section 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:

(A) If a fixed-term contract of 12 months or less is contemplated, use the total estimated value of the purchase;

(B) 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;

(C) If an indefinite-term contract is contemplated, use the estimated monthly payment multiplied by 48; or

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- (D) If there is any doubt as to the contemplated term of the contract, use the estimated monthly payment multiplied by 48.
- (i) 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.
- (j) 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 Clause Usage Prescriptions.**

##### ***PROCEDURE:***

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 insert the provision at 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 clause 9-2);
  - (2) supplies subject to a trade agreement and expected to exceed the thresholds established in section 9.4; and
  - (3) information technology equipment or supplies that are commercial products.
- (b) The CO shall insert the clause at 9-2, Waiver of Buy American Act for Civil Aircraft and Related articles, in solicitations for the acquisition of civil aircraft and related articles.
- (c) The CO shall insert the clause at 9-3, Buy American Act-Supplies, in all solicitations and contracts for 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 clause 9-2);
  - (2) supplies subject to a trade agreement and expected to exceed the thresholds established in section 9.4; and
  - (3) information technology equipment or supplies that are commercial products.
- (d) The CO shall insert the clause at 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 clause 9-2) and those for purchase of supplies subject to certain trade agreements as outlined in section 9.4

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### **9.2 BUY AMERICAN ACT - CONSTRUCTION MATERIALS.**

**INFORMATION:** This subpart implements the Buy American Act (41 U.S.C. § 10a et seq.) and obligations of the United States under trade agreements (see section 9.4) and under Executive Order 10582, as amended. It applies to contracts for the construction, alteration, or repair of any public building or public work in the United States.

#### **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 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;

(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 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.**

**INFORMATION:**

"Components" means those articles, materials, and supplies incorporated directly into construction materials.

"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 for incorporation into the building or work.

"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, if the cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components.

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

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### **9.2.3 Evaluation Procedures.**

(a) Unless the HCA determines otherwise, when the cost of a comparable domestic construction material exceeds by more than 6 percent the cost of a foreign construction material included in an offer, using the domestic construction material would unreasonably increase the cost and use of a foreign construction material is acceptable. This evaluation shall be made for each foreign construction material not specifically excepted by the solicitation.

(b) The clause at 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) 6 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 outline in section 9.4

### **9.2.4 Clause Usage Prescriptions.**

#### ***PROCEDURE:***

(a) The CO shall insert the clause at 9-5, Buy American Act -- Construction Materials, in solicitations and contracts which are for construction which are expected to exceed \$50,000. The clause shall not be inserted in solicitations and contracts for construction materials subject to certain trade agreements as outline in section 9.4

(b) The CO shall insert the provision at 9-6, Buy American Act Representations, in solicitations for construction expected to exceed \$50,000. The clause shall not be inserted in solicitations and contracts for construction materials subject to certain trade agreements as outlined in section 9.4

(c) The CO shall insert the provision at 9-7, Buy American Act Notice, in solicitations for construction expected to exceed \$50,000. The clause shall not be inserted in solicitations and contracts for construction materials subject to certain trade agreements as outlined in section 9.4

## **9.3 ADDITIONAL FOREIGN ACQUISITION POLICIES.**

### **9.3.1 Foreign Shipments by Sea.**

***INFORMATION:*** See Part 14.15, Use of Privately-owned U. S. Flag Vessels.

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#### **9.3.2 Restricted Foreign Purchases.**

(a) **POLICY:** 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) **INFORMATION:** 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.treas.gov/offices/enforcement/ofac/sdn>. 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.treas.gov/offices/enforcement/ofac>.

(c) **PROCEDURES:**

- (1) The CO shall insert the clause at 9-8, Restrictions on Certain Foreign Purchases, in all solicitations and contracts .
- (2) 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  
Washington, DC 20220  
Telephone: (202) 622-2490

#### **9.3.3 NAFTA Patent Notification Requirements.**

**INFORMATION:** See Part 17.2(f) for details of patent notification requirements for use of a U.S. patent by a NAFTA contractor.

#### **9.3.4 Services.**

**PROCEDURE:**

- (a) The evaluation of offers of: (1) covered services; or (2) construction services that are subject to certain trade agreements shall be in accordance with the provisions of section 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-

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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 (Public Law 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 (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 Agreement 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)); and

(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));

(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); or

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(5) 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 section 9.1.3.

(c) The value of the acquisition is a determining factor in the applicability of trade agreements. Most of these dollar thresholds are subject to revision by the USTR approximately every two years. The most recent list of agreements and thresholds applicable to DOE power marketing administrations were obtained from the Office of the USTR as of March 9, 2009 and are listed in section 9.4.2.

### **9.4.1 Definitions**

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

“Free Trade Agreement country” means Australia, Bahrain, Canada, Chile, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Mexico, Morocco, Nicaragua, Oman, Peru, or Singapore.

“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, East Timor, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, Laos, Lesotho, Liberia, Madagascar, Malawi, Maldives, Mali, Mauritania, Mozambique, Nepal, Niger, Rwanda, Samoa, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, Somalia, Tanzania, Togo, Tuvalu, Uganda, Vanuatu, Yemen, or Zambia. These countries are covered by the WTO GPA.

“North American Free Trade Agreement means any of the following countries: Mexico, Canada. Canada is currently excluded as to the trade agreement exemption from the Buy American Act.

A “World Trade Organization Government Procurement Agreement” (WTO GPA) country (Aruba, Austria, Belgium, Bulgaria, Canada, 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, Netherlands, 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)) or United Kingdom).

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**9.4.2 Trade Agreement Thresholds**

(a) The various thresholds for supplies, services, and construction services under trade agreements are summarized in the table below. See section 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. All values are in U.S. Dollars. The CO shall specify that offerors must submit offers in U.S. dollars.

<b>Trade Agreement</b>	<b>Supplies</b>	<b>Services</b>	<b>Construction</b>
<b>World Trade Organization Government Procurement Agreement (WTO GPA)</b> [also covers least developed countries and Caribbean Basin countries] [Canada is excluded from coverage until it covers its provinces and hydro utilities]	\$203,000	\$203,000	\$7,804,000
<b>Dominican Republic-Central American-United States Free Trade Agreement (DR-CAFTA)</b>	\$70,079	\$70,079	\$7,804,000
<b>North American Free Trade Agreement (NAFTA)</b> [Canada is excluded from coverage until it covers its provinces and hydro utilities]	\$70,079	\$70,079	\$9,110,318
<b>U.S. - Australia Free Trade Agreement</b>	\$70,079	\$70,079	\$7,804,000
<b>U.S. - Bahrain Free Trade Agreement</b>	\$203,000	\$203,000	\$9,110,318
<b>U.S. - Chile Free Trade Agreement</b>	\$70,079	\$70,079	\$7,804,000
<b>U.S. - Morocco Free Trade Agreement</b>	\$203,000	\$203,000	\$7,804,000
<b>U.S. - Oman Free Trade Agreement</b>	\$203,000	\$203,000	\$9,110,318
<b>U.S. - Peru Free Trade Agreement</b>	\$203,000	\$203,000	\$7,804,000
<b>U.S. - Singapore Free Trade Agreement</b>	\$70,079	\$70,079	\$7,804,000

**9.50 TEXT OF CLAUSES.**

The following clauses are referred to in Part 9:

- Clause 9-1 Buy American Certificate
- Clause 9-2 Waiver of Buy American Act for Civil Aircraft and Related Articles
- Clause 9-3 Buy American Act - Supplies
- Clause 9-4 Foreign Offers
- Clause 9-5 Buy American Act - Construction Materials
- Clause 9-6 Buy American Act Representations
- Clause 9-7 Buy American Act Notice
- Clause 9-8 Restrictions on Certain Foreign Purchases

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**Clause 9-1 BUY AMERICAN CERTIFICATE (Oct 93)(BPI 9.1.6)**

(a) The Offeror certifies that each end product, 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.

EXCLUDED END PRODUCTS AND COUNTRY OF ORIGIN

(List as necessary)

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(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 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

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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 BPA, such additional information as the Contracting Officer may request in order to verify the foregoing in evaluating the offer.

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.

(c) 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, BPA assumes that domestic firms intend to furnish domestic end products and that foreign firms intend to furnish products of foreign origin.

(End of clause)

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#### **Clause 9-2 WAIVER OF BUY AMERICAN ACT FOR CIVIL AIRCRAFT AND RELATED ARTICLES (Sep 98)(BPI 9.1.6)**

(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. As of December 27, 1999, those countries and instrumentalities include Austria, Belgium, Bulgaria, Denmark, Egypt, Finland, France, Germany, Greece, Ireland, Italy, Japan, Luxembourg, Macao, the Netherlands, Norway, Portugal, Romania, Spain, Sweden, Switzerland, 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 clause)

#### **Clause 9-3 BUY AMERICAN ACT - SUPPLIES (Sep 98)(BPI 9.1.6)**

(a) The Buy American Act (41 U.S. Code 10a-d) provides that the Government give preference to domestic source end products.

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

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

"Domestic end product" means (1) an unmanufactured end product mined or produced in the United States or (2) an end product manufactured in the United States, if the cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the

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cost of all its components. Components of foreign origin of the same class or kind as the products referred to in (b) (2) or (3) of this clause shall be treated as domestic. Scrap generated, collected, and prepared for processing in the United States is considered domestic.

(b) The Contractor shall deliver only domestic end products, except those

(1) That BPA 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 BPA determines that domestic preference would be inconsistent with the public interest; or

(3) For which BPA determines the cost to be unreasonable.

(The foregoing requirements are administered in accordance with Executive Order No. 10582, as amended, and Part 9 of the BPI.)

(End of clause)

#### **Clause 9-4 FOREIGN OFFERS (Sep 98)(BPI 9.1.6)**

(a) Offers proposing to furnish material or equipment produced or manufactured outside the United States will be considered on an f.o.b. destination 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 six 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 twelve percent in the event that the low domestic Offeror qualifies as a small business concern.

(End of clause)

#### **Clause 9-5 BUY AMERICAN ACT - CONSTRUCTION MATERIALS (Sep 98)(BPI 9.2.4)**

(a) Agreement

In accordance with the Buy American Act (41 U.S.C. § 10a-10d), and Executive Order 10582, (as amended), the Contractor agrees that only domestic construction material will be used (by the Contractor, subcontractors, materialmen, and suppliers) in the performance of this contract, except for nondomestic material listed in the contract.

(b) Domestic construction material

"Construction material" means any article, material, or supply brought to the construction site for incorporation in the building or work. An unmanufactured construction material is a "domestic construction material" if it has been mined or produced in the United States. A manufactured construction material is a "domestic construction material" if it has been manufactured in the United States and if the cost of its components which have been mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. "Component" means any article, material, or supply directly incorporated in a construction material.

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(c) Domestic component

A component shall be considered to have been "mined, produced, or manufactured in the United States" (regardless of its source in fact) if the article, material, or supply in which it is incorporated was manufactured in the United States and the component is of a class or kind determined by the Government to be not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.

(d) Excluded materials.

The requirements of this clause do not apply to the following raw material and construction material components:

- Antimony, as metal or oxide.
- Asbestos, amosite, chrysolite, and crocidolite.
- Bauxite.
- Cadmium, ores and flue dust.
- Calcium cyanamide.
- Chrome ore or chromite.
- Cobalt, in cathodes, rondelles, or other primary ore and metal forms.
- Cork, wood or bark and waste.
- Diamonds, industrial, stones and abrasives.
- Fibers of the following types: jute, jute burlaps, and sisal.
- Graphite, natural, crystalline, crucible grade.
- Hemp.
- Leather, sheepskin, hair type.
- Manganese.
- Mica.
- Nickel, primary, in ingots, pigs, shots, cathodes, or similar forms; nickel oxide and nickel salts.
- Platinum and related group metals.
- Quartz crystals.
- Rubber, crude and latex.
- Spare and replacement parts for equipment of foreign manufacture, and for which domestic parts are not available.

(End of clause)

### Clause 9-6 BUY AMERICAN ACT REPRESENTATIONS (Jul 94)(BPI 9.2.4)

(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	\$ _____

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(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.

Name of item of domestic material comparable to offered foreign material	Quantity & Unit (Weight, feet, Number, etc.)	Cost Delivered
_____	_____	_____
-	-	-
_____	_____	_____
-	-	-
_____	_____	_____
-	-	-

(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 clause)

### Clause 9-7 BUY AMERICAN ACT NOTICE (Sep 98)(BPI 9.2.4)

(a) The Buy American Act (41 U.S.C. § 10a-d) 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:

\_\_\_\_\_  
- (List excepted material 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 6 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, BPA shall add to the offer 6 percent of the cost of the foreign construction material qualifying under paragraph (c) above.

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(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 clause)

**Clause 9-8 RESTRICTIONS ON CERTAIN FOREIGN PURCHASES (May 11)(BPI 9.3.2)**

(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)