

DFARS Procedures, Guidance, and Information

PGI 225—Foreign Acquisition

(Revised November 20, 2015)

PGI 225.70—AUTHORIZATION ACTS, APPROPRIATIONS ACTS, AND OTHER STATUTORY RESTRICTIONS ON FOREIGN ACQUISITION

PGI 225.7002 Restrictions on food, clothing, fabrics, and hand or measuring tools.

PGI 225.7002-1 Restrictions.

(a)(1)(ii)(1) The following are examples, not all-inclusive, of Product and Service Codes (PSCs) that contain items of clothing:

(i) Clothing apparel (such as outerwear, headwear, underwear, nightwear, footwear, hosiery, or handwear) listed in PSC 8405, 8410, 8415, 8420, 8425, 8450, or 8475.

(ii) Footwear listed in PSC 8430 or 8435.

(iii) Hosiery, handwear, or other items of clothing apparel, such as belts and suspenders, listed in PSC 8440 or 8445.

(iv) Badges or insignia listed in PSC 8455.

(2) The PSCs listed in paragraph (a)(1)(ii)(1) of this section also contain items that are not clothing, such as—

(i) Visors;

(ii) Kevlar helmets;

(iii) Handbags; and

(iv) Plastic identification tags.

(3) Each item should be individually analyzed to determine if it is clothing, rather than relying on the PSC alone to make that determination.

(4) The fact that an item is excluded from the foreign source restriction of the Berry Amendment applicable to clothing does not preclude application of another Berry Amendment restriction in DFARS [225.7002-1](#) to the components of the item.

(5) Small arms protective inserts (SAPI plates) are an example of items added to, and not normally associated with, clothing. Therefore, SAPI plates are not covered under the Berry Amendment as clothing. However, fabrics used in the SAPI plate are still subject to the foreign source restrictions of the Berry Amendment. If the fabric used in the SAPI plate is a synthetic fabric or a coated synthetic fabric, the fibers and yarns used in the fabric are not covered by the Berry Amendment, because the fabric is a component of an end product that is not a textile product (see DFARS [225.7002-2\(m\)](#)).

Example: A SAPI plate is compliant with the Berry Amendment if the synthetic fiber or yarn is obtained from foreign country X and woven into synthetic fabric in the United States, which is then incorporated into a SAPI plate manufactured in foreign country Y.

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(2) *Hand or measuring tools.*

(A) As applied to hand or measuring tools, “produced in the United States” means that the hand or measuring tool was assembled in the United States out of components, or otherwise made from raw materials into the finished product that is to be provided to the Government.

(B) If a hand or measuring tool was assembled in a country other than the United States, then disassembled and reassembled in the United States, the hand or measuring tool was not produced in the United States.

(C) The requirement to buy hand or measuring tools produced in the United States does not impose any restriction on the source of the components of the hand or measuring tools. This is unlike the Berry Amendment restriction on clothing (see [225.7002-1\(a\)\(1\)\(ii\)](#)), which explicitly requires domestic source for the materials and components of clothing (other than unusual components such as sensors or electronics), as well as the additional separate restrictions on various types of fibers and fabrics that might be components of the clothing.

(D) If the acquisition of the hand or measuring tools is also subject to the Buy American statute (see FAR subpart 25.1), then in order to qualify as a domestic end product, the cost of the components mined, produced, or manufactured in the United States or a qualifying country, must exceed 50 percent of the cost of all the components of the hand or measuring tool.

PGI 225.7002-2 Exceptions.

(b) *Domestic nonavailability determinations.*

(3) *Defense agencies other than the Defense Logistics Agency.*

(A) A defense agency requesting a domestic nonavailability determination must submit the request, including the proposed determination, to—

Director, Defense Procurement and Acquisition Policy
ATTN: OUSD(AT&L) DPAP/CPIC
3060 Defense Pentagon
Washington, DC 20301-3060.

(B) The Director, Defense Procurement and Acquisition Policy, will forward the request to the Under Secretary of Defense (Acquisition, Technology, and Logistics) (USD(AT&L)) as appropriate.

PGI 225.7003 Restrictions on acquisition of specialty metals.

PGI 225.7003-2 Restrictions.

(a)(i) This restriction applies to the item containing the specialty metal, not just the specialty metal, as was true when the restriction was part of 10 U.S.C. 2533a. The previous practice of withholding payment while conditionally accepting noncompliant items is not

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permissible for—

(A) Contracts entered into on or after November 16, 2006; or

(B) New procurements or out-of-scope changes accomplished on or after November 16, 2006, through the use of bilateral modifications to contracts originally awarded prior to November 16, 2006.

(ii) Consistent with the definition of “component” in the clause at DFARS [252.225-7009](#), a component is any item supplied to the Government as part of an end item or of another component. Items that are not incorporated into any of the items listed in DFARS [225.7003-2\(a\)](#) are not components of those items. For example, test equipment, ground support equipment, or shipping containers are not components of the missile system.

PGI 225.7003-3 Exceptions.

(b)(2) *Report of COTS items.*

If a department or agency uses the exception at DFARS [225.7003-3\(b\)\(2\)](#) for an acquisition of COTS end items valued at \$5 million or more per item, the department or agency shall address use of the exception in a year-end report, to be prepared and submitted as follows:

(A) Entitle the report “COTS Specialty Metal Exceptions Granted During Fiscal Year _____.”

(B) For each excepted COTS item purchased during the fiscal year, include in the report, at a minimum, the applicable—

- (1) Contract number and any applicable delivery order number;
- (2) Dollar value; and
- (3) Item description.

(C) Submit the report by October 31 of each year to:

Director, Defense Procurement and Acquisition Policy
ATTN: OUSD(AT&L) DPAP/CPIC
3060 Defense Pentagon
Washington, DC 20301-3060.

(b)(5) Domestic specialty metals nonavailable as and when needed.

(A) Determining availability.

(1) FAR 15.402 requires that contracting officers purchase supplies and services at fair and reasonable prices. Thus, contracting officers must determine whether any increase in contract price that results from providing compliant specialty metal is fair and reasonable, given the circumstances of the particular situation. In those cases where

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the contracting officer determines that the price would not be fair and reasonable, the Secretary of the military department concerned may use that information in determining whether the unreasonable price causes the compliant metal to be effectively “nonavailable.” Where these “reasonableness” limits should be drawn is a case-by-case decision.

(2) A similar approach may be used to determine whether delays associated with incorporating compliant specialty metals into items being acquired results in the metals being effectively nonavailable.

(C)(1) A department or agency requesting a determination or approval from USD(AT&L) in accordance with DFARS [225.7003-3\(b\)\(5\)](#) shall submit the request, including the proposed determination, to—

Director, Defense Procurement and Acquisition Policy
ATTN: OUSD(AT&L) DPAP/CPIC
3060 Defense Pentagon
Washington, DC 20301-3060.

(2) The Director, Defense Procurement and Acquisition Policy, will forward the request to USD(AT&L) as appropriate.

(b)(6) *Application of specialty metals restrictions to magnets.*

HPM = High performance magnet
COTS = Commercially available off-the-shelf

Magnet made of specialty metal is:	Commercially available, HPM	NOT Commercially available, HPM	COTS, NOT HPM	NOT COTS, NOT HPM
Incorporated into COTS assembly or COTS end item	NOT restricted	*	NOT restricted	*
NOT incorporated into COTS assembly or COTS end item	Restricted	Restricted	NOT restricted	Restricted
Included in 2 percent minimum content?	Cannot be included in 2 percent minimum content	Cannot be included in 2 percent minimum content	NOT restricted	Can be included in 2 percent minimum content

* By definition, COTS assemblies and COTS end items will not include a HPM that is not commercially available or any other magnet that is not COTS.

(c) Compliance for commercial derivative military articles.

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(i) A department or agency requesting a determination or approval from USD(AT&L) in accordance with DFARS [225.7003-3](#)(c) shall submit the request, including the proposed determination, to—

Director, Defense Procurement and Acquisition Policy
ATTN: OUSD(AT&L) DPAP/CPIC
3060 Defense Pentagon
Washington, DC 20301-3060.

(ii) The Director, Defense Procurement and Acquisition Policy, will forward the request to USD(AT&L) as appropriate.

(d) National security waiver.

(i) A department or agency shall request a national security waiver from USD(AT&L) in accordance with DFARS [225.7003-3](#)(d) in a timely manner after discovering or being informed of a specialty metals noncompliance in an item, or component thereof, listed at [225.7003-2](#)(a). The department or agency shall submit the request, via the chain of command, including the draft determination and draft letters of notification to the congressional defense committees, as follows:

Director, Defense Procurement and Acquisition Policy
ATTN: OUSD(AT&L) DPAP/CPIC
3060 Defense Pentagon
Washington, DC 20301-3060

(ii) The request shall include—

(A) The quantity of end items to which the waiver would apply;

(B) The time period that the waiver will cover;

(C) How and when the noncompliance was discovered—

(1) By the subcontractor(s);

(2) By the contractor; and

(3) By the department or agency;

(D) A complete description of all of the items or systems containing noncompliant specialty metals;

(E) The contract number(s), date(s), duration, and subcontractor(s) associated with the noncompliance;

(F) The manufacturer and country of origin of the noncompliant material, if known;

(G) Whether the contractor flowed down the DFARS clause to the subcontractors and in what format (e.g., exact quote or substantially the same?);

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(H) A technical description of the affected parts, their role in the larger assembly, and their function in the end item;

(I) Estimated cost and schedule to replace noncompliant parts if a national security waiver is not granted;

(J) Operational and safety implications;

(K) Other national security considerations (such as how the requested waiver will contribute to national security policy or operational security);

(L) A description of the contractor's efforts to develop and implement a corrective plan to ensure future compliance; and

(M) Information helpful to a determination as to whether any noncompliance was knowing and willful.

(iii) The Director, Defense Procurement and Acquisition Policy, will forward the request to USD(AT&L) as appropriate.

PGI 225.7017 Utilization of domestic photovoltaic devices.

PGI 225.7017-4 Waiver.

The following templates are provided as examples, and may be modified as appropriate for a particular acquisition.

(a) *Inconsistent with the public interest.*

(1) Utilization of U.S.-made photovoltaic devices in procurements covered by the World Trade Organization Government Procurement Agreement.

SAMPLE D&F: SERVICE OR AGENCY

Waiver of Section 858 of the National Defense Authorization Act (NDAA)
for Fiscal Year (FY) 2015

Determination and Findings of Inconsistency with the Public interest

Upon the basis of the following findings and determination which I hereby make in accordance with the provisions of DFARS [225.7017-4\(a\)\(1\)](#), U.S.-made photovoltaic devices may be utilized as follows:

Findings

1. The (*contracting office*) proposes to award a contract under contract number _____ that provides for photovoltaic devices manufactured or substantially transformed in the United States to be—

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- a. Installed inside the United States on DoD property or in a facility owned by DoD; or
 - b. Reserved for the exclusive use of DoD in the United States for the full economic life of the device.
2. The total estimated cost of these photovoltaic devices is \$_____.
3. Section 858 of the NDAA for FY 2015 requires that any photovoltaic device installed under a covered contract be manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured in the United States (i.e., a domestic photovoltaic device), unless waived on a case-by case basis because the inclusion of such requirement is inconsistent with the public interest or involves unreasonable costs, subject to exceptions provided in the Trade Agreements Act of 1979 (19 U.S.C. 2501 et seq.) or otherwise provided by law.
4. Pursuant to the Trade Agreements Act of 1979 and the World Trade Organization Government Procurement Agreement, the President has authority to waive, in whole or in part, with respect to eligible products of any foreign country or instrumentality designated under subsection (b) of this section, and suppliers of such products, the application of any law, regulation, procedure, or practice regarding Government procurement that would, if applied to such products and suppliers, result in treatment less favorable than that accorded to—
- a. United States products and suppliers of such products; or
 - b. Eligible products of another foreign country or instrumentality, which is a party to the Agreement and suppliers of such products.

The President has delegated this authority to the United States Trade Representative, who has waived application of the Buy American Act and other discriminatory provisions for eligible products from certain designated countries. Therefore, the restrictions of section 858 also do not apply to eligible products from certain designated countries (i.e., designated country photovoltaic devices). The country of origin for an eligible product that consists in whole or in part of materials from another country, is the country in which the article 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. Since the Trade Agreements Act applies only to products of foreign countries, section 858 is not automatically waived for products substantially transformed in the United States, i.e., U.S.-made photovoltaic devices.

These different rules of origin result in less favorable treatment for U.S.-made photovoltaic devices. Manufacturers of photovoltaic devices commonly use worldwide sources for components. Unless waived on a case-by-case basis, section 858 does not even allow the utilization of a U.S.-made photovoltaic device with a predominance of foreign components (i.e., not a domestic photovoltaic device). There is also a disproportionately burdensome recordkeeping requirement on firms offering domestic photovoltaic devices in acquisitions subject to Trade Agreements, in order to demonstrate that the photovoltaic device meets the 50 percent domestic component test. Because of the component requirement, such offerors of domestic photovoltaic devices must determine, control, and track the source of components. In today's global economy, this has become an extremely difficult, if not impossible task. On the other hand, this burden does not apply to designated

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country photovoltaic devices, because the substantial transformation rule of origin for designated country photovoltaic devices does not limit similarly the country of origin of components. This may encourage a company to manufacture the photovoltaic device in a designated foreign country rather than in the United States.

5. The solicitation contained the clause at DFARS [252.225-7017](#), Photovoltaic Devices, and the provision at DFARS [252.225-7018](#), Photovoltaic Devices—Certification. The offeror has certified that the photovoltaic devices to be utilized under this contract are U.S.-made photovoltaic devices. Offers were solicited from other sources and the offer received from (*offeror*) is found to be otherwise eligible for award.

Determination

I hereby determine that it is inconsistent with the public interest to apply the restrictions of section 858 of the NDAA for FY 2015 to the offer described in this determination and findings.

(Date)

(2) Utilization of photovoltaic devices from a qualifying country.

SAMPLE D&F: SERVICE OR AGENCY

Waiver of Section 858 of the National Defense Authorization Act (NDAA)
for Fiscal Year (FY) 2015

Determination and Findings of Inconsistency with the Public Interest

Upon the basis of the following findings and determination which I hereby make in accordance with DFARS [225.7017-4\(a\)\(2\)](#), a qualifying country photovoltaic device may be utilized as follows:

Findings

1. The (*contracting office*) proposes to award a contract under contract number _____ that provides for photovoltaic devices manufactured in (*qualifying country of origin*) to be—
 - a. Installed inside the United States on DoD property or in a facility owned by DoD; or
 - b. Reserved for the exclusive use of DoD in the United States for the full economic life of the device.
2. The total aggregate cost of these photovoltaic devices is \$_____.
3. Section 858 of the NDAA for FY 2015 requires that any photovoltaic device installed under a covered contract be manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured in the United States (i.e., a domestic photovoltaic device), unless waived on a case-by-case basis because the inclusion of such requirement is inconsistent with the public interest or involves

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unreasonable costs, subject to exceptions provided in the Trade Agreements Act of 1979 (19 U.S.C. 2501 et seq.) or otherwise provided by law.

4. The United States Government and the Government of _____ have signed a memorandum of understanding, in which the Governments have agreed that, in relation to defense procurement, each country will accord to the industries of the other country treatment no less favorable than that accorded to its own industries insofar as laws and regulations permit. The reciprocal opportunities that the memorandum of understanding affords to the Governments and their defense industries enhances our mutual military readiness and promotes standardization and interoperability of equipment between the armed forces of the two nations. These factors contribute considerably to the security of the United States.

5. The Agreement stipulates that utilization of such items shall fully satisfy Department of Defense requirements for performance, quality, and delivery and shall cost the Department of Defense no more than would comparable U.S. source or other foreign source defense equipment.

6. The solicitation contained the clause at DFARS [252.225-7017](#), Photovoltaic Devices, and the provision at DFARS [252.225-7018](#), Photovoltaic Devices—Certification. The offeror has certified that the photovoltaic devices to be utilized under this contract are qualifying country photovoltaic devices. Offers were solicited from other sources and the offer received from (offeror) is found to be otherwise eligible for award.

Determination

I hereby determine that it is inconsistent with the public interest to apply the restrictions of section 858 of the NDAA for FY 2015 to the offer described in this determination and findings.

(Date)

(b) *Unreasonable cost.*

SAMPLE D&F: SERVICE OR AGENCY

Waiver of Section 858 of the National Defense Authorization Act (NDAA)
for Fiscal Year (FY) 2015

Determination and Findings of Unreasonable Cost of Domestic Photovoltaic Devices

Upon the basis of the following findings and determination which I hereby make in accordance with the provisions of DFARS [225.7017-4](#)(b), foreign photovoltaic devices may be utilized as follows:

Findings

1. The (contracting office) proposes to award a contract under contract number _____, that provides for photovoltaic devices manufactured in (country of origin) to be—

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- a. Installed inside the United States on DoD property or in a facility owned by DoD; or
 - b. Reserved for the exclusive use of DoD in the United States for the full economic life of the device.
2. The total aggregate cost of these photovoltaic devices is \$_____.
3. Section 858 of the NDAA for FY 2015 requires that any photovoltaic device installed under a covered contract be manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured in the United States (i.e., a domestic photovoltaic device), unless waived on a case-by case basis because the inclusion of such requirement is inconsistent with the public interest or involves unreasonable costs, subject to exceptions provided in the Trade Agreements Act of 1979 (19 U.S.C. 2501 et seq.) or otherwise provided by law.
4. The solicitation contained the clause at DFARS [252.225-7017](#), Photovoltaic Devices, and the provision at DFARS [252.225-7018](#), Photovoltaic Devices—Certification. The offeror has provided documentation in accordance with the provision DFARS [252.225-7018](#) that the cost of a domestic photovoltaic device would be unreasonable in comparison to the cost of the proposed foreign photovoltaic device, i.e., that the price of the foreign photovoltaic device plus 50 percent is less than the price of a comparable domestic photovoltaic device.

Determination

I hereby determine that the cost of utilizing domestic photovoltaic devices would be unreasonable, and therefore waive application of the restrictions of section 858 of the NDAA for FY 2015 to the offer described in this determination and findings.

(Date)