



OFFICE OF THE UNDER SECRETARY OF DEFENSE

3000 DEFENSE PENTAGON
WASHINGTON, DC 20301-3000



ACQUISITION AND
TECHNOLOGY

January 17, 1997

DP (DAR)

In reply refer to
DFARS Cases: 96-D328/96-D329
D. L. 97-008

MEMORANDUM FOR DIRECTORS OF DEFENSE AGENCIES
DEPUTY FOR ACQUISITION AND BUSINESS MANAGEMENT,
ASN(RD&A)/ABM
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE
(CONTRACTING), SAF/AQC
DIRECTOR, PROCUREMENT POLICY, ASA(RD&A)/SARD-PP
DEPUTY DIRECTOR (ACQUISITION), DEFENSE LOGISTICS
AGENCY

SUBJECT: Restriction on MILCON Overseas Architect-Engineer (A-E)
Contracts and Preference for U.S. Firms on MILCON Overseas
Construction

We have amended the Defense Federal Acquisition Regulation Supplement (DFARS) to implement Sections 111 and 112 of the Fiscal Year 1997 Military Construction Appropriations Act (Public Law 104-196). Section 111 restricts award of A-E contracts estimated to exceed \$500,000, for projects to be accomplished in Japan, in any NATO member country, or in countries bordering the Arabian Gulf, to U.S. firms or U.S. firms in joint venture with host nation firms. Section 112 provides a 20 percent preference for U.S. firms on all contracts estimated to exceed \$1,000,000 for military construction projects in the U.S. territories and possessions in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf.

The attached interim DFARS rule is effective immediately and will be included in a future Defense Acquisition Circular.


Eleanor R. Spector
Director, Defense Procurement

Attachment

cc: DSMC, Ft. Belvoir



DFARS Case 96-D328
Preference for U.S. Firms on MILCON Overseas Construction
Contracts

DFARS Case 96-D329
Restriction on MILCON Overseas A-E Contracts

Interim Rule

PART 225—FOREIGN ACQUISITION

* * * * *

SUBPART 225.70—AUTHORIZATION ACTS, APPROPRIATIONS ACTS, AND OTHER
STATUTORY RESTRICTIONS ON FOREIGN PURCHASES[ACQUISITION]

225.7000 Scope of subpart.

(a) This subpart contains restrictions on the acquisition of foreign products [and services], imposed by DoD[Defense] A[a]ppropriations and A[a]uthorization A[a]cts and other statutes. Refer to the A[a]cts to verify current applicability of the restrictions.

* * * * *

225.7003 Reserved[Restriction on overseas military construction].

For restriction on award of military construction contracts to be performed in the United States territories and possessions in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf, see 236.274(a).]

225.7004 Reserved[Restriction on overseas architect-engineer services].

For restriction on award of architect-engineer contracts to be performed in Japan, any North Atlantic Treaty Organization member country, or in countries bordering the Arabian Gulf, see 236.602-70.]

* * * * *

PART 236—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

SUBPART 236.1—GENERAL

236.102 Definitions.

* * * * *

[(4) "United States firm," is defined in the provisions at 252.236-7010, Overseas Military Construction—Preference for United States Firms, and 252.236-7011, Overseas Architect-Engineer Services—Restriction to United States Firms.

* * * * *

SUBPART 236.2—SPECIAL ASPECTS OF CONTRACTING FOR CONSTRUCTION

* * * * *

236.274 Construction in foreign countries.

[(a) In accordance with Section 112 of Public Law 104-32 and similar sections in subsequent military construction appropriations acts, military construction contracts that are estimated to exceed \$1,000,000 and are to be performed in the United States territories and possessions in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf, shall be awarded only to United States firms, unless the lowest responsive and responsible offer of a United States firm exceeds the lowest responsive and responsible offer of a foreign firm by more than 20 percent.

[(b)] When a technical working agreement with a foreign government is required for a construction contract—

(a[1]) Consider inviting the Army Office of the Chief of Engineers, or the Naval Facilities Engineering Command to participate in the negotiations.

(b[2]) The agreement should, as feasible and where not otherwise provided for in other agreements, cover all elements necessary for the construction that are required by laws, regulations, and customs of the United States and the foreign government, including—

(1[i]) Acquisition of all necessary rights;

(2[ii]) Expeditious, duty-free importation of labor, material, and equipment;

(3[iii]) Payment of taxes applicable to contractors, personnel, materials, and equipment;

- (4[iv]) Applicability of workers' compensation and other labor laws to citizens of the United States, the host country, and other countries;
- (5[v]) Provision of utility services;
- (6[vi]) Disposition of surplus materials and equipment;
- (7[vii]) Handling of claims and litigation; and
- (8[viii]) Resolution of any other foreseeable problems which can appropriately be included in the agreement.

* * * * *

SUBPART 236.5—CONTRACT CLAUSES

236.570 Additional provisions and clauses.

* * * * *

[(c) Use the provision at 252.236-7010, Overseas Military Construction—Preference for United States Firms, in solicitations for military construction contracts that are estimated to exceed \$1,000,000 and are to be performed in the United States territories and possessions in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf.]

* * * * *

SUBPART 236.6-ARCHITECT-ENGINEER SERVICES

* * * * *

236.602 Selection of firms for architect-engineer contracts.

* * * * *

[236.602-70 Restriction on award of overseas architect-engineer contracts to foreign firms.

In accordance with Section 111 of Public Law 104-32 and similar sections in subsequent military construction appropriations acts, A-E contracts funded by military construction appropriations that are estimated to exceed \$500,000 and are to be performed in Japan, any North Atlantic Treaty Organization member country, or in countries bordering the Arabian Gulf, shall be awarded only to United States firms or to joint ventures of United States and host nation firms.]

* * * * *

236.609-70 ~~Option for supervision and inspection services~~
[Additional provision and clause].

- (a) [(1)] Use the clause at 252.236-7009, Option for Supervision and Inspection Services, in solicitations and contracts for A-E services when-
- (1[i]) The contract will be fixed price; and
 - (2[ii]) Supervision and inspection services by the A-E may be required during construction.
- (b) [2] Include the scope of such services in Appendix A of the contract.

[(b) Use the provision at 252.236-7011, Overseas Architect-Engineer Services-Restriction to United States Firms, in solicitations for A-E contracts that are estimated to exceed \$500,000 and are to be performed in Japan, any North Atlantic Treaty Organization member country, or in countries bordering the Arabian Gulf.]

* * * * *

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

* * * * *

[252.236-7010 Overseas Military Construction—Preference for United States Firms.

As prescribed in 236.570(c), use the following provision:

OVERSEAS MILITARY CONSTRUCTION—PREFERENCE FOR
UNITED STATES FIRMS (JAN 1997)

(a) *Definition.*

"United States firm," as used in this provision, means a firm incorporated in the United States that complies with the following:

- (1) The corporate headquarters are in the United States;
- (2) The firm has filed corporate and employment tax returns in the United States for a minimum of 2 years (if required), has filed State and Federal income tax returns (if required) for 2 years, and has paid any taxes due as a result of these filings; and
- (3) The firm employs United States citizens in key management positions.

(b) *Evaluation.* Offers from firms that do not qualify as United States firms will be evaluated by adding 20 percent to the offer.

(c) *Status.* The offeror ____ is, ____ is not a United States firm.

(End of provision)]

[252.236-7011 Overseas Architect-Engineer Services—Restriction to United States Firms.

As prescribed in 236.609-70(b), use the following provision:

OVERSEAS ARCHITECT-ENGINEER SERVICES—RESTRICTION TO
UNITED STATES FIRMS (JAN 1997)

(a) *Definition.*

"United States firm," as used in this provision, means a firm incorporated in the United States that complies with the following:

- (1) The corporate headquarters are in the United States;
- (2) The firm has filed corporate and employment tax returns in the United States for a minimum of 2 years (if required), has filed State and Federal income tax returns (if required) for 2 years, and has paid any taxes due as a result of these filings; and

(3) The firm employs United States citizens in key management positions.

(b) *Restriction.* Military construction appropriations acts restrict award of a contract, resulting from this solicitation, to a United States firm or a joint venture of United States and host nation firms.

(c) *Status.* The offeror confirms, by submission of its offer, that it is a United States firm or a joint venture of United States and host nation firms.

(End of provision)]



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January 17, 1997



ACQUISITION AND
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DP (DAR)

In reply refer to
DFARS Case: 96-D328/96-D329

MEMORANDUM FOR DIRECTOR, DEFENSE ACQUISITION REGULATIONS COUNCIL

SUBJECT: Restriction on MILCON Overseas Architect-Engineer (A-E)
Contracts and Preference for U.S. Firms on MILCON Overseas
Construction

Pursuant to 41 U.S.C. 418b, I have determined that urgent and compelling reasons exist to publish an interim rule prior to affording the public an opportunity to comment.

The interim rule implements Sections 111 and 112 of the Fiscal Year 1997 Military Construction Appropriations Act (Public Law 104-196). Section 111 restricts award of A-E contracts estimated to exceed \$500,000, for projects to be accomplished in Japan, in any NATO member country, or in countries bordering the Arabian Gulf, to U.S. firms or U.S. firms in joint venture with host nation firms. Section 112 provides a 20 percent preference for U.S. firms on all contracts estimated to exceed \$1,000,000 for military construction projects in the United States territories and possessions in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf.

Immediate publication of an interim rule is necessary to promptly comply with Sections 111 and 112 of the Fiscal Year 1997 Military Construction Appropriations Act. I am, therefore, authorizing issuance of an interim rule on a priority basis for immediate use.

for Roland A. Hasselbrand
Eleanor R. Spector

Director, Defense Procurement



96-D328

DEPARTMENT OF DEFENSE

48 CFR Parts 225, 236, and 252

[DFARS Case 96-D328]

Defense Federal Acquisition Regulation Supplement; Preference for U.S. Firms on MILCON Overseas Construction

AGENCY: Department of Defense (DOD).

ACTION: Interim rule with request for comments.

SUMMARY: The Director of Defense Procurement has issued an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement Section 112 of the Fiscal Year 1997 Military Construction Appropriations Act (Public Law 104-196). Section 112 provides a 20 percent preference for United States firms on all contracts estimated to exceed \$1,000,000 for military construction projects in the United States territories and possessions in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf.

DATES: Effective date: January 17, 1997.

Comment Date: Comments on the interim rule should be submitted in writing to the address shown below on or before March 18, 1997, to be considered in the formulation of the final rule.

ADDRESSES: Interested parties should submit written comments to: Defense Acquisition Regulations Council, Attn: Ms. Amy Williams, PDUSD (A&T) DP (DAR), IMD 3D139, 3062 Defense Pentagon, Washington, DC 20301-3062. Telefax number (703) 602-0350. Please cite DFARS Case 96-D328 in all correspondence related to this issue.

FOR FURTHER INFORMATION CONTACT: Ms. Amy Williams, (703) 602-0131.

SUPPLEMENTARY INFORMATION:

A. Background

This interim rule amends the DFARS to implement Section 112 of the Fiscal Year 1997 Military Construction Appropriations Act (Public Law 104-196). The rule contains, at 236.274(a), the statutory restriction on award of overseas military construction contracts; and adds a solicitation provision at 252.236-7010, Overseas Military Construction-Preference for United States Firms.

B. Regulatory Flexibility Act

This interim rule is not expected to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq.,

because the rule only applies to contracts estimated to exceed \$1,000,000 for military construction projects in the United States territories and possessions in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf. It is estimated that only 12 such contracts are awarded per year. An Initial Regulatory Flexibility Analysis has, therefore, not been performed. Comments are invited from small businesses and other interested parties. Comments from small entities concerning the affected DFARS subparts also will be considered in accordance with 5 U.S.C. 610. Such comments should be submitted separately and should cite DFARS Case 96-D328 in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act applies. It is estimated that the new provision at DFARS 252.236-7010 will increase, by 5 hours, the annual paperwork burden associated with DFARS Part 236 and related provisions/ clauses. The Office of Management and Budget (OMB) has approved this increase under OMB Control Number 0704-0255.

D. Determination to Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense that urgent and compelling reasons exist to publish this interim rule prior to affording the public an opportunity to comment. This interim rule implements Section 112 of the Fiscal Year 1997 Military Construction Appropriations Act (Public Law 104-196). Section 112 provides a 20 percent preference for United States firms on all contracts estimated to exceed \$1,000,000 for military construction projects in the United States territories and possessions in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf. Immediate publication of an interim rule is necessary to promptly comply with Section 112. Comments received in response to the publication of this interim rule will be considered in formulating the final rule.

List of Subjects in 48 CFR Parts 225, 236, and 252

Government procurement. Michele P. Peterson, Executive Editor, Defense Acquisition Regulations Council.

Therefore, 48 CFR Parts 225, 236, and 252 are amended as follows:

1. The authority citation for 48 CFR Parts 225, 236, and 252 continues to read as follows:

Authority: 41 U.S.C. 421 and 48 CFR Chapter 1.

PART 225—FOREIGN ACQUISITION

2. Section 225.7000 is amended by revising paragraph (a) to read as follows:

225.7000 Scope of subpart.

(a) This subpart contains restrictions on the acquisition of foreign products and services, imposed by Defense appropriations and authorization acts and other statutes. Refer to the acts to verify current applicability of the restrictions.

* * * * *

3. Section 225.7003 is added to read as follows:

225.7003 Restriction on overseas military construction.

For restriction on award of military construction contracts to be performed in the United States territories and possessions in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf, see 236.274(a).

PART 236—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

4. Section 236.274 is amended by redesignating the introductory text as paragraph (b); by redesignating paragraphs (a) and (b) as paragraphs (b)(1) and (b)(2), respectively; by redesignating paragraphs (b)(1) through (b)(8) as paragraphs (b)(2)(i) through (b)(2)(viii); and by adding a new paragraph (a) to read as follows:

236.274 Construction in foreign countries.

(a) In accordance with Section 112 of Public Law 104-32 and similar sections in subsequent military construction appropriations acts, military construction contracts that are estimated to exceed \$1,000,000 and are to be performed in the United States territories and possessions in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf, shall be awarded only to United States firms, unless the lowest responsive and responsible offer of a United States firm exceeds the lowest responsive and responsible offer of a foreign firm by more than 20 percent.

* * * * *

5. Section 236.570 is amended by adding paragraph (c) to read as follows:

236.570 Additional provisions and clauses.

* * * * *

(c) Use the provision at 252.236-7010, Overseas Military Construction-Preference for United States Firms, in solicitations for military construction

252.219-7004. The rule reflects changes to the Test Program for Negotiation of Comprehensive Small Business Subcontracting Plans, as required by Section 811 of the National Defense Authorization Act for Fiscal Year 1996 (Public Law 104-106). The final rule differs from the interim rule in that it amends the clause at 252.219-7004 to clarify instructions for contractor submission of Standard Form 295, Summary Subcontract Report.

Item XII—Bond Waivers (DFARS Case 96-D019)

This final rule removes DFARS 219.808, 219.811, and 252.219-7007, which pertained to waiver of Miller Act requirements for performance and payment bonds under 8(a) construction contracts. The statutory authority for waiver of these requirements (Section 813 of Public Law 102-190) applied only to contracts awarded during fiscal years 1992 through 1994.

Item XIII—Small Business Competitiveness Demonstration Program (DFARS Case 96-D025)

This final rule amends DFARS 219.1005 to remove dredging from the list of designated industry groups under the Small Business Competitiveness Demonstration Program. Dredging had been added to the list as part of a test program established under Section 722 of the Small Business Credit and Business Opportunity Enhancement Act of 1992 (Public Law 102-366). The statutory authority for the test program expired on September 30, 1996.

Item XIV—Pilot Mentor-Protégé Program (DFARS Case 96-D317)

This final rule was issued by Departmental Letter 96-018, effective October 18, 1996 (61 FR 54346, October 18, 1996). The rule amends DFARS 219.7104 and Appendix I to implement Section 802 of the National Defense Authorization Act for Fiscal Year 1997 (Public Law 104-201). Section 802: (1) Extends to September 30, 1998, the date by which an interested company must apply for participation as a mentor firm under the DoD Pilot Mentor-Protégé Program; and (2) extends to September 30, 1999, the date by which a mentor firm must incur costs in order to be eligible for reimbursement under the Program.

Item XV—Nondomestic Construction Materials (DFARS Case 97-D009)

This final rule removes the clause at DFARS 252.225-7004, Nondomestic Construction Materials, and the corresponding prescriptive language at 225.205. The DFARS clause has been

superseded by the clauses at FAR 52.225-5, Buy American Act—Construction Materials, and 52.225-15, Buy American Act—Construction Materials under Trade Agreements Act and North American Free Trade Agreement, as amended by Federal Acquisition Circular 90-46.

Item XVI—Petroleum Products from Caribbean Basin Countries (DFARS Case 96-D312)

The interim rule published as Item XI of DAC 91-11 is converted to a final rule without change. The rule amended DFARS 225.403 to fully implement Section 8094 of the National Defense Appropriations Act for Fiscal Year 1994 (Public Law 103-139). Section 8094 requires DoD to consider all qualified bids from eligible countries under the Caribbean Basin Economic Recovery Act as if they were offers from designated countries under the Trade Agreements Act. The rule also amended DFARS 225.403-70 and 252.225-7007 to clarify that the definition of Caribbean Basin country end products includes petroleum and any end product derived from petroleum.

Item XVII—Metalworking Machinery—Trade Agreements (DFARS Case 96-D030)

This final rule was issued by Departmental Letter 97-005, effective January 17, 1997 (62 FR 2615, January 17, 1997). The rule amends DFARS 225.403-70 to remove the exception to application of the trade agreements acts for those machine tools for which acquisition was previously, but is no longer, restricted by 10 U.S.C. 2534. As a result, all metal working machinery products in Federal Supply Group 34 are subject to the trade agreements acts.

Item XVIII—Authority To Waive Foreign Purchase Restrictions (DFARS Case 96-D319)

This interim rule supersedes the interim rule issued by Departmental Letter 97-006 on January 17, 1997. The rule amends DFARS 225.872, 225.70, and clauses at 252.225-7016 and 252.225-7029 to implement the waiver by the Under Secretary of Defense (Acquisition and Technology) of the foreign source restrictions of 10 U.S.C. 2534(a), for the acquisition of defense items manufactured in a qualifying country. This waiver is authorized by 10 U.S.C. 2534(d)(3), as amended by section 810 (the McCain Amendment) of the National Defense Authorization Act for Fiscal Year 1997 (Public Law 104-201).

Item XIX—Foreign Machine Tools and Powered and Non-Powered Valves (DFARS Case 96-D023)

This final rule was issued by Departmental Letter 96-019, effective November 15, 1996 (61 FR 58488, November 15, 1996). The rule amends DFARS Subpart 225.70, and removes the clause and provision at 252.225-7017 and 252.225-7040, to reflect the expiration of the restriction on the acquisition of machine tools and powered and non-powered valves at 10 U.S.C. 2534. Related amendments are made at 212.504(a) and 252.212-7001(b).

Item XX—Preference for U.S. Firms on MILCON Overseas Construction (DFARS Case 96-D328)

The interim rule issued by Departmental Letter 97-008, on January 17, 1997, is converted to a final rule without change. The rule amends DFARS 225.7000, 225.7003, 236.274, and 236.570, and adds a new provision at 252.236-7010, to implement Section 112 of the Military Construction Appropriations Act for Fiscal Year 1997 (Public Law 104-196). Section 112 provides a 20 percent evaluation preference for U.S. firms on contracts estimated to exceed \$1,000,000 for military construction projects in the U.S. territories and possessions in the Pacific and on Kwajalein atoll, or in countries bordering the Arabian Gulf.

Item XXI—Restriction on MILCON Overseas Architect-Engineer Contracts (DFARS Case 96-D329)

The interim rule issued by Departmental Letter 97-008, on January 17, 1997, is converted to a final rule without change. The rule adds new sections at DFARS 225.7004 and 236.602-70, amends 236.102 and 236.609-70, and adds a new provision at 252.236-7011, to implement Section 111 of the Military Construction Appropriations Act for Fiscal Year 1997 (Public Law 104-196). Section 111 restricts award of architect-engineer contracts estimated to exceed \$500,000 for projects to be accomplished in Japan, in any North Atlantic Treaty Organization member country, or in countries bordering the Arabian Gulf, to U.S. firms or U.S. firms in joint venture with host nation firms.

Item XXII—Application of Berry Amendment (DFARS Case 96-D333)

This interim rule was issued by departmental Letter 97-009, effective February 7, 1997 (62 FR 5779, February 7, 1997). The rule amends DFARS 225.7002, 252.212-7001, 252.225-7012, and 252.225-7014; adds a new section

Infile



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DEPUTY FOR ACQUISITION AND BUSINESS MANAGEMENT,
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DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE
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The attached interim DFARS rule is effective immediately and will be included in a future Defense Acquisition Circular.

Eleanor R. Spector
Eleanor R. Spector
Director, Defense Procurement

Attachment

cc: DSMC, Ft. Belvoir



JAN 23 1997

DFARS Case 96-D328

Preference for U.S. Firms on MILCON Overseas Construction Contracts

DFARS Case 96-D329

Restriction on MILCON Overseas A-E Contracts

Interim Rule

PART 225—FOREIGN ACQUISITION

* * * * *

SUBPART 225.70—AUTHORIZATION ACTS, APPROPRIATIONS ACTS, AND OTHER STATUTORY RESTRICTIONS ON FOREIGN PURCHASES [ACQUISITION]

225.7000 Scope of subpart.

(a) This subpart contains restrictions on the acquisition of foreign products [and services], imposed by ~~DoD~~ [Defense] A[a]ppropriations and A[a]uthorization A[a]cts and other statutes. Refer to the A[a]cts to verify current applicability of the restrictions.

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PART 236—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

SUBPART 236.1—GENERAL

236.102 Definitions.

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[(b)] When a technical working agreement with a foreign government is required for a construction contract—

(a[1]) Consider inviting the Army Office of the Chief of Engineers, or the Naval Facilities Engineering Command to participate in the negotiations.

(b[2]) The agreement should, as feasible and where not otherwise provided for in other agreements, cover all elements necessary for the construction that are required by laws, regulations, and customs of the United States and the foreign government, including—

(1[i]) Acquisition of all necessary rights;

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(4[iv]) Applicability of workers' compensation and other labor laws to citizens of the United States, the host country, and other countries;

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[(c) Use the provision at 252.236-7010, Overseas Military Construction—Preference for United States Firms, in solicitations for military construction contracts that are estimated to exceed \$1,000,000 and are to be performed in the United States territories and possessions in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf.]

* * * * *

SUBPART 236.6--ARCHITECT-ENGINEER SERVICES

* * * * *

236.602 Selection of firms for architect-engineer contracts.

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[236.602-70 Restriction on award of overseas architect-engineer contracts to foreign firms.

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[Additional provision and clause].**

(a) [(1)] Use the clause at 252.236-7009, Option for Supervision and Inspection Services, in solicitations and contracts for A-E services when-

(1[i]) The contract will be fixed price; and

(2[ii]) Supervision and inspection services by the A-E may be required during construction.

(b[2]) Include the scope of such services in Appendix A of the contract.

[(b) Use the provision at 252.236-7011, Overseas Architect-Engineer Services--Restriction to United States Firms, in solicitations for A-E contracts that are estimated to exceed \$500,000 and are to be performed in Japan, any North Atlantic Treaty Organization member country, or in countries bordering the Arabian Gulf.]

* * * * *

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

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[252.236-7010 Overseas Military Construction—Preference for United States Firms.

As prescribed in 236.570(c), use the following provision:

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(a) *Definition.*

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- (1) The corporate headquarters are in the United States;
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- (3) The firm employs United States citizens in key management positions.

(b) *Evaluation.* Offers from firms that do not qualify as United States firms will be evaluated by adding 20 percent to the offer.

(c) *Status.* The offeror _____ is, _____ is not a United States firm.

(End of provision)]

[252.236-7011 Overseas Architect-Engineer Services—Restriction to United States Firms.

As prescribed in 236.609-70(b), use the following provision:

OVERSEAS ARCHITECT-ENGINEER SERVICES—RESTRICTION TO
UNITED STATES FIRMS (JAN 1997)

(a) *Definition.*

"United States firm," as used in this provision, means a firm incorporated in the United States that complies with the following:

- (1) The corporate headquarters are in the United States;
- (2) The firm has filed corporate and employment tax returns in the United States for a minimum of 2 years (if required), has filed State and Federal income tax returns (if required) for 2 years, and has paid any taxes due as a result of these filings; and

(3) The firm employs United States citizens in key management positions.

(b) *Restriction.* Military construction appropriations acts restrict award of a contract, resulting from this solicitation, to a United States firm or a joint venture of United States and host nation firms.

(c) *Status.* The offeror confirms, by submission of its offer, that it is a United States firm or a joint venture of United States and host nation firms.

(End of provision)]



Comptroller General
of the United States

Washington, D.C. 20548

Decision

S N A A

Matter of: Black Construction Corporation

File: B-250647; B-250647.2

Date: February 8, 1993

Richard F. Smith, Esq., John S. Pachter, Esq., and Jonathan D. Shaffer, Esq., Smith, Pachter, McWhorter & D'Ambrosio, for the protester. James A. Sparks, Esq., and Paul F. Fisher, Esq., Department of the Navy, for the agency. Barbara C. Coles, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that awardee is a foreign corporation and ineligible to receive construction contract under the American Preference Policy is denied where record establishes that corporation qualifies as a United States contractor.

DECISION

Black Construction Corporation protests the award of a contract to Hanil Resorts (Joint Venture) Corporation under invitation for bids (IFB) No. N62766-88-B-0206, issued by the Department of the Navy for the alteration of enlisted personnel housing at Andersen Air Force Base, Guam.

We deny the protests.

The IFB was issued on July 27, 1992, and was amended twice prior to bid opening. One amendment incorporated the American Preference Policy, which precludes the award of a construction contract, estimated by the government to exceed \$1 million, to a foreign contractor, unless the lowest responsive bid of a United States contractor exceeds the lowest responsive bid of a foreign contractor by more than 20 percent. To qualify as a United States contractor, the firm (or if a joint venture, all members of the joint venture) must be incorporated in the United States and, comply with the following: (1) the corporate headquarters must be in the United States; (2) the firm must have filed corporate and employment tax returns in the United States for a minimum of 2 years (if required), must have filed state and federal income tax returns (if required) for 2 years, and must have paid any taxes due as a result of

GENERAL

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these filings; and (3) the firm must employ United States citizens in key management positions.

The Navy received four bids by the September 3 bid opening date; Hanil was the apparent low bidder with a bid of \$5,665,000, and Black was the second low bidder with a bid of \$6,064,000. The IFB included the provision at Federal Acquisition Regulation (FAR) § 52.214-2, entitled "Type of Business Organization-Sealed Bidding"; in response to this provision, Hanil certified that it operates as a corporation incorporated under the laws of Guam. After reviewing information pertaining to Hanil's corporate status, the contracting officer concluded that Hanil qualified as a United States contractor under the terms of the American Preference Policy clause. By letter dated September 25, Black filed an agency-level protest challenging the proposed award to Hanil on the basis that Hanil is a foreign contractor.

The contracting officer advised Black that he reached his determination that Hanil was eligible for award as a United States contractor after obtaining Hanil's articles of incorporation and communicating with Guam's Department of Revenue and Taxation. The contracting officer explained that Hanil is a single corporation rather than a joint venture, as its name implies, and that it was incorporated on September 13, 1989, under the laws of Guam. The contracting officer also explained that Hanil has filed tax returns in the territory of Guam for more than 2 years and its corporate headquarters has been in Guam since the corporation's inception. The contracting officer advised Black that Hanil has four key management positions; two positions (president and general manager/marketing director) are filled by Korean citizens and the other two positions (secretary and contract administrator) are filled by United States citizens. After receiving this letter, Black filed a protest with our Office challenging the contracting officer's determination and the resulting award to Hanil. The agency has suspended performance under the contract pending our resolution of the protest.

Black's protest to our Office is essentially a reiteration of the allegation that it raised in its agency-level protest, namely, that the contracting agency's "objective determination that Hanil is a United States contractor under the American Preference Policy clause" was improper. To support its allegation, Black asserts that if the agency had conducted a thorough investigation to determine whether or not Hanil is a United States contractor, it would have concluded that Hanil does not employ United States citizens in key management positions but rather is owned, managed, and controlled by Korean citizens. As a result, the protester requests that we recommend that the agency

terminate its contract with Hanil and make award to the protester.

The American Preference Policy, as set forth in the Military Construction Appropriations Act of 1992,¹ Pub. L. No. 102-136, 105 Stat. 637 (1991), states in pertinent part that:

"None of the funds appropriated in this Act for military construction in the United States territories and possessions in the Pacific and on Kwajalein Island may be used to award any contract estimated by the [g]overnment to exceed \$1,000,000 to a foreign contractor: Provided, that this section shall not be applicable to contract awards for which the lowest responsive and responsible bid of a United States contractor exceeds the lowest responsive and responsible bid of a foreign contractor by greater than 20 per centum."

As defined in the IFB, a United States contractor for the purposes of the American Preference Policy is a firm that has corporate headquarters in the United States; has filed corporate and employment tax returns in the United States for a minimum of 2 years (if required), has filed state and federal income tax returns (if required) for 2 years, and has paid any taxes due as a result of these filings; and employs United States citizens in key management positions. As stated above, Hanil certified in its bid that it is not a

¹Initially, Congress directed the Department of Defense to develop a preference plan for United States contractors in the award of construction contracts in the Persian Gulf/ Indian Ocean area in order to stimulate the use of United States firms in the area and to assure the regional availability of companies that were responsive to United States interests and requirements. H.R. Conf. Rep. No. 1433, 96th Cong., 2d Sess. 4 (1980). In 1983, the House Appropriations Committee received testimony that the presence of American contractors in the Pacific was decreasing despite the fact that the military construction program in the area was increasing dramatically. Similar to the earlier concerns about the Persian Gulf area, it appeared that without some type of American preference program, the majority of United States funded projects in the Pacific would be awarded to foreign firms. To increase the opportunities for American construction firms in the Pacific area, Congress in the Second Supplemental Appropriations Act of 1984, Pub. L. No. 98-396, 98 Stat. 1398 (1984), first instituted an American Preference Policy in the American territories of the Pacific and on Kwajalein Island.

foreign contractor, and thus, by implication, that it is a United States contractor.

The protester contends that the award to Hanil is improper because the awardee does not employ United States citizens in key management positions. According to the protester, the agency's determination that the awardee employs United States citizens in key management positions was improper because two of the three corporate officers, including the ranking corporate officer, are Korean citizens, and because two of the three corporate directors are Korean citizens.

The protester's reliance on the number of corporate officers or directors, as well as the type of offices held in the corporation by United States citizens, as the determinative factor for qualification under the American Preference Policy is misplaced. The American Preference Policy neither requires that a specific number of officers or directors be United States citizens, nor mandates that an employee hold a corporate office in order to be considered a key management employee. In this regard, there is no indication that Congress intended the policy to be applied as narrowly as the protester suggests; rather, the legislative history indicates simply that in order to qualify as a United States contractor, a construction firm should, in addition to other requirements, employ United States personnel in key management and supervisory positions. See, e.g., H.R. Rep. No. 238, 98th Cong., 1st Sess. 14 (1983).

In support of its position, the protester cites Samwhan Am. et al. v. Captain G.B. Estes, No. 86-0033 (D. Guam July 16, 1986). In Samwhan, the court merely made a finding of fact that the plaintiff qualified as a United States contractor because the firm employed United States citizens in key management positions, namely, as president and vice president. Contrary to the protester's suggestion, the court did not find that key employees must be corporate officers.

The protester also contends that the awardee cannot qualify as a United States contractor because the majority of its corporate officers are not United States citizens, citing MWK Int'l Ltd. et al. v. United States, 2 Cl. Ct. 206 (1983). The solicitation at issue in MWK restricted the competition to United States contractors and specifically stated that to qualify as a United States contractor, the bidder must have, in addition to other factors, a majority of corporate officers who are United States citizens. In contrast, the solicitation here does not require that the contractor employ a majority of United States citizens as corporate officers. Accordingly, unlike in MWK, the fact that the majority of the awardee's corporate officers are

not United States citizens is not dispositive of its eligibility under the American Preference Policy.

With regard to the contracting officer's conclusion that the awardee employs two United States citizens in key management positions--corporate secretary and contract administrator--the protester contends that a thorough review by the contracting agency would have revealed that neither the corporation's secretary nor its contract administrator performs key management duties. The protester claims that the secretary's duties are limited to those of outside legal counsel; therefore, the secretary cannot be considered to hold a key management position within the firm. The protester also claims that the secretary holds the same position with other Guam corporations. As for the contract administrator, the protester alleges that he was recently elevated to this position and that he previously lacked any supervisory duties. According to the protester, the agency should have analyzed the following factors in determining whether these employees provide key management duties:

- (1) time devoted by the individual to the entity's business;
- (2) primary physical location of the individual;
- (3) written responsibilities of the individual;
- (4) ability of the individual to legally bind the corporation; and
- (5) whether the individual performs a sufficient management function to be exempt from overtime.

While the protester suggests that the secretary, who is an attorney, plays only a limited role in the corporation's activities, the secretary's description of his level of involvement reasonably supports the contracting officer's determination that the secretary is part of the corporation's key management. In describing his duties, the secretary states that he is consulted "on a weekly or monthly basis concerning projects that the corporation is working on, property holdings, submittals of documents to the government . . . and . . . hiring and firing of employees," and has "much more to do with the day to day operation of the corporation" than does the General Manager, who is a Korean citizen. The secretary also confirms that the second key management employee identified by Hanil, the contract administrator, has been given the necessary authority to handle "all aspects of the management of this contract on behalf of [the] corporation." The secretary, whose interest in the corporation is also that of a minority shareholder, concludes by stating that he and the contract administrator together "would handle all of the key decisions of the corporation and . . . provide "one hundred percent (100%) of the management for the company."

We see no basis to conclude that the contracting officer was required to do a more in-depth investigation into the nature of the two individuals' duties. The protester does not

allege and the record does not suggest that the contracting officer should have suspected that the information he received concerning the corporation's key employees was inaccurate. While the protester states that it bases its suspicions on its dealing with the awardee, there is no evidence in the record that even remotely suggests that the contracting officer had or should have had any knowledge about the corporation or its employees that should have caused him to question Hanil's eligibility under the American Preference Policy. Absent, for example, documented complaints or suspicions prior to his award decision that the awardee is actually foreign-owned and operated within the meaning of the American Preference Policy, an exhaustive investigation into the factors suggested by the protester was not required.

The record does not support the protester's argument that the award was improper because, according to the protester, the major shareholder in the corporation is a Korean citizen. The solicitation provision containing the American Preference Policy did not include a stock requirement; therefore, it would have been improper for the contracting agency to have imposed such a requirement after receipt of bids.

The protester also contends that the award to Hanil is improper because Hanil has not met the American Preference Policy's tax requirements. In essence, the protester claims that the agency failed to investigate whether Hanil has paid taxes due. In investigating Hanil's compliance with the tax filing and payment requirements, the contracting officer contacted Guam's Department of Revenue and Taxation and was informed that Hanil had filed tax returns in Guam for more than 2 years. The contract administrator's staff verified this information and learned that Hanil did not owe any territorial taxes as a result of these filings.²

²A declaration filed by the contract administrator describing her inquiry into Hanil's compliance with the tax requirements refers to the firm as "Hanil Resorts, JV, Corporation Services, Inc." The agency has indicated that the reference was simply a typographical error and that the tax information it received did in fact pertain to the protester, Hanil Resorts (Joint Venture) Corporation.

Consequently, the record establishes that Hanil met the tax requirements under the American Preference Policy.

The protests are denied.



for James F. Hinchman
General Counsel

PROVED BY FARMS GOVERNMENT
TRANSMITTAL FORM (6/90)

GASE MANAGER: (b)(6) DATE: 3-26-97

DAR Case No: 96-0328 DAR Case Title: Preference for U.S. Firms on MIL CON

DFARS Cite(s): 225.70, 236.102, 236.274, 236.570, 252.236-7010 Overseas Construction Contracts

Check One: Final Interim Info

DAC Intro Item:

The interim rule issued by Departmental Letter 97-008, on January 17, 1997, is converted to a final rule without change. The rule amends DFARS 225.70, 236.102, 236.274, 236.570, and adds the clause at 252.236-7010 to implement Section 112 of the Fiscal Year 1997 Military Construction Appropriations Act.

Public Comment: (Pub. L. 104-196). Section 112 provides a 20% percent preference for U.S. firms on all contracts estimated to exceed *

- (Interim Rule) Comments invited _____ day comment period.
- (Interim/Final Rule) Does not have significant effect beyond internal operating procedures or significant cost or administrative impact on contractors.
- (Final Rule) Comments were requested on 1-17-97. 62 FR 2856.

Reg Flex:

- (Interim/Final Rule) Does not apply. Rule does not constitute significant revision.
- (Final Rule) Applies. A final RF analysis is attached.
- (Final rule) DoD certifies that final rule will not have significant economic impact because see attached
- (Interim Rule) Applies. May have significant economic impact because _____
- Initial RF analysis forwarded to SBA.
- Initial RF analysis delayed because _____ but will be forwarded by _____
- (Interim Rule) Applies but not expected to have significant economic impact. No RF analysis.

Paperwork Reduction:

- (Interim/Final Rule) No information collection requirements.
- (Interim Rule) Applies. OMB approval requested.
- (Final Rule) Applies. OMB approved. Control number 0704-0255

Deviations:

- No
- Yes. Deviation approval request attached.

Interim Rule:

- Determination of Urgency attached

* \$1,000,000 for military construction projects in the U.S. territories and possessions in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf.



OFFICE OF THE UNDER SECRETARY OF DEFENSE

3000 DEFENSE PENTAGON
WASHINGTON, DC 20301-3000
December 30, 1996



ACQUISITION AND
TECHNOLOGY

DP (DAR)

In reply refer to
DFARS Cases: 96-D328/96-D329

Mr. Bruce McConnell
Chief, Information Policy and Technology Branch
Office of Information and Regulatory Affairs
Room 3235 NEOB
Washington, DC 20503

Dear Mr. McConnell:

We are preparing to publish an interim rule to amend language in the Defense Federal Acquisition Regulation Supplement (DFARS) to implement Sections 111 and 112 of the Fiscal Year 1997 Military Construction Appropriations Act (Public Law 104-196). Section 111 restricts award of architect and engineer contracts estimated to exceed \$500,000, for projects to be accomplished in Japan, in any NATO member country, or in countries bordering the Arabian Gulf, to U.S. firms or U.S. firms in joint venture with host nation firms. Section 112 provides a 20 percent preference for U.S. firms on all contracts estimated to exceed \$1,000,000 for military construction projects in the United States territories and possessions in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf.

We are enclosing a courtesy copy of the DFARS language and would appreciate your clearance to proceed with publication.

Sincerely,

for *Anda D. Nelson*

D. S. Parry
Captain, SC, USN
Director, Defense Acquisition
Regulations Council

Enclosure



OPTIONAL FORM 00

FAX TRANSMITTAL

of pages > 1

To (b)(6)	From PEARCE	JMS control number 0 7 0 4 - 0 2 5 5
Dept./Agency PDVSD(A&T)DP/DAR	Phone # /	
Agency/Subagency Department of Defense Defense Acquisition Regulations Directorate	Fax # (b)(2) /	

Enter only items that change

Current record

New record

Agency form number(s)	Current record	New record
Annual reporting and recordkeeping hour burden		
Number of respondents	2,680	2,710
Total annual respondents	2,680	2,740
Percent of these responses collected electronically	%	%
Total annual hours	276,620	276,625
Difference		5
Explanation of difference		
Program change		
Adjustment		5
Annual reporting and recordkeeping cost burden (in thousands of dollars)		
Total annualized Capital/Startup costs		
Total annual costs (O&M)		
Total annualized cost requested		
Difference		
Explanation of difference		
Program change		
Adjustment		

Other changes**

Signature of Senior Official or designee: <i>Anne M. Jeffrey</i> Anne M. Jeffrey	Date: 12/2/96	For OIRA Use
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**This form cannot be used to extend an expiration date.



ACQUISITION AND
TECHNOLOGY

OFFICE OF THE UNDER SECRETARY OF DEFENSE

3000 DEFENSE PENTAGON
WASHINGTON DC 20301-3000

MEMORANDUM FOR DIRECTOR DEFENSE ACQUISITION REGULATIONS COUNCIL

SUBJECT: FAR Case 96-325 and DFARS Cases 96-D320/D328/D329

Thank you for the opportunity to review the subject cases. This office is unable to concur in the cases as they are currently drafted. To the extent that these comments are late, and the cases have already been released for publication as proposed or interim rules, please consider our comments as part of the public comment process. Our specific concerns are addressed below.

FAR Case 96-325, Compensation of Certain Contractor Personnel. This case purports to implement section 809 of the FY 97 Defense Authorization Act. *Halachis*

Procedurally, we do not understand why the Team did not take a clean sheet approach to implementing this significantly changed provision and it does not appear that the public played any role at framing this implementation. We therefore believe that this should be published as a proposed rule. We can internally direct that work on developing annual overhead rates will continue but that no overhead rates will be approved before the rule becomes final.

Substantively, the statutory language leaves great discretion to the Department in determining how we define two critical terms, Senior Executive Officer and "individuals in senior management positions." It is unclear from the team's report why they have chosen to define both of these terms in a restrictive manner. I understand that establishing a fixed number of Senior Executive Officers and "individuals in senior management positions" is easier to administer for the Department, but it does not appear that in all circumstances it will be the correct solution both for the government and industry, nor does it appear to address Congress' underlying concern vis a vis those individuals whose salaries should be capped. We prefer a definition of these terms which compels a company by company review of senior management and a determination on a case by case basis, first by the company and then reviewed by the contracting officer, on who should be a Senior Executive Officer or an "individual in senior management". This review can be accomplished in the same process that overhead rates are established and approved. This will actually give both government and industry more discretion in determining who should properly be identified as subject to the cap and more accurately implement Congress' intent. A fixed number without justification is arbitrary, and in the absence of a sound justification, capricious.

DFARS Case 96-D320, Notice of Termination. This case purports to implement section 824 of the FY 97 Defense Authorization Act. It implements the provisions in a clause with no reference or definition in the substantive provisions of the DFARS itself. We recommend that the team include language in DFARS 249 that addresses the requirement as well. *Lauger*



Williams

DFARS Cases 96-D328 and D329, Preference for US Firms on MILCON Overseas Construction Contracts and Restriction on MILCON Overseas Architect-Engineer (A-E) Contracts. These cases purport to implement sections 11 and 112 of the FY96-97 Military Construction Appropriations Act. The team has not explained its rationale for including a requirement that the firms, to fit within the preference, must hire US citizens in key management positions. The statute does not require a limitation on employment of key management positions to US citizens. Why did the team feel this was necessary and what impact will have this have on effecting Congress' intent and our ability to implement? What happens if individuals in "key management positions" turn over in the process or the company reorganizes? The team also did not include a definition of key management. Query, should the definitions in this case be the same as the definitions in FAR Case 96-325? Absent a compelling reason to the contrary, we think so. We think the team needs to rework this case in light of our comments.



David A. Drabkin
Acting Deputy Under Secretary of Defense
(Acquisition Reform)

Defense Acquisition Regulations Directorate
Memo

OCT 25 1996

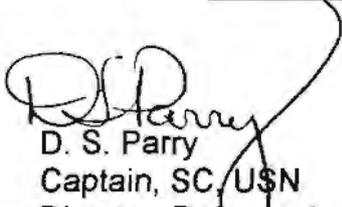
To: Mr. Pete Bryan (FC)
Mr. David Drabkin (AR)

Subject: Preference of U.S. Firms on MILCON Overseas Construction Contracts (DFARS Case 96-D328) and Restriction on MILCON Overseas Architect-Engineer (A-E) Contracts (DFARS Case 96-D329)

The attached draft interim rules (Atch 1) implement restrictions on award of overseas military construction and A-E contracts to foreign firms, as required by Sections 111 and 112 of the Fiscal Years 1996 and 1997 Military Construction Appropriations Acts (Atch 2).

These rules add cross references in 225.70; add a definition for "United States firm" at 236.106, applicable to both military construction and A-E contracts; and add solicitation provisions to notify the offeror of the restrictions and confirm the status of the offeror.

The DAR Council plans to discuss these cases on October 30, 1996. We invite any comments you may have. Our case manager is (b)(6), (b)(2)


D. S. Parry
Captain, SC/USN
Director, Defense Acquisition
Regulations Council

Attachments

DFARS Case 96-D328
Preference for U.S. Firms on MILCON Overseas Construction Contracts
PART 225—FOREIGN ACQUISITION

* * * * *

SUBPART 225.70—AUTHORIZATION ACTS, APPROPRIATIONS ACTS, AND OTHER
STATUTORY RESTRICTIONS ON FOREIGN PURCHASES[ACQUISITION]

225.7000 Scope of Subpart.

(a) This subpart contains restriction on the acquisition of foreign products [and services], imposed by ~~DoD~~[Defense] Appropriations and Authorization Acts and other statutes. Refer to the A[cts] to verify current applicability of the restrictions.

* * * * *

225.7003 ~~Reserved.~~[Restriction on overseas military construction.

For restriction on award to foreign firms of military construction contracts to be performed in the United States territories and possessions in the Pacific and on Kwajalein Atoll or in countries bordering the Arabian Gulf, see 236.274(b).]

* * * * *

PART 236—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

SUBPART 236.1—GENERAL

236.102 Definitions.

* * * * *

[(4) "United States firm," as used in this part, means a firm incorporated in the United States that complies with the following:

- (i) The corporate headquarters are in the United States;
- (ii) The firm has filed corporate and employment tax returns in the United States for a minimum of two years (if required), has filed state and federal income tax returns (if required) for 2 years, and has paid any taxes due as a result of these filings; and
- (iii) The firm employs United States citizens in key management positions.]

* * * * *

SUBPART 36.2—SPECIAL ASPECTS OF CONTRACTING FOR CONSTRUCTION

* * * * *

236.274 Construction in foreign countries.

[(a)] When a technical working agreement with a foreign government is required for a construction contract—

(a[1]) Consider inviting the Army Office of the Chief of Engineers, or the Naval Facilities Engineering Command to participate in the negotiations.

(b[2]) The agreement should, as feasible and where not otherwise provided for in other agreements, cover all elements necessary for the construction that are required by laws, regulations, and customs of the United States and the foreign government, including—

(+i) Acquisition of all necessary rights;

(2ii) Expeditious, duty-free importation of labor, material, and equipment;

(3iii) Payment of taxes applicable to contractors, personnel, materials, and equipment;

(4iv) Applicability of workers' compensation and other labor laws to citizens of the United States, the host country, and other countries;

(5v) Provision of utility services;

(6vi) Disposition of surplus materials and equipment;

(7vii) Handling of claims and litigation; and

(8viii) Resolution of any other foreseeable problems which can appropriately be included in the agreement.

[(b) In accordance with Section 112 of Public Law 104-32 and similar sections in subsequent military construction appropriations acts, military construction contracts that are estimated to exceed \$1,000,000 and are to be performed in the United States territories and possessions in the Pacific and on Kwajalein Atoll or in countries bordering the Arabian Gulf shall be awarded only to United States firms, unless the lowest responsive and responsible bid from a United States firm exceeds the lowest responsive and responsible bid of a foreign contractor by more than 20 percent.

* * * * *

SUBPART 236.5—CONTRACT CLAUSES

236.570 Additional provisions and clauses.

* * * * *

[(c) Use the provision at 252.236-70XX, Overseas Military Construction - Preference for United States Firms, in military construction contracts that are estimated to exceed \$1,000,000 and are to be performed in the United States territories and possessions in the Pacific and on Kwajalein Atoll or in countries bordering the Arabian Gulf.]

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

**[252.236-70XX Overseas Military Construction - Preference for United States Firms.
As prescribed in 236.570(c), use the following provision:**

**OVERSEAS MILITARY CONSTRUCTION - PREFERENCE FOR
UNITED STATES FIRMS (DATE)**

(a) *Definition.*

“United States firm,” as used in this provision, means a firm incorporated in the United States that complies with the following:

- (i) The corporate headquarters are in the United States;**
- (ii) The firm has filed corporate and employment tax returns in the United States for a minimum of two years (if required), has filed state and federal income tax returns (if required) for 2 years, and has paid any taxes due as a result of these filings; and**
- (iii) The firm employs United States citizens in key management positions.**

(b) *Evaluation.* Offers from firms which do not qualify as United States firms will be evaluated by adding 20 percent to the offer.]

(c) *Status.* The offeror shall check the appropriate box. The offeror ____ is, ____ is not a United States firm.

(End of provision)]

**DFARS Case 96-D329
Restriction on MILCON Overseas A-E Contracts**

PART 225—FOREIGN ACQUISITION

**SUBPART 225.70—AUTHORIZATION ACTS, APPROPRIATIONS ACTS, AND OTHER
STATUTORY RESTRICTIONS ON FOREIGN PURCHASES[ACQUISITION]**

225.7004 ~~Reserved.~~ *{Restriction on machine tools and powered and non-powered valves deleted by 96-D023}* [Restriction on overseas architect-engineer services.

For restriction on award to foreign firms of architect-engineer contracts to be performed in Japan, any NATO member country, or in countries bordering the Arabian Gulf, see 236.602-70.]

PART 236—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

SUBPART 236.6—ARCHITECT-ENGINEER SERVICES

236.602 Selection of firms for architect-engineer contracts.

236.602-70 Restriction on award of overseas A-E contracts to foreign firms.

[In accordance with Section 111 of Public Law 104-32 and similar sections in subsequent military construction appropriations acts, architect-engineer contracts funded by military construction that are estimated to exceed \$500,000 and are to be performed in Japan, any NATO member country, or in countries bordering the Arabian Gulf shall be awarded only to United States firms or to joint ventures of United States and host nation firms.

236.609-70 ~~Option for supervision and inspection services~~[Additional provisions and clauses].

(a)[(1)] Use the clause at 252.236-7009, Option for Supervision and Inspection Services, in solicitations and contracts for A-E services when—

(1)[i]) The contract will be fixed price; and

(2)[ii]) Supervision and inspection services by the A-E may be required during construction.

(b)[2]) Include the scope of such services in Appendix A of the contract.

[(b) Use the provision 252.236-70YY, Overseas Architect-Engineer Services - Restriction to United States Firms, in architect-engineer contracts that are estimated to exceed \$500,000 and are to be performed in Japan, any NATO member country, or in countries bordering the Arabian Gulf.]

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

**[252.236-70YY Overseas Architect-Engineer Services - Restriction to United States Firms.
As prescribed in 236. 609-70(b), use the following provision:**

**OVERSEAS ARCHITECT-ENGINEER SERVICES - RESTRICTION TO
UNITED STATES FIRMS (DATE)**

(a) *Definition.*

“United States firm,” as used in this provision, means a firm incorporated in the United States that complies with the following:

- (i) The corporate headquarters are in the United States;**
- (ii) The firm has filed corporate and employment tax returns in the United States for a minimum of two years (if required), has filed state and federal income tax returns (if required) for 2 years, and has paid any taxes due as a result of these filings; and**
- (iii) The firm employs United States citizens in key management positions.**

(b) *Restriction.* Military construction appropriations acts restrict award of this contract to a United States firm or a joint venture of United States and host nation firms.

(c) *Status.* The offeror confirms, by submission of this offer, that it is a United States firm or a joint venture of United States firms and host nation firms.

(End of provision)]

Pub. L. 104-32 (FY 96 Military Construction Appropriations Act)

SEC. 111. None of the funds appropriated in Military Construction Appropriations Acts may be obligated for architect and engineer contracts estimated by the Government to exceed \$500,000 for projects to be accomplished in Japan, in any NATO member country, or in countries bordering the Arabian Gulf, unless such contracts are awarded to United States firms or United States firms in joint venture with host nation firms.

SEC. 112. None of the funds appropriated in Military Construction Appropriations Acts for military construction in the United States territories and possessions in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf, may be used to award any contract estimated by the Government to exceed \$1,000,000 to a foreign contractor: [Italic->] Provided, [<-Italic] That this section shall not be applicable to contract awards for which the lowest responsive and responsible bid of a United States contractor exceeds the lowest responsive and responsible bid of a foreign contractor by greater than 20 per centum.

Atch 2

FAX

TO: (b)(6) FAX NR. (b)(2)
PHONE NR. (b)(2)

DATE: 10-24-96

7 Pages including this transmittal sheet

SUBJECT: DFARS Cases 96-D327, D328, D396

MESSAGE:

- I am proposing some changes and additions to the draft rules submitted by the Construction Committee.
- DAC 91-10 changed the baseline, implementing a final rule under DFARS Case 95-D024.
 - I recommend a solicitation provision for cases 96-D328 and D329 to notify offerors of the requirements and provide a way for them to confirm their status.
 - I recommend a cross reference in subpart 25.70.

FROM: (b)(6) Defense Acquisition Regulations

Directorate, PDUSD (A&T) DP/DAR, (b)(2) FAX (b)(2)
(b)(2)

- I have cited the FY96 Military Construction Appropriation Act because that is the first year in which the restriction occurred in its present form (including Arabian Gulf countries).

PLEASE DELIVER IMMEDIATELY

If you have any comments with regard to these proposed revisions, please let me know.

(b)(6)

FAX

TO: DAR Council FAX NR. _____
PHONE NR. _____

DATE: 10-24-96

7 Pages including this transmittal sheet

SUBJECT: DFARS Cases 96-D327, 96-D328, 96-D329

MESSAGE: This is an advance copy of some changes I am proposing to the draft rules submitted by the Construction Committee - to be discussed 10-30-96

- DAC 91-10 changed the baseline, implementing a final suborder, DFARS Case 95-D024 (96-D327)
- I have cited the FY 96 Military Appropriations Act, because it is the first war in which the restriction occurred in its present form (including Arabian Gulf countries)

FROM: (b)(6) Defense Acquisition Regulations Directorate, PDUSD (A&T) DP/DAR, (b)(2), FAX (b)(2)

(b)(2)

- I have added cross-references in 27S.70 and solicitation provisions. (96-D328, 96-D329)

PLEASE DELIVER IMMEDIATELY

Case Management Record

Discussion Handout

DFARS Case 96-D328	Date March 24, 1997
Title Preference for U.S. Firms on MILCON Overseas Construction Contracts	
Priority 1	Submitted By (b)(6)
Origination Code L	
Case Manager (b)(6)	Case References
FAR Cites	DFARS Cites 225.70, 236.102, 236.274, 236.570, 252.236
Cognizant Committees Construction	
Coordination FC	
Recommendation Convert to final rule without change. <i>Agree to convert to final rule</i>	
<p>This case was opened on September 30, 1996, to implement Section 112 of the FY 97 Military Construction Appropriations Act (Pub. L. 104-196). Section 112 provides a 20 percent preference for U.S. firms on all contracts estimated by the Government to exceed \$1,000,000 for military construction projects in the U.S. territories and possessions in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf. An interim rule was published for public comment (62 FR 2856), with comments due on or before March 18, 1997.</p> <p>One public comment was received from the Associated General Contractor's of America (AGC) (TAB A). AGC is concerned that the 20 percent bid preference provided for in Section 112 represents a change of existing policy without adequate opportunity for public comment. Prior policy on construction in the Arabian Gulf Area had limited competition and award to United States firms, if competition were adequate. However, the statutory restriction takes precedence over prior policy, and Congress is not required to obtain public comment when imposing statutory restrictions.</p> <p>AGC also inquired verbally as to the location of the "Arabian Gulf," and whether we meant the Persian Gulf or the Arabian Sea. Since the Gulf War, the Government now generally uses the term "Arabian Gulf" to identify the Gulf bordered by Saudi Arabia, Oman, United Arab Emirates, Qatar, Bahrain, Kuwait, Iraq, and Iran (TAB B).</p>	



THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA
1957 E Street, N.W. • Washington, D.C. 20006 • (202) 393-2040 • FAX (202) 347-4004

March 13, 1997

(b)(6)

Defense Acquisition Regulations Council
PDUSD (A&T) DP (DAR)
IMD 3D139, 3062 Defense
Pentagon
Washington, D.C. 20301-3062

Dear (b)(6)

On behalf of the Associated General Contractors of America (AGC), I am writing with regard to DFARS Case 96-D328 and the request for comments in the January 17, 1997 Federal Register regarding the implementation of Section 112 of the Fiscal Year 1997 Military Construction Appropriations Act (P.L. 104-196). AGC is a national trade association of more than 33,000 construction industry firms including 7,500 of the nation's leading general contracting companies.

AGC has for many years strongly supported bid preferences for U.S. contractors on overseas military construction projects. In that general sense, we welcome the provision of Section 112 that provides for a preference for United States firms on all contracts exceeding \$1 million for military construction projects in the U.S. territories and possessions in the Pacific, on Kwajalein Atoll and in countries bordering the Arabian Gulf.

AGC is concerned, however, that application of the 20 percent bid preference provided for in Section 112 to military construction projects "in countries bordering the Arabian Gulf" may represent a change of existing policy without adequate opportunity for public comment. Since 1980, bidding for military construction projects over \$5 million in the Indian Ocean/Persian Gulf region has been subject to the provisions of the "Indian Ocean/Persian Gulf Preference" (see attachment) which provides that, on projects in this area, "If competition is adequate, the competition and award will be limited to United States firms". This preference also provides that, under certain conditions, host country firms are permitted to participate in projects covered by the preference. (C)

In the attached letter of November 24, 1980 to the Chairman of the Senate Armed Services Military Construction Subcommittee, Deputy Assistant Secretary of Defense Perry Fliakas - referring to the construction of facilities in the Indian Ocean/Persian Gulf region -

stated that "To construct these facilities, the Department of Defense needs a construction capability that is dependable, technically proficient, and responsive to United States requirements and interests. Only United States firms, using United States citizens in key supervisory positions, which are not susceptible to influence or pressures from foreign governments can meet this need in this area of the world".

AGC is in strong agreement with the arguments in Deputy Assistant Secretary Fliakas' letter in favor of using only U.S. contractors on military construction projects in the Indian Ocean/Persian Gulf region and would oppose any change in the Indian Ocean/Persian Gulf Preference which would open bidding on such projects to foreign firms.

AGC respectfully requests that AGC's views on this matter be considered in the implementation of Section 112 of the FY 97 Military Construction Appropriations Act.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "T.M. Chamberlain". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Terry M. Chamberlain
Director

International Construction Division

Attachment



OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE

WASHINGTON, D.C. 20301

MANPOWER,
RESERVE AFFAIRS
AND LOGISTICS

24 NOV 1980

Honorable Gary W. Hart
Chairman, Subcommittee on Military
Construction and Stockpiles
Committee on Armed Services
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The Senate and House reports on the Fiscal Year 1981 Military Construction Authorization Bill noted various problems encountered by the United States construction industry relative to construction in the Indian Ocean/Persian Gulf region.

The Department of Defense is also aware of these conditions and shares the concerns of the committees in this regard. Because the national interests of the United States are so inextricably linked to the volatile and unstable Indian Ocean/Persian Gulf region, extensive construction of local operational facilities is needed to support the Rapid Deployment Force concept and to improve the operational readiness levels of our forces in the area. To construct these facilities, the Department of Defense needs a construction capability that is dependable, technically proficient, and responsive to United States requirements and interests. Only United States firms, using United States citizens in key supervisory positions, which are not susceptible to influence or pressures from foreign governments can meet this need in this area of the world.

Accordingly, the Department of Defense has developed a construction policy which provides for preference to United States firms to ensure and maintain an American construction capability in the Indian Ocean/Persian Gulf area. The policy which will be implemented by our construction agents is provided as an enclosure. We believe that this policy meets the needs of the Department of Defense with respect to construction in the Indian Ocean/Persian Gulf area and also addresses the concerns of the Congressional committees. A letter similar to this is also being furnished to the Chairman of the Subcommittee on Installations and Facilities, Committee on Armed Services, House of Representatives.

Sincerely,

Signed

Ferry J. Fliakas
Deputy Assistant Secretary of Defense
(Installations and Housing)

Enclosure

its principal place of business within the United States and must employ United States citizens in key supervisory positions. Assistance as appropriate should be solicited from participating host nations in screening the credentials of any involved foreign firms. The normal requirements for bid and performance bonds should be utilized and other nonconflicting standard contracting procedures followed.

~~_____~~
Ferry J. Fliakas
Deputy Assistant Secretary of Defense
(Installations and Housing)

Largest seas

Name	Area*	
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Bering Sea	2 304 000	890 000
Bay of Bengal	2 172 000	839 000
Sea of Okhotsk	1 590 000	614 000
Gulf of Mexico	1 543 000	596 000
Gulf of Guinea	1 533 000	592 000
Barents Sea	1 405 000	542 000
Norwegian Sea	1 383 000	534 000
Gulf of Alaska	1 327 000	512 000
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SAUDI ARABIA

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Timezone GMT + 3

Area 2 331 000 km²/899 766 sq mi

Population total (1992e) 15 267 000

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Capital Riyadh (Ar-Riyāḍ)

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Ethnic groups Arab (90%), Afro-Asian (10%)

Religions Muslim (Sunni 85%, Shi'ite 15%), small Christian minority

Physical features Comprises four-fifths of the Arabian peninsula. Red Sea coastal plain bounded E by mountains; highlands in SW contain Jebel Abha. Saudi Arabia's highest peak, 3 133m/10 279 ft. Arabian peninsula slopes gently N and E towards oil-rich Al Hasa plain on the Arabian Gulf; interior comprises two extensive areas of sand desert, the An Nafud (N) and Rub' al-Khali (the Great Sandy Desert) (S); salt flats numerous in E lowlands. Large network of wadis drains NE. 95% of land is arid or semi-arid desert.

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1982- Fahd ibn Abdul Aziz

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Status Federation of autonomous emirates

Date of independence 1971

Capital Abu Dhabi

Languages Arabic (official), English, Farsi, Urdu, and Hindi also spoken

Ethnic groups Emirian (19%), other Arab (23%), S Asian (50%)

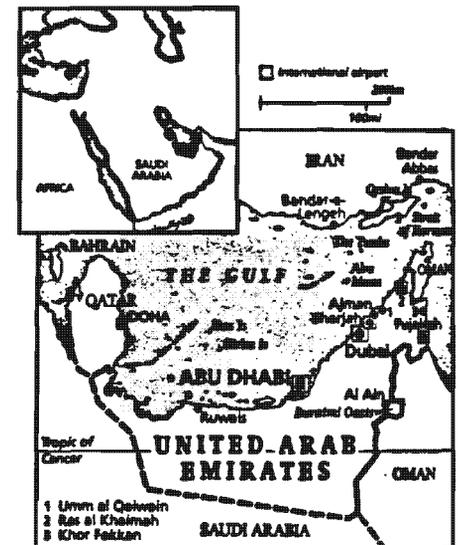
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Priority 1	Submitted By (b)(6)	Origination Code L
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Cognizant Committees Construction		
Coordination FC		
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<p>This case was opened on September 30, 1996, to implement Section 112 of the FY 97 Military Construction Appropriations Act (Pub. L. 104-196). Section 112 provides a 20 percent preference for U.S. firms on all contracts estimated by the Government to exceed \$1,000,000 for military construction projects in the U.S. territories and possessions in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf. An interim rule was published for public comment (62 FR 2856), with comments due on or before March 18, 1997.</p> <p>One public comment was received from the Associated General Contractor's of America (AGC) (TAB A). AGC is concerned that the 20 percent bid preference provided for in Section 112 represents a change of existing policy without adequate opportunity for public comment. Prior policy on construction in the Arabian Gulf Area had limited competition and award to United States firms, if competition were adequate. However, the statutory restriction takes precedence over prior policy, and Congress is not required to obtain public comment when imposing statutory restrictions.</p> <p>AGC also inquired verbally as to the location of the "Arabian Gulf," and whether we meant the Persian Gulf or the Arabian Sea. Since the Gulf War, the Government now generally uses the term "Arabian Gulf" to identify the Gulf bordered by Saudi Arabia, Oman, United Arab Emirates, Qatar, Bahrain, Kuwait, Iraq, and Iran (TAB B).</p>		

MAR 25 1997



THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA

1957 E Street, N.W. • Washington, D.C. 20006 • (202) 393-2040 • FAX (202) 347-4004

March 13, 1997

(b)(6)

Defense Acquisition Regulations Council
PDUSD (A&T) DP (DAR)
IMD 3D139, 3062 Defense
Pentagon
Washington, D.C. 20301-3062

Dear (b)(6)

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AGC respectfully requests that AGC's views on this matter be considered in the implementation of Section 112 of the FY 97 Military Construction Appropriations Act.

Thank you for your consideration.

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Terry M. Chamberlain
Director
International Construction Division

Attachment



OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE

WASHINGTON, D.C. 20301

MANPOWER,
RESERVE AFFAIRS
AND LOGISTICS

24 NOV 1980

Honorable Gary W. Hart
Chairman, Subcommittee on Military
Construction and Stockpiles
Committee on Armed Services
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The Senate and House reports on the Fiscal Year 1981 Military Construction Authorization Bill noted various problems encountered by the United States construction industry relative to construction in the Indian Ocean/Persian Gulf region.

The Department of Defense is also aware of these conditions and shares the concerns of the committees in this regard. Because the national interests of the United States are so inextricably linked to the volatile and unstable Indian Ocean/Persian Gulf region, extensive construction of local operational facilities is needed to support the Rapid Deployment Force concept and to improve the operational readiness levels of our forces in the area. To construct these facilities, the Department of Defense needs a construction capability that is dependable, technically proficient, and responsive to United States requirements and interests. Only United States firms, using United States citizens in key supervisory positions, which are not susceptible to influence or pressures from foreign governments can meet this need in this area of the world.

Accordingly, the Department of Defense has developed a construction policy which provides for preference to United States firms to ensure and maintain an American construction capability in the Indian Ocean/Persian Gulf area. The policy which will be implemented by our construction agents is provided as an enclosure. We believe that this policy meets the needs of the Department of Defense with respect to construction in the Indian Ocean/Persian Gulf area and also addresses the concerns of the Congressional committees. A letter similar to this is also being furnished to the Chairman of the Subcommittee on Installations and Facilities, Committee on Armed Services, House of Representatives.

Sincerely,

Signed

Ferry J. Fliakas
Deputy Assistant Secretary of Defense
(Installations and Housing)

Enclosure



OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE

WASHINGTON, D.C. 20301

MANPOWER,
RESERVE AFFAIRS
AND LOGISTICS

24 NOV 1980

MEMORANDUM FOR ASSISTANT SECRETARY OF THE ARMY (IL&FM)
ASSISTANT SECRETARY OF THE NAVY (MRA&L)

SUBJECT: Construction in the Indian Ocean/Persian Gulf

The interests of the United States are inextricably linked to the Indian Ocean/Persian Gulf region. In furtherance of these interests, Congressional military construction acts authorized and appropriated funds for construction of extensive facilities in the area. Instability in the region and lack of a local construction capability requires that the United States construction industry must be able to carry out this construction in support of the Rapid Deployment Force concept and to improve the operational readiness of our forces in the region.

In order to ensure a viable, responsive and dependable construction capability, a DoD policy that provides preference to United States firms will be implemented. This policy will apply to all general construction prime contracts of an estimated value greater than \$5 million. It will not include dredging contracts which as specialized work will be awarded in accordance with the provisions of the Fiscal Year 1981 Military Construction Appropriation Act (PL 96-436).

The preference policy should be implemented in accordance with the following procedure: Construction agents will assess the adequacy of potential competition among United States firms, by 60-day advance publication in the Commerce Business Daily soliciting expressions of interest by the United States construction industry. The final judgment as to the adequacy of competition will be left to the construction agent. If competition is not deemed adequate, the contract will be opened to international competition. If competition is adequate, the competition and award will be limited to United States firms. If necessary to accommodate government to government agreements, the procedure will be expanded to permit or require appropriate host country participation. Thus, in Diego Garcia, for example, competition (except for dredging discussed above) will be limited to consortia composed of a firm or firms of United States origin and a United Kingdom firm or firms. In Oman, "maximum practicable" use must be made of Omani contractors, either as joint venture partners or sub-contractors. The specific details of implementing such government to government agreements will be left to the discretion of the construction agents for resolution on a case by case basis.

In carrying out this policy, construction agents are cautioned to be alert to the possibility of firms which might be formed to exploit the policy. Any firm claiming the benefits of this American preference provision must have

its principal place of business within the United States and must employ United States citizens in key supervisory positions. Assistance as appropriate should be solicited from participating host nations in screening the credentials of any involved foreign firms. The normal requirements for bid and performance bonds should be utilized and other nonconflicting standard contracting procedures followed.

~~_____~~
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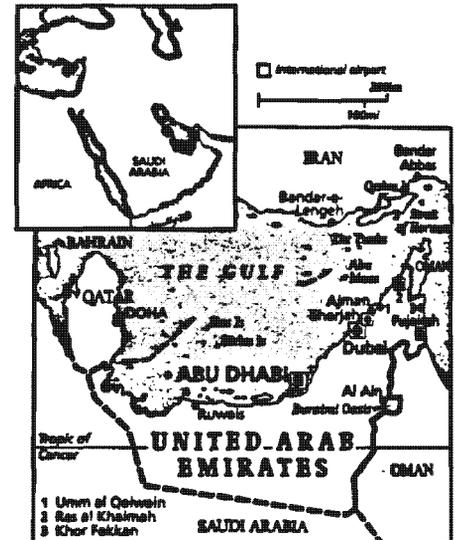
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Official Case Record *Dept. of Defense*

Date: October 30, 1996

DFARS Case: 96-D328

Case Title: Preference for U.S. Firms on MILCON Overseas Construction

Origination:
L

Sponsor:
A

Committee:
Construction

Case Manager:
(b)(6)

FAR/DFARS: DFARS 225.70, 236.102, 236.274,
236.570, 252.236

Statute:
Section 112 of Pub. L. 104-196

Statutory Date:

Outside Interest (Circle): IG OFPP OMB DCAA GAO Industry Other _____

Coordination/Comments (Circle): DDP MPI CPA CPF DSPS FC GC Other AR _____

Action Scheduled Today:

Discuss committee/Case manager recommended revisions to the DFARS.
TAB B - Statute; TAB - FC memo; TAB D - Committee Report.

OSD Position:

Recommend agreement with draft interim ~~FAR~~ rule at TAB A.

Discussions/Actions Taken:

Incomplete

CAM Update:

DFARS Case 96-D328
Preference for U.S. Firms on MILCON Overseas Construction Contracts
PART 225-FOREIGN ACQUISITION

* * * * *

SUBPART 225.70-AUTHORIZATION ACTS, APPROPRIATIONS ACTS, AND OTHER
STATUTORY RESTRICTIONS ON FOREIGN PURCHASES[ACQUISITION]

225.7000 Scope of Subpart.

(a) This subpart contains restriction on the acquisition of foreign products [and services], imposed by ~~DoD~~[Defense] Appropriations and Authorization Acts and other statutes. Refer to the A[acts] to verify current applicability of the restrictions.

* * * * *

225.7003 ~~Reserved.~~[Restriction on overseas military construction.

For restriction on award to foreign firms of military construction contracts to be performed in the United States territories and possessions in the Pacific and on Kwajalein Atoll or in countries bordering the Arabian Gulf, see 236.274(b).]

* * * * *

PART 236-CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

SUBPART 236.1-GENERAL

236.102 Definitions.

* * * * *

[(4) "United States firm," as used in this Part, means a firm incorporated in the United States that complies with the following:

- (i) The corporate headquarters are in the United States;
- (ii) The firm has filed corporate and employment tax returns in the United States for a minimum of two years (if required), has filed state and federal income tax returns (if required) for 2 years, and has paid any taxes due as a result of these filings; and
- (iii) The firm employs United States citizens in key management positions.]

* * * * *

SUBPART 36.2—SPECIAL ASPECTS OF CONTRACTING FOR CONSTRUCTION

* * * * *

236.274 Construction in foreign countries.

[(a)] When a technical working agreement with a foreign government is required for a construction contract—

(a[1]) Consider inviting the Army Office of the Chief of Engineers, or the Naval Facilities Engineering Command to participate in the negotiations.

(b[2]) The agreement should, as feasible and where not otherwise provided for in other agreements, cover all elements necessary for the construction that are required by laws, regulations, and customs of the United States and the foreign government, including—

(1[i]) Acquisition of all necessary rights;

(2[ii]) Expeditious, duty-free importation of labor, material, and equipment;

(3[iii]) Payment of taxes applicable to contractors, personnel, materials, and equipment;

(4[iv]) Applicability of workers' compensation and other labor laws to citizens of the United States, the host country, and other countries;

(5[v]) Provision of utility services;

(6[vi]) Disposition of surplus materials and equipment;

(7[vii]) Handling of claims and litigation; and

(8[viii]) Resolution of any other foreseeable problems which can appropriately be included in the agreement.

[(b)] In accordance with Section 112 of Public Law 104-32 and similar sections in subsequent military construction appropriations acts, military construction contracts that are estimated to exceed \$1,000,000 and are to be performed in the United States territories and possessions in the Pacific and on Kwajalein Atoll or in countries bordering the Arabian Gulf shall be awarded only to United States firms, unless the lowest responsive and responsible bid from a United States firm exceeds the lowest responsive and responsible bid of a foreign contractor by more than 20 percent.

* * * * *

SUBPART 236.5—CONTRACT CLAUSES

236.570 Additional provisions and clauses.

* * * * *

[(c)] Use the provision at 252.236-70XX, **Overseas Military Construction - Preference for United States Firms**, in military construction contracts that are estimated to exceed \$1,000,000 and are to be performed in the United States territories and possessions in the Pacific and on Kwajalein Atoll or in countries bordering the Arabian Gulf.]

* * * * *

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

* * * * *

[252.236-70XX Overseas Military Construction - Preference for United States Firms.
As prescribed in 236.570(c), use the following provision:

**OVERSEAS MILITARY CONSTRUCTION - PREFERENCE FOR
UNITED STATES FIRMS (DATE)**

(a) *Definition.*

“United States firm,” as used in this provision, means a firm incorporated in the United States that complies with the following:

- (i) The corporate headquarters are in the United States;
- (ii) The firm has filed corporate and employment tax returns in the United States for a minimum of two years (if required), has filed state and federal income tax returns (if required) for 2 years, and has paid any taxes due as a result of these filings; and
- (iii) The firm employs United States citizens in key management positions.

(b) *Evaluation.* Offers from firms which do not qualify as United States firms will be evaluated by adding 20 percent to the offer.]

(c) *Status.* The offeror shall check the appropriate box. The offeror ____ is, ____ is not a United States firm.

(End of provision)]

SEC. 112. None of the funds appropriated in Military Construction Appropriations Acts for military construction in the United States territories and possessions in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf, may be used to award any contract estimated by the Government to exceed \$1,000,000 to a foreign contractor: [Italic->] Provided, [<-Italic] That this section shall not be applicable to contract awards for which the lowest responsive and responsible bid of a United States contractor exceeds the lowest responsive and responsible bid of a foreign contractor by greater than 20 per centum.

SEC. 113. The Secretary of Defense is to inform the appropriate Committees of Congress, including the Committees on Appropriations, of the plans and scope of any proposed military exercise involving United States personnel thirty days prior to its occurring, if amounts expended for construction, either temporary or permanent, are anticipated to exceed \$100,000.

SEC. 114. Not more than 20 per centum of the appropriations in Military Construction Appropriations Acts which are limited for obligation during the current fiscal year shall be obligated during the last two months of the fiscal year.

(TRANSFER OF FUNDS)

SEC. 115. Funds appropriated to the Department of Defense for construction in prior years shall be available for construction authorized for each such military department by the authorizations enacted into law during the current session of Congress.

SEC. 116. For military construction or family housing projects that are being completed with funds otherwise expired or lapsed for obligation, expired or lapsed funds may be used to pay the cost of associated supervision, inspection, overhead, engineering and design on those projects and on subsequent claims, if any.

SEC. 117. Notwithstanding any other provision of law, any funds appropriated to a military department or defense agency for the construction of military projects may be obligated for a military construction project or contract, or for any portion of such a project or contract, at any time before the end of the fourth fiscal year after the fiscal year for which funds for such project were appropriated if the funds obligated for such project (1) are obligated from funds available for military construction projects, and (2) do not exceed the amount appropriated for such project, plus any amount by which the cost of such project is increased pursuant to law.

(TRANSFER OF FUNDS)

SEC. 118. During the five-year period after appropriations available to the Department of Defense for military construction and family housing operation and maintenance and construction have expired for obligation, upon a determination that such appropriations will not be necessary for the liquidation of obligations or for making authorized adjustments to such appropriations for obligations incurred during the period of availability of such appropriations, unobligated balances of such appropriations may be transferred into the appropriation 'Foreign Currency Fluctuations, Construction, Defense' to be merged with and to be available for the same time period and for the same purposes as the appropriation to which transferred.

SEC. 119. The Secretary of Defense is to provide the Committees on Appropriations of the Senate and the House of Representatives with an annual report by February 15, containing details of the specific actions proposed to be taken by the Department of Defense during the current fiscal year to encourage other member nations of the North Atlantic Treaty Organization, Japan, Korea, and United States allies bordering the Arabian Gulf to assume a greater share of the common defense burden of such nations and the United States.



ACQUISITION AND TECHNOLOGY

OFFICE OF THE UNDER SECRETARY OF DEFENSE

3000 DEFENSE PENTAGON
WASHINGTON, DC 20301-3000



October 28, 1996

MEMORANDUM FOR DIRECTOR, DEFENSE ACQUISITION REGULATIONS COUNCIL

SUBJECT: Preference of U.S. Firms on MILCON Overseas Construction Contracts (DFARS Case 96-D328) and Restriction on MILCON Overseas Architect-Engineer (A-E) Contracts (DFARS Case 96-D329)

I have reviewed your memorandum of October 25, 1996, and the draft interim rules required to implement restrictions on award of overseas military construction and A-E contracts to foreign firms, as required by Sections 111 and 112 of the FY96 and 97 Military Construction Appropriations Acts.

I concur with the interim rules as drafted.

Pete Bryan
Pete A. Bryan
Deputy Director, Defense
Procurement (Foreign Contracting)

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To (b)(6)	From (b)(6)
Co.	Co.
Dept.	Phone #
Fax # (b)(2)	Fax #



October 21, 1996

CECC-C

MEMORANDUM FOR DIRECTOR, DAR COUNCIL

SUBJECT: DFARS Case 96-D328, Preference for U.S. Firms on MILCON Overseas Construction Contracts

I. PROBLEM: The Military Construction Appropriations Act 1997 provides for a 20 percent evaluation preference for United States firms on certain overseas MILCON funded contracts.

II. RECOMMENDATION: Revise the DFARS as shown at Tab A.

III. DISCUSSION: Section 112 of the 1997 DoD Military Construction Appropriations Act prohibits the use of funds appropriated under the Act for construction contracts awarded to a foreign contractor and estimated by the Government to exceed \$1,000,000 for projects in the United States territories and possessions in the Pacific and on Kwajalein Atoll or in countries bordering the Arabian Gulf, unless the lowest responsive and responsible bid of a United States contractor is exceeds the lowest responsive and responsible bid of a foreign contractor by at least 20 percent.

IV. COLLATERALS:

Federal Register Notice: This rule would have a significant effect on competition beyond agency internal operating procedures. Public comments concerning this regulation should be invited through a Federal Register notice, in accordance with 41 U.S.C. 418b and FAR 1.301(b).

Regulatory Flexibility Act: A Regulatory Analysis is not required by the Regulatory Flexibility Act (5 U.S.C. 601-611). This rule would not impose a new burden on any small businesses.

Paperwork Reduction Act: The provisions of the Paperwork Reduction Act (44 U.S.C. 3501, et seq.) do not apply. This rule would not impose a new requirement on 10 or more offerors or contractors to submit, maintain, retain or disclose information.

V. COORDINATION: The Army, Navy, Air Force and DoD members concur in this report.

FOR THE CONSTRUCTION, A-E AND BONDS COMMITTEE:

Laura K. Meeker, Chair

Enclosures

[236.275-70 Restrictions on award to foreign firms.

(a) The 1997 military construction appropriations act (Public Law 104-196, section 111) requires the award of a construction contract to a United States firm if --

[(1) the contract is funded by a military construction appropriations act;

[(2) Is for military construction (for example, military construction, family housing construction, family housing operation and maintenance, or minor construction);

[(3) Is estimated to exceed \$1,000,000; and

[(4) Will be performed in the United States territories and possessions in the Pacific and on Kwajalein Atoll or in countries bordering the Arabian Gulf; and

[(5) The lowest responsive and responsible bid of a United States contractor does not exceed the lowest responsive and responsible bid of a foreign contractor by more than 20 percent.

(b) A United States firm must be incorporated in the United States and comply with the following: (i) the corporate headquarters must be in the United States; (ii) the firm must have filed corporate and employment tax returns in the United States for a minimum of 2 years (if required), must have filed state and federal income tax returns (if required) for 2 years, and must have paid any taxes due as a result of these filings; and (iii) the firm must employ United States citizens in key management positions. See decision of the Comptroller General Black Construction Corporation, B-250647; B-250647.2; February 8, 1993, 93-1 CPD ____.

98-116 (1984-1988)
Tab A

11. + 112-

Chapter IX
General Provisions
(containing only)

2

doesn't include Arabian Gulf
- 111 + 112 adds Arabian Gulf

Case Management Record

discussion

<i>Case:</i> 96-D328		<i>Date:</i> 22 Oct. 1996	
<i>Title:</i> Preference for U.S. Firms on MILCON Overseas Construction Contracts			
<i>Priority:</i> 1		<i>Submitted By:</i> Army Policy	<i>Originator:</i>
<i>Case Manager:</i> AW		<i>Case References:</i>	
<i>FAR Cites:</i>		<i>DFARS Cites:</i>	
<i>Committees:</i> Construction, A-E and Bonds			
<i>Coordination:</i>			
<i>Recommendation:</i> Discuss: 10/20			

OCT 23 1996

October 21, 1996

CECC-C

MEMORANDUM FOR DIRECTOR, DAR COUNCIL

SUBJECT: DFARS Case 96-D328, Preference for U.S. Firms on MILCON Overseas Construction Contracts

I. PROBLEM: The Military Construction Appropriations Act 1997 provides for a 20 percent evaluation preference for United States firms on certain overseas MILCON funded contracts.

II. RECOMMENDATION: Revise the DFARS as shown at Tab A.

III. DISCUSSION: Section 112 of the 1997 DoD Military Construction Appropriations Act prohibits the use of funds appropriated under the Act for construction contracts awarded to a foreign contractor and estimated by the Government to exceed \$1,000,000 for projects in the United States territories and possessions in the Pacific and on Kwajalein Atoll or in countries bordering the Arabian Gulf, unless the lowest responsive and responsible bid of a United States contractor is exceeds the lowest responsive and responsible bid of a foreign contractor by at least 20 percent.

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Federal Register Notice: This rule would have a significant effect on competition beyond agency internal operating procedures. Public comments concerning this regulation should be invited through a Federal Register notice, in accordance with 41 U.S.C. 418b and FAR 1.301(b).

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Paperwork Reduction Act: The provisions of the Paperwork Reduction Act (44 U.S.C. 3501, et seq.) do not apply. This rule would not impose a new requirement on 10 or more offerors or contractors to submit, maintain, retain or disclose information.

V. COORDINATION: The Army, Navy, Air Force and DoD members concur in this report.

FOR THE CONSTRUCTION, A-E AND BONDS COMMITTEE:

Laura K. Meeker, Chair

Enclosures

[236.275-70 Restrictions on award to foreign firms.

(a) The 1997 military construction appropriations act (Public Law 104-196, section 111) requires the award of a construction contract to a United States firm if --

[(1) the contract is funded by a military construction appropriations act;

[(2) Is for military construction (for example, military construction, family housing construction, family housing operation and maintenance, or minor construction);

[(3) Is estimated to exceed \$1,000,000; and

[(4) Will be performed in the United States territories and possessions in the Pacific and on Kwajalein Atoll or in countries bordering the Arabian Gulf; and

[(5) The lowest responsive and responsible bid of a United States contractor does not exceed the lowest responsive and responsible bid of a foreign contractor by more than 20 percent.

(b) A United States firm must be incorporated in the United States and comply with the following: (i) the corporate headquarters must be in the United States; (ii) the firm must have filed corporate and employment tax returns in the United States for a minimum of 2 years (if required), must have filed state and federal income tax returns (if required) for 2 years, and must have paid any taxes due as a result of these filings; and (iii) the firm must employ United States citizens in key management positions. See decision of the Comptroller General Black Construction Corporation, B-250647; B-250647.2; February 8, 1993, 93-1 CPD ____.

Tab A

Case Management Record

Discussion Handout

DFARS Case 96-D328		Date October 30, 1996	
Title Preference for U.S. Firms on MILCON Overseas Construction Contracts			
Priority 1		Submitted By (b)(6)	Originator Code L
Case Manager (b)(6)		Case References	
FAR Cites		DFARS Cites 225.70, 236.102, 236.274, 236.570, 252.236	
Cognizant Committees Construction			
Coordination FC			
Recommendation Discuss with case today.			
<p>This revised draft interim rule has been coordinated with the construction committee chair and FC.</p>			
OCT 30 1996			

DFARS Case 96-D328

Preference for U.S. Firms on MILCON Overseas Construction Contracts

PART 225--FOREIGN ACQUISITION

* * * * *

SUBPART 225.70--AUTHORIZATION ACTS, APPROPRIATIONS ACTS, AND OTHER
STATUTORY RESTRICTIONS ON FOREIGN PURCHASES[ACQUISITION]

225.7000 Scope of Subpart.

(a) This subpart contains restriction on the acquisition of foreign products [and services], imposed by ~~DeD~~[Defense] Appropriations and Authorization Acts and other statutes. Refer to the A[a]cts to verify current applicability of the restrictions.

* * * * *

225.7003 ~~Reserved.~~[Restriction on overseas military construction.

For restriction on award to foreign firms of military construction contracts to be performed in the United States territories and possessions in the Pacific and on Kwajalein Atoll or in countries bordering the Arabian Gulf, see 236.274(b).]

* * * * *

PART 236--CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

SUBPART 236.1--GENERAL

236.102 Definitions.

* * * * *

[(4) "United States firm," as used in this part, means a firm incorporated in the United States that complies with the following:

- (i) The corporate headquarters are in the United States;
- (ii) The firm has filed corporate and employment tax returns in the United States for a minimum of two years (if required), has filed state and federal income tax returns (if required) for 2 years, and has paid any taxes due as a result of these filings; and
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* * * * *

SUBPART 36.2—SPECIAL ASPECTS OF CONTRACTING FOR CONSTRUCTION

* * * * *

236.274 Construction in foreign countries.

[(a)] When a technical working agreement with a foreign government is required for a construction contract—

(a[1]) Consider inviting the Army Office of the Chief of Engineers, or the Naval Facilities Engineering Command to participate in the negotiations.

(b[2]) The agreement should, as feasible and where not otherwise provided for in other agreements, cover all elements necessary for the construction that are required by laws, regulations, and customs of the United States and the foreign government, including—

(4[i]) Acquisition of all necessary rights;

(2[ii]) Expeditious, duty-free importation of labor, material, and equipment;

(3[iii]) Payment of taxes applicable to contractors, personnel, materials, and equipment;

(4[iv]) Applicability of workers' compensation and other labor laws to citizens of the United States, the host country, and other countries;

(5[v]) Provision of utility services;

(6[vi]) Disposition of surplus materials and equipment;

(7[vii]) Handling of claims and litigation; and

(8[viii]) Resolution of any other foreseeable problems which can appropriately be included in the agreement.

[(b) In accordance with Section 112 of Public Law 104-32 and similar sections in subsequent military construction appropriations acts, military construction contracts that are estimated to exceed \$1,000,000 and are to be performed in the United States territories and possessions in the Pacific and on Kwajalein Atoll or in countries bordering the Arabian Gulf shall be awarded only to United States firms, unless the lowest responsive and responsible bid from a United States firm exceeds the lowest responsive and responsible bid of a foreign contractor by more than 20 percent.

* * * * *

SUBPART 236.5—CONTRACT CLAUSES

236.570 Additional provisions and clauses.

* * * * *

[(c) Use the provision at 252.236-70XX, Overseas Military Construction - Preference for United States Firms, in military construction contracts that are estimated to exceed \$1,000,000 and are to be performed in the United States territories and possessions in the Pacific and on Kwajalein Atoll or in countries bordering the Arabian Gulf.]

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

**[252.236-70XX Overseas Military Construction - Preference for United States Firms.
As prescribed in 236.570(c), use the following provision:**

**OVERSEAS MILITARY CONSTRUCTION - PREFERENCE FOR
UNITED STATES FIRMS (DATE)**

(a) *Definition.*

“United States firm,” as used in this provision, means a firm incorporated in the United States that complies with the following:

- (i) The corporate headquarters are in the United States;**
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(b) *Evaluation.* Offers from firms which do not qualify as United States firms will be evaluated by adding 20 percent to the offer.]

(c) *Status.* The offeror shall check the appropriate box. The offeror ____ is, ____ is not a United States firm.

(End of provision)]

Official Case Record

Date: October 30, 1996
JB

DFARS Case: 96-D328

Case Title: Preference for U.S. Firms on MILCON Overseas Construction

Origination:

L

Sponsor:

A

Committee:

Construction

Case Manager:

(b)(6)

FAR/DFARS: DFARS 225.70, 236.102, 236.274,
236.570, 252.236

Statute:

Section 112 of Pub. L. 104-196

Statutory Date:

Outside Interest (Circle): IG OFPP OMB DCAA GAO Industry Other _____

Coordination/Comments (Circle): DDP MPI CPA CPF DSPS FC GC Other AR _____

Action Scheduled Today:

Discuss committee/Case manager recommended revisions to the DFARS.
TAB B - Statute; TAB - FC memo; TAB D - Committee Report.

OSD Position:

Recommend agreement with draft interim FAR rule at TAB A.

Discussions/Actions Taken:

CAM Update: Agree to draft interim rule as red text

DFARS Case 96-D328

Preference for U.S. Firms on MILCON Overseas Construction Contracts
PART 225-FOREIGN ACQUISITION

* * * * *

SUBPART 225.70-AUTHORIZATION ACTS, APPROPRIATIONS ACTS, AND OTHER
STATUTORY RESTRICTIONS ON FOREIGN PURCHASES[ACQUISITION]

225.7000 Scope of Subpart.

(a) This subpart contains restriction on the acquisition of foreign products [and services], imposed by DoD[Defense] Appropriations and Authorization Acts and other statutes. Refer to the A[acts] to verify current applicability of the restrictions.

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PART 236-CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

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~~(a)~~ When a technical working agreement with a foreign government is required for a construction contract—

~~(a)~~ Consider inviting the Army Office of the Chief of Engineers, or the Naval Facilities Engineering Command to participate in the negotiations.

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PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

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OFFICE OF THE UNDER SECRETARY OF DEFENSE

3000 DEFENSE PENTAGON
WASHINGTON, DC 20301-3000



ACQUISITION AND
TECHNOLOGY

October 28, 1996

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I concur with the interim rules as drafted.

Pete A. Bryan
Deputy Director, Defense
Procurement (Foreign Contracting)

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Co.	Co.
Dept.	Phone #
Fax # (b)(2)	Fax #



October 21, 1996

CECC-C

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III. DISCUSSION: Section 112 of the 1997 DoD Military Construction Appropriations Act prohibits the use of funds appropriated under the Act for construction contracts awarded to a foreign contractor and estimated by the Government to exceed \$1,000,000 for projects in the United States territories and possessions in the Pacific and on Kwajalein Atoll or in countries bordering the Arabian Gulf, unless the lowest responsive and responsible bid of a United States contractor is exceeds the lowest responsive and responsible bid of a foreign contractor by at least 20 percent.

IV. COLLATERALS:

Federal Register Notice: This rule would have a significant effect on competition beyond agency internal operating procedures. Public comments concerning this regulation should be invited through a Federal Register notice, in accordance with 41 U.S.C. 418b and FAR 1.301(b).

Regulatory Flexibility Act: A Regulatory Analysis is not required by the Regulatory Flexibility Act (5 U.S.C. 601-611). This rule would not impose a new burden on any small businesses.

Paperwork Reduction Act: The provisions of the Paperwork Reduction Act (44 U.S.C. 3501, et seq.) do not apply. This rule would not impose a new requirement on 10 or more offerors or contractors to submit, maintain, retain or disclose information.

V. COORDINATION: The Army, Navy, Air Force and DoD members concur in this report.

FOR THE CONSTRUCTION, A-E AND BONDS COMMITTEE:

Laura K. Meeker, Chair

Enclosures

TAB D

[236.275-70 Restrictions on award to foreign firms.

(a) The 1997 military construction appropriations act (Public Law 104-196, section 111) requires the award of a construction contract to a United States firm if --

[(1) the contract is funded by a military construction appropriations act;

[(2) Is for military construction (for example, military construction, family housing construction, family housing operation and maintenance, or minor construction);

[(3) Is estimated to exceed \$1,000,000; and

[(4) Will be performed in the United States territories and possessions in the Pacific and on Kwajalein Atoll or in countries bordering the Arabian Gulf; and

[(5) The lowest responsive and responsible bid of a United States contractor does not exceed the lowest responsive and responsible bid of a foreign contractor by more than 20 percent.

(b) A United States firm must be incorporated in the United States and comply with the following: (i) the corporate headquarters must be in the United States; (ii) the firm must have filed corporate and employment tax returns in the United States for a minimum of 2 years (if required), must have filed state and federal income tax returns (if required) for 2 years, and must have paid any taxes due as a result of these filings; and (iii) the firm must employ United States citizens in key management positions. See decision of the Comptroller General Black Construction Corporation, B-250647; B-250647.2; February 8, 1993, 93-1 CPD ____.

98-116 (1984-1988)
Tab A

*Resolution process
Definition of U.S. firm?*

*when was first restriction? sections 111 & 112
20.096*

*102-131 109 110 117 (1991) - doesn't include Arabian Gulf
111 & 112*

*Pub. L. 98-396, 102 Stat. 1398 (1988) Chapter II
Pacific & Kwajalein (const. only)
General Provisions*

*103-167 (Jan 3, 1994) - doesn't include Arabian Gulf
104-122 (Aug 7, 95) - 111 & 112 adds Arabian Gulf*

Case Management Record

discussion

<i>Case:</i> 96-D328		<i>Date:</i> 22 Oct. 1996	
<i>Title:</i> Preference for U.S. Firms on MILCON Overseas Construction Contracts			
<i>Priority:</i> 1	<i>Submitted By:</i> Army Policy		<i>Originator:</i>
<i>Case Manager:</i> AW		<i>Case References:</i>	
<i>FAR Cites:</i>		<i>DFARS Cites:</i>	
<i>Committees:</i> Construction, A-E and Bonds			
<i>Coordination:</i>			
<i>Recommendation:</i> Discuss: 10/30 <i>interested</i>			

OCT 23 1996

October 21, 1996

CECC-C

MEMORANDUM FOR DIRECTOR, DAR COUNCIL

SUBJECT: DFARS Case 96-D328, Preference for U.S. Firms on MILCON Overseas Construction Contracts

I. PROBLEM: The Military Construction Appropriations Act 1997 provides for a 20 percent evaluation preference for United States firms on certain overseas MILCON funded contracts.

II. RECOMMENDATION: Revise the DFARS as shown at Tab A.

III. DISCUSSION: Section 112 of the 1997 DoD Military Construction Appropriations Act prohibits the use of funds appropriated under the Act for construction contracts awarded to a foreign contractor and estimated by the Government to exceed \$1,000,000 for projects in the United States territories and possessions in the Pacific and on Kwajalein Atoll or in countries bordering the Arabian Gulf, unless the lowest responsive and responsible bid of a United States contractor is exceeds the lowest responsive and responsible bid of a foreign contractor by at least 20 percent.

IV. COLLATERALS:

Federal Register Notice: This rule would have a significant effect on competition beyond agency internal operating procedures. Public comments concerning this regulation should be invited through a Federal Register notice, in accordance with 41 U.S.C. 418b and FAR 1.301(b).

Regulatory Flexibility Act: A Regulatory Analysis is not required by the Regulatory Flexibility Act (5 U.S.C. 601-611). This rule would not impose a new burden on any small businesses.

Paperwork Reduction Act: The provisions of the Paperwork Reduction Act (44 U.S.C. 3501, et seq.) do not apply. This rule would not impose a new requirement on 10 or more offerors or contractors to submit, maintain, retain or disclose information.

V. COORDINATION: The Army, Navy, Air Force and DoD members concur in this report.

FOR THE CONSTRUCTION, A-E AND BONDS COMMITTEE:

Laura K. Meeker, Chair

Enclosures

[236.275-70 Restrictions on award to foreign firms.

(a) The 1997 military construction appropriations act (Public Law 104-196, section 111) requires the award of a construction contract to a United States firm if --

[(1) the contract is funded by a military construction appropriations act;

[(2) Is for military construction (for example, military construction, family housing construction, family housing operation and maintenance, or minor construction);

[(3) Is estimated to exceed \$1,000,000; and

[(4) Will be performed in the United States territories and possessions in the Pacific and on Kwajalein Atoll or in countries bordering the Arabian Gulf; and

[(5) The lowest responsive and responsible bid of a United States contractor does not exceed the lowest responsive and responsible bid of a foreign contractor by more than 20 percent.

(b) A United States firm must be incorporated in the United States and comply with the following: (i) the corporate headquarters must be in the United States; (ii) the firm must have filed corporate and employment tax returns in the United States for a minimum of 2 years (if required), must have filed state and federal income tax returns (if required) for 2 years, and must have paid any taxes due as a result of these filings; and (iii) the firm must employ United States citizens in key management positions. See decision of the Comptroller General Black Construction Corporation, B-250647; B-250647.2; February 8, 1993, 93-1 CPD ____.

Tab A

Case Management Record

Discussion Handout

DFARS Case 96-D328	Date October 30, 1996	
Title Preference for U.S. Firms on MILCON Overseas Construction Contracts		
Priority 1	Submitted By (b)(6)	Originator Code L
Case Manager (b)(6)	Case References	
FAR Cites	DFARS Cites 225.70, 236.102, 236.274, 236.570, 252.236	
Cognizant Committees Construction		
Coordination FC		
Recommendation Discuss with case today.		
<p>This revised draft interim rule has been coordinated with the construction committee chair and FC.</p>		

DFARS Case 96-D328

Preference for U.S. Firms on MILCON Overseas Construction Contracts

PART 225—FOREIGN ACQUISITION

* * * * *

SUBPART 225.70—AUTHORIZATION ACTS, APPROPRIATIONS ACTS, AND OTHER
STATUTORY RESTRICTIONS ON FOREIGN PURCHASES[ACQUISITION]

225.7000 Scope of Subpart.

(a) This subpart contains restriction on the acquisition of foreign products [and services], imposed by ~~DoD~~[Defense] Appropriations and Authorization Acts and other statutes. Refer to the A[cts] to verify current applicability of the restrictions.

* * * * *

225.7003 ~~Reserved~~—[Restriction on overseas military construction.

For restriction on award to foreign firms of military construction contracts to be performed in the United States territories and possessions in the Pacific and on Kwajalein Atoll or in countries bordering the Arabian Gulf, see 236.274(b).]

* * * * *

PART 236—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

SUBPART 236.1—GENERAL

236.102 Definitions.

* * * * *

[(4) "United States firm," as used in this part, means a firm incorporated in the United States that complies with the following:

- (i) The corporate headquarters are in the United States;
- (ii) The firm has filed corporate and employment tax returns in the United States for a minimum of two years (if required), has filed state and federal income tax returns (if required) for 2 years, and has paid any taxes due as a result of these filings; and
- (iii) The firm employs United States citizens in key management positions.]

* * * * *

SUBPART 36.2—SPECIAL ASPECTS OF CONTRACTING FOR CONSTRUCTION

* * * * *

236.274 Construction in foreign countries.

[(a)] When a technical working agreement with a foreign government is required for a construction contract—

(a[1]) Consider inviting the Army Office of the Chief of Engineers, or the Naval Facilities Engineering Command to participate in the negotiations.

(b[2]) The agreement should, as feasible and where not otherwise provided for in other agreements, cover all elements necessary for the construction that are required by laws, regulations, and customs of the United States and the foreign government, including—

(4[i]) Acquisition of all necessary rights;

(2[ii]) Expeditious, duty-free importation of labor, material, and equipment;

(3[iii]) Payment of taxes applicable to contractors, personnel, materials, and equipment;

(4[iv]) Applicability of workers' compensation and other labor laws to citizens of the United States, the host country, and other countries;

(5[v]) Provision of utility services;

(6[vi]) Disposition of surplus materials and equipment;

(7[vii]) Handling of claims and litigation; and

(8[viii]) Resolution of any other foreseeable problems which can appropriately be included in the agreement.

[(b) In accordance with Section 112 of Public Law 104-32 and similar sections in subsequent military construction appropriations acts, military construction contracts that are estimated to exceed \$1,000,000 and are to be performed in the United States territories and possessions in the Pacific and on Kwajalein Atoll or in countries bordering the Arabian Gulf shall be awarded only to United States firms, unless the lowest responsive and responsible bid from a United States firm exceeds the lowest responsive and responsible bid of a foreign contractor by more than 20 percent.

* * * * *

SUBPART 236.5—CONTRACT CLAUSES

236.570 Additional provisions and clauses.

* * * * *

[(c) Use the provision at 252.236-70XX, Overseas Military Construction - Preference for United States Firms, in military construction contracts that are estimated to exceed \$1,000,000 and are to be performed in the United States territories and possessions in the Pacific and on Kwajalein Atoll or in countries bordering the Arabian Gulf.]

* * * * *

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

* * * * *

**[252.236-70XX Overseas Military Construction - Preference for United States Firms.
As prescribed in 236.570(c), use the following provision:**

**OVERSEAS MILITARY CONSTRUCTION - PREFERENCE FOR
UNITED STATES FIRMS (DATE)**

(a) *Definition.*

“United States firm,” as used in this provision, means a firm incorporated in the United States that complies with the following:

- (i) The corporate headquarters are in the United States;**
- (ii) The firm has filed corporate and employment tax returns in the United States for a minimum of two years (if required), has filed state and federal income tax returns (if required) for 2 years, and has paid any taxes due as a result of these filings; and**
- (iii) The firm employs United States citizens in key management positions.**

(b) *Evaluation.* Offers from firms which do not qualify as United States firms will be evaluated by adding 20 percent to the offer.]

(c) *Status.* The offeror shall check the appropriate box. The offeror ____ is, ____ is not a United States firm.

(End of provision)]

Case Management Record

Discussion Handout

DFARS Case 96-D328	Date September 30, 1996	
Title Preference for U.S. Firms on MILCON Overseas Construction		
Priority 1	Submitted By (b)(6)	Originator Code L
Case Manager (b)(6)	Case References	
FAR Cites	DFARS Cites 236.2	
Cognizant Committees Construction/International Acquisition Committees		
Coordination		
Recommendation Task CON Cmte. RD: 10/23/96		
<p>This is a new DFARS case to implement Section 112 of the FY97 Military Construction Appropriations Act (Public Law 104-196). Section 112 provides a 20 percent preference for U.S. firms on all contracts estimated by the Government to exceed \$1,000,000 for military construction projects in the United States territories and possessions in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf.</p> <p>Section 112 was effective upon enactment (September 16, 1996).</p>		
OCT 02 1996		

SEC. 112. Not more than 20 per centum of the funds appropriated in Military Construction Appropriations Acts for military construction in the United States territories and possessions in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf, may be used to award any contract estimated by the Government to exceed \$1,000,000 to a foreign contractor: *Provided*, That this section shall not be applicable to contract awards for which the lowest responsive and responsible bid of a United States contractor exceeds the lowest responsive and responsible bid of a foreign contractor by greater than 20 per centum.

SEC. 113. The Secretary of Defense is to inform the appropriate Committees of Congress, including the Committees on Appropriations, of the plans and scope of any proposed military exercise involving United States personnel thirty days prior to its occurring, if amounts expended for construction, either temporary or permanent, are anticipated to exceed \$100,000.

SEC. 114. Not more than 20 per centum of the appropriations in Military Construction Appropriations Acts which are limited for obligation during the current fiscal year shall be obligated during the last two months of the fiscal year.

(TRANSFER OF FUNDS)

SEC. 115. Funds appropriated to the Department of Defense for construction in prior years shall be available for construction authorized for each such military department by the authorizations enacted into law during the current session of Congress.

SEC. 116. For military construction or family housing projects that are being completed with funds otherwise expired or lapsed for obligation, expired or lapsed funds may be used to pay the cost of associated supervision, inspection, overhead, engineering and design on those projects and on subsequent claims, if any.

SEC. 117. Notwithstanding any other provision of law, any funds appropriated to a military department or defense agency for the construction of military projects may be obligated for a military construction project or contract, or for any portion of such a project or contract, at any time before the end of the fourth fiscal year after the fiscal year for which funds for such project were appropriated if the funds obligated for such project (1) are obligated from funds available for military construction projects, and (2) do not exceed the amount appropriated for such project, plus any amount by which the cost of such project is increased pursuant to law.

(TRANSFER OF FUNDS)

SEC. 118. During the five-year period after appropriations available to the Department of Defense for military construction and family housing operation and maintenance and construction have expired for obligation, upon a determination that such appropriations will not be necessary for the liquidation of obligations or for making authorized adjustments to such appropriations for obligations incurred during the period of availability of such appropriations, unobligated balances of such appropriations may be transferred into the appropriation 'Foreign Currency Fluctuations, Construction, Defense' to be merged with and to be available for the same time period and for the same purposes as the appropriation to which transferred.

SEC. 119. The Secretary of Defense is to provide the Committees on Appropriations of the Senate and the House of Representatives with an annual report by February 15, containing details of the specific actions proposed to be taken by the Department of Defense during the current fiscal year to encourage other member nations of the North Atlantic Treaty Organization, Japan, Korea, and United States allies bordering the Arabian Gulf to assume a greater share of the common defense burden of such nations and the United States.



Comptroller General
of the United States

Washington, D.C. 20548

Decision

S N A A

Matter of: Black Construction Corporation

File: B-250647; B-250647.2

Date: February 8, 1993

Richard F. Smith, Esq., John S. Pachter, Esq., and Jonathan D. Shaffer, Esq., Smith, Pachter, McWhorter & D'Ambrosio, for the protester.

James A. Sparks, Esq., and Paul F. Fisher, Esq., Department of the Navy, for the agency.

Barbara C. Coles, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that awardee is a foreign corporation and ineligible to receive construction contract under the American Preference Policy is denied where record establishes that corporation qualifies as a United States contractor.

DECISION

Black Construction Corporation protests the award of a contract to Hanil Resorts (Joint Venture) Corporation under invitation for bids (IFB) No. N62766-88-B-0206, issued by the Department of the Navy for the alteration of enlisted personnel housing at Andersen Air Force Base, Guam.

We deny the protests.

The IFB was issued on July 27, 1992, and was amended twice prior to bid opening. One amendment incorporated the American Preference Policy, which precludes the award of a construction contract, estimated by the government to exceed \$1 million, to a foreign contractor, unless the lowest responsive bid of a United States contractor exceeds the lowest responsive bid of a foreign contractor by more than 20 percent. To qualify as a United States contractor, the firm (or if a joint venture, all members of the joint venture) must be incorporated in the United States and comply with the following: (1) the corporate headquarters must be in the United States; (2) the firm must have filed corporate and employment tax returns in the United States for a minimum of 2 years (if required), must have filed state and federal income tax returns (if required) for 2 years, and must have paid any taxes due as a result of

GENERAL

34001697
TAB B

these filings; and (3) the firm must employ United States citizens in key management positions.

The Navy received four bids by the September 3 bid opening date; Hanil was the apparent low bidder with a bid of \$5,665,000, and Black was the second low bidder with a bid of \$6,064,000. The IFB included the provision at Federal Acquisition Regulation (FAR) § 52.214-2, entitled "Type of Business Organization-Sealed Bidding"; in response to this provision, Hanil certified that it operates as a corporation incorporated under the laws of Guam. After reviewing information pertaining to Hanil's corporate status, the contracting officer concluded that Hanil qualified as a United States contractor under the terms of the American Preference Policy clause. By letter dated September 25, Black filed an agency-level protest challenging the proposed award to Hanil on the basis that Hanil is a foreign contractor.

The contracting officer advised Black that he reached his determination that Hanil was eligible for award as a United States contractor after obtaining Hanil's articles of incorporation and communicating with Guam's Department of Revenue and Taxation. The contracting officer explained that Hanil is a single corporation rather than a joint venture, as its name implies, and that it was incorporated on September 13, 1989, under the laws of Guam. The contracting officer also explained that Hanil has filed tax returns in the territory of Guam for more than 2 years and its corporate headquarters has been in Guam since the corporation's inception. The contracting officer advised Black that Hanil has four key management positions; two positions (president and general manager/marketing director) are filled by Korean citizens and the other two positions (secretary and contract administrator) are filled by United States citizens. After receiving this letter, Black filed a protest with our Office challenging the contracting officer's determination and the resulting award to Hanil. The agency has suspended performance under the contract pending our resolution of the protest.

Black's protest to our Office is essentially a reiteration of the allegation that it raised in its agency-level protest, namely, that the contracting agency's "objective determination that Hanil is a United States contractor under the American Preference Policy clause" was improper. To support its allegation, Black asserts that if the agency had conducted a thorough investigation to determine whether or not Hanil is a United States contractor, it would have concluded that Hanil does not employ United States citizens in key management positions but rather is owned, managed, and controlled by Korean citizens. As a result, the protester requests that we recommend that the agency

terminate its contract with Hanil and make award to the protester.

The American Preference Policy, as set forth in the Military Construction Appropriations Act of 1992, Pub. L. No. 102-136, 105 Stat. 637 (1991), states in pertinent part that:

"None of the funds appropriated in this Act for military construction in the United States territories and possessions in the Pacific and on Kwajalein Island may be used to award any contract estimated by the [g]overnment to exceed \$1,000,000 to a foreign contractor: Provided, that this section shall not be applicable to contract awards for which the lowest responsive and responsible bid of a United States contractor exceeds the lowest responsive and responsible bid of a foreign contractor by greater than 20 per centum."

As defined in the IFB, a United States contractor for the purposes of the American Preference Policy is a firm that has corporate headquarters in the United States; has filed corporate and employment tax returns in the United States for a minimum of 2 years (if required), has filed state and federal income tax returns (if required) for 2 years, and has paid any taxes due as a result of these filings; and employs United States citizens in key management positions. As stated above, Hanil certified in its bid that it is not a

Initially, Congress directed the Department of Defense to develop a preference plan for United States contractors in the award of construction contracts in the Persian Gulf/ Indian Ocean area in order to stimulate the use of United States firms in the area and to assure the regional availability of companies that were responsive to United States interests and requirements. H.R. Conf. Rep. No. 1433, 96th Cong., 2d Sess. 4 (1980). In 1983, the House Appropriations Committee received testimony that the presence of American contractors in the Pacific was decreasing despite the fact that the military construction program in the area was increasing dramatically. Similar to the earlier concerns about the Persian Gulf area, it appeared that without some type of American preference program, the majority of United States funded projects in the Pacific would be awarded to foreign firms. To increase the opportunities for American construction firms in the Pacific area, Congress in the Second Supplemental Appropriations Act of 1984, Pub. L. No. 98-396, 98 Stat. 1398 (1984), first instituted an American Preference Policy in the American territories of the Pacific and on Kwajalein Island.



THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA

1957 E Street, N.W. • Washington, D.C. 20006 • (202) 393-2040 • FAX (202) 347-4004

March 13, 1997

(b)(6)

Defense Acquisition Regulations Council
PDUSD (A&T) DP (DAR)
IMD 3D139, 3062 Defense
Pentagon
Washington, D.C. 20301-3062

Dear (b)(6)

On behalf of the Associated General Contractors of America (AGC), I am writing with regard to DFARS Case 96-D328 and the request for comments in the January 17, 1997 Federal Register regarding the implementation of Section 112 of the Fiscal Year 1997 Military Construction Appropriations Act (P.L. 104-196). AGC is a national trade association of more than 33,000 construction industry firms including 7,500 of the nation's leading general contracting companies.

AGC has for many years strongly supported bid preferences for U.S. contractors on overseas military construction projects. In that general sense, we welcome the provision of Section 112 that provides for a preference for United States firms on all contracts exceeding \$1 million for military construction projects in the U.S. territories and possessions in the Pacific, on Kwajalein Atoll and in countries bordering the Arabian Gulf.

AGC is concerned, however, that application of the 20 percent bid preference provided for in Section 112 to military construction projects "in countries bordering the Arabian Gulf" may represent a change of existing policy without adequate opportunity for public comment. Since 1980, bidding for military construction projects over \$5 million in the Indian Ocean/Persian Gulf region has been subject to the provisions of the "Indian Ocean/Persian Gulf Preference" (see attachment) which provides that, on projects in this area, "If competition is adequate, the competition and award will be limited to United States firms". This preference also provides that, under certain conditions, host country firms are permitted to participate in projects covered by the preference.

In the attached letter of November 24, 1980 to the Chairman of the Senate Armed Services Military Construction Subcommittee, Deputy Assistant Secretary of Defense Perry Fliakas - referring to the construction of facilities in the Indian Ocean/Persian Gulf region -

stated that "To construct these facilities, the Department of Defense needs a construction capability that is dependable, technically proficient, and responsive to United States requirements and interests. Only United States firms, using United States citizens in key supervisory positions, which are not susceptible to influence or pressures from foreign governments can meet this need in this area of the world".

AGC is in strong agreement with the arguments in Deputy Assistant Secretary Fliakas' letter in favor of using only U.S. contractors on military construction projects in the Indian Ocean/Persian Gulf region and would oppose any change in the Indian Ocean/Persian Gulf Preference which would open bidding on such projects to foreign firms.

AGC respectfully requests that AGC's views on this matter be considered in the implementation of Section 112 of the FY 97 Military Construction Appropriations Act.

Thank you for your consideration.

Sincerely,

A handwritten signature in black ink, appearing to read "T.M. Chamberlain". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

Terry M. Chamberlain
Director
International Construction Division

Attachment

OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE

WASHINGTON, D.C. 20301



MANPOWER
RESERVE AFFAIRS
AND LOGISTICS

24 NOV 1980

Honorable Gary W. Hart
Chairman, Subcommittee on Military
Construction and Stockpiles
Committee on Armed Services
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

The Senate and House reports on the Fiscal Year 1981 Military Construction Authorization Bill noted various problems encountered by the United States construction industry relative to construction in the Indian Ocean/Persian Gulf region.

The Department of Defense is also aware of these conditions and shares the concerns of the committees in this regard. Because the national interests of the United States are so inextricably linked to the volatile and unstable Indian Ocean/Persian Gulf region, extensive construction of local operational facilities is needed to support the Rapid Deployment Force concept and to improve the operational readiness levels of our forces in the area. To construct these facilities, the Department of Defense needs a construction capability that is dependable, technically proficient, and responsive to United States requirements and interests. Only United States firms, using United States citizens in key supervisory positions, which are not susceptible to influence or pressures from foreign governments can meet this need in this area of the world.

Accordingly, the Department of Defense has developed a construction policy which provides for preference to United States firms to ensure and maintain an American construction capability in the Indian Ocean/Persian Gulf area. The policy which will be implemented by our construction agents is provided as an enclosure. We believe that this policy meets the needs of the Department of Defense with respect to construction in the Indian Ocean/Persian Gulf area and also addresses the concerns of the Congressional committees. A letter similar to this is also being furnished to the Chairman of the Subcommittee on Installations and Facilities, Committee on Armed Services, House of Representatives.

Sincerely,

Signed

Ferry J. Fliakas
Deputy Assistant Secretary of Defense
(Installations and Housing)

Enclosure



OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE

WASHINGTON, D.C. 20301

MANPOWER,

RESERVE AFFAIRS

AND LOGISTICS

24 NOV 1980

MEMORANDUM FOR ASSISTANT SECRETARY OF THE ARMY (IL&FM)
ASSISTANT SECRETARY OF THE NAVY (MRA&L)

SUBJECT: Construction in the Indian Ocean/Persian Gulf

The interests of the United States are inextricably linked to the Indian Ocean/Persian Gulf region. In furtherance of these interests, Congressional military construction acts authorized and appropriated funds for construction of extensive facilities in the area. Instability in the region and lack of a local construction capability requires that the United States construction industry must be able to carry out this construction in support of the Rapid Deployment Force concept and to improve the operational readiness of our forces in the region.

In order to ensure a viable, responsive and dependable construction capability, a DoD policy that provides preference to United States firms will be implemented. This policy will apply to all general construction prime contracts of an estimated value greater than \$5 million. It will not include dredging contracts which as specialized work will be awarded in accordance with the provisions of the Fiscal Year 1981 Military Construction Appropriation Act (PL 96-436).

The preference policy should be implemented in accordance with the following procedure: Construction agents will assess the adequacy of potential competition among United States firms, by 60-day advance publication in the Commerce Business Daily soliciting expressions of interest by the United States construction industry. The final judgment as to the adequacy of competition will be left to the construction agent. If competition is not deemed adequate, the contract will be opened to international competition. If competition is adequate, the competition and award will be limited to United States firms. If necessary to accommodate government to government agreements, the procedure will be expanded to permit or require appropriate host country participation. Thus, in Diego Garcia, for example, competition (except for dredging discussed above) will be limited to consortia composed of a firm or firms of United States origin and a United Kingdom firm or firms. In Oman, "maximum practicable" use must be made of Omani contractors, either as joint venture partners or subcontractors. The specific details of implementing such government to government agreements will be left to the discretion of the construction agents for resolution on a case by case basis.

In carrying out this policy, construction agents are cautioned to be alert to the possibility of firms which might be formed to exploit the policy. Any firm claiming the benefits of this American preference provision must have

its principal place of business within the United States and must employ United States citizens in key supervisory positions. Assistance as appropriate should be solicited from participating host nations in screening the credentials of any involved foreign firms. The normal requirements for bid and performance bonds should be utilized and other nonconflicting standard contracting procedures followed.

~~-----~~
Ferry J. Fliakas
Deputy Assistant Secretary of Defense
(Installations and Housing)