

Fact Sheet:

Procurement Restrictions Under the Foreign Assistance Act

This fact sheet summarizes two procurement restrictions that apply to Foreign Assistance Act of 1961 (FAA)-authorized funds, including the Peacekeeping Operations (PKO) account: 1) the U.S.-manufactured motor vehicle procurement restriction, and 2) the more general procurement restriction applicable to all items that must be procured. Only the FAA shall be referenced by offerors (Buy America does **not** apply to PKO funds and shall not be referenced).

1. U.S.-Manufactured Motor Vehicle Procurement Restrictions:

Pursuant to section 636(i) of the FAA, none of the funds made available to carry out the FAA (including, but not limited to, Economic Support Funds (ESF), PKO, and Nonproliferation, Anti-terrorism, Demining and Related Programs (NADR) funds) may be used to finance the purchase, sale, long-term lease,¹ exchange, or guaranty of a sale of a motor vehicle unless such motor vehicle is manufactured in the United States (this restriction does not pertain to spare parts for vehicles, which would fall under the 604(a)(1) restrictions outlined in the next section).

Section 636(i) provides that “where special circumstances exist the President is authorized to waive the provisions of this section in order to carry out the purposes of the [FAA].” This waiver authority has been delegated to the Secretary of State by Executive Order 12163 of September 29, 1979, as amended, and the authority has been further delegated to Assistant Secretaries pursuant to section 2(e)(2) of State Department Delegation of Authority 293-2. Examples of circumstances that have been used to justify a waiver in the past include:

1. **Availability:** Vehicles that are manufactured in the United States cannot be procured because of interoperability issues (e.g. African Model Diesel Variant vehicles for peacekeeping or counterterrorism missions in Africa or all mechanical engines); and,

¹ Long-term lease is not defined in the statute. However, USAID has promulgated regulations implementing the restriction. The USAID regulations can be found at 22 C.F.R. part 228, which define “long term lease” as “a single lease of more than 180 calendar days; or repetitive or intermittent leases under a single award within a one-year period, which cumulatively total more than 180 calendar days. A single lease may consist of a lease of one or more of the same type of commodity within the same lease term.”

2. **Timeliness:** The vehicles need to arrive at their destination within a specific time period (e.g. for specific peacekeeping deployments or counterterrorism missions) and procuring in the United States will cause unacceptable delays.

Cost savings alone is not a sufficient justification to seek a vehicle procurement restriction waiver. At least one of the aforementioned circumstances (e.g. availability/interoperability or timeliness) must also be present.

****Even if the vehicle procurement restriction is waived, the general procurement restriction described below still applies.****

2. General Procurement Restrictions

Section 604(a)(1) of the FAA requires that funds made available for assistance under the FAA (including but not limited to ESF, PKO, and NADR funds) **may be used for procurement only in the United States, the recipient country, or non-advanced developing countries** (see below for definition), unless the provision of such assistance requires commodities or services of a type that are not produced in and available for purchase in any such country, or the President waives the restriction under circumstances described below. This waiver authority has been delegated to the Secretary of State by Executive Order 12163 of September 29, 1979, as amended, and the authority has been further delegated to Assistant Secretaries pursuant to section 2(e)(2) of State Department Delegation of Authority 293-2.

For purposes of defining the scope of this procurement restriction, all items that can be procured – including expendable supplies such as fuel, food, tires, batteries, paper, pencils, as well as construction materials – are covered for the purposes of this restriction. For purposes of determining whether procurement takes place “in” a given country, it matters only where the item is being procured (i.e. the country from which it will be exported).² The seller’s home country or country of incorporation is not relevant to this question. The manufacturing location of the items is also not relevant for evaluating whether a waiver is required (unless the item in question is a motor vehicle, in which case it is also subject to section 636(i) of the FAA, see above for further details). Recipients and contractors shall not

² Where the commodity is purchased in the recipient country, the recipient country is the country in which the procurement takes place. Where the commodity is shipped to the recipient country from a free port or bonded warehouse, procurement is considered to have taken place in the country from which the commodity was shipped to the free port or bonded warehouse.

engage suppliers of commodities in an authorized country to import commodities from a non-authorized country for the purpose of circumventing the restriction.

This restriction does not apply if the items or supplies in question are not available for purchase in the United States, recipient country, or non-advanced developing countries. Items or supplies are considered unavailable for purchase where they are not available in sufficient quantities or reasonable quality (e.g. they are not of a quality fit for the intended purpose) in an exempt country. Although a waiver is not necessary under these circumstances, the relevant Assistant Secretary must still make a finding in an action memo that such commodities are not available in the United States, recipient country, or any non-advanced developing country.

Therefore, the annexes to this guidance must still be filled out in order for the Department to prepare internal documentation justifying that a waiver is not required.

Where the restriction does apply, a waiver of the restriction is necessary to procure items from a country other than the United States, recipient country, or non-advanced developing country. Procurement may be made from a country other than the United States, recipient country, or non-advanced developing country only if the relevant Assistant Secretary determines, on a case-by-case basis, that procurement in such other country is necessary:

1. to meet unforeseen circumstances, such as emergency situations, where it is important to permit procurement other than in the United States, recipient country, or a non-advanced developing country (e.g. for timeliness); or
2. to promote efficiency in the use of United States foreign assistance resources, including to avoid impairment of foreign assistance objectives.

****In order to justify the waiver on the basis of promoting efficiency of U.S. foreign assistance resources, the offeror shall demonstrate that it is at least 25% cheaper to procure and ship a given item from a non-exempt country (when including factors such as shipping from the different location(s)).****

With respect to any funds, a request to waive this provision must be done for each separate procurement (i.e. it cannot cover an entire program for the year – it has to list specific items for a specific program), and will be scrutinized closely.

Note: In order to determine whether a country is an advanced developing country, offerors shall check the most recent OECD DAC List of ODA Recipients, which includes a list of “Upper Middle Income Countries” that are considered to be

advanced developing countries. Only countries listed as “Least Developed Countries”, “Other Low Income Countries”, and Lower Middle Income Countries and Territories” are considered non-advanced developing countries for purposes of this requirement. The latest list can be found at the following address: https://www.oecd.org/dac/financing-sustainable-development/development-finance-standards/DAC_List_ODA_Recipients2018to2020_flows_En.pdf. If the URL changes, it is the offerors’ responsibility to find and review the current version.

3. **Implementation Guidance for Offerors**

In order to be considered for waivers, the offerors **shall** read the instructions below for each procurement restriction and fill-in/complete and submit the templates for 636(i) and 604(a)(1) waivers (Annex 1 and Annex 2) in the technical proposal. The Government’s requirement to sole-source specific types of vehicles and/or item does NOT obviate the need to follow these procurement restrictions and fill out the necessary templates. In order to fully comply with these requirements, the offeror must:

- Clearly indicate in the narrative that the offeror is seeking one or both waivers, and shall provide narrative justification explaining why per the requirements of this Fact Sheet.
- Fill out a separate Annex 1 for **EVERY vehicle type** that that is included in the solicitation, per the instructions below.
- Fill out a separate Annex 2 for each type of item and/or vehicle for which a waiver is being sought (e.g. a separate Annex 2 completed for each vehicle type, a separate Annex 2 completed for each separate type of item (uniforms, generators, tents etc)).
 - Note: If spare parts for a vehicle are coming from the same location, the offeror only needs to fill out a single Annex 2 form for spare parts for each type of item waived (e.g. a separate annex for spare parts for Toyota Landcruiser, a separate annex for spare parts for radios, a separate annex for spare parts for Puma armored personnel carriers, etc.). The offeror does NOT need to fill out a separate Annex 2 for each individual spare part (e.g. tires, wrenches, tubes, etc.) for a Toyota Landcruiser as long as they are coming from the same location.

Failure to meet all of the above requirements will eliminate the Offeror from competition for that task order.

Detailed Guidance for Vehicles:

Page 1 of Annex 1 **MUST** be filled out for each vehicle type that is proposed to be procured under the Task Order, regardless of where the vehicle is being manufactured or procured from. This is required regardless of whether the item proposed is being sole-sourced for a specific type of item (e.g. Africa Specification Toyota Landcruiser). **Filling out Annex 1 is still required if compliant vehicles can only be procured from one location.**

Page 2 of Annex 1 **MUST** also be filled out for each vehicle type manufactured outside the United States that is being proposed to be procured (as defined by the 80% U.S. origin standard on Page 1). The offeror shall demonstrate that it researched options from a minimum of three vendors from the United States in the technical proposal, and indicate why those options were not compliant with solicitation requirements, in the format specified by the annex. In addition, Annex 1 should also include any vendors from the recipient country and non-advanced developing countries that were examined and state why they were found not compliant with the solicitation requirements. The offeror must complete all fields in Annex 1 in accordance with the instructions to be considered compliant. **Filling out Annex 1 is still required if compliant vehicles can only be procured from one location.**

Detailed Guidance for all other Items:

Annex 1 is **NOT** required to be submitted for non-vehicular item. A **minimum of four 604(a) compliant vendors**, including at least one from the United States and one from the recipient country (if possible), should be included in each Annex 2 submission for each item type. The offeror must complete all fields in Annex 1 in accordance with the instructions to be considered compliant.

Annex 2 **MUST** also be filled out for each type of items (e.g. a separate Annex 2 completed sheet for each type of items – tents, generators, radios etc.) that is being proposed for procurement outside of the United States, the recipient country, or non-advanced developing country. For purposes of defining the scope of this procurement restriction, all items that can be procured – including expendable supplies such as fuel, food, tires, batteries, paper, pencils, as well as construction materials – are covered for the purposes of this restriction. The Government's requirement to sole-source a specific type of item does **NOT** obviate the need to fill out Annex 2. **Annex 2 must still be filled out if equipment is only available in one location (e.g., Hesco barriers can only be procured from the United Kingdom),**

demonstrating that it cannot be procured anywhere else. A minimum of four vendors, including at least one from the United States and one from the recipient country (if possible), should be included in each Annex 2 submission for each item type. The offeror must complete all fields in Annex 2 in accordance with the instructions to be considered compliant.

Additional Guidance for both Procurement Restrictions:

****In plain language, the offeror shall state in its technical narrative proposal its intent to seek one of these waivers and provide an explanation of what item(s) it is seeking a waiver for, a summary of what alternative solutions it has sought, and why it is seeking a waiver. A simple statement acknowledging that the offeror is seeking a procurement waiver in the narrative of the proposal is NOT sufficient. ****

To address these Vehicle and General Procurement Restrictions, offerors **shall NOT**:

- Utilize guidance related to the Buy American Act. The Buy American Act is entirely separate and distinct from the regulations described above, and does not apply to purchases made under the FAA. It should not be used to inform procurement strategies financed under the FAA.
- Propose any procurement involving sales through a business office/subsidiary in the United States/a non-advanced developing country/the recipient country, when the product will actually be procured or manufactured and shipped from a country that is not the United States, the recipient country, or a non-advanced developing country.
- Propose procurements where a new production facility/manufacturing facility/subsidiary is temporarily established in a non-advanced developing country for the sole purpose of addressing the 604(a)(1) restriction.
- Propose procurements where finished “kits” are sent from a non-authorized country for final assembly in a non-advanced developing country or other authorized country.
- Propose procurements of vehicles or other items that are being sourced in a 604(a)(1) compliant country that requires the supplier to do a special order.

If the supplier in a 604(a)(1) compliant country regularly has compliant items in stock, and simply needs to order the items to replenish inventory, then this approach is compliant. However, special orders unrelated to replenishment of normal inventory are not compliant. For example, if a Toyota dealership in X country in Africa normally has five vehicles in stock, and the solicitation requires 20 vehicles, a section 604(a)(1) waiver would be required for the balance of the vehicles, reflecting the original shipping location.

- Propose procurements where new manufacturing of major components takes place in non-authorized countries, which are then shipped to an authorized country. While not every component of the vehicle or item has to originate from the procurement location, significant new manufacturing of components comprising more than 20% of the vehicle's value should not be taking place in non-authorized countries following award - this is known as the Vehicle and Item Procurement Standard. See Annex 1 for content percentage reporting requirements and format

If in doubt, offerors shall raise additional questions related to interpretation of the above statutes during the solicitation phase, using the procedures outlined by AQM in the solicitation documents.

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Annex 1 – 636 (i) Templates - VEHICLES
Equipment Component Origin Reporting Template

Offerors **shall** complete the template below for each make and model of vehicle proposed and include it in the technical proposal:

Receiving Country: _____
Vehicle Make and Model: _____
Quantity to Procure: _____

Component	Source Company and Location	Manufacture Origin	% of Vehicle by Cost
Chassis:			
Frame:			
Axles:			
Transfer Case:			
Engine:			
Electrical			
Glass			
Armor (if applicable)			
Body			
Integration and Assembly Labor			
		U.S. Origin Percentage:	%
		Non- U.S. Origin Percentage:	%

If U.S. Origin content value is less than 80%, then the proposed equipment does not meet the Vehicle and Equipment Procurement Standard. If Offeror is seeking to waive the restrictions in the Fact Sheet: Vehicle and Equipment Procurement Restrictions Under the Foreign Assistance Act, then Offeror shall report on all alternatives that meet these restrictions and clearly state how they do not meet the solicitation's requirements and **shall use the template provided on the next page in the technical proposal.**

<u>Vendor</u>	<u>Location of Equipment</u>	<u>636(i) Compliant</u>	<u>Present in Vendor Inventory</u>	<u>Meets Task Order Solicitation Specifications</u>	<u>Explanations for Deviations and Waivers</u>		
					<u>Specification/Availability Issues</u>	<u>Timeliness Issues</u>	<u>Cost Variance</u>
A	United States	Yes	N/A	No	Detailed Explanation (e.g. not right-hand drive, not dirty diesel compatible, no local vendor/source for post-delivery support/spare parts)	Explanation (e.g. will arrive 90 days later than Government requires in Task Order)	Detailed Explanation
B	Recipient Country	Yes	No	No	Detailed Explanation	Detailed Explanation	Detailed Explanation (e.g. cost will be 25% cheaper than procuring from USG including shipping costs)
C	Other non-Advanced Developing Country #1	Yes	Yes	No	Detailed Explanation	Detailed Explanation	Detailed Explanation
E	Other non-Advanced Developing Country #2	No	Yes	Yes	Detailed Explanation	Detailed Explanation (e.g. will arrive within Governments delivery date requirement Government Task Order)	Detailed Explanation
F	Proposed location	TBD	TBD	Yes	Detailed Explanation	Detailed Explanation	Detailed Explanation

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Annex 2: 604(a)(1) Waiver Template
General Procurement (including Vehicles)

For all items recommended to be purchased outside a 604(a)(1) compliant country, the below template **shall** be completed for each unique type of item (e.g. vehicles, tents, ambulance, armored personnel carrier, radios, etc.). **Spare parts for one unique type of item can be submitted on one Annex 2 template and not individual sheets as long as they are coming from the same location.** A separate template sheet is required for each unique type of item.

Receiving Country: _____

Item Type: _____

Quantity to Procure: _____

Vendor	Location of Item	604(a)(i) Compliant	Present in Vendor Inventory	Meets Task Order Solicitation Specifications	Explanations for Deviations and Waivers		
					Spec Problems	Timeline Issues	Cost Variance
A	United States	Yes	N/A	No	Detailed Explanation (e.g. not right hand drive, not dirty diesel compatible, not produced in U.S.)	Detailed Explanation (e.g. will arrive 90 days later than Government requires in Task Order)	Detailed Explanation
B	Recipient Country	Yes	No	No	Detailed Explanation	Detailed Explanation	Detailed Explanation (e.g. cost will be 30% cheaper than procuring from USG including shipping costs)
C	Other non-Advanced	Yes	Yes	No	Detailed Explanation	Detailed Explanation	Detailed Explanation

	<i>Developing Country #1</i>						
<i>D</i>	<i>Other non- Advanced Developing Country #2</i>	<i>Yes</i>	<i>Yes</i>	<i>No</i>	<i>Detailed Explanation</i>	<i>Detailed Explanation</i>	<i>Detailed Explanation</i>
<i>E</i>	<i>Proposed location</i>	<i>TBD</i>	<i>TBD</i>	<i>Yes</i>	<i>Detailed Explanation</i>	<i>Detailed Explanation</i>	<i>Detailed Explanation</i>