

## HOUSE OF REPRESENTATIVES “BUY AMERICAN” AMENDMENTS TO THE FY 2004 DEFENSE AUTHORIZATION BILL

The House of Representatives recently passed the FY 2004 Defense Authorization Bill (H.R.1588) with several amendments to acquisition policy and management provisions, including “Buy American” requirements.<sup>i</sup> The House of Representatives Committee on Armed Services is concerned that the U.S. industrial base is becoming more dependent on foreign sources and that there are fewer indigenous capabilities available for the design and fabrication of critical components, systems, and materials used in military systems.<sup>ii</sup> The appendix to this paper provides a summary of the provisions of the House Bill.<sup>iii</sup>

These “Buy American” amendments would require the Secretary of Defense to purchase “*certain critical items*” only if they are entirely produced in the United States<sup>iv</sup>. An item meets this criteria if it is a “*critical item*” (“*essential for the proper functioning and performance of the military system*”, or “*involves a critical technology*”), and “*there are limited sources of production capability of the item in the United States.*” The current global nature of electronics manufacturing, coupled with the proliferation of electronics in all but the simplest of defense products, would throw into disarray Department of Defense procurements necessary to support the U.S. military. In addition to prohibiting the use of components manufactured by foreign companies, this ban would also disallow the use of components produced by those U.S. based companies with manufacturing facilities in foreign countries, including some that are DoD certified.

In May 2002, the G-12 Solid State Devices Committee prepared a position paper discussing the potential impact of similar legislation on the use of semiconductors in DoD weapon systems.<sup>vi</sup> This new “Buy American” legislation extends the issues discussed in this paper to materials (such as metals, ceramics and polymeric materials from offshore manufacturers) and to machine tools<sup>vii</sup>. The restrictions on critical technology apply to those contained in the most recent biennial report on national critical technologies submitted to Congress by the President. The National Critical Technologies List includes materials produced offshore that are used in the manufacture of electronic components.

This “Buy American” legislation threatens to impact DoD’s ability to support the majority of weapons systems in use today and would encumber future systems with exorbitant costs. Though the proposed legislation contains a waiver provision, it would result in a substantial bureaucratic infrastructure required for critical item identification and tracking, and to manage a continuous flow of waiver requests in order to proceed with procurements for electronic equipment.

In a letter to the House Armed Services Committee, GEIA and JEDEC stated “*Industry and DoD have demonstrated that foreign supplied components can be reliably incorporated into weapon systems. This capability promotes interoperability with our allies, lowers procurement and R&D costs to the U.S., and promotes free market access for all firms*”<sup>viii</sup>.

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i National Defense Authorization Act for Fiscal Year 2004 (Engrossed as Agreed to or Passed by House) [H.R.1588.EH]

ii House Report 108-106

iii Provided by James Serafin, VP Government Relations & Marketing, Government Electronics & Information Technology Association (GEIA) a sector of EIA

iv Section 813—Procurement of Certain Critical Items from American Sources

v Section 812—Identification of Critical Items and Section

vi H. Livingston, “DoD Weapon System Dependence On ‘Off-Shore’ Semiconductor Manufacturing - GEIA G-12 Solid State Devices Committee Concerns Regarding H. R. 3597”, GEIA, May 2002.

vii Section 826—Requirement for Major Defense Acquisition Programs to use Machine Tools Entirely Produced within the United States

viii GEIA / JEDEC Letter to The Honorable Bob Stump, Chairman, House Armed Services Committee, dated 31 May 2002

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**SEC. 811. ASSESSMENT OF UNITED STATES DEFENSE INDUSTRIAL BASE CAPABILITIES.**

Section 811 would require the Secretary of Defense to establish program to assess the capabilities of United States defense industrial base to produce military systems necessary for national security. Each service would be required to designate an individual to assist the Secretary in carrying out the program. The four responsibilities of the service designee would be: 1) to report to the Service Acquisition Executive on industrial base matters; 2) provide information to assist the Secretary of Defense in carrying out his duties on the National Defense Technology and Industrial Base Council; 3) Oversee collection of data to assist the Secretary in carrying out required data collection; and 4) Oversee the process of determining critical items under section 812 of this subtitle.

The heart of section 811 is a requirement in subsection (c) that the Secretary of Defense collect data with respect to so-called covered military systems. A covered military system is defined in section 831 as military system costing more than \$25,000 in one of at least 11 federal supply classes that contains at least one "critical item". Whether an item is a "critical item" is determined as a result of the process that the Secretary would be required to follow in section 812 as described below. The data collection requirements would apply not only to a contractor awarded a contract for a covered system but also to any other offeror's bids or proposals to provide a covered system. For the contractor, the information required to be collected would include: 1) identification of all "critical items" in the system and whether such items are from a domestic or a foreign source; 2) whether, if the contractor is foreign company, the contract was awarded sole source because of no U.S. capability or after receipt of offers from U.S. companies, and 3), if the contractor is a U.S. company, the locations of any planned research, development or manufacturing outside the U.S.; the business rationale for having any such work performed outside the U.S.; and certification of the percentage of the total contract to be performed outside the U.S..

For the other, unsuccessful offerors, the information required to be collected would include: 1) identification of all "critical items" in the system and whether such items are from a domestic or a foreign source; 2) an identification of domestic and foreign offerors (*subcontractors or suppliers in the proposal?*) and the location where the work was proposed to be performed; and 3) a statement whether there was only one or more the one offeror.

The Secretary would be required to make every effort to keep the information collected from the private sector confidential.

**Effective Date:** The Secretary would be required to provide an assessment of the compiled under this section to the House and Senate Armed Services for every two-year period with the first report for 2002-2003 to be submitted by November 1, 2004.

**Waiver authority:** None.

**SECTION. 812. IDENTIFICATION OF CRITICAL ITEMS: MILITARY SYSTEM BREAKOUT LIST.**

Section 812 would require the Secretary of Defense to establish a process to identify all items and components (including, per section 831, subassemblies and software) within a military system (defined in section 831 as any military system costing more than \$25,000 necessary to support national security requirements) and to list all the items and components on a military system breakout list. In putting together the breakout list, the Secretary would be required to list separately those items and components that are "essential" and those essential items and components that are "critical".

For purposes of the proposed identification process, an essential item or component is defined as 1) essential to the proper functioning of the military system or 2) involving a critical technology as defined in 10 U.S.C. 2500. 10 U.S.C. 2500 defines "critical technology" as either a technology on the National Critical Technologies List required to be prepared by the President biennially under 42 U.S.C. 6683(d) or a technology identified a defense critical technology identified pursuant to the annual assessment required under 10 U.S.C. 2505.

For purposes of the requirement in section 812, a critical item or component is defined as an essential item or component for which there is a "high barrier" for entry for production. A "high barrier" is defined in terms of a significant period of time or level of investment necessary to establish within the United States production and surge capabilities for wartime requirements.

The Secretary of Defense would be required to prepare and submit an annual report to the congressional Armed Services committees by November 1 with detailed information on the implementation of the breakout list process under this section.

**Effective date:** Upon date of enactment. The first report would be required to be submitted on November 1, 2004.

**Waiver authority:** None.

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**SECTION. 813. PROCUREMENT OF CERTAIN CRITICAL ITEMS FROM AMERICAN SOURCES.**

Under section 813, the Secretary of Defense would be required to procure only critical items identified pursuant to section 812 for which there are limited (not defined) American sources of production. The requirements in this section would apply to all existing contracts and subcontracts for the procurement of “covered “military systems (defined in section 831 as a military system costing over \$25,000 containing at least one critical item or component identified pursuant to section 812).

**Effective date:** Upon date of enactment.

**Waiver authority:** The Secretary of Defense would be able to waive the application of the requirement in section 813 to a specific item if he determines in writing that the Department of Defense has a need of such unusual and compelling urgency that the U.S. would be seriously harmed if the requirement in section 813 were applied to the procurement of the item.

**SECTION. 814. PRODUCTION CAPABILITIES IMPROVEMENT FOR CERTAIN CRITICAL ITEMS USING DEFENSE INDUSTRIAL BASE CAPABILITIES FUND.**

Section 814 would establish a Defense Industrial Capabilities Fund in the U.S. Treasury with an authorization of \$100 million in FY 2004. The Secretary of Defense would be authorized to use the fund to establish U.S. production capabilities for critical items identified pursuant to section 812 if the item is available only from foreign sources or from a limited number of U.S. sources. Before obligating money from the Fund, the Secretary would be required to report to Congress on his plans for implementing the Fund. The Secretary would also be required to designate a fund manager for the Fund who would have to report annually to Congress on the activities of the Fund during the previous fiscal year.

**Effective date:** Upon date of enactment.

**SECTION. 821. DOMESTIC SOURCE LIMITATION AMENDMENTS.**

Section 821 would amend 10 U.S.C. 2534 and 10 U.S.C. 2500 with respect to the application of domestic source limitations in Defense Department procurements. The section would add eight new items to current list of items in 10 U.S.C. 2534(a) which the Secretary is required to procure only from sources within the national technology and industrial base. Section 821 would redefine the term “national technology and industrial base” in 10 U.S.C. 2500 paragraph (1) by eliminating Canada from the base and by requiring that sources in the base perform research, development, production and maintenance activities to be considered a manufacturing source for purposes of section 2534. Section 821 would add a requirement that the Secretary of Defense make any determination pursuant to the waiver of a requirement in 10 U.S.C 2534 in writing. Section 821 would repeal six of the eight justifications in subsection (d) of section 2534 for waiving a domestic source requirement in that section. The current waiver justifications that would be repealed include:

- (1) Unreasonable costs or delays;
- (2) US producers of an item would not be jeopardized by competition from a foreign country and the item would be from a country that does not discriminate against items from the U.S. to a greater degree than the U.S. discriminates against items from that country;
- (3) Would impede cooperative programs between DoD and a foreign country or would impede the reciprocal procurement of items under a defense procurement memorandum of understanding and the foreign country involved does not discriminate against items from the U.S. to a greater degree than the U.S. discriminates against items from that country;
- (6) The procurement for the item in question is for less than the simplified acquisition threshold (\$100, 000) and simplified purchase procedures are being used in the procurement (10 U.S.C. 2534(g) currently provides that none of the requirements in section 2534 apply to a procurement below the simplified acquisition threshold. 2534(g) was not amended in the House bill);
- (7) Would not be in the national interest of the United States; or
- (8) Would adversely affect a United States company.

In addition to repealing most of the waiver authority in 10 U.S.C. 2534, section 821 would limit the use of the remaining waiver justification in current paragraph 2534(d) (5) (the application of the domestic source requirement to the procurement an item would result in the existence of only one domestic source for the item) by prohibiting the use of the waiver for the procurement of any item deemed critical pursuant to section 812 above.

Section 821 would add a new waiver justification to section 2534 based, as in section 813, on a determination by the Secretary of Defense that the Department of Defense has a need of such unusual and compelling urgency that the U.S. would be

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seriously harmed if the requirement were applied to the procurement of the item. This would leave a total of three justifications for waivers of section 2534 in place of the eight in current law.

**Effective date:** Upon date of enactment.

**SECTION. 822. REQUIREMENTS RELATING TO BUYING COMMERCIAL ITEMS CONTAINING SPECIALTY METALS FROM AMERICAN SOURCES.**

Sections 822, 824, and 825 would modify 10 U.S.C. 2533a, known as the “Berry Amendment”. Section 822 would amend several parts of section 2533a primarily associated with requirements to procure domestically produced specialty metals. Section 822 would extend the Buy American requirements for both clothing and specialty metals to include explicitly materials, components, and parts of any items procured by the Department of Defense. The section would also eliminate the ability of the Secretaries of the Services to waive the application of the Berry Amendment restrictions in cases where U.S. sources can not provide sufficient quantity, quality or material at a reasonable U.S. market price. The Secretary of Defense, as sole remaining waiver authority, would also have the added requirement to notify Congress in writing when he determines to exercise such a waiver. Section 822 would in general limit the delegability of any waiver determination under 10 U.S.C. 2533a to the Under Secretary of Defense for Acquisition, Technology, and Logistics.

Section 822 would create two exemptions from the application of the Berry Amendment requirements for procurement commercial items containing specialty metals. In the case of a commercial item, the Secretary of Defense could waive the application of the specialty metals requirements based on a determination in writing that the Department of Defense has a need of such unusual and compelling urgency that the U.S. would be seriously harmed if the requirement were applied to the procurement of the item. The requirement could also be waived in cases where a contractor agrees that, for each DoD contract entered into using this exemption, over a period of 18 months the contractor will purchase an amount of the U.S. produced specialty metal that is equivalent to the amount that would otherwise be required to be procured under the contract plus ten percent. Section 822 would prohibit the Secretary of Defense from waiving the specialty metal requirements for commercial items using any other waiver authority in section 2533a. The Secretary of Defense would be required to notify Congress and wait 15 days before applying either of the commercial item exemptions. In implementing this authority, the Secretary would be required to publish a notice in the *Federal Register* on the method proposed to measure the equivalent amount for purposes of applying the second commercial item exemption.

In current law, subsection (e) of section 2533a exempts purchases of specialty metals and chemical protective clothing from foreign countries necessary to comply with offsets under approved programs serving defense requirements or in furtherance of agreements with foreign governments to reciprocally remove barriers to purchases of supplies and services. Section 822 would repeal the applicability to specialty metal procurements of these two exemptions in 2533a (e).

**Effective date:** Upon date of enactment. The new specialty metals exception for commercial items would apply to any contract for a commercial item entered into before, on, or after the date of enactment.

**SECTION 823. ELIMINATION OF UNRELIABLE SOURCES OF DEFENSE ITEMS AND COMPONENTS.**

Section 823 would require the Secretary of Defense to identify foreign countries that restricted provision or sale of military goods or services to the United States because of U.S. policies toward or military actions in Iraq since 9/12/02. Section 823 would prohibit the Secretary of Defense from procuring any items or components contained in military systems that were manufactured in the identified foreign countries.

**Effective date:** Upon date of enactment. For contracts in existence at date of enactment, the Secretary of Defense would be required to take such action as is necessary to bring the contracts into compliance with section 823 within 24 months.

**Waiver authority:** The Secretary of Defense would be able to waive the application of the requirement in section 823 to a specific item if he determines in writing that the Department of Defense has a need of such unusual and compelling urgency that the U.S. would be seriously harmed if the requirement were applied to the procurement of the item.

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**SECTION. 824. CONGRESSIONAL NOTIFICATION REQUIRED BEFORE EXERCISING EXCEPTION TO REQUIREMENT TO BUY SPECIALTY METALS FROM AMERICAN SOURCES.**

Section 824 would require that the Secretary of Defense or a Service Secretary submit to Congress and publish in the *Federal Register* a notice of determination and then wait 15 days before procuring specialty metals from a non-U.S. source on the basis of 10 U.S.C. 2533a(c) (Note that the Service Secretaries' authority to exercise this waiver would be eliminated in section 822 above).2533a(c) allows the purchase of non-U.S. specialty metals in cases where U.S. sources can not provide sufficient quantity, quality or material at a reasonable U.S. market price.

**Effective date:** Upon date of enactment.

**SECTION. 825. REPEAL OF AUTHORITY FOR FOREIGN PROCUREMENT OF PARA-ARAMID FIBERS AND YARNS.**

Section 825 would restore a requirement in 10 U.S.C. 2533a that the Department of Defense procure para-aramid fibers and yarns only from U.S. sources.

**Effective date:** Upon date of enactment.

**Waiver authority:** As otherwise provided subsections (c), (d), and (h) of 10 U.S.C. 2533a.

**SECTION. 826. REQUIREMENT FOR MAJOR DEFENSE ACQUISITION PROGRAMS TO USE MACHINE TOOLS ENTIRELY PRODUCED WITHIN THE UNITED STATES.**

Section 825 would apply to any procurement of a major defense acquisition program and would require that the contractor under each such program use only U.S. manufactured machine tools to carry out the program. The requirement would also apply to any subcontractor under the program with a contract valued at \$5 million or more.

**Effective date:** Applies to all contracts entered into beginning four years after the date of enactment.

**Waiver authority:** None.

**SECTION. 827. DATA COLLECTION AND TECHNICAL ASSISTANCE CENTER RELATED TO MACHINE TOOLS**

Section 827 would require the Secretary of Defense to collect data identifying all contractors and subcontractors with defense contracts over \$5 million that use machine tools to perform the contracts. The section would also require the Secretary to establish a center to assist machine tool companies and firms that use machine tools with understanding government contracting regulations and contracting opportunities.

**Effective date:** Upon date of enactment.

**Waiver authority:** None.

**SECTION. 828. BUY AMERICAN ENHANCEMENT.**

Section 828 would amend the criteria available to the Secretary of Defense under 10 U.S.C. 2533 in determining whether the application of the Buy American Act (41 U.S.C. 10A) is consistent with the public interest. The Buy American Act requires that purchases of articles, supplies or materials by Federal agencies for use in the United States contain supplies, etc. substantially (defined in regulation as at least 50 percent) mined, produced or manufactured in the United States. Section 2 of the Buy American Act allows each agency head discretion to determine whether application of the requirement is consistent with the public interest .Section 828 would prohibit the Secretary of Defense from considering provisions in any trade agreements with foreign countries in making a public interest determination not to apply the Buy American Act.

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**Effective date:** Upon date of enactment.

**Waiver authority:** None.

**SECTION. 829. REQUIREMENT RELATING TO PURCHASES BY THE DEPARTMENT OF DEFENSE SUBJECT TO THE BUY AMERICAN ACT.**

Section 829 would require that, in any application of the Buy American Act to the Department of Defense, the term “substantially” in section 2 of the Act would mean 65 percent rather than the 50 percent for Federal agencies as provided in current regulations implementing the Act.

**Effective date:** Upon date of enactment.

**Waiver authority:** None.