Buy American Exception
Findings and Determination of Inconsistency with the Public Interest

I, as Under Secretary of Defense (Acquisition, Technology & Logistics), hereby make the following findings and determination regarding the application of the restrictions of Section 2 of Title III of the Act of March 3, 1933, 47 Stat. 1520 (the Buy American Act, 41 U.S.C. 10a-d) to procurements of end items that are subject to the Trade Agreements Act (19 U.S.C. 2501, et seq.) and which are substantially transformed in the U.S.

Findings

1. The Buy American Act (BAA) requires the Government to purchase for public use only those manufactured products that have been manufactured in the United States substantially all from articles, materials or supplies mined, produced or manufactured in the United States. Executive Order 10582 (December 17, 1954), as amended, provides that a product is considered not to be manufactured "substantially all from..." if the cost of the foreign components used in such product constitutes fifty percent or more of the cost of all its components. The BAA does not apply when the head of a federal agency determines that its application is inconsistent with the public interest or that domestic products are unreasonable in cost. The Department of Defense (DoD) implements the unreasonable cost exception by adding an evaluation factor of fifty percent to the offered price of foreign end products.

2. Pursuant to the Trade Agreements Act of 1979 (TAA), the United States Trade Representative has waived application of the BAA for eligible products from certain "designated" countries. Eligible products are largely commercial items. The country of origin for an eligible product, that consists in whole or in part of materials from another country, is the country in which the article has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed. Since the TAA applies only to products of foreign countries, the BAA is not waived for products substantially transformed in the United States from mostly foreign components, i.e., U.S.-made products.

3. Manufacturers of products covered by the TAA commonly use worldwide sources for components. Under the TAA, a product substantially transformed in a designated country is exempt from application of the BAA regardless of the source of its components. However, for offers of products that are composed of fifty percent or more foreign components but that are substantially transformed in the United States, the BAA evaluation factor must be applied to the offer if doing so would result in the award of a contract to the offeror of a domestic end product. The application of these different rules of origin results in treating products substantially transformed in the United States less favorably than designated country products in similar circumstances. This may encourage a company to manufacture the product or locate a manufacturing facility in a designated foreign country rather than in the United States.

4. These different rules of origin result in a disproportionately burdensome record keeping requirement on firms offering domestic and U.S.-made products. Because of the component content requirement of the BAA, such offerors must determine, control, and track the source of components. In today's global economy, this has become an extremely difficult, if not impossible, task and creates a disincentive for companies to sell to the Department of Defense. On the other hand, this burden does not apply to offerors of products from designated countries because the TAA substantial transformation rule of origin does not limit similarly the country of origin of components, thus there is no need for record keeping as to the origin of those components.

5. An example of this burden is the Defense Logistics Agency's (DLA) EMall. The EMall is a web-based ordering system that provides access to the commercial catalogs of numerous vendors. As DLA has attempted to expand the number of commercial items available to its customers from existing electronic catalogs, vendors are unable to comply with the requirement to certify the origin of products under the BAA. Because of this, companies have indicated an inability to participate in solicitations subject to the BAA.

6. Today's markets are globally integrated with foreign components often indistinguishable from domestic components. Manufacturers' component purchasing decisions are based on factors such as cost, quality, availability, and maintaining the state of the art, not the country of origin, making it much more difficult in today's market for a manufacturer to guarantee the source of its components over the term of a contract. It is even more difficult for a dealer to determine and guarantee the source for the components included in products on the shelf. In order to certify their products, however, offerors must determine and control the source of components. The difficulty in tracking the country of origin of components is a disincentive for firms to become defense contractors, limiting DoD's ability to purchase products already in commercial distribution systems, and impeding DoD's ability to obtain state-of-the-art modifications incorporating advanced commercial technology to existing products that are available to commercial customers.

7. The requirement to track the country of origin is unique to Government procurement, and represents a significant deterrent to the acquisition of TAA covered items by DoD. In today's globally integrated market, it is expensive for manufacturers to distinguish between foreign and domestic components. Requiring them to do so results in increased costs of procurements for DoD and impedes the ability of DoD to obtain the latest advances in commercial technology.

8. Implementation of the country of origin requirement has resulted in a difficult and confusing regulatory system for international acquisition. This complex interrelationship of statutes and agreements has led to differing interpretations by Executive agencies and confusion to offerors. It also makes it difficult for firms to determine how their products will be evaluated and thus may act as a disincentive for firms to become defense contractors. This determination will result in a simplification of the regulations and significantly reduce the difficulty in implementing and administering them. Waiving the BAA for all TAA covered products substantially transformed in the U.S. will negate the need to apply the 50 percent evaluation factor associated with U.S.-made end products that do not qualify as domestic products and result in a more streamlined and simplified evaluation process. Further, waiving the BAA for U.S.-made end products would

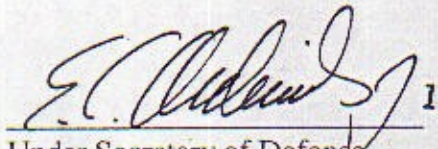
harmonize the Federal Acquisition Regulation and the Defense Federal Acquisition Regulation Supplement with regard to the manner in which U.S.-made end products are treated.

9. This determination will enable DoD to procure U.S.-made items if they are lower in cost. Additionally, reducing the record keeping burden on United States firms as well as eliminating the need for separate tracking systems should result in lower costs and better quality for DoD procurements as a result of increased competition from U.S.-made products.

10. For products covered by the TAA, this waiver will deny the fifty percent price advantage that domestic end products currently enjoy over U.S.-made products. Therefore, the cost incentive to manufacture components in the United States will be removed. This disadvantage is counteracted by a reduced incentive to move end product manufacturing facilities to a designated foreign country to avoid the BAA price difference. I believe the advantages of this determination clearly outweigh this disadvantage.

Determination

In accordance with the Buy American Act, and after considering the factors at 10 U.S.C. 2533, I determine that, for procurements subject to the Trade Agreements Act, it would be inconsistent with the public interest to apply the Buy American Act to U.S.-made end products that are substantially transformed in the United States. This determination will remain in effect for all Department of Defense purchases until amended or revoked.



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Under Secretary of Defense
(Acquisition, Technology & Logistics)