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Via Hand Delivery and Email

Defense Acquisition Regulations Council

Attn: Ms. Amy Williams

PDUSD(A&T) DP(DAR)

IMD 3D139

3062 Defense Pentagon

Washington, D.C. 20301-3062

Re: DFARS Case 99-D301, Domestic Source Restrictions – Commercial Items, 64 Fed. Reg. 49757

Dear Ms. Williams:

On behalf of the Section of Public Contract Law (the "Section") of the American Bar Association ("ABA"), I am submitting comments on the above-referenced matter. The Section consists of attorneys and associated professionals in private practice, industry and Government service. The Section's governing Council and substantive committees contain members representing these three segments to ensure that all points of view are considered. In this manner, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.

The Section is authorized to submit comments on acquisition regulations under special authority granted by the ABA's Board of Governors. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association.

The Director of Defense Procurement is proposing to amend provisions of the Defense Federal Acquisition Regulation Supplement ("DFARS") pertaining to the applicability of certain domestic source restrictions to contracts and subcontracts for the acquisition of commercial items and commercial components. The proposed regulations state that they supersede prior proposed regulations published on November 4, 1997, at 62 Fed. Reg. 59641 (DFARS Case 97-D028) pertaining to commercial ball or roller bearings that are components of noncommercial items.

The currently proposed regulations are materially different from the prior proposed regulations and propose changes far beyond the acquisition of commercial ball or roller bearings. Specifically, the proposed regulations would: (1) delete the provision allowing acquisition of United Kingdom manufactured commercial ball and roller bearings as end items; (2) narrow the existing waiver of the domestic source restrictions in 10 U.S.C. § 2534 and annual defense appropriations acts, such that the waiver would only be applicable if the restricted foreign goods are components of commercial items or commercial components being acquired; and (3) remove the Trade Agreements Act, 19 U.S.C. § 2512, and the Buy American Act , 41 U.S.C. § 10, from the list of laws that are inapplicable to subcontracts for the acquisition of commercial items.

For the reasons set forth below, the Section opposes the proposed regulations and urges that they be revised according to the comments set forth herein.

The Proposed Regulations Fail to Comply With the Regulatory Flexibility Act.

The proposed regulations do not comply with the requirements of the Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq*.

The preamble to the proposed regulations state that an initial regulatory flexibility analysis was not performed as required by the Regulatory Flexibility Act, 5 U.S.C. § 603 because the proposed regulations are "not expected to have a significant economic impact on a substantial number of small entities within the meaning of the . . . Act . . . because the primary effect of the rule is a restriction on the acquisition of ball and roller bearings manufactured in the United Kingdom." The preamble goes on to state that the proposed change would no longer permit the acquisition of commercial ball and roller bearings from the United Kingdom ("UK") if the bearings are acquired as end items, rather than as components of end items.

Nevertheless, as indicated above, the proposed regulations affect much more than simply the acquisition of UK-manufactured ball and roller bearings. Rather, the proposal will have a significant economic impact on, among others, a substantial number of small entities. In addition to making changes regarding restrictions on the acquisition of UK-manufactured ball and roller bearings in connection with all commercial item subcontracts awarded under Department of Defense ("DoD") prime contracts, the proposed regulations would (1) reapply the requirements of the Trade Agreements Act ("TAA") and the Buy American Act ("BAA") to such commercial item subcontracts and (2) narrow the existing waiver of the domestic source restrictions in 10 U.S.C. § 2534 in connection with all such commercial item subcontracts.

The only reason given for reapplying the BAA and TAA to commercial item subcontracts is set forth in the Background section of the proposed rule, which states that the TAA and BAA are being removed from the list of laws inapplicable to commercial item subcontracts "since the Trade Agreements Act and the Buy American Act apply to end items only." This explanation does not support the proposed action to remove the TAA and BAA from the waiver list for commercial item subcontracts.

There are no clear guidelines for determining whether an item will be considered an end product or a component. This determination is nonetheless essential because only end products must comply with the requirements of the BAA and the TAA. It is not unusual for an item that is considered an end product under one solicitation to be considered a component under another solicitation. Further, the fact that the restrictions of the TAA and BAA apply only to end products does not mean that the TAA and BAA can never apply to subcontracts for commercial items. In many instances, it is the manufacturer of the end product who performs as the subcontractor and provides the end products, especially in those instances where the prime contractor is a reseller or a systems integrator.

Compliance with the TAA and BAA also will have significant impact on commercial item vendors. In order to ascertain that their products comply with the Acts, vendors will be required perform onerous analysis of the origin of each product and its components. In today's increasingly internationalized marketplace, it is becoming more difficult and expensive for manufacturers and their suppliers to perform such an analysis. Indeed, to comply with the BAA and the TAA, not only must vendors trace rigorously the origin of their products and components but they must segregate or otherwise identify their BAA and TAA compliant contract inventory from non-qualifying commercial inventory, which drives up the cost of all covered goods. Consequently, exempting commercial item subcontracts from the BAA and TAA helps to reduce the price of items sold to the government and the inefficiencies inherent in government procurement while, at the same time, increasing the variety of available supplies. Therefore, to reapply the BAA and TAA to all commercial item subcontracts awarded under DoD prime contracts will have a significant economic impact on a substantial number of entities, including small entities within the meaning of the Regulatory Flexibility Act.

With regard to the domestic source restrictions in 10 U.S.C. § 2534, the proposal seeks to narrow the existing waiver of such restrictions for commercial item subcontracts such that the waiver would no longer apply if the restricted items are acquired as end items. Rather, the proposal seeks to limit the waiver to only those instances in which the restricted items are acquired as components of end items. No explanation is offered in support of the proposed action. The domestic source restrictions in 10 U.S.C. § 2534 apply to

much more than ball and roller bearings. The restrictions also apply to multi-passenger motor vehicles (buses), chemical weapons antidotes, several items needed for naval vessels, and several valves and machines tools. 10 U.S.C. § 2534(a). Thus, narrowing the applicability of the existing waiver of these various domestic source restrictions will have a significant impact on a substantial number of entities, including small entities.

If the proposed regulation is to go forward without preparation of an initial regulatory flexibility analysis pursuant to the Regulatory Flexibility Act, the proposed regulation should, at a minimum, be modified to withdraw the provisions that seek to (1) reapply the BAA and TAA to commercial item subcontracts and (2) narrow the existing waiver of the domestic source restrictions in 10 U.S.C. § 2534. Further, as set forth below, the Section recommends that, even if an initial regulatory flexibility analysis is prepared, the proposed regulations should be revised to retain the existing waivers of the BAA, TAA and the domestic source restrictions of 10 U.S.C. § 2534 for commercial item subcontracts awarded under DoD prime contracts.

The Proposed Regulations Should Be Revised to Retain the Existing Waiver of the TAA, BAA, and Domestic Source Restrictions of 10 U.S.C. § 2534 for Commercial Item Subcontracts

The existing waivers for commercial item subcontracts of the Trade Agreements Act, the Buy American Act, and the domestic source restrictions of 10 U.S.C. § 2534 should be retained for the following reasons.

Title VIII — Commercial Items of the Federal Acquisition Streamlining Act of 1994 ("FASA") specifically stated that the FAR "shall include a list of provisions of law that are inapplicable to subcontracts under either a contract for the procurement of commercial items or a subcontract for the procurement of commercial items." FASA, Section 8003, Pub. L. No. 103-355 (now codified at 41 U.S.C. § 430(b)). FASA also specified that all statutes that set forth policies, procedures, requirements, or restrictions for the procurement of property or services by the Federal Government "shall be included on the list of inapplicable provisions of law" unless (1) the law provides for criminal or civil penalties; (2) the law specifically states that it shall be applicable to commercial item contracts and subcontracts; or (3) the FAR Council makes a written determination that it would not be in the best interests of the Federal Government to exempt commercial item subcontracts from the law. 41 U.S.C. §§ 430(b)(2), (c).

Pursuant to these requirements of FASA, the BAA, TAA, and the domestic source restrictions of 10 U.S.C. § 2534 were properly included in and should be retained on the DoD FAR Supplement list of laws inapplicable to commercial item subcontracts. Neither the BAA nor TAA nor the restrictions of 10 U.S.C. § 2534 provide for criminal or civil penalties; nor do any of these statutes specifically state that it shall be applicable to commercial item subcontracts. Further, the Section is unaware of any written determination by the FAR Council that it would not be in the best interests of the Federal Government to exempt commercial item subcontracts from either the BAA, TAA, or the domestic source restrictions of 10 U.S.C. § 2534.

The fact that neither the BAA nor TAA is included on the FAR § 12.504 waiver list of laws inapplicable to commercial item subcontracts does not take the place of the required written determination by the FAR Council. Rather, the FAR Council proposed in May 1996 in FAR Case 96-308, 61 Fed. Reg. 22010, to waive the BAA in connection with prime contracts for the subcategory of "commercially available off-the-shelf items" created by the Clinger-Cohen Act of 1996, Pub. L. 104-106 (now codified at 41 U.S.C. § 431), which permits waiver of laws under a statutory scheme that is identical to those governing commercial item subcontracts in general. In response to the FAR Council's May 1996 proposed rule on waiver of laws for commercially available off-the-shelf items, the Section recommended to the FAR Secretariat in comments dated July 12, 1996, that the TAA be added to the list of waived laws in addition to the BAA. FAR Case 96-308 remains open and is still pending before the FAR Council.

Accordingly, the Section recommends that the proposed regulations be revised to retain the existing waiver in the DoD FAR Supplement of the BAA, TAA, and the domestic source restrictions of 10 U.S.C. § 2534 for commercial item subcontracts.

The Section appreciates the opportunity to provide these comments and is available to provide additional

information or assistance as you may require.

Sincerely,

Rand L. Allen

Chair

cc:

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