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October 1, 2001

VIA FEDERAL EXPRESS

Domenico C. Cipicchio
Deputy Director
Defense Procurement
Contract Policy & Administration
OUSD (AT&L)
3060 Defense Pentagon
Washington, DC 20301-3060

**Re: Proposed BAA Exception for Commercial Products:
66 Fed. Reg. 41561 (August 8, 2001)**

Dear Mr. Cipicchio:

On behalf of the Section of Public Contract Law of the American Bar Association ("the Section"), 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 Association'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.¹

¹ Mary Ellen Coster Williams, an Officer of the Public Contract Law Section, did not

(footnote continued to next page)

Mr. Domenico C. Cipicchio

October 1, 2001

Page 2

The Section strongly supports the Department of Defense's proposal to establish a public-interest exception to the Buy American Act ("BAA") for acquisitions subject to the Trade Agreements Act ("TAA") for the purchase of commercial U.S.-made end products that are substantially transformed in the United States and that do not qualify as domestic products under the BAA. Nevertheless, the Section believes that the Department's proposal is too narrow to cure the ills set forth in its "Request for public comments" ("Request").

Accordingly, the Section recommends the extension of the public-interest exception to the BAA to all supplies acquired by DoD that qualify as U.S.-made end products, and not simply to "commercial U.S.-made end products." The Section further recommends the adoption of this policy by all Federal agencies and a change to the Federal Acquisition Regulation ("FAR") to incorporate this policy in all Federal procurements.

Under the current procurement regime, U.S.-made end products that do not qualify as domestic end products are at a competitive disadvantage against the products of designated foreign countries when competing for DoD procurements. *See* 66 Fed. Reg. at 41562. The different BAA and TAA rules of origin also create burdensome record-keeping requirements on firms that offer both domestic and U.S.-made end products and thereby create a disincentive for commercial companies to sell to DoD. *Id.* Adopting the proposed public-interest exception to the BAA will not only help to level the playing field for U.S.-made commercial end products, but will "reduce the incentive to move end product manufacturing facilities to a designated foreign country." *Id.*

The Section agrees with each of the conclusions reached by DoD in its Request, but encourages DoD and other Federal agencies to go even farther. The rationale supporting the change requested by DoD applies with equal weight to all supplies procured by the Federal Government, not just to commercial U.S.-made end products procured by DoD that are substantially transformed in the United States and that do not qualify as domestic products under the BAA. Thus, the Section recommends the

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previous page)*

participate in the Section's consideration of these comments, and she abstained from voting to approve and send this letter.

Mr. Domenico C. Cipicchio
October 1, 2001
Page 3

addition of the following language to FAR 25.103(a) to implement the adoption of this public-interest exception by all Federal agencies:

For procurements subject to the Trade Agreements Act, it is 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.

In the alternative, the Section recommends that, at a minimum, DFARS 225.103(a)(1) be modified as follows to reflect the extension of the proposed public-interest exception to the BAA to all DoD procurements for supplies to which the TAA is applicable:

The Under Secretary of Defense (Acquisition, Technology, and Logistics) has determined that, for procurements subject to the Trade Agreements Act, it is 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.

The adoption of these recommendations will carry out the intent of Section 2502(1) of the TAA, which is “to approve and implement trade agreements negotiated under the Trade Agreements Act of 1974” by, *inter alia*, “foster[ing] the economic growth of and full employment in the United States . . . establish[ing] fairness and equity in international trading relations . . . [and] provid[ing] adequate procedures to safeguard American industry and labor against unfair or injurious import competition. *See* Trade Act of 1974, 19 U.S.C. § 2102.

The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,

Norman R. Thorpe
Chair, Section of Public Contract Law

cc: **Mary Ellen Coster Williams**
Hubert J. Bell, Jr.
Patricia H. Wittie

Mr. Domenico C. Cipicchio

October 1, 2001

Page 4

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