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October 10, 2002

**VIA U.P.S. OVERNIGHT DELIVERY
AND ELECTRONIC MAIL**

 Ms. Amy Williams
 Defense Acquisition Regulations Council
 OUSD(A&T)DP(DAR), IMD 3C132
 3062 Defense Pentagon
 Washington, DC 20301-3062

**Re: Trade Agreements Act -- Exception for U.S.-Made End
Products: DFARS Case 2002-D008**

Dear Ms. Williams:

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 American Bar 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.

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On October 1, 2001, the Section provided comments to the Department of Defense ("DoD") that supported its "Proposed Buy American Act Exception for Commercial U.S.-Made End Products" (66 Fed. Reg. 41561) in procurements subject to the Trade Agreements Act ("TAA"). Nevertheless, in addition to supporting DoD's proposed exception, the Section recommended its extension to all supplies acquired by DoD which qualified as U.S.-Made End Products. The current proposed rule, in essence, adopts the Section's October 1, 2001 recommendations. Accordingly, and consistent with its earlier recommendations, the Section strongly endorses the current proposed change to the DoD Federal Acquisition Regulation ("FAR") Supplement ("DFARS") that would exempt U.S.-Made End Products from the Buy American Act ("BAA") in procurements subject to the TAA.

At the present time, DoD treats U.S.-Made End Products that do not qualify as "domestic end products" as products from a nonqualifying country for BAA evaluation purposes. See DFARS § 225.502(5)(iii). As a result, when evaluating "Foreign Offers," DoD adds a 50 percent factor to the price of the U.S.-Made End Products, which puts these products at a distinct competitive disadvantage with domestic end products and end products that were substantially transformed in a designated, Caribbean Basin, or NAFTA country in competitions subject to the TAA. See DFARS Subpart 225.5.

The proposed change would not only harmonize the DFARS and FAR provisions regarding U.S.-Made End Products for TAA procurements, but would eliminate the incentive for companies to manufacture their products in designated countries, the Caribbean Basin, or NAFTA countries to avoid the application of the 50 percent evaluation factor that currently applies to certain U.S.-Made End Products purchased by DoD. As the proposed rule notes, if adopted this change will "avoid treating products substantially transformed in the United States less favorably than products substantially transformed in a designated, Caribbean Basin, or NAFTA country." 67 Fed. Reg. 49279, ¶ B. Thus, for all of the foregoing reasons, the Section strongly supports adoption of the proposed rule.

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

Sincerely,



Mary Ellen Coster Williams
Chair, Section of Public Contract Law

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