

2000-D301-1

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

Subject: COMMENTS: Alternative to DFARS Case 2000-D301

Dear Ms. Williams:

Below please find comments submitted in response to the above-cited interim rule concerning the regulations implementing recently enacted statutory changes governing the "Buy America" provisions applicable to the government's procurement of vessel propellers.

In short, these comments assert that the language of the interim rule goes beyond the clear meaning of the recently added statutory language by adding restrictions not otherwise included in the statute. As such, this language inappropriately restricts competition for the acquisition of vessel propellers in the United States.

We believe that a simple amendment to the interim rule language would sufficiently implement the statutory language without exceeding the statutory authority.

Background. At the end of the last Congressional session, the Appropriations Committees added three words to existing regulatory language concerning ball and roller bearings that effectively included Vessel Propellers in this restrictive "Buy America" provision.

No Accompanying Legislative Record. There was, however, no accompanying legislative record, as the language was not included in either the House or Senate version of the Bill prior to the Appropriations Conference. Also, there was no report language in either the House or Senate Defense Appropriations Bill and only one short descriptive sentence in the Conference Report.

The Appropriations Language. The language as written states:

“SEC. 8064. None of the funds appropriated in fiscal year 2000 and by this Act (FY2001) may be used for the procurement of vessel propellers and ball and roller bearings other than those produced by a domestic source and of domestic origin...”

This language was written by adding the words, “*and vessel propellers,*” into language that in prior years’ Appropriations Bills had applied solely to ball and roller bearings.

The Interim Rule. In its Interim Rule the Department of Defense (DOD) interpreted this as follows:

“In accordance with Section 8064 of the National Defense Appropriations Act or Fiscal Year 2001 (Public law 106-259), do not use fiscal year 2000 or 2001 funds to acquire vessel propellers other than those produced by a domestic source of domestic origin, i.e., vessel propellers—

- (a) Manufactured in the United States or Canada; and*
- (b) For which all component castings were poured and finished in the United States or Canada.”*

Problem with an Overly Restrictive Definition that is not spelled out in Legislation. From the wording of this interim rule, the drafters clearly sought to provide a definition of the statutory terms, “domestic source and of domestic origin.” However, the definition provided defies the standard definition of “domestic source or domestic origin” in the industry, as well as that historically applied by the Department of Defense to the acquisition of items required to be of “domestic origin.” As such, the drafters have exceeded their authority by adding restrictions to the regulatory language that exceed the clear language of the statute.

How to define Domestic Origin. The issue of how to define when a product meets a statutory requirement to be of “domestic origin” has been the subject of much debate within the procurement community over the past two decades. Through this process, the Department of Defense has defined domestic origin -- for purposes of propellers as well as many other items -- to require that the item be finished and assembled in the United States by a United States firm, with at least 51 percent of the product cost -- components and labor -- stemming from a domestic source. As long as an item otherwise meets this 51% standard, there is no requirement for all components to be made in the United States or for castings to be “poured and finished in the United States or Canada” as stated in this interim rule.

By Exceeding the Historical "Buy America" definitions without Legislative Direction, the Rule is Overbroad and Unduly Restricts Competition.

Historically, the "Buy America" standards have been met as long as the product satisfies the 51% domestic content test outlined above and assembled in the United States. As a result, the interim language adding the restriction that components be "poured and finished in the United States or Canada" misstates the accepted definition of the "domestic origin" term used in the statute. Moreover, by adding this additional requirement, the interim rule results in the improper alteration of a statutory requirement in a manner that is unduly restrictive of competition.

Precedent from Department of Navy Response to "Buy America" Provision in the FY2000 Appropriations Act. Historically, Congress has regularly included various "Buy America" provisions in its Appropriations Acts. For instance, in Section 8105 of H.R. 2561 (Public Law 106-79, DoD Appropriations Act for Fiscal Year 2000) specific ship propulsion systems were required to be "manufactured in the United States by a domestically operated entity." When the resulting regulations faced a challenge by private industry, the Navy stated unequivocally that its role was to comply with the "plain meaning" of the statute, which placed no restrictions on the source of components other than to meet the 51% domestic content rule discussed above.

JCLI believes this rationale also applies to the statute at issue today. Similarly to the case above, Section 8064 of the FY2001 Appropriations Act likewise places no restrictions on the source of components. It requires simply that "(n)one of the funds appropriated in fiscal year 2000 and by this Act may be used for the procurement of vessel propellers ... other than those produced by a domestic source and of domestic origin." In sum, whichever way the Congress mandates a "Buy America" intention with respect to systems procured by the federal government, an unambiguous provision cannot be interpreted to require more than the plain meaning of the statute. Consequently, we believe that propellers that meet the long-accepted 51% domestic content rule surely satisfy the statutory requirements of Section 8064 of the Act.

Harm to the United States Navy. If the Rule is not modified as suggested, the regulation will force the Navy to procure its propeller systems from a single source without any competition. When Section 8064 was first passed, the Navy was in the midst of a procurement for a set of propellers for aircraft carriers. They were able to postpone that procurement. If they had not been able to postpone the procurement, and had been forced to live with the definitions contained within the Interim Rule, the price they would have had to

pay to JCLI's competitor would have been significantly higher than the price quoted by JCLI. This fact was raised to the Navy by the shipyard in charge of the procurement, Newport News Shipbuilding.

Harm to John Crane Lips, Inc., Chesapeake, VA. John Crane Lips, Inc., provides propellers through its American subsidiary in Chesapeake, VA. JCLI does not have a foundry capability at this facility or anywhere else within the United States or Canada. It acquires its castings and some of the work on those castings primarily from its facilities in the Netherlands, a NATO ally with a bi-lateral Defense Procurement Memorandum of Understanding. The facility in Chesapeake then substantially transforms those castings through various accepted industrial processes into the finished product, if the finished product is a monobloc propeller. With more complex propeller systems, JCLI then procures other necessary components from sources within the United States and abroad, and assembles the system in the United States. When it has been required to do this in the past under previous "Buy America" legislation, JCLI has complied with provisions requiring that the system be "manufactured in the United States or Canada," and it still was able to offer a competitively priced, technically competent propeller or propeller system, even though it was at a higher price than had the legislation not been in effect.

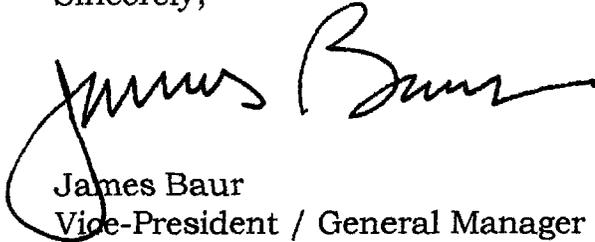
If the interim rule is not modified, JCLI and other potential competitors without a foundry in the United States will not be able to bid on any propeller procurement for the U.S. Navy. It would be impossible to bid without buying propeller castings from its competitor who has a foundry in the United States or from the U.S. Navy propeller facility's foundry in Philadelphia, PA. It is clear that its competitor would not sell castings to JCLI without charging an excessive price, if it would sell them castings at all. Secondly, when this option was explored in the past, the Department of the Navy has ruled that the Navy Propeller Facility cannot sell castings to a private corporation. Consequently, without a change in the Interim Rule, there is a significant risk of economic loss for JCLI because they will be unable to bid on any Navy vessel propeller procurement.

Summary. JCLI believes that language in the Interim Rule imposes an unduly restrictive additional requirement that exceeds the authority of the statute and must be removed. JCLI believes that the first subparagraph in the Interim Rule interprets the Appropriations Bill language sufficiently by requiring vessel propellers to be "manufactured in the United States."

However, JCLI believes that the second section, "for which all component castings were poured or finished in the United States or Canada," goes beyond the letter of the law and should be stricken. Nowhere in the language in Public Law 106-259 is there any reference to components or castings. If the interim

rule is modified as suggested, JCLI and other competitors will still be able to compete for Navy propeller systems so long as they meet the longstanding definition of the "Buy America" term, "domestic origin."

Sincerely,

A handwritten signature in black ink, appearing to read "James Baur". The signature is fluid and cursive, with a large initial "J" and a long horizontal stroke at the end.

James Baur
Vice-President / General Manager