GSA

GSA Office of Governmentwide Policy

MAR 18 2004

MEMORANDUM FOR RONALD POUSSARD
DIRECTOR
DEFENSE ACQUISITION REGULATIONS COUNCIL

FROM: RODNEY P. LANTIER, DIRECTOR
REGULATORY AND FEDERAL ASSISTANCE
PUBLICATIONS DIVISION

SUBJECT: FAR Case 2000-305, Commercially Available Off-the Shelf (COTS) Items

Attached are comments received on the subject FAR case published at 69 FR 2448; January 15, 2004. The comment closing date was March 15, 2004.

Response Number	Date Received	Comment Date	Commenter
2000-305-1	01/23/04	01/23/04	W.S. Spotswood & Sons, Inc.
2000-305-2	01/22/04	01/22/04	Jill K. Dobbins
2000-305-3	02/05/04	02/05/04	Dan Cronin
2000-305-4	02/17/04	02/17/04	Rudy G. Sturgill
2000-305-5	02/18/04	02/18/04	Peter Tuttle
2000-305-6	02/20/04	02/20/04	Gary A. Smith
2000-305-7	02/25/04	02/25/04	Sharon Kaufmann
2000-305-8	02/25/04	02/25/04	Roland Cyr
2000-305-9	03/03/04	02/20/04	Buffalo Supply, Inc.

U.S. General Services Administration
1800 F Street, NW
Washington, DC 20405-0002
www.gsa.gov

Response Number	Date Received	Comment Date	Commenter
2000-305-10	03/11/04	01/01/04	Agilent Technologies
2000-305-11	03/16/04	03/12/04	Dell, Inc.
2000-305-12	03/11/04	03/10/04	The Division of Maritime Programs
2000-305-13	03/11/04	03/11/04	ABA
2000-305-14	03/12/04	03/09/04	LexMarK
2000-305-15	03/15/04	03/12/04	Masters, Mates &Pilots
2000-305-16	03/15/04	03/15/04	IBM
2000-305-17	03/15/04	03/12/04	Veterans Administration
2000-305-18	03/15/04	03/11/04	American Shipbuilding Assoc.,
2000-305-19	03/15/04	03/12/04	International Electronics Manufacturers and Consumers of America
2000-305-20	03/15/04	03/15/04	Ingersoll-Rand Co.
2000-305-21	03/15/04	03/15/04	GSA/OIG
2000-305-22	03/15/04	03/15/04	Canon
2000-305-23	03/15/04	03/15/04	APL
2000-305-24	03/15/04	03/15/04	American Roll-onRoll-Off Carrier, LLC

Response Number	Date Received	Comment Date	Commenter
2000-305-25	03/16/04	03/12/04	Patriot Holdings, LLC
2000-305-26	03/16/04	03/10/04	3M Company
2000-305-27	03/16/04	03/09/04	RPL Management Inc.
2000-305-28	03/16/04	03/16/04	Kathryn Coulter
2000-305-29	03/16/04	03/15/04	U.S. Maritime Administration
2000-305-30	03/16/04	03/15/04	Maersk Line, Ltd.Kenneth C. Gaulden
2000-305-31	03/16/04	03/15/04	ITAA
2000-305-32	03/16/04	03/15/04	Burl Williams
2000-305-33	03/16/04	03/16/04	Selma Munden
2000-305-34	03/16/04	03/15/04	Panasonic
2000-305-35	03/16/04	03/15/04	Hewlett-Packard
2000-305-36	03/16/04	03/15/04	VA(Barbara Latvanas)
2000-305-37	03/16/04	03/15/04	NEMA
2000-305-38	03/16/04	03/15/04	Emergency Committee for American Trade
2000-305-39	03/16/04	03/12/04	Extreme Networks, Inc.
2000-305-40	03/16/04	03/12/04	CSA
2000-305-41	03/16/04	03/15/04	Hoppel, Mayer & Coleman

Response Number	Date Received	Comment Date	Commenter
2000-305-42	03/16/04	03/15/04	POGO
2000-305-43	03/16/04	03/15/04	DoD/ Transportation Command
2000-305-44	03/16/04	03/15/04	OKI Data Corporation
2000-305-45	03/16/04	03/11/04	Xerox
2000-305-46	03/16/04	03/12/04	Information Technology Industry Council
2000-305-47	03/15/04	03/15/04	American Maritime Congress
2000-305-48	03/19/04	03/22/04	AIA
2000-305-49	03/15/04	03/22/04	DOL
2000-305-50	03/15/04	03/22/04	TECO Ocean Shipping
2000-305-51	03/22/04	03/22/04	DOC
2000-305-52	03/23/04	03/15/04	Transportation Institute
2000-305-53	03/23/04	03/23/04	USTR
2000-305-54	03/29/04	03/29/04	Teco Ocean Shipping
2000-305-55	03/29/04	03/29/04	DOL
2000-305-56	06/22/04	04/09/2004	DOD/(USD)

Attachments

[Federal Register: January 15, 2004 (Volume 69, Number 10)]
[Proposed Rules]
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From the Federal Register Online via GPO Access [wais.access.gpo.gov]
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Part III

Department of Defense

General Services Administration

National Aeronautics and Space Administration

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48 CFR Parts 2, 3, 12, et al.

Federal Acquisition Regulation; Commercially Available Off-the-Shelf (COTS) Items; Proposed Rule

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 3, 12, 22, 23, 25, 27, 44, 47, and 52

[FAR Case 2000-305]
RIN 9000-AJ55

305-1

Federal Acquisition Regulation; Commercially Available Off-the-Shelf (COTS) Items

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are soliciting comments regarding the implementation of section 4203 of the Clinger-Cohen Act of 1996, 41 U.S.C. 431 (the Act) with respect to Commercially Available Off-the-Shelf Item acquisitions. The Act requires the Federal Acquisition Regulation (FAR) list certain provisions of law that are inapplicable to contracts for acquisitions of commercially available off-the-shelf items. The Act excludes section 15 of the Small Business Act and bid protest procedures from the list. The list of inapplicable statutes cannot include a provision of law that provides for criminal or civil penalties.

DATES: Interested parties should submit comments in writing on or before March 15, 2004 to be considered in the formulation of a final rule.

ADDRESSES: Submit written comments to General Services Administration, FAR Secretariat (MVA), 1800 F Street, NW., Room 4035, ATTN: Laurie Duarte, Washington, DC 20405.

Submit electronic comments via the Internet to-- farcase.2000-305@gsa.gov.

Please submit comments only and cite FAR case 2000-305 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat at (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Mr. Gerald Zaffos, Procurement Analyst, at (202) 208-6091. Please cite FAR case 2000-305.

SUPPLEMENTARY INFORMATION:

A. Background

Certain laws have already been determined to be inapplicable to all commercial items as a result of the implementation of the Federal Acquisition Streamlining Act of 1994 (see FAR 12.503). On January 30, 2003, the FAR Secretariat issued an *Advanced Notice of Proposed* Rulemaking in the Federal Register (68 FR 4874) that lists the additional provisions of law that could be determined inapplicable to commercially available off-the-shelf (COTS) items. Seven public comments were received. The Commercial Products and Practices Committee reviewed the public comments; identified potential changes to the FAR; and submitted a report, including a draft proposed rule for consideration by the Councils.

The Councils recognize the concerns raised by the U.S. Trade Representative, the Department of Labor, and other agencies regarding the listing of certain laws. The proposed rule does not represent a final decision on any of those laws. Rather, the proposed rule lists the universe of laws that could be determined inapplicable to COTS. The Council is seeking public comments that the Administrator for Federal Procurement Policy will use in making the statutory determination that it would be in the best interest of the Government to maintain certain of those proposed laws.

This is not a significant regulatory action and, therefore, was not

subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The changes may have a significant, but beneficial, economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because the rule exempts the application of a number of laws to businesses, large and small, offering commercially available off-the-shelf items to the Federal Government. An Initial Regulatory Flexibility Act Analysis (IRFA) has been prepared and is summarized as follows:

The objective and legal basis of this rule is to implement the requirements of section 4203 of the Clinger-Cohen Act (Public Law 104-106). Available data indicates that many commercial sales to the Government will come from small businesses. The rule does not impose new reporting or record keeping requirements and does not duplicate, overlap, or conflict with any other Federal rules. The rule is expected to have a beneficial impact on industry because it proposes to exempt purchases of commercially available off-the-shelf items from many Government-unique requirements. Although the rule does not specifically propose different procedures for small versus large entities, existing preferences for small businesses, contained in FAR Part 19, remain unchanged. We believe that the relief from administrative burdens proposed by this rule may serve to motivate more small entities to do business with the Government.

The FAR Secretariat has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the FAR Secretariat. Comments are invited. The Councils will consider comments from small entities concerning the affected FAR parts 2, 3, 12, 22, 23, 25, 27, 44, 47, and 52 in accordance with 5 U.S.C. 610. Comments must be submitted separately and should cite 5 U.S.C. 601, et seq. (FAR case 2000-305), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act applies. It is anticipated that the rule will reduce annual information collection burdens. An estimate of the burden reduction is undetermined at this time. The reduction will be dependant on the estimated burden reductions taken for each provision of law that will be excluded from the final rule. Accordingly, a Paperwork Reduction Act Change to pertinent existing burdens will be submitted to the Office of Management and Budget under 44 U.S.C. 2502, et seq.

List of Subjects in 48 CFR Parts 2, 3, 12, 22, 23, 25, 27, 44, 47, and 52

Government procurement.

Dated: January 9, 2004.
Ralph De Stefano,
Deputy Director, Acquisition Policy Division.

Therefore, DoD, GSA, and NASA propose amending 48 CFR parts 2, 3, 12, 22, 23, 25, 27, 44, 47, and 52 as set forth below:

1. The authority citation for 48 CFR parts 2, 3, 12, 22, 23, 25, 27, 44, 47, and 52 is revised to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 2--DEFINITIONS OF WORDS AND TERMS

2. Amend section 2.101 in paragraph (b) by adding, in alphabetical order, the definition ``Commercially available off-the-shelf item (COTS)'' to read as follows:

2.101 Definitions.

* * * * *

(b) * * *

Commercially available off-the-shelf item (COTS)--(1) Is a subset of a

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commercial item and means any item of supply that is--

(i) A commercial item (as defined in this section);

(ii) Sold in substantial quantities in the commercial marketplace; and

(iii) Offered to the Government, without modification, in the same form in which it is sold in the commercial marketplace.

(2) Does not include bulk cargo, as defined in section 3 of the Shipping Act of 1984 (46 U.S.C. App. 1702), such as agricultural products and petroleum products.

* * * * *

PART 3--IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

3. Revise section 3.503-2 to read as follows:

3.503-2 Contract clause.

The contracting officer shall insert the clause at 52.203-6, Restrictions on Subcontractor Sales to the Government, in solicitations and contracts exceeding the simplified acquisition threshold, except when contracts are for the acquisition of commercially available off-the-shelf items. For the acquisition of commercial items, other than COTS, the contracting officer shall use the clause with its Alternate I.

PART 12--ACQUISITION OF COMMERCIAL ITEMS

4. Amend section 12.102 by adding a sentence to the end of paragraph (a) to read as follows:

12.102 Applicability.

(a) * * * Unless indicated otherwise, all of the policies that apply to commercial items also apply to COTS items defined in 2.101.

* * * * *

5. Amend section 12.301 by--

a. Revising the section heading;

b. Adding a sentence to the end of paragraph (b)(3);

c. Revising the paragraph heading and the first sentence of paragraph (b)(4); and

d. Adding paragraph (b)(5) to read as follows:

12.301 Solicitation provisions and contract clauses.

* * * * *

(b) * * *

(3) * * * When acquiring a COTS item, contracting officers may include Alternate I of the clause when it is in the best interests of the Government.

(4) The clause at 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders--Commercial Items (Other than COTS). This clause incorporates by reference only those clauses required to implement provisions of law or executive orders applicable to the acquisition of commercial items, other than COTS items. * * *

(5) The clause at 52.212-XX, Contract Terms and Conditions Required to Implement Statutes or Executive Orders--Commercially Available Off-the-Shelf (COTS) Items. This clause incorporates by reference only those clauses required to implement provisions of law or Executive orders applicable to the acquisition of COTS items. The contracting officer shall attach this clause to the solicitation and contract and, using the appropriate clause prescriptions, indicate which, if any, of the additional clauses cited in 52.212-XX (b) or (c) are applicable to the specific acquisition. This clause may not be tailored.

* * * * *

Subpart 12.5--Applicability of Certain Laws to the Acquisition of Commercial Items and Commercially Available Off-the-Shelf Items

6. Revise the heading of Subpart 12.5 to read as set forth above.

7. Revise section 12.500 to read as follows:

12.500 Scope of subpart.

(a) As required by sections 34 and 35 of the Office of Federal Procurement Policy Act (41 U.S.C. 401, et seq.), this subpart lists provisions of law that are not applicable to--

(1) Contracts for commercial items;

(2) Subcontracts, at any tier, for the acquisition of commercial items; and

(3) Contracts and subcontracts, at any tier, for the acquisition of COTS items.

(b) This subpart also lists provisions of law that have been amended to eliminate or modify their applicability to either contracts or subcontracts for the acquisition of commercial items.

8. Amend section 12.502 by adding paragraph (c) to read as follows:

12.502 Procedures.

* * * * *

(c) The FAR prescription for the provision or clause for each of the laws listed in 12.505 has been revised in the appropriate part to reflect its proper application to prime contracts for the acquisition of COTS items. For subcontracts for the acquisition of COTS items or COTS components, the clauses at 52.212-XX, Contract Terms and Conditions Required to Implement Statutes or Executive Orders--Commercially Available Off-the-Shelf (COTS) Items, and 52.244-6, Subcontracts for Commercial Items and Commercial Components, reflect the applicability of the laws listed in 12.505 by identifying the only provisions and clauses that are required to be included in a subcontract at any tier for the acquisition of COTS items or COTS components.

12.504 [Amended]

9. Amend section 12.504 in paragraph (a) by removing paragraph (a)(2) and redesignating paragraphs (a)(3) through (a)(12) as (a)(2) through (a)(11), respectively.

10. Add section 12.505 to read as follows:

12.505 Applicability of certain laws to contracts and subcontracts for the acquisition of COTS items.

(a) The following laws are not applicable to contracts or subcontracts, at any tier, for the acquisition of COTS items:

(1) 10 U.S.C. 2631, Transportation of Supplies by Sea (see 52.247-64).

(2) 19 U.S.C. 2501, et seq., Trade Agreements Act (see 52.225-5).

(3) 19 U.S.C. 2512, et seq., Trade Agreements Act (see 52.225-5).

(4) 29 U.S.C. 793, Affirmative Action for Handicapped Workers (see 52.222-36).

(5) 31 U.S.C. 3324, Restrictions on Advance Payments (see Alternate I to 52.212-4 which permits payment upon notice of shipping).

(6) 31 U.S.C. 1352, Limitation on Payments to Influence Certain Federal Transactions (see Subpart 3.8).

(7) 31 U.S.C. 1354(a), Limitation on use of appropriated funds for contracts with entities not meeting veteran's employment reporting requirements (see 22.1302).

(8) 38 U.S.C. 4212, Equal Opportunity for Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans (see 52.222-35).

(9) 38 U.S.C. 4212(d)(1), Employment Reports on Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans (see 52.222-37).

(10) 41 U.S.C. 10a, et seq., Buy American Act--Supplies (see 52.225-1 and 52.225-3).

(11) 41 U.S.C. 43, Walsh-Healey Act (see Subpart 22.6).

(12) 41 U.S.C. 416(a)(6), Minimum Response Time for Offers under Office of Federal Procurement Policy Act (see Subpart 5.2).

(13) 41 U.S.C. 418a, Rights in Technical Data (see sections 12.211 and 27.409).

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(14) 41 U.S.C. 253d, Validation of Proprietary Data Restrictions (see sections 12.211 and 27.409).

(15) 41 U.S.C. 253g and 10 U.S.C. 2402, Prohibition of Limiting Subcontractor Direct Sales to the United States (see 52.203-6).

(16) 41 U.S.C. 254(a) and 10 U.S.C. 2306(b), Contingent Fees (see Subpart 3.4).

(17) 41 U.S.C. 254d(c) and 10 U.S.C. 2513(c), Examination of Records of Contractor (see 52.215-2).

(18) 41 U.S.C. 701, et seq., Drug-Free Workplace Act of 1988 (see Subpart 23.5).

(19) 46 U.S.C. Appx 1241(b), Transportation in American Vessels of Government Personnel and Certain Cargo (see 52.247-64).

(20) 49 U.S.C. 40118, Fly American provisions (see Subpart 47.4).

(b) The requirement for a clause and certain other requirements related to 40 U.S.C. 327, et seq., Requirements for a Certificate and Clause under the Contract Work Hours and Safety Standards Act (see Subpart 22.3), 41 U.S.C. 57(a) and (b), and 41 U.S.C. 58, the Anti-Kickback Act of 1986, and 42 U.S.C. 6962(c)(3)(A), Estimate of Percentage of Recovered Material EPA-Designated Product (limited to the certification and estimate requirements) (see 52.223-9) have been eliminated for contracts and subcontracts at any tier for the acquisition of COTS items (see 3.502).

(c) The applicability of 41 U.S.C. 254(d) and 10 U.S.C. 2306a, Truth in Negotiations Act (see Subpart 15.4) and 41 U.S.C. 422, Cost

Accounting Standards (see section 12.214) have been modified in regards to contracts or subcontracts at any tier for the acquisition of COTS items.

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PART 22--APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

22.1310 [Amended]

11. Amend section 22.1310 by removing the word ``Insert'' from the introductory text of paragraph (a)(1) and adding ``Except for the acquisition of commercially available off-the-shelf items, insert'' in its place.

22.1408 [Amended]

12. Amend section 22.1408 in the introductory text of paragraph (a) by removing the comma after ``$10,000'' and adding ``and are not for the acquisition of commercially available off-the-shelf items,'' in its place.

PART 23--ENVIRONMENT, CONSERVATION, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE

23.406 [Amended]

13. Amend section 23.406 by removing the word ``Insert'' from paragraphs (a) and (b) and adding ``Except for the acquisition of commercially available off-the-shelf items, insert'' in its place.

PART 25--FOREIGN ACQUISITION

14. Amend section 25.401 by--

a. Removing the word ``and'' from the end of paragraph (a)(4);

b. Removing the period at the end of paragraph (a)(5) and adding ``; and'' in its place; and

c. Adding paragraph (a)(6) to read as follows:

25.401 Exceptions.

(a) * * *

(6) Acquisitions for commercially available off-the-shelf items.

* * * * *

15. Amend section 25.1101 by--

a. Removing from the introductory text of paragraph (a)(1) ``or $15,000 for acquisitions as described in 13.201(g)(1)(ii)'';

b. Removing the word ``or'' from the end of paragraph (a)(1)(ii);

c. Removing the period from the end of paragraph (a)(1)(iii) and adding ``; or'' in its place;

d. Adding paragraph (a)(1)(iv); and

e. Removing the word ``Insert'' from the introductory text of paragraph (b)(1)(i) and adding ``Except for the acquisition of commercially available off-the-shelf items, insert'' in its place. The added text reads as follows:

25.1101 Acquisition of supplies.

* * * * *

(a)(1) * * *

(iv) The acquisition is for commercially available off-the-shelf

items.
* * * * *

PART 27--PATENTS, DATA, AND COPYRIGHTS

16. Amend section 27.409 by--
a. Removing the word ``or'' from the end of paragraph(a)(1)(vi);
b. Removing ``. (See 27.408.)'' from the end of paragraph (a)(1)(vii) and adding ``(see 27.408); or'' in its place; and
c. Adding paragraph (a)(1)(viii) to read as follows:

27.409 Solicitation provisions and contract clauses.

(a)(1) * * *
(viii) An acquisition for commercially available off-the-shelf items.
* * * * *

PART 44--SUBCONTRACTING POLICIES AND PROCEDURES

44.400 [Amended]

17. Amend section 44.400 by removing the period at the end of the sentence and adding ``and section 4203 (Pub. L. 104-106).'' in its place.

PART 47--TRANSPORTATION

47.507 [Amended]

18. Amend section 47.507 in paragraph (a)(1) by removing ``Insert'' and adding ``Except for the acquisition of commercially available off-the-shelf items, insert'' in its place.

PART 52--SOLICITATION PROVISIONS AND CONTRACT CLAUSES

52.212-3 [Amended]

19. Amend section 52.212-3 by revising the date of the provision to read ``(Date)''; and in paragraph (e) of the clause by removing the period after ``$100,000'' and adding ``, except for the acquisition of commercially available off-the-shelf items.'' in its place.
20. Amend section 52.212-4 by adding Alternate I to read as follows:

52.212-4 Contract Terms and Conditions--Commercial Items.

* * * * *
(Alternate I (XX/XX)). As prescribed in 12.301(b)(3), substitute the following paragraph (i)(1) for paragraph(i)(1) in the basic clause:
(i)(1) Items accepted. Payment shall be made based upon the Contractor's submission of an invoice that is supported by evidence the Contractor has delivered the supplies to a post office, common carrier, or point of first receipt by the Government. Payment prior to acceptance shall not abrogate the Contractor's responsibilities to replace, repair, or correct--
(i) Supplies not received at destination;
(ii) Supplies damaged in transit; or

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(iii) Supplies that do not conform to the contract.

21. Add section 52.212-XX to read as follows:

52.212-XX Contract Terms and Conditions Required to Implement Statutes or Executive Orders--Commercially Available Off-the-Shelf (COTS) Items.

As prescribed in 12.301(b)(5), insert the following clause:

Contract Terms and Conditions Required To Implement Statutes or Executive Orders--Commercially Available Off-the-Shelf (COTS) Items (Date)

(a) The Contractor shall comply with the following Federal Acquisition Regulation (FAR) clause, which is incorporated in this

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contract by reference, to implement provisions of law or Executive orders applicable to acquisitions of COTS items: 52.233-3, Protest After Award (Aug 1996) (31 U.S.C. 3553).

(b) The Contractor shall comply with the FAR clauses in this paragraph (b) that the Contracting Officer has indicated as being incorporated in this contract by reference to implement provisions of law or Executive orders applicable to acquisitions of COTS items: [Contracting Officer check as appropriate.]

---- (1) 52.219-3, Notice of Total HUBZone Set-Aside (Jan 1999) (15 U.S.C. 657a).

---- (2) 52.219-4, Notice of Price Evaluation Preference for HUBZone Small Business Concerns (Jan 1999) (if the offeror elects to waive the preference, it shall so indicate in its offer) (15 U.S.C. 657a).

---- (3)(i) 52.219-5, Very Small Business Set-Aside (June 2003) (Pub. L. 103-403, section 304, Small Business Reauthorization and Amendments Act of 1994).

---- (ii) Alternate I (Mar 1999) of 52.219-5.

---- (iii) Alternate II (June 2003) of 52.219-5.

---- (4)(i) 52.219-6, Notice of Total Small Business Set-Aside (June 2003) (15 U.S.C. 644).

---- (ii) Alternate I (Oct 1995) of 52.219-6.

---- (5)(i) 52.219-7, Notice of Partial Small Business Set-Aside (June 2003) (15 U.S.C. 644).

---- (ii) Alternate I (Oct 1995) of 52.219-7.

---- (6) 52.219-8, Utilization of Small Business Concerns (Oct 2000) (15 U.S.C. 637(d)(2) and (3)).

---- (7)(i) 52.219-9, Small Business Subcontracting Plan (Jan 2002) (15 U.S.C. 637(d)(4)).

---- (ii) Alternate I (Oct 2001) of 52.219-9.

---- (iii) Alternate II (Oct 2001) of 52.219-9.

---- (8) 52.219-14, Limitations on Subcontracting (Dec 1996) (15 U.S.C. 637(a)(14)).

---- (9)(i) 52.219-23, Notice of Price Evaluation Adjustment for Small Disadvantaged Business Concerns (June 2003) (Pub. L. 103-355, section 7102, and 10 U.S.C. 2323). (if the offeror elects to waive the adjustment, it shall so indicate in its offer).

---- (ii) Alternate I (June 2003) of 52.219-23.

---- (10) 52.219-25, Small Disadvantaged Business Participation Program--Disadvantaged Status and Reporting (Oct 1999) (Pub. L. 103-355, section 7102, and 10 U.S.C. 2323).

---- (11) 52.219-26, Small Disadvantaged Business Participation Program--Incentive Subcontracting (Oct 2000) (Pub. L. 103-355, section 7102, and 10 U.S.C. 2323).

---- (12) 52.222-3, Convict Labor (June 2003) (E.O. 11755).

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---- (13) 52.222-19, Child Labor--Cooperation with Authorities and Remedies (Sep 2002) (E.O. 13126).

---- (14) 52.222-21, Prohibition of Segregated Facilities (Feb 1999).

---- (15) 52.222-26, Equal Opportunity (Apr 2002) (E.O. 11246).

---- (16) 52.225-13, Restrictions on Certain Foreign Purchases (Dec 2003) (E.O.'s proclamations, and statutes administered by the Office of Foreign Assets Control of the Department of the Treasury).

---- (17) 52.225-15, Sanctioned European Union Country End Products (Feb 2000) (E.O. 12849).

---- (18) 52.232-29, Terms for Financing of Purchases of Commercial Items (Feb 2002) (41 U.S.C. 255(f), 10 U.S.C. 2307(f)).

---- (19) 52.232-30, Installment Payments for Commercial Items (Oct 1995) (41 U.S.C. 255(f), 10 U.S.C. 2307(f)).

---- (20) 52.232-33, Payment by Electronic Funds Transfer--Central Contractor Registration (Oct 2003) (31 U.S.C. 3332).

---- (21) 52.232-34, Payment by Electronic Funds Transfer--Other than Central Contractor Registration (May 1999) (31 U.S.C. 3332).

---- (22) 52.232-36, Payment by Third Party (May 1999) (31 U.S.C. 3332).

(c)(1) Notwithstanding the requirements of the clauses in paragraphs (a) and (b) of this clause, the Contractor is not required to flow down any FAR clause, other than those in paragraphs (i) through (ii) of this paragraph in a subcontract for COTS items. Unless other-wise indicated below, the extent of the flow down shall be as required by the clause--

(i) 52.219-8, Utilization of Small Business Concerns (Oct 2000) (15 U.S.C. 637(d)(2) and (3)), in all subcontracts that offer further subcontracting opportunities. If the subcontract (except subcontracts to small business concerns) exceeds $500,000 ($1,000,000 for construction of any public facility), the subcontractor must include 52.219-8 in lower tier subcontracts that offer subcontracting opportunities.

(ii) 52.222-26, Equal Opportunity (Apr 2002) (E.O. 11246).

(2) While not required, the Contractor may include in its subcontracts for COTS items a minimal number of additional clauses necessary to satisfy its contractual obligations.

(End of clause)

22. Amend section 52.244-6 by--

a. Revising the date of the clause to read ``(Date)'';

b. In paragraph (a) of the clause by adding, in alphabetical order, the definition ``Commercially available off-the-shelf item'';

c. In paragraph (c)(1)(iii) of the clause by removing the semicolon at the end of the paragraph and adding ``. (This clause does not apply to subcontracts for commercially available off-the-shelf items.)'' in its place; and

d. Adding ``(This clause does not apply to subcontracts for commercially available off-the-shelf items.)'' to the end of paragraphs (c)(1)(iv) and (c)(1)(v) of the clause. The added definition reads as follows:

52.244-6 Subcontracts for Commercial Items.

* * * * *

Subcontracts for Commercial Items (Date)

(a) * * *

Commercially available off-the-shelf item has the meaning contained in the clause at 52.202-1, Definitions.

* * * * *

2000-305-2

"Dobbins, Jill"
<jdobbins@cessna.textron.com>

01/22/2004 05:08 PM

To: "'farcase.2000-305@gsa.gov'" <farcase.2000-305@gsa.gov>
cc:
Subject: FAR Case 2000-305

The Part 2 proposed definition as currently written for a COTS does not provide for a COTS service to be included within its parameters. As FAR 2.101 is currently written, commercial item means...'Installation services, maintenance services, repair services, training services, and other services if - Services of a type offered and sold competitively in substantial quantities in the commercial marketplace based on established catalog or market prices for specific tasks performed under standard commercial terms and conditions....'

If the COTS definition is to be complete and truly represent a 'subset' of a commercial item, the proposed rule should examine the inclusion of services as defined and limited in Part 2. Recommend revisiting the definition for COTS to include services as currently allowed for commercial item acquisitions.

Thank you.

Jill K. Dobbins
Cessna Aircraft Company
Manager, Gov't Contract Administration
(316)517-8055
(316)517-5658 (Fax)
(316)206-6154 (PC Fax)

2000-305-3

"Cronin, Dan" <Dan.Cronin@ssa.gov >

02/05/2004 07:52 AM

To: "'farcase.2000-305@gsa.gov'" <farcase.2000-305@gsa.gov>
cc:
Subject: FAR Case 2000-305; Commercially Available Off-the-Shelf Items

Ladies and gentlemen,

The Social Security Administration offers the following comments on the subject proposed rule.

1. In FAR section 25.100, change the second sentence to read: "Except for the acquisition of commercially available off-the-shelf items, the Buy American Act applies to supplies acquired for use ..."

2. In FAR section 25.103, add a new exception as follows: "(e) The acquisition is for a commercially available off-the-shelf item."

Thanks you,

Dan Cronin, Director
Division of Policy and Information Management
Office of Acquisition and Grants
410-965-9540
dan.cronin@ssa.gov

2000-305-4

"Sturgill, Rudy"
<sturgillr@milvets.com
>

To: Farcase.2000-305@gsa.gov
cc: "Sturgill, Rudy" <sturgillr@milvets.com>
Subject: FAR case 2000-305

02/17/2004 08:53 AM

Mr. Al Matera,
We would first like to thank you for the opportunity to be able to express an opinion on Off-The-Shelf items. In as much as Off-The-Shelf commercial items do not effect our business directly we only have the concern of the 508 disability compliance. As a Disabled Veteran owner company ensuring compliance with 508 and those who have disabilities should always be addressed. In your supplementary information you have addressed certain US code determined inapplicable provisions to commercial off-the-shelf items. We believe that depending on the items procured these inapplicable provisions come into play. While everyone wants to emerge as making the correct decision often offices take that which is provided as a guideline and make it a standard which causes procurement erosion after a few years. I.E. (that which could be determined) We recommend a clear understanding of those items for Off-The-Shelf that will "not" add costs to the government down the road by bringing them in compliance with the needs of individuals with disabilities. We again thank you for this opportunity to comment and look forward to the final provisions. Should there be any questions please feel free to contact me at the below address and/or phone number.
Best Regards and thank you,

Rudy G Sturgill
Executive, Business Development
Milvets
SDVO/HUBZone/Small Business
4601 Forbes Rd, Lanham Md. 20706
301-731-1849 wk
240-304-1349 cell
sturgillr@milvets.com
WWW.MILVETS.COM

2000-305-5

"Tuttle, Peter" <PeterT@distributedinc.com>

02/18/2004 09:41 AM

To: farcase.2000-305@gsa.gov
cc: "Falcone, Ron" <RonF@distributedinc.com>
Subject: FAR Case 2000-305 FAR: Commercially Available Off-the-Shelf (COTS) Items

1. Issue.

We are concerned that a portion of the proposed definition of COTS (FAR 2.101 "Definitions" (b)(iii) "Offered to the Government, without modification, in the same form in which it is sold to the commercial marketplace.", contains language which does not reflect industry's understanding of the nature of COTS. The phrase "without modification" is unduly restrictive and does not take into account that some COTS products may require some type of modification to suit the intended use of the product.

2. Discussion.

a. There does not appear to be a general consensus on what COTS is, exactly, but there does seem to be a level of understanding that some modifications may need to be made to some COTS products in order to address customer requirements. See the attached document for several examples of differing opinions, with selected text highlighted in "red." The table in the attached document brings to light the notion of different levels of COTS modifications.

b. The phrase "without modification" does not take into account the likelihood that most COTS products, especially software, may require modification, and yet still logically retain their COTS categorization. Some firms use the term "customization" (modifying source code) versus "configuration" (changes that do not require source code modifications) as the discriminator between COTS and other than COTS.

3. Recommendation.

Either remove the phrase "without modification" from the definition entirely, or revise it to embrace the concept that some level of modifications is allowable to COTS products, without the products losing their identity as COTS products. Perhaps an amplification that the word modification, in this context, is meant as a change that affects the existing nature and purpose of the COTS product, as opposed to a customization or configuration that adjusts the product to the customer's intended use without changing its existing nature and/or purpose.

Questions can be directed to the undersigned or Ron Falcone at Distributed Solutions, Inc., (703) 471-7530.

Thanks for the opportunity to comment.

Regards,

Peter Tuttle, CPCM
Distributed Solutions, Inc.

COTS Backup.doc

Several examples of definitions and discussion of COTS modifications:

Webopedia.com (http://www.webopedia.com/TERM/C/COTS.html) - ***commercial off-the-shelf***, an adjective that describes software or hardware products that are ready-made and available for sale to the general public. For example, Microsoft Office is a COTS product that is a packaged software solution for businesses. COTS products are designed to be implemented easily into existing systems **without the need for customization**.

CeBase.org
(http://www.cebase.org/www/frames.html?/www/researchActivities/COTS/definition.html)

- Our working definition is: a software product,

- developed by a third party (who controls its ongoing support and evolution),
- bought, licensed, or acquired
- for the purposes of integration into a larger system as an integral part, i.e. that will be delivered as part of the system to the customer of that system (i.e. not a tool),
- which **might or might not allow modification at the source code level**,
- **but may include mechanisms for customization**,
- and is bought and used by a significant number of systems developers.

Dacs.dtic.mil (http://www.dacs.dtic.mil/techs/cots/toc.shtml) COTS may be one of the most diversely defined terms in current software development. Not surprisingly, different organizations and individuals mean different things for COTS.

We discuss now various characteristics and issues raised by the term COTS: origin, or who develops it, **modifiability, or whether it can be modified or not**, cost and property, its form of packaging, whether it is integrated in the final deliverable or not, and the type of delivered functionality.

The web page at http://www.dacs.dtic.mil/techs/cots/systemsPart2.shtml also appears to indicate that some level of modification may be required for COTS products. It depends on both the product and its intended use.

Origin and Modifiability of COTS.

Independent Commercial Item	Commercial Product with Escrowed Source Code		Oracle Financial		Microsoft Office
Special Version of Commercial Item					Standard compiler with specialized pragmas
Component Produced by Contract				Standard industry with custom systems	
Existing Components from External Sources		Standard gov't practice with NDI			Legacy component whose source code is lost

Component Produced In-house	Most existing custom systems				
	Extensive Reworking of Code	**Internal Code Revision**	**Necessary Tailoring and Customization**	**Simple Parameterization**	**Very Little or no Modification**

Table proposed by [Carney and Long 2000], considers origin and modifiability of COTS and reports some examples.

2000-305-6

Gary.Smith@mdhelicopters.com

02/20/2004 10:39 AM

To: farcase.2000-305@gsa.gov
cc:
Subject: FAR Case 2000-305

MD Helicopters, Inc. is an Arizona corporation manufacturing single and twin engine commercial light helicopters. Its sole production plant is located in Mesa, Arizona. MD Helicopters, Inc. is the successor in interest to what once was the Hughes Helicopter Company, McDonnell Douglas Helicopter Company and The Boeing Company product. Products are sold worldwide.

MD Helicopters, Inc. opposes the inclusion of the Buy American Act (41 USCA Section 10a, et seq.) and the Trade Agreement Act (19 UCS Section 2501, et seq.) in the list of laws not applicable to contracts or subcontracts at any tier for the acquisition of commercially available off-the-shelf items, as contained in the proposed FAR 12.505(a). MD Helicopters, Inc. joins in the position expressed by the Office of the US Trade Representative.

These laws should not be included in the list without the appropriate application of the principles of reciprocity. In MD Helicopters, Inc.'s attempts to sell helicopters around the world, it has met with significant anticompetitive practices in government procurements in Italy. Even in the face of judicial court orders to follow the competitive rules, certain agencies have awarded sole source contracts to Agusta, the indigenous helicopter manufacturer. In France, the government will ignore a proposal from a foreign source. The French government has been cited by the European Union for its anticompetitive practices. Although MD Helicopters, Inc. has been somewhat successful with local governments in Germany, the Federal government is basically off limits to foreign competition as well. Both France and Germany opt for their indigenous manufacturer, Eurocopter. To a lesser extent, the Brazilian government favors Eurocopter as well, because of a Eurocopter plant located in their country.

Gary A. Smith
General Counsel
MD Helicopters, Inc.
4555 E McDowell
Mesa, AZ 85215 USA
Pho (480)346-6140
Fax (480)346-6802

2000-305-7

"Sharon Kaufmann" <skaufmann@caci.com>

02/25/2004 07:17 AM

To: farcase.2000-305@gsa.gov
cc: RobuckJ@pentagon.af.mil, "Soderquist James Civ OO-ALC/PKL" <James.Soderquist@HILL.af.mil>, Joyce.Allen@eis.army.mil, "Jim Hargrove" <jhargrove@caci.com>, "Allen Harrison" <Allen_Harrison@amsinc.com>
Subject: FAR Case 2000-305

FAR Case 2000-305 was published in the Federal Register on January 15, 2004 as a Proposed rule with request for comments NLT March 15, 2004.

As a part of this proposed rule, a new FAR clause would be introduced: 52.212-XX, Contract Terms and Conditions Required to Implement Statutes or Executive Orders--Commerically Available Off-the-Shelf (COTS) Item. The text of the proposed new clause implies that the Contracting Officer would have to place checks in the appropriate list of clauses in paper form.

Since DoD has moved towards paperless acquisition, such as the Standard Procurement System (SPS) and other automated systems, the requirements of the clause would be fulfilled using a process called Automatic Clause Selection. Automatic clause selection provides a list of suggested clauses for the Contracting Officer to chose which ones are appropriate for the acquisition.

We would like to recommend that an Alternate I to this clause be introduced as well. The following attachments contain the text of the proposed 52.212-XX and the text of the recommended Alternate I:

Sharon Kaufmann
Lead Procurement Analyst
Defense Acquisition Automation
CACI
(703) 227-4197 (office)
skaufmann@caci.com


52.212XX.doc


52.212XXAltI.doc

305-1

52.212-XX Contract Terms and Conditions Required to Implement Statutes or Executive Orders--Commercially Available Off-the-Shelf (COTS) Items.

As prescribed in 12.301(b)(5), insert the following clause:

Contract Terms and Conditions Required To Implement Statutes or Executive Orders--Commercially Available Off-the-Shelf (COTS) Items (Date)

(a) The Contractor shall comply with the following Federal Acquisition Regulation (FAR) clause, which is incorporated in this contract by reference, to implement provisions of law or Executive orders applicable to acquisitions of COTS items: 52.233-3, Protest After Award (Aug 1996) (31 U.S.C. 3553).

(b) The Contractor shall comply with the FAR clauses in this paragraph (b) that the Contracting Officer has indicated as being incorporated in this contract by reference to implement provisions of law or Executive orders applicable to acquisitions of COTS items: [Contracting Officer check as appropriate.]

---- (1) 52.219-3, Notice of Total HUBZone Set-Aside (Jan 1999) (15 U.S.C. 657a).

---- (2) 52.219-4, Notice of Price Evaluation Preference for HUBZone Small Business Concerns (Jan 1999) (if the offeror elects to waive the preference, it shall so indicate in its offer) (15 U.S.C. 657a).

---- (3)(i) 52.219-5, Very Small Business Set-Aside (June 2003) (Pub. L. 103-403, section 304, Small Business Reauthorization and Amendments Act of 1994).

---- (ii) Alternate I (Mar 1999) of 52.219-5.

---- (iii) Alternate II (June 2003) of 52.219-5.

---- (4)(i) 52.219-6, Notice of Total Small Business Set-Aside (June 2003) (15 U.S.C. 644).

---- (ii) Alternate I (Oct 1995) of 52.219-6.

---- (5)(i) 52.219-7, Notice of Partial Small Business Set-Aside (June 2003) (15 U.S.C. 644).

---- (ii) Alternate I (Oct 1995) of 52.219-7.

---- (6) 52.219-8, Utilization of Small Business Concerns (Oct 2000) (15 U.S.C. 637(d)(2) and (3)).

---- (7)(i) 52.219-9, Small Business Subcontracting Plan (Jan 2002) (15 U.S.C. 637(d)(4)).

---- (ii) Alternate I (Oct 2001) of 52.219-9.

---- (iii) Alternate II (Oct 2001) of 52.219-9.

---- (8) 52.219-14, Limitations on Subcontracting (Dec 1996) (15 U.S.C. 637(a)(14)).

---- (9)(i) 52.219-23, Notice of Price Evaluation Adjustment for Small Disadvantaged Business Concerns (June 2003) (Pub. L. 103-355, section 7102, and 10 U.S.C. 2323). (if the offeror elects to waive the adjustment, it shall so indicate in its offer).

---- (ii) Alternate I (June 2003) of 52.219-23.

---- (10) 52.219-25, Small Disadvantaged Business Participation Program--Disadvantaged Status and Reporting (Oct 1999) (Pub. L. 103-355, section 7102, and 10 U.S.C. 2323).

---- (11) 52.219-26, Small Disadvantaged Business Participation Program--Incentive Subcontracting (Oct 2000) (Pub. L. 103-355, section 7102, and 10 U.S.C. 2323).

---- (12) 52.222-3, Convict Labor (June 2003) (E.O. 11755).

---- (13) 52.222-19, Child Labor--Cooperation with Authorities and Remedies (Sep 2002) (E.O. 13126).

---- (14) 52.222-21, Prohibition of Segregated Facilities (Feb 1999).

---- (15) 52.222-26, Equal Opportunity (Apr 2002) (E.O. 11246).

---- (16) 52.225-13, Restrictions on Certain Foreign Purchases (Dec 2003) (E.O.'s proclamations, and statutes administered by the Office of Foreign Assets Control of the Department of the Treasury).

---- (17) 52.225-15, Sanctioned European Union Country End Products (Feb 2000) (E.O. 12849).

---- (18) 52.232-29, Terms for Financing of Purchases of Commercial Items (Feb 2002) (41 U.S.C. 255(f), 10 U.S.C. 2307(f)).

---- (19) 52.232-30, Installment Payments for Commercial Items (Oct 1995) (41 U.S.C. 255(f), 10 U.S.C. 2307(f)).

---- (20) 52.232-33, Payment by Electronic Funds Transfer--Central Contractor Registration (Oct 2003) (31 U.S.C. 3332).

---- (21) 52.232-34, Payment by Electronic Funds Transfer--Other than Central Contractor Registration (May 1999) (31 U.S.C. 3332).

---- (22) 52.232-36, Payment by Third Party (May 1999) (31 U.S.C. 3332).

(c)(1) Notwithstanding the requirements of the clauses in paragraphs (a) and (b) of this clause, the Contractor is not required to flow down any FAR clause, other than those in paragraphs (i) through (ii) of this paragraph in a subcontract for COTS items. Unless other-wise indicated below, the extent of the flow down shall be as required by the clause--

(i) 52.219-8, Utilization of Small Business Concerns (Oct 2000) (15 U.S.C. 637(d)(2) and (3)), in all subcontracts that offer further subcontracting opportunities. If the subcontract (except subcontracts to small business concerns) exceeds $500,000 ($1,000,000 for construction of any public facility), the subcontractor must include 52.219-8 in lower tier subcontracts that offer subcontracting opportunities.

(ii) 52.222-26, Equal Opportunity (Apr 2002) (E.O. 11246).

(2) While not required, the Contractor may include in its subcontracts for COTS items a minimal number of additional clauses necessary to satisfy its contractual obligations.

(End of clause)

305-1

FAR language for Alternate I: Use the clause with Alternate I when contracts are prepared using an electronic contract writing system.

As prescribed in 12.301(b)(5), insert the following clause:

Contract Terms and Conditions Required To Implement Statutes or Executive Orders--Commercially Available Off-the-Shelf (COTS) Items (Date) Alternate I

(b) The Contractor shall comply with the FAR clauses that the Contracting Officer has indicated elsewhere in this contract as being incorporated by reference.

2000-305-8

Laurie A. Duarte
02/25/2004 10:17 AM

To: farcase.2000-305@gsa.gov
cc:
Subject: Comment from Office of Audit, OIG, EPA

Gerald Zaffos
02/25/2004 09:50 AM

To: Laurie A. Duarte/MVA/CO/GSA/GOV@GSA
cc:
Subject: Re: Request for Comments - Proposed FAR Rule - Commercially Available Off-the-Shelf (COTS) Items

According to Mr. Cyr, he was trying to send the comment to the website below. So, yes, it is meant to be a comment on the proposed rule.

Jerry Zaffos
Phone: 202-208-6091
Fax: 202-501-3341

Laurie A. Duarte

----- Forwarded by Gerald Zaffos/MVP/CO/GSA/GOV on 02/25/2004 08:11 AM -----

Cyr.Roland@epamail.epa.gov
02/25/2004 08:07 AM

To: gerald.zaffos@gsa.gov
cc:
Subject: Re: Request for Comments - Proposed FAR Rule - Commercially Available Off-the-Shelf (COTS) Items

Dear Mr. Wyborski,

On behalf of the Office of Audit, Office of Inspector General, Michael Petscavage has reviewed the Proposed FAR Rule - Commercially Available Off-the-Shelf (COTS) Items [FAR case 2000-305]. We do not have any comments to offer.

Should you have any questions, please let me know.

Roland Cyr
Office of Audit
Office 202-566-2528
Cell 202-641-1510

Larry Wyborski
01/26/2004 01:59 PM

To: OARM-OAM-ALL,
cc: OARM-OAM-RCODIST, OARM-OAM-CCRC
Subject: Request for Comments

305-8

- Proposed FAR Rule - Commercially Available Off-the-Shelf (COTS) Items

Your comments are requested on the subject proposed rule. Please click on the site below to view the rule.

http://www.acqnet.gov/far/ProposedRules/2000-305a.pdf

The Clinger-Cohen Act of 1996 (41 U.S.C. 431) requires that the FAR list certain provisions of law that are inapplicable to contracts for acquisitions of commercially available off-the-shelf (COTS) items. The proposed rule addresses this requirement.

Please forward electronic comments to Larry Wyborski (wyborski.larry@epa.gov) in the Office of Acquisition Management's Policy and Oversight Service Center by close of business on Friday, February 27, 2004. Comments should be routed through your normal chain of command prior to submission.

Larry may be reached on (202) 564-4369, if you have questions.

BUFFALO SUPPLY
INCORPORATED

2000-305-9

February 20, 2004

General Services Administration
FAR Secretariat (MVA)
1800 F Street NW, Room 4035
Attn: Laurie Duarte
Washington DC 20405

Re: Comments on Proposed Rule -- FAR Case 2000-305 – "Commercially Available Off-the-Shelf Items"

Dear Ms. Duarte:

On behalf of Buffalo Supply, Inc. ("BSI"), I am submitting the following comments on the proposed rule. As detailed below, BSI supports the proposed rule and also suggests two minor modifications to ensure its clarity.

By way of background, BSI is a woman-owned small business that provides medical, laboratory, safety, and hardware supplies and equipment throughout the United States, principally to federal government customers, through Federal Supply Schedule ("FSS") contracts with both the Department of Veterans Affairs and the General Services Administration. BSI has received several awards for its service to the federal marketplace.

BSI serves as a distributor of the products that appear on its FSS contracts. The products that BSI sells to federal customers all meet the definition of "commercial item" as it appears in FAR 2.101 and also meet the definition of "commercially available off-the-shelf item (COTS)" as it appears in FAR 2.101 under the proposed rule.

Some general comments are warranted before we address specific elements. The proposed rule is a fundamental tenet of procurement reform that is long overdue. As you know, the requirement to establish reduced regulatory and contractual burdens was enacted into law over seven years ago with the passage of Section 4203 of the Clinger-Cohen Act, 41 U.S.C. § 431. In the interim, the government has lost numerous valuable opportunities to purchase COTS items at fair and reasonable prices that are consistent with or better than prices available in the commercial marketplace. The quality, safety and reliability of COTS items also are validated by commercial customers. This market validation further reduces the costs associated with government purchases, as well as the burdens on

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government procurement budgets and, ultimately, those on taxpayers. We strongly urge that the FAR Secretariat move quickly after the period comment closes on March 15 to review comments and implement the regulatory changes.

We also urge that the FAR Secretariat provide contracting officers with guidance to modify existing contracts to include these new provisions. BSI's FSS contracts, like those of many COTS suppliers, may have a duration of as long as twenty (20) years. Given the length of these contracts and the fact that they generally are in their first five years of existence, specific instructions to modify such clauses into FSS and other long-term indefinite delivery, indefinite quantity contracts will fulfill the intent of Congress as expressed in the Clinger-Cohen Act as well as in this proposed rule.

We want to endorse specifically one aspect of the proposed rule. As drafted, the proposed rule eliminates the applicability of the Buy American Act ("BAA") and the Trade Agreements Act ("TAA") to COTS procurements. These laws, and their implementing regulations and contract clauses, are out of place in the contemporary international market for commercial items. The complex and ever-changing nature of the sourcing decisions that confront commercial technology manufacturers make compliance with these provisions difficult and, in some cases, impossible. Even in the limited circumstances in which sourcing can be monitored on a real-time basis, the compliance burdens and costs are time-consuming and, once again, drive up the costs of the commercial products purchased by the federal government.

The application of the BAA and TAA to commercial item contracts has had an adverse impact on small businesses such as BSI. BSI has had to make a substantial investment in monitoring the BAA and TAA compliance of the products that it sells to the federal government, since the manufacturers themselves lack appropriate controls. These compliance costs both affect BSI's revenues and the prices that federal government customers pay.

For these reasons, BSI applauds the inclusion of the BAA and TAA on the list of laws that are inapplicable to COTS procurements appearing at FAR 12.505 of the proposed rule. For clarity, BSI recommends that the FAR Secretariat carefully review each of the FAR clauses that implement the BAA and the TAA and consider including those in the parentheticals in proposed FAR 12.505(a)(2), (3) and (10). For example, the proposed rule identifies only FAR 52.225-5 as a TAA clause that will be inapplicable in COTS procurements and only FAR 52.225-1 and –3 as BAA clauses that will be inapplicable in such procurements. However, other clauses in this series also generate TAA and BAA obligations. See FAR 52.225-6 (TAA certificate; FAR 25.1101(c)(2) requires it to be included in a solicitation or contract only when FAR 52.225-5 applies); FAR 52.225-2 (BAA certificate; FAR 25.1101(a)(2) requires it to be included only when FAR 52.225-1 applies). Moreover, FAR 52.225-3 and –4 also are clauses that implement BAA and TAA waivers as implemented in the Caribbean Basin Trade Initiative, North American Free Trade Agreement and the Israeli Trade Act. See FAR 25.400, 25.404, 25.405, 25.406. BSI asks that all of these clauses be referenced specifically as inapplicable to COTS procurement.

305-9

BSI also suggests one other modification or addition. The definition of COTS items at proposed FAR 2.101(b)(1)(ii) requires that the item be "[s]old in substantial quantities in the commercial marketplace...." As a distributor of COTS items for manufacturers, BSI is concerned that this language could create some confusion about whether the "substantial quantities" must be sold by the contractor itself, or whether an item meets the test if the item itself is sold in substantial quantities by multiple vendors. Although the plain language of the rule suggests that the test is whether the "item of supply...is – [s]old in substantial quantities in the commercial marketplace...", FSS contracting officers may disregard this plain language and decline to provide the reduced regulatory and contractual burdens afforded by the proposed rule to small business distributors that do not, in the contracting activity's judgment, sell "substantial quantities" of the items by themselves. There is precedent for such a concern: FSS contracts require distributors that do not have "significant sales" of commercial products on their own to obtain detailed pricing and discounting information from the manufacturers that they represent, and to disclose that information to the government as a prerequisite to receiving FSS contract awards or adding products to the contracts. See GSAR 515.408(b)(5). The language of that regulation and its intent (to ensure fair and reasonable pricing) is very different from the intent of Clinger-Cohen and the proposed rule. Yet the similarity of the language may cause FSS contracting officers to deny the benefits of the law and new regulations to small business such as BSI. We recommend that the FAR Secretariat either modify the proposed rule to make clear that the "substantial quantities" test applies to the item and not the vendor, or else provide clarifying guidance to that effect in the final rule.

We have very much appreciated this opportunity to provide comments on the proposed rule, and hope that you will incorporate them into the final rule. Should you have any questions about the comments, please do not hesitate to contact me.

Sincerely,

Harold Jackson
Vice President

2000-305-10

Agilent Technologies, Inc.
395 Page Mill Road
PO Box 10395
Palo Alto, California 94303-0870

Agilent Technologies

March 1, 2004

General Services Administration
FAR Secretariat (MVA)
1800 F Street, NW Room 4035
Attn: Laurie Duarte
Washington, DC 20405

Ref: FAR Case 2000-305

Dear Ms. Duarte:

Agilent Technologies is pleased to submit comments in response to the Proposed Rule published in the January 15, 2004 edition of the Federal Register (69FR2448). We applaud the inclusion of the Trade Agreements Act of 1979 (TAA) and the Buy America Act in the list of "provisions of law" that should be waived for federal purchases of commercial off-the –shelf products (COTS). We support its inclusion in the final rule.

Agilent Technologies ranks first worldwide in a broad array of market categories that span communications, electronics, and life sciences. As a technology driven company, Agilent is globally focused. In the past year, approximately 60% of the company's revenues came from outside the US. Originally as Hewlett Packard and since 1999, Agilent has provided a wide variety of products and services to the federal government for over 60 years. Currently sales to the US government account for less than 5% of our annual revenues of $6.1 billion.

Over the past decade great strides have been made by Congress and the executive agencies to make changes to the federal procurement process for commercial items that reflect commercial business practices. Uniformly industry has identified compliance with TAA and related BAA as the last major procurement requirement that adds to the complexity and cost in place administrative processes to assure products delivered to the government comply with these regulations. COTS products should be thought of as goods that are not unique to any customer and can be delivered to the government without consideration of product related differences.

3/11/04

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Global companies, such as Agilent, have manufacturing facilities around the world. Agilent has, and will, make decisions on manufacturing strategies based on factors other than compliance with TAA. In many cases we have been required to put in place manufacturing procedures to meet these US Government unique requirements. There is a cost incurred in these procedures that cannot be passed on to the government in the pricing of commercial items. There have also been cases where Agilent is no longer able to offer products and/or product lines that are now only sourced from non-compliant countries.

Agilent offers many technologies that are widely used throughout the government in support of Homeland Security, Communications, Surveillance, and general purpose test equipment. We value the Government as a customer and will continue to support their many endeavors. However, we compete in global markets that will continue to require Agilent and other companies to make strategic global decisions on product sourcing. Over the long term without relief from TAA there may be products or product lines from a wide variety of information technology companies that will no longer be available for purchase by the US Government.

Agilent joins many in industry and the government in supporting the finalization of the proposed rule with TAA included in the list of regulations that are exempted from the procurement of commercial off the shelf items. This extends the commercial product procurement regulation changes necessary to assure the latest and best commercial technology is available to the US Government.

Thank you for the opportunity to comment on this important matter.

Sincerely,

Ned Barnholt
Chairman, President and CEO
Agilent Technologies, Inc.

2000-305-11

March 12, 2004

General Services Administration
FAR Secretariat (MVA)
1800 F Street, N.W., Room 4035
ATTN: Laurie Duarte
Washington, D.C. 20405

RE: FAR Case 2000-305

EMAIL ADDRESS: farcase.2000-305@gsa.gov

Dear Ms. Duarte:

Dell, Inc. appreciates the opportunity to comment on the proposed rule published in the January 15, 2004 edition of the Federal Register (69 FR 2448) pertaining to the acquisition of commercial off the shelf (COTS) items. The proposed rule clearly establishes that certain laws, including the Trade Agreements Act, 19 U.S.C. 2512, et seq. (TAA) and the Buy American Act, 41 U.S.C. 10a, et seq. (BAA) are not applicable to the acquisition of COTS items. Dell strongly supports the proposed rule, as Dell believes the FAR provision eliminating the applicability of numerous laws, such as the TAA and the BAA, to the acquisition of COTS items is essential to the Government's ability to obtain cutting edge technology at the lowest possible price in today's commercial environment. Dell further believes that promulgation of the regulation as currently drafted will result in the elimination of many bureaucratic, time-consuming, and ultimately expensive compliance procedures that drive up the cost of commercial products purchased by the Federal Government and increases the delivery time of products from contractors to their Government customers. In short, this rule creates a more efficient procurement system.

Background

Dell

Dell is a premier provider of products and services required for customers worldwide to build their information-technology and Internet infrastructures. Dell's climb to market leadership is the result of a persistent focus on delivering the best possible customer experience by directly selling standards-based computing products and services. Dell's revenue for the last four quarters totaled $41.4 billion and the company employs approximately 46,000 team members around the globe.

TAA

The Federal Acquisition Regulation's (FAR) provisions that implement the Trade Agreements Act of 1979 prohibits the Government from acquiring and

contractors from providing end products, unless those end products have been "substantially transformed" in the United States, Caribbean Basin countries, NAFTA countries, or countries that are signatories to the Agreement on Government Procurement (GPA), referred to as designated countries.

The original intent of the Act was to provide incentives, in the form of reciprocal access to the U.S. Government market, to countries that agreed to open their government markets to U.S. companies. Only 29 countries have signed the GPA in the 25 years of the existence of the TAA with most of these signatories being original signatories. Accordingly, barring access to the U.S. Government market has not provided U.S. trade negotiators with the leverage to open foreign government markets that they may have envisioned when the TAA was passed.

In fact, the onerous burden of compliance with the FAR's TAA provisions has had the perverse effect of preventing many U.S. information technology companies from fully competing for their own government's business. It is inconceivable that Congress' original intent when passing the TAA was to drive U.S. companies out of the U.S. Government contracts market, yet this has been the impact of the TAA. The increased cost of ensuring compliance with the TAA, keeps some firms out of the market completely, while generally increasing the cost of product to the Government.

Dell believes it is time to eliminate the barriers imposed by the TAA that limit technology companies from accessing the Federal Government contract market. It is time to recognize that the TAA has failed to deliver anticipated trade benefits, and that IT companies have had significant success in gaining access to foreign government markets without any assistance from the Act. It is time to finalize this rule.

Implications

In addition to the TAA's failure to open foreign markets to the extent originally envisioned, compliance with the TAA ultimately drives up federal costs, while unnecessarily prolonging procurements, especially when it comes to IT products. The Act has also resulted in federal agencies being denied access to the most productive, cost-effective technology available.

For Dell, the TAA imposes a severe administrative burden for supplying information technology products to the Federal Government. In particular, the requirement to track where products are made or transformed requires Dell to implement and maintain a costly, labor-intensive system whose sole purpose is to ensure that the unique provisions of TAA are being met. The requirement to comply with the TAA significantly increases the cost to the Government of a product. In an era of high budget deficits and expanding Government reliance on IT, it makes no sense whatsoever to maintain the costly TAA procurement

prohibitions given the lack of reciprocal benefit that United States companies have received.

The TAA and BAA regulations also have the unintended impact of making U.S. Government second-class users of technology. The requirement to comply with TAA slows and often denies the Government access to solutions that are readily available to commercial customers. This is due to some contractors simply choosing not to offer the Government their most technologically advanced products, if the products are not substantially transformed in a designated country, and the company determines it is not worthwhile to alter its manufacturing process solely for the Government. Thus, the TAA impacts not only business, but also homeland security and national defense missions as well.

Acquisition rules should help, not hamper, a company's ability to assist the Government in meeting its need to access streamlined and efficient solutions. With the global economy constantly growing and the Unites States' international relationships transcending new lines, it is becoming more difficult for companies to comply with procurement rules like the TAA that inherently slows down the system, and still move at the speed of the Government's need.

TAA constraints also fail in that they do not influence IT product-manufacturing decisions. The reality is that while the United States Government is an incredibly important customer to Dell and similarly situated companies, Government sales are a relatively small percentage of the overall sales of most of these companies. Thus, decisions as to where to manufacture for these companies are driven by the need to be competitive in the much larger commercial marketplace, where there are no country of origin restrictions, and where cost is a major factor in many individual's buying decisions.

IT companies like Dell source products globally in order to be cost competitive in the worldwide marketplace. Global competition has forced Dell to gravitate to the low cost source, which are often located in countries that have not signed the GPA, including China, Malaysia and Taiwan. For commodity IT products, contract awards are often based on the difference of only a few dollars per unit. Since the revenue derived from sales of COTS IT products to the Government is generally very low, companies such as Dell cannot justify manufacturing decisions based on unique U.S. Government requirements.

Outside of Dell, TAA requirements may also result in the Government restricting competitive opportunities for our Nation's small businesses. Faced with the substantial administrative and other burdens imposed by TAA, some companies, especially small businesses, with leading edge products may choose not to sell to the Government at all. Waiving these rules for COTS procurements is perhaps the best of all recent proposals to reduce these barriers and encourage small business participation in the Government market.

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Dell believes that lightening the regulatory burdens on COTS contractors by exempting Government procurements from the Trade Agreements Act, the Buy American Act, and a host of other contract requirements is the right thing to do from many different vantage points. Such a move will lower acquisition costs and increase competition, especially in the vital small business theater. It will allow the Federal Government to access and receive today's cutting-edge technology today, when it's most needed. And it will allow contractors like Dell to better support the varied and crucial missions the Government is called upon to meet every day.

Thank you again for this opportunity to comment. We look forward to continuing this dialogue and working toward a more efficient, cost-effective, and common-sense procurement policy.

Sincerely,

Brian C. Jones
Manager, Federal Government Relations
Dell, Inc.

2000-305-12

Record Type: Record

To: Nathan L. Knuffman/OMB/EOP@EOP

cc:
Subject: FW: Classification of COTS Rule as Nonsignificant

Could you notify the right person?

-----Original Message-----
From: Gurland, Christine <MARAD>
Sent: Wednesday, March 10, 2004 9:14 AM
To: Radloff, Gwyneth
Cc: Bloom, Murray <MARAD>
Subject: Classification of COTS Rule as Nonsignificant

The Division of Maritime Programs does not agree with the determination that FAR case 2000-305, dealing with Commercial Off-the-Shelf items, is a non-significant rule. Is the proper procedure for you to contact Nathan Knuffman on this? Could you please advise? I'll be glad to contact whomever is appropriate at OMB if you would prefer that we do it. Thanks. I have pasted the portion of the comments that address this issue in our draft comments for the record in order to make it easier for you with regard to OMB.

Christine

The FAR Council has determined that the Proposed Rule is not a significant regulatory action that is subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30,1993, and that the rule is not a major rule under 5 U.S.C.

§ 804. MARAD disagrees with the FAR Council's determinations with respect whether the rule should be classified as significant and major. Section 3(f) of Executive Order 12866 defines a "significant regulatory action" as any regulatory action that meets any one of several factors, including (1) whether it may "have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities" or (2) whether it will "create a serious inconsistency or otherwise interfere with an action taken or planned by another agency." The Proposed Rule could result in the potential loss of nearly $1.2 billion in revenue to U.S.-flag operators from the loss of preference cargoes covered by COTS. The impact of this loss to the economy is far greater if the loss of U.S. jobs are taken into consideration. In addition, the Proposed Rule is inconsistent with the Administration's maritime policy that is supported through the Cargo Preference Laws, VISA and MSP; therefore, the rule should have been classified as a significant rule under Executive Order 12866.
The Proposed Rule also qualifies as a major rule under 5 U.S.C. § 804. A

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major
rule is defined as any rule that the Administrator of the Office of Information
and Regulatory Affairs of the Office of Management and Budget finds has resulted
in or is likely to result in:

(A) an annual effect on the economy of $100,000,000 or more;

(B) a major increase in costs or prices for consumers, individual industries,
Federal, State, or local government agencies, or geographic regions; or

(C) significant adverse effects on competition, employment, investment,
productivity, innovation or on the ability of United States-based enterprises
to compete with foreign-based enterprises in domestic and export markets.

5 U.S.C. § 804(2).

As noted above, the Proposed Rule satisfies the economic impact threshold for a
major rule as the potential loss of revenue to U.S.-flag carriers from the loss
of preference cargo that is subject to the proposed COTS rule is nearly $1.2
billion. Furthermore, preference cargoes provide an important base of cargo
that enables U.S.-flag carriers to be more competitive with lower cost foreign
carriers; therefore, the proposed waivers of the Cargo Preference Laws for COTS
would result in a significant adverse effect on the ability of U.S.-flag
carriers to compete with lower cost foreign-based
carriers in U.S.-foreign trade.
The Proposed Rule clearly meets the threshold requirements to be classified as a
significant rule under Executive Order 12866 and as a major rule pursuant to 5
U.S.C. § 804(2). Accordingly, the FAR Council should request that the
Administrator of the Office of Information and Regulatory Affairs of the Office
of Management and Budget review the Proposed Rule and its impact.

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2000-305-13

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AMERICAN BAR ASSOCIATION

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March 11, 2004

Via Hand Delivery and Electronic Mail

General Services Administration
Attn: Ms. Laurie Duarte
FAR Secretariat (MVA)
Room 4035
1800 F Street, N.W.
Washington, DC 20405

Re: FAR Case 2000-305
Proposed Rule
Commercially Available Off-the-Shelf (COTS) Items
69 Fed. Reg. 2447 (January 15, 2004)

Dear Ms. Duarte:

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 have members representing these three segments to ensure that all points of view are considered. By presenting their consensus view, 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.

Received 3/11/04 MVA

2000-305-13

The Proposed Rule, published in the Federal Register on January 15, 2004, is a follow-on to two Advanced Notices of Proposed Rulemaking ("ANPRs") published in response to passage of the Federal Acquisition Reform Act of 1996 ("FARA"), Pub. L. No. 104-106. *See* 61 Fed. Reg. 22010, May 13, 1996; 68 Fed. Reg. 4874, January 30, 2003. Section 4203 of FARA amended the Office of Federal Procurement Policy Act (*codified at* 41 U.S.C. § 431) to require the Administrator of OFPP ("Administrator") to establish a list of provisions of law that would not be applicable to federal government procurement of commercially available off-the-shelf ("COTS") items. The purpose of this provision was to expand – beyond the exemptions already applicable to the broader category of "commercial items" – the list of exemptions applicable to procurement of COTS items. Any law that meets the criteria in 41 U.S.C. § 431(b) ***shall*** be included on the list unless the Administrator "makes a written determination that it would not be in the best interests of the United States" to exempt COTS procurements from application of that specific law. 41 U.S.C. § 431(a)(1)(3).

As we did in our comments on the 1996 and 2003 ANPRs, the Section generally commends the FAR Council's recommendation concerning the laws that should not be applicable to purchases of COTS items. We have comments, however, in a number of areas, each of which is addressed below.

1. **Buy American Act/Trade Agreements Act**

The proposed rule would exempt COTS procurements from both the Buy American Act, 41 U.S.C. §§ 10a-10d and the Trade Agreements Act, 19 U.S.C. §§ 2501-2518. The Section strongly endorses this proposal, which is consistent with previous comments of the section in connection with the two earlier ANPRs. *See* Section's July 12, 1996 Comments to Advance Notice of Proposed Rulemaking (FAR Case 96-308); Section's March 31, 2003 Comments to Advance Notice of Proposed Rulemaking (FAR Case 2000-305). This comment addresses why the Section believes exemption from these statutes is mandated by FARA, and offers suggested improvements in the language seeking to implement this exemption.

As indicated above, FARA mandates that COTS procurements be exempt from statutes that impose government unique and burdensome requirements, unless the Administrator makes a written determination that the public interest nonetheless requires application of the statute to COTS procurements. The Buy American Act and the Trade Agreements Act unquestionably meet the threshold standard and there is no significant countervailing public interest that mandates continuing to apply these statutory restrictions to procurement of COTS products.

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First, both statutes impose significant, and importantly, different obligations on manufacturers and suppliers of COTS products. Under the Buy American Act and its implementing regulations, a supplier must track the place of "manufacture" – an undefined term – of each "component" and then make the complex calculation of whether the value of those components manufactured in the United States exceeds 50% of the total value of all components. It is not enough to know the country in which the component was purchased, but the end product manufacturer must determine the "manufacturing" location which may or may not be the same as the country of origin for purposes of labeling (governed by Federal Trade Commission rules) or customs (governed by U.S. Customs and Border Protection rules). Tracking the place of "manufacture" and component value is not necessary for compliance with the general origin labeling requirements applicable generally in the U.S. commercial market place.

The Trade Agreements Act and its implementing regulations employ a different test, focusing instead on the country in which the components were "substantially transformed" into a new product distinct from its component parts. It is difficult enough for Original Equipment Manufacturers ("OEMs") to evaluate their manufacturing to ensure that the definitive "substantial transformation" occurred in a "designated country." For downstream suppliers, proper identification is even more problematic as the OEM's origin labeling may not be sufficient to determine the location of "substantial transformation" for Trade Agreements Act purposes.

Compounding the compliance burden for both contractors and government contracting officials is the complexity of determining which rules apply. For example, in many complex procurements it can be difficult to ascertain the "end product" for purposes of the Buy American Act because the definition does not make it synonymous with "end item." There is often ambiguity – particularly in Federal Supply Schedule contracts for which no Buy American Act or Trade Agreements Act compliance guidance has been published – whether the threshold for application of the Trade Agreements Act applies to each individual offered product or to the FSS contract as a whole. Indeed, one need only parse through the examples in FAR Subpart 25.5 *Evaluating Foreign Offers – Supply Contracts* to appreciate the complexity and government-unique burden imposed by these statutes.

For more than ten years now, Congress has mandated the elimination, where possible, of barriers to the government's ability to procure commercial items. The Federal Acquisition Streamlining Act ("FASA"), Pub. L. No. 103-355, and this FARA provision are prime examples of that policy choice. There are also examples specifically in the Buy American context. Thus, in 1994, Congress specifically amended the list of factors included in 10 U.S.C. § 2533(a) that the

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Secretary of Defense considers in granting waivers of the Buy American Act to include such factors as:

> * * *
>
> (6) A need to ensure that the Department of Defense has access to advanced, state-of the-art commercial technology;
>
> * * *
>
> (9) Any need -- . . . . not to impair integration of the military and commercial industrial base.

See FY 1995 DoD Authorization Act, Pub. L. 103-337, § 812(a) (1994). Just this past January, in the Consolidated Appropriation Act, Congress expressly exempted the broader category of information technology "commercial items" from the Buy American Act. *See* Pub. L. 108-199, Div. F, § 535 (2004).

These actions are wholly consistent with a conclusion by the Administrator to exempt COTS procurements from application of either the Buy American Act or the Trade Agreements Act. The usual justifications for these kinds of protections (the U.S. industrial base and protection of jobs) apply with significantly reduced force in the context of COTS procurements. Such items, by definition, must already survive and prosper in the commercial market place where these restrictions do not apply. Furthermore, it would make little sense to exempt COTS from Buy American but not from the Trade Agreements Act which itself is simply a waiver of Buy American restrictions. The government should be free to purchase the best available product at the lowest cost, and contractors should be free of the burden and difficulty of tracking information to ensure their COTS products qualify under these complex statutes.

The Section makes the following suggestions with respect to the language proposed to implement exemption of COTS from the Buy American Act and Trade Agreements Act.

First, we recommend two changes with respect to how the Trade Agreements Act and the Buy American Act are identified in the list of laws set forth in FAR 12.505(a). There is no apparent reason for listing the Trade Agreements Act twice as the proposed rule currently does in 12.505(a)(2) and (a)(3). It would avoid confusion by eliminating the "*et seq*." and identify specifically the applicable sections in which the Buy American Act and Trade Agreements Act are codified. Also, the list in the proposed rule only identifies the contract clause but not the corresponding certification clause for solicitations.

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Although the regulations (elsewhere in FAR 25.1101) specify that the certification clauses are only included in solicitations that included the corresponding contracts clause, the Section believes it would promote clarity to include in the list of exempted statutes references to all of the affected clauses. Accordingly, proposed FAR 12.505(a) would be changed as follows:

> (2) 19 U.S.C. 2501-2518 (*see* 52.225-5 and 52.225-6)
>
> ~~(3)~~
>
> * * *
>
> ~~(10)~~ (9) 41 U.S.C. 10a-10d, Buy American Act – Supplies (*see* 52.225-1, 52.225-2, 52.225-3 and 52.225-4).

Second, the proposed rule expressly adds "acquisitions for commercially available off-the-shelf items" to the Trade Agreements Act exceptions listed in FAR 25.401(a). The proposed rule neglects to include an equivalent exception in the list of exceptions to the Buy American Act contained in FAR 25.103. Accordingly, the Section proposes inserting a new Section 25.103(e) as follows:

> (e) *Commercially Available Off-the-Shelf Items.* Pursuant to the authority of 41 U.S.C. § 431, the Administrator of OFPP has determined that it is inconsistent with the public interest to apply the Buy American Act to purchases of commercially available off-the-shelf items.

2. <u>COTS Definition in FAR 52.244-6</u>

The proposed rule would modify FAR 52.244-6 *Subcontracts for Commercial Items* to specify that the definition of "commercially available off-the-shelf items" has the meaning contained in the clause at FAR 52.202-1 *Definitions*. That clause, however, does not currently contain a definition of "commercially available off-the-shelf items." In fact, under FAR Case 2002-013, Federal Acquisition Regulations; Definitions Clause, 69 Fed. Reg. 2988 (Jan. 21, 2004), the Councils have proposed to modify both the Definitions clause, 52.202-1, as well as FAR 52.244-6. If that FAR case is not adopted, then this proposed rule needs to change in order to incorporate into FAR 52.201-1, a definition of commercially available off-the-shelf items. If the proposal contained in FAR Case 2002-013 is

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adopted, as the Section believes it should be, then to be consistent the proposed change to FAR 52.244-6(a) should read as follows:

> *Commercially Available Off-the-Shelf Item* has the meaning contained in Federal Acquisition Regulation 2.101, Definitions.

3. Rights in Technical Data

In the area of rights in technical data, the proposed rule cites only 41 U.S.C. § 418a (Rights in Technical Data) and 41 U.S.C. § 253d (Validation of Proprietary Data Restrictions). It has been argued that these provisions are only applicable to the civilian agencies. To avoid potential disparate treatment of software and technical data relating to commercial-off-the-shelf items sold to the Department of Defense as compared to those COTS items sold to civilian agencies, the parallel Rights in Technical Data provisions Title 10, 10 U.S.C. § 2320 (Rights in Technical Data) and 10 U.S.C. § 2321 (Validation of Proprietary Data Restrictions) should also be listed.

4. Services as COTS Items

The proposed amendment to FAR 2.101 that would define a "Commercially available off-the-shelf item (COTS)" contains language that it is a "subset of a commercial item and means any item of supply" that meets several listed criteria. The inclusion of the words "of supply" appears to preclude a commercial item that is a service from ever being considered a COTS item, even if it meets the definition of a commercial item and meets all the other criteria to be a COTS item.

The stated purpose of the proposed rule is to implement 41 U.S.C. § 431 with respect to commercially available off-the-shelf items. 41 U.S.C. § 431(a) states that the FAR is to "include a list of provisions of law that are inapplicable to contracts for the procurement of commercially available off-the shelf items." 41 U.S.C. § 431(b) states that except for provisions of law that provide for criminal or civil penalties or are specifically applicable to COTS items, the list is to include all laws "for the procurement of property or services". The statutory definition of a "commercially available off-the-shelf item" in 41 U.S.C. § 431(c) is virtually identical to the proposed FAR 2.101 definition, except the statutory definition does not contain the limitation that a COTS item be an item "of supply."

Accordingly, we see no basis in the statute to preclude commercial items that are services and meet the statutory definition of a COTS item to be ineligible as a COTS item under the FAR. Our specific recommendation is to delete the

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words "of supply" from the proposed FAR 2.101 definition of "Commercially available off-the-shelf item (COTS)."

5. Subcontracts for COTS Items Under Commercial Item Prime Contracts

Under subsection (c) of the proposed FAR clause 52.212-XX, Contract Terms and Conditions Required To Implement Statutes or Executive Orders – Commercially Available Off-the-Shelf (COTS) Items, Contractors are only required to flow down two (2) FAR clauses in a subcontract for COTS items. Those two clauses are the Utilization of Small Business Concerns clause, FAR 52.219-8, and the Equal Opportunity clause, FAR 52.222-26. This addresses the situation of a subcontract for a COTS item under a COTS prime contract, and we agree with the FAR Council's approach.

Nevertheless, subcontracts for COTS items can also be encountered under prime contracts for other than commercial items and under prime contracts for commercial items that are not COTS items. To achieve uniformity, we believe the required FAR flowdown clauses for subcontracts for COTS items should be the same regardless of which type of prime contract is involved.

The proposed rule addresses this concern with respect to subcontracts for COTS items under prime contracts for other than commercial items. Under the current FAR clause 52.244-6, which is for prime contracts for other than commercial items, there are five (5) required FAR clauses that are to flowdown for subcontracts for commercial items. These include FAR 52.219-8 and FAR 52.222-26, which the FAR Council is proposing to apply to COTS subcontracts. The proposed rule would amend FAR 52.244-6 to add the following language -- "(This clause does not apply to subcontracts for commercially available off-the-shelf items.)" -- after the references to each of the other three clauses in FAR 52.244-6[1]. This leaves COTS subcontracts under prime contracts for other than commercial items with the same required FAR clauses as COTS subcontracts under COTS prime contracts, a result we commend.

The proposed rule does not, however, address the situation that could be encountered in a subcontract for COTS items under a commercial item (but non-COTS) prime contract. Under the current FAR clause 52.212-5, which is for prime

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[1] Those clauses are Affirmative Action for Disabled Veterans and Veterans of the Vietnam Era, FAR 52.222-35, Affirmative Action for Workers with Disabilities, FAR 52.222-36, and Preference for Privately Owned U.S.-Flag Commercial Vessels, FAR 52.247-64.

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contracts for commercial items, there are required FAR clauses that are to flowdown for subcontracts for commercial items. With respect to the references in FAR 52.212-5(e) to FAR clauses 52.222-35, 52.222-36, and 52.247-64, we recommend that the same parenthetical the FAR Council is proposing for the references to these clauses in FAR 52.244-6 be added following the references to these clauses in FAR 52.212-5(e). This would bring COTS subcontracts under prime contracts for commercial (but non-COTS) items in line with COTS subcontracts under any other prime contract.

Our specific recommendation is to add at the end of subparagraphs (iii), (iv), and (vi) of FAR 52.212-5 the following language: "(This clause does not apply to subcontracts for commercially available off-the-shelf items.)"

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

Sincerely,

H. J. Bell, Jr.

Hubert J. Bell, Jr.
Chair, Section of Public Contract Law

cc: Patricia H. Wittie
Robert L. Schaefer
Michael A. Hordell
Patricia A. Meagher
Mary Ellen Coster Williams
Norman R. Thorpe
Council Members
Dorothy Kay Canon
Alan W. H. Gourley
Paul B. Haseman
Daniel R. Allemeier
William H. Anderson
Femand Lavalee
John E. McCarthy, Jr.
Steven P. Pitler

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Michael F. Mason
David Kasanow

LEXMARK

Lexmark International, Inc.
740 West New Circle Road
Lexington, Kentucky 40550
USA

2000-305-14

March 9, 2004

General Services Administration
FAR Secretariat (MVA)
1800 F Street, NW Room 4035
Attn: Laurie Duarte
Washington, DC 20405

Ref: FAR Case 2000-305

Dear Ms. Duarte:

On behalf of Lexmark International, Inc., one of the world's leading manufacturers of printers and printing solutions, I am submitting comments on the proposed rule regarding federal purchases of commercial off-the-shelf products ("COTS"), published in the Federal Register on January 15, 2004. Lexmark strongly supports the inclusion of the Trade Agreements Act of 1979 ("TAA") in the proposed list of "provisions of law" that should be waived in the COTS rule. The TAA waiver should be included in the final rule, and the final rule should be implemented as quickly as possible.

Background

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are seeking comments on whether it is "in the best interest of the Government to maintain certain of those proposed laws" that have been included in a proposed new section 25.2505 of the Federal Acquisition Regulation (FAR). For the reasons discussed below, Lexmark respectfully submits that it would be contrary to the government's best interests to exclude the TAA exception for COTS items.

In 1996, Congress passed the Clinger-Cohen Act (Public Law 104-106). Among the purposes of this Act was the removal of barriers that prevented the federal government from participating freely in the commercial marketplace. Congress recognized that government-specific requirements were being imposed on commercial contractors and were driving up costs and creating inordinate delays in the procurement process. The Act directed the Administrator of Federal Procurement Policy to identify the burdensome laws and minimize their impact on COTS acquisitions.

The TAA requires that all products delivered to federal agencies be manufactured or "substantially transformed" in the United States, Caribbean Basin countries, NAFTA countries or countries that have signed the World Trade Organization's (WTO) Agreement on Government

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Procurement (GPA). Under the GPA, signatory countries promise to open their government markets to competition from companies based in other signatory countries.

Rationale for Inclusion of the TAA Waiver

1. TAA has been ineffective in accomplishing its objectives, so there is no harm in waiving it: With the U.S. having committed to the GPA, Congress passed the TAA to spur other countries to likewise commit to the GPA. TAA grants exclusive federal market access privileges to GPA signatories, but such exclusivity is not required by the GPA or any other treaty. As it turns out, the U.S. is the sole GPA signatory to enact such market restrictions. Unfortunately, the supposed incentives of TAA have failed to produce the intended result. Only a handful of new countries have acceded to the GPA since its inception. Perversely, however, and surely contrary to the best interests of the United States economy, TAA is succeeding in preventing U.S. information technology companies from fully competing for their own government's business. There is no evidence that Congress intended such a self-defeating outcome.

The GPA came into force in the mid-1990s. Of the current 145 WTO member countries, only 28 have acceded to the GPA, 23 of which were the *original* signatories. So, there are only five out of 145 countries whose joining of the GPA could be attributed to the TAA. A handful of other WTO members have "observer" status, but without any indication that they will ultimately accede to the GPA.

The lack of progress on the GPA and other multilateral negotiations has led the Office of the U.S. Trade Representative to concentrate on bilateral agreements with similar market access provisions. This strategy has proven far more effective, with Singapore, Australia, and Chile recently concluding Free Trade Agreements with the U.S. Even so, these agreements do *not* include commitments to accede to the GPA nor do they rely upon government market restrictions.

Given the TAA's ineffectiveness at accomplishing its stated objectives, there is no evidence that waiving the TAA for federal COTS purchases will disadvantage U.S. negotiators to any extent. The law's ineffectiveness alone should provide a basis for a COTS waiver. Yet there are many other sound fiscal and policy reasons for waiving the TAA.

2. Foreign governments are, in fact, procuring from U.S.-based IT firms: The ineffectiveness of the TAA has forced the Office of the U.S. Trade Representative to pursue other means, such as bilateral agreements, to achieve open markets. None of these have relied upon government market restrictions to achieve success. Meanwhile, U.S.-based IT companies are succeeding on their own in gaining access to foreign government markets by virtue of offering world class products and services.

3. Federal agencies pay higher costs solely due to TAA: The TAA's government-specific certification requirements force many contractors to establish and maintain costly, labor-

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intensive product tracking systems that are not needed in their commercial business. Others have chosen to maintain or create limited manufacturing capabilities in TAA-qualified countries solely to meet the law's requirements. It has been estimated that this adds approximately 10 percent to the government's acquisition costs when the entire supply chain is taken into consideration. In an era of high budget deficits and expanding government reliance on IT, it makes no sense whatsoever to maintain the costly TAA procurement prohibitions.

4. TAA rules impose unnecessary costs on U.S.-based IT firms: At a time when U.S. firms are striving to be as competitive as possible within the context of a global economy, to impose extra costs and burdens on U.S. firms – to require that products be reassembled in TAA-compliant countries for no economic purpose – is unsound policy. Because government sales represent a relatively small proportion of many IT vendors' annual revenues, TAA is resulting in decisions in some cases to refrain from selling certain products into the federal market.

5. TAA needlessly increases the risk of competing for federal sales: The TAA's procurement rules and certification requirements are adding millions of dollars per year in contractor compliance and administrative costs, while producing no net trade or contracting benefits. The value of lost sales opportunities is difficult to quantify, but industry experts estimate that, for some companies, it exceeds hundreds of millions of dollars. The certification requirements potentially expose manufacturers to civil False Claims and other legal sanctions, even when they have taken extraordinary steps to comply with the TAA. The government's accelerating use of multi-year contracts is magnifying this problem.

Summary

Given the TAA's failure to deliver the anticipated trade benefits, and the significant success of IT companies in gaining access to foreign government markets without the TAA, there is no evident harm that would result from a COTS waiver for the TAA. Lexmark urges the FAR Council to retain the waiver of the Trade Agreements Act of 1979 for COTS items in the final rule. Moreover, to allow the federal government to improve its procurement posture by the beginning of the FY05 procurement cycle, Lexmark urges expeditious publication of the final rule.

Lexmark appreciates the opportunity to submit its comments on this very important subject. We would welcome the opportunity to provide greater detail regarding our views should that be valuable.

Sincerely,

Patrick Brewer
Director, Government Affairs

International Organization of
Masters, Mates & Pilots
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TIMOTHY A. BROWN
International President

GLEN P. BANKS
International Secretary-Treasurer

2000-305-15

March 12, 2004

General Services Administration
FAR Secretariat (MVA)
1800 F Street, NW
Room 4035
Washington, DC 20405

ATTN: Laurie Duarte

RE: FAR Case 2000 – 305

Dear Ms. Duarte:

We are writing on behalf of the International Organization of Masters, Mates & Pilots (MM&P) and the Maritime Institute for Research and Industrial Development (MIRAID) to convey our strong opposition to the proposed rule to make the Cargo Preference Act of 1904 and 1954, as amended, inapplicable to the waterborne transportation of commercially available off-the-shelf (COTS) items. The MM&P represents American citizen Masters and Licensed Deck Officers working aboard United States-flag vessels. MIRAID represents United States-flag shipping companies that have a collective bargaining relationship with the MM&P. Together, our organizations represent American shipping companies that transport significant volumes of commodities that would no longer be subject to United States-flag shipping requirements under the proposed rule.

Our organizations wish to strongly associate ourselves with the detailed and substantive comments submitted by the American Maritime Congress in opposition to the proposed rule as it affects U.S.-flag shipping requirements. At the same time, we would like to make the following points in order to emphasize our opposition to this proposal that would reduce the amount of cargo subject to United States-flag shipping requirements and the amount of government cargo transported by U.S.-flag commercial vessels.

The controlling statute for the carriage of military cargoes by United States-flag commercial vessels is the Cargo Preference Act of 1904 (10 U.S.C. 2631). This statute requires that 100 percent of defense cargoes be transported on privately-owned U.S.-flag commercial vessels unless their freight rates are determined to be "excessive or otherwise unreasonable." The controlling statute for the carriage of non-military cargoes by U.S.-flag vessels is contained in the Merchant Marine Act of 1936, as amended. This body of law requires that 50 percent of non-defense government commodities be transported on privately-owned United States-flag

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commercial vessels available at fair and reasonable rates. Proposed 12.505 (a)(1) and (a)(19) would make these statutes and requirements inapplicable to commercially available off-the-shelf items transported under contracts or subcontracts for the government.

The existing U.S.-flag cargo preference shipping requirements ensure that U.S. taxpayer-financed exports and imports are transported at least in part on U.S.-flag vessels in order to achieve various economic benefits in the form of American jobs, American taxes and the preservation of America's critically important commercial sealift capability. In fact, it has been demonstrated throughout our nation's history that the commercial U.S.-flag merchant marine and its cadre of U.S. citizen mariners are a key component of America's sealift capability. Our country's ability to respond to international crises is dependent on America's ability to transport troops, equipment, machinery and medical and other critical supplies anywhere they are needed throughout the world – a role the privately-owned U.S.-flag merchant marine and civilian merchant mariners have fulfilled in every conflict as they continue to do today as part of Operation Iraqi Freedom and the War Against Terrorism.

In May, 2003, General Richard B. Myers, USAF, Chairman of the Joint Chiefs of Staff, stated that "The unsung heroes of the merchant marine are not just a part of history, they are a vital part of our joint force today." Similarly, Rear Admiral Paul Schultz said in May of last year that "America's merchant mariners have served in every U.S. war since the country began. It was merchant mariners who crewed *HANNAH,* the first ship commissioned by the Continental Congress to go up against the might of the British Navy in 1775. And they prevailed, capturing the British ship *UTILITY* in short order. Since then," according to Admiral Schultz, "America's merchant mariners have been the backbone of our nation's maritime service, especially in war."

As successive Congresses and Administrations have realized, the best, if not only, way to ensure that the United States will have the commercial sealift capability and U.S. citizen mariners it needs in time of war or other international emergency is to promote and support the U.S.-flag merchant marine at all times. U.S.-flag commercial vessels and their U.S. citizen crews are forced to operate in an international shipping arena that is dominated by state owned and controlled merchant fleets and by foreign fleets and foreign crews that pay little if any taxes. In contrast, U.S.-flag vessel operators and U.S. citizen crews are subject to the full range of U.S. taxes, operate in full compliance with United States Coast Guard regulations, and comply with all other U.S. government imposed rules and regulations that control U.S.-flag vessel operations.

In other words, U.S.-flag vessels and U.S. citizen crews do not operate in a tax-free environment. They do not operate beyond the scope of Coast Guard and other U.S. government imposed rules and regulations. Consequently, in the face of this unfair foreign competition, it is necessary for the United States government to help maintain an active, viable U.S.-flag commercial fleet through the continued full enforcement and implementation of the existing U.S.-flag cargo preference shipping requirements.

The base of cargo made available to U.S.-flag commercial vessels by the various cargo preference statutes and requirements helps support the continued operation of vessels under the

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U.S.-flag. Without the full range of commodities presently covered by the U.S.-flag shipping requirements that would be eliminated by the proposed rule, it is likely that operators of U.S.-flag vessels will have little option but to place an increasing number of their U.S.-flag vessels under a foreign flag. This will not only result in a loss to our government of significant U.S.-flag commercial sealift capability but will also cost our nation dearly in terms of lost employment opportunities for American merchant mariners who are needed to crew the government's surge and sustainment vessels in time of war.

Recently, General John W. Handy, USAF, Commander in Chief, United States Transportation Command, told the House of Representatives Committee on Armed Services that "We simply cannot, as a nation, fight the fight without the partnership of the commercial maritime industry. We rely on the commercial maritime industry to provide the primary source of manpower to crew our organic vessels. Our nation's organic sealift capabilities, in the form of highly capable prepositioned, fast sealift ships (FSS), large medium speed roll on and roll off ships (LMSR), and Ready Reserve Force (RRF) ships which provide emergency and surge response capabilities to globally deploy our combat and support forces, would literally be useless without the support of the commercial maritime industry."

The International Organization of Masters, Mates & Pilots and the Maritime Institute for Research and Industrial Development urge that the proposed sections 12.505 (a)(1) and (a)(19) that would make existing U.S.-flag shipping requirements inapplicable to commercially available off-the-shelf items transported under contracts or subcontracts for the government be withdrawn. To do otherwise would simply weaken and diminish America's commercial sealift capability.

Sincerely,

Captain Timothy A. Brown
President
International Organization of Masters,
Mates & Pilots

C. James Patti
President
Maritime Institute for Research and
Industrial Development

IBM 2000-305-16

Office of the Vice President,
Governmental Programs

1301 K Street Northwest, Suite 1200
Washington, DC 20005 3307

March 15, 2004

Ms. Laurie Duarte
General Services Administration
FAR Secretariat (MVA)
1800 F Street, NW, Room 4035
Washington, DC 20405

Dear Ms. Duarte:

International Business Machines Corporation is pleased to respond to the Proposed Rule published in the January 15, 2004 edition of the Federal Register seeking comments on FAR Case 2000-305. The proposed rule regards implementation of section 4203 of the Clinger-Cohen Act of 1996, 41 U.S.C. 431, with respect to laws that are inapplicable to contracts for the acquisition of Commercially Available Off-The-Shelf (COTS) Items.

IBM's comments support inclusion of the Trade Agreements Act of 1979 (P.L. 96-39, 19 U.S.C. 2501 et seq.) in the final rule.

The Trade Agreements Act of 1979 (TAA) requires that all products being delivered to federal agencies be made or "substantially transformed" in the United States, Caribbean Basin countries, NAFTA countries, Chile, and countries that have signed the World Trade Organization's (WTO) Government Procurement Agreement (GPA). This unilateral requirement was implemented in order to: 1) reward those countries who agreed to open their government procurement markets to U.S. companies by providing reciprocal access to the U.S. government market; and 2) to incentivize other countries to enter into similar agreements with the U.S. and open their markets.

Unfortunately, these objectives have not been achieved, while U.S. companies, particularly IT companies such as IBM, and the U.S. government customers are being negatively impacted. Since TAA implementation in 1981, only 28 countries have signed the GPA, and 25 are original signatories. It has become apparent that barring access to the U.S. government market has not provided U.S. trade negotiators with leverage to open foreign government markets. At the same time, many U.S.-based companies, including IBM, have been successful in accessing government markets of non-signatory countries without any formal government-to-government agreements.

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Furthermore, TAA's prohibition on acquiring products from nonparticipating countries is not required by any treaty or international agreement, including the GPA. The United States is the only GPA signatory country to enact such a law. The Office of the U.S. Trade Representative has attempted to compensate for TAA's ineffectiveness as a GPA incentive by entering into bilateral agreements, with terms and conditions similar to the GPA, in part to try to steer non-designated countries toward eventually becoming a signatory to the GPA. IBM believes that this confirms that the restrictive sourcing provisions of the TAA are not needed to accomplish the intended objectives of the TAA.

The restrictive sourcing provisions of TAA drive up federal costs and unnecessarily prolong procurements of COTS items, particularly for IT products. By imposing TAA restrictions on agency COTS procurements, a self-imposed embargo has been created whose only result is the government may be denying itself access to the most productive, cost-effective items available. In fact, it appears that the U.S. government is the only entity without access to non-TAA-eligible products. Ironically, the government's own employees, as well as anyone else in the world, are free to purchase and use "non-compliant products." This policy of denial is inconsistent with fiscally sound procurement policy.

TAA has become a severe administrative burden for suppliers of COTS items to the federal government. The requirement to track where products are made or transformed causes IBM to maintain a costly, labor-intensive system whose sole purpose is to meet the unique provisions of the TAA. Moreover, for items produced in more than one country, determining whether they are substantially transformed in a TAA-eligible country can be a painstaking, fact-intensive, and often expensive process given the subjective nature of the "substantial transformation" test. Even after we certify our products' country of origin, we must assume the burden of continually monitoring for any manufacturing source changes during contract performance to assure compliance with our initial certification. Many of our contracts extend over several years, which adds to the complexity, burden and compliance challenges for IBM.

While some have argued that agencies can simply apply for a waiver to overcome TAA restrictions, see 19 U.S.C. Section 2512(b), contracting officers are extremely reluctant to seek waivers that delay the procurement process and call attention to non-standard purchases.

Despite the importance of the federal market to IBM, TAA constraints do not influence our product-manufacturing decisions. We must source parts, components and product manufacturing globally in order to be cost competitive in the worldwide marketplace.

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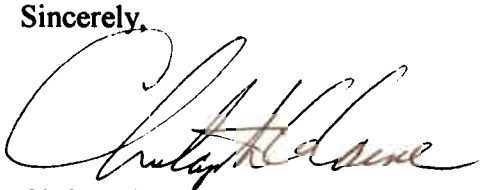
For the above reasons, IBM believes the Trade Agreements Act interferes with the government's ability to acquire COTS products, and therefore should be included in the final rule.

Sincerely,



Christopher G. Caine

CGC:bd

DEPARTMENT OF VETERANS AFFAIRS
Deputy Assistant Secretary for Acquisition and Materiel Management
Washington DC 20420

MAR 1 2 2004

2000-305-17

General Services Administration
FAR Secretariat (MVA)
1800 F Street NW
Room 4035, ATTN: Laurie Duarte
Washington, DC 20405

Dear FAR Secretariat:

This is in response to proposed rule RIN 9000-AJ55, FAR Case 2000-305, titled Federal Acquisition Regulation: Commercially Available Off-the-Shelf (COTS) Items, which was published in the Federal Register on January 15, 2004. We offer the following objections to a number of the provisions contained in this proposed rule. The provisions are listed below in the order shown at proposed section 12.505.

The rule proposes to remove Federal Acquisition Regulation (FAR) clause 52.222-36, Affirmative Action for Handicapped Workers, from application to COTS acquisitions (see 12.505(a)(4)). The vast majority of the Department of Veterans Affairs' (VA's) acquisitions for supplies are for COTS items. Many of the nation's veterans are handicapped as a result of their service to their country. I fail to see why firms who sell vast quantities of COTS items to the Federal Government, especially to VA, should not be required to comply with the provisions of 29 United States Code (U.S.C.) 793 and this FAR clause and be exempt from the requirement to provide affirmative action to employ and advance in employment qualified individuals with disabilities, especially disabled veterans.

The rule proposes to remove 31 U.S.C. 3324 from application to COTS acquisitions (see 12.505(a)(5)). This statute restricts the advance of public money. The only reason for removal of this provision of Law appears to be to allow payment for goods that have been shipped but not yet received at the Government destination. Removal of an entire statute from application to COTS acquisitions shouldn't be necessary to implement this minor optional provision. This proposed action would remove a significant provision of Law to solve a relatively minor problem and will result in many requests for payment in advance under COTS contracts when such advance payment would not be appropriate. If 31 U.S.C. 3324 is excluded at all, its exclusion should be specifically limited to those situations involving payment for items shipped and not yet received. 31 U.S.C. 3324 should otherwise apply to all other COTS acquisitions. The Federal Government should not be paying in advance for routine COTS acquisitions and contracting officers should not be put in the position of having to defend denial of such advance payments without the backup of statute.

The rule proposes to remove FAR clause 52.222-35, Equal Opportunity for Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans, from application to COTS acquisitions (see 12.505(a)(8)). By

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removing these provisions, virtually all companies that sell supplies to VA would no longer be obligated by contract to provide equal opportunities to veterans. With the current situation in the Gulf, removal of this clause would send the wrong message to all veterans. Veterans have sacrificed for this nation and deserve to be treated fairly in the job market.

The rule proposes to remove FAR clause 52.222-37, Employment Reports on Special Disabled Veterans and Veterans of the Vietnam Era, from application to COTS acquisitions (see 12.505(a)(9)). This clause requires contractors to file reports on their employment of veterans (the VETS-100 Report). The majority of companies that sell supplies to civilian agencies of the Federal Government would no longer be required by contract to file VETS-100 Reports. Congress has taken a keen interest in the VETS-100 Report, as evidenced by section 1354 of Public Law 105-339. Whether or not contractors are required to file employment reports is a matter that should be determined by Congress rather than by administrative change to the FAR.

The rule proposes to remove the provisions of 42 U.S.C. 6962(c)(3)(A)(ii) from application to COTS acquisitions (see 12.505(b)). This section of U.S. Code requires contractors on contracts over $100,000 to estimate the percentage of the total material used in the performance of the contract which is recovered materials. We are concerned that this may preclude contractors from having to indicate on their products the percent of recycled materials contained therein. Information on recovered material content is necessary in order for agencies to carry out the intent of the Resources Conservation and Recovery Act and Executive Order 13101.

For the above reasons, VA objects to the removal of the above clauses and provisions of law from application to COTS acquisitions. The actions proposed in this rule could have a negative impact on veterans and on veteran-owned and service-disabled veteran-owned small businesses. We urge reconsideration of this proposal.

Please direct any questions regarding the above comments to Mr. Don Kaliher, Acquisition Policy Division, at (202) 273-8819.

Sincerely,

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March 11, 2004

2000-305-18

General Services Administration
FAR Secretariat (MVA)
1800 F Street, NW
Room 4035
ATTN: Laurie Duarte
Washington DC 20405

VIA Internet: farcase.2000-305@gsa.gov

RE: FAR Case 2000-305 (Commercially Available Off-The-Shelf (COTS) Items)

Dear Ms. Duarte:

On behalf of the American shipbuilding industry, the American Shipbuilding Association (ASA), which represents the six major shipbuilders in the United States that build all of the capital ships for the Navy, and 30 companies that manufacture ship systems and components, respectfully urges the withdrawal of the proposed rule because of the adverse impact it will have on the defense shipbuilding industrial base of the United States; our national security; and on the further erosion and loss of thousands of highly skilled shipyard and domestic supplier jobs which, in turn, will increase the price of each naval ship, and threaten America's ability to build a Navy.

By way of background, the former robust shipbuilding industrial base of the United States is but a shell of what it once was, and it has been in an almost free fall decline for the last 13 years. The once ballyhooed "600-ship" Navy during the Reagan years of the the1980s is now at 294, and is on course to fall below 200 unless the shipbuilding production rate is dramatically increased. In this regard, the procurement rate for Navy ships has averaged less than six ships a year for the last 13 years - - the lowest rate since the Great Depression. As a result of this low ship production rate, tens of thousands of highly skilled shipyard jobs have been lost; and over 60% of the U.S. suppliers of ship systems and components have ceased doing business, which represents the further loss of hundreds of thousands of jobs in the shipbuilding industry. The further "ripple effect" of this low rate of ship production increases the unit costs of ship systems and components and the ships themselves, and makes the remaining domestic suppliers less competitive with foreign suppliers, which threatens to make the United States totally dependent upon foreign sources for the critical ship systems and components that are used in the ships that defend America - - both at her shores and abroad.

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Since the proposed rule would be tantamount to a waiver of 20 statutes, including three that have a direct impact upon the shipbuilding industrial base of the United States and on jobs in the maritime industry - - 10 USC 2631 (Transportation of Supplies by Sea; 41 USC 10a (Buy America); and 46 USC Appendix 1241b (Transportation in American Vessels of Government Personnel and Certain Cargo - - it must be treated as a "*significant regulatory action*" that is subject to review under Section 6 (b) of Executive Order 12866, and as a "*major rule*" as defined by 5 USC 804 because it is *"likely to result . . . (in) significant adverse effects . . . on employment . . . or on the ability of United States enterprises to compete with foreign-based enterprises in . . . domestic markets*." Furthermore, such a sweeping administrative determination that the statutory limitations of not one, not two, but 20 statutes enacted by Congress are not applicable to contracts for the acquisition of COTS items should elevate the proposed rule to the level of a "*significant regulatory action*" and a "*major rule.*" Still further, Subparagraph (f) of Section 3 of the cited Executive Order defines "*significant regulatory action*" to mean any regulatory action that "*is likely to result in a rule that may . . . adversely affect in a material way . . .* ***jobs.***" As discussed above, the sustained loss of jobs in our industry sector, the prospect of a further erosion of jobs, and the potential adverse effect that the proposed rule could have on the ability of *"United States-based enterprises to be able to compete with foreign-based enterprises in . . . domestic markets,"* require strict compliance with 5 USC 804.

Another concern with regards to the proposed waiver of 10 USC 2631 and 46 USC Appendix 1241b is that it could have an adverse impact on loan guarantee programs such as Title XI loans associated with ship construction contracts. This realistic, potential consequence *"could adversely affect*" this sector of the economy, and could "*materially alter the budgetary impact of . . . loan programs or the rights and obligations of recipients thereof,*" which are referenced in subparagraph (f) (1) and (2) of Section 3 of Executive Order 12866.

Finally, and of paramount importance, is the fact that the proposed rule poses a potential threat to the national security of the United States. In this regard, our shipbuilding industrial base is on the precipice of extinction, and any administrative action, such as the proposed rule, that could undermine the shipbuilding industrial base of the United States; and that may emasculate the ability of the United States to be self reliant in order to "*maintain a Navy,*" as required by Article I, Section 8 (13) of the U. S. Constitution, deserves greater consideration than the proposed attempt to "streamline" the procurement process at the expense of the national security of the United States. Accordingly, you are urged to withdraw the proposed rule in its entirety.

Sincerely,

Cynthia L. Brown
President

2000-305-19

International Electronics Manufacturers and Consumers of America
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March 12, 2004

Ms. Laurie Duarte
General Services Administration
FAR Secretariat (MVA)
1800 F Street, N.W.
Room 4035
Washington, D.C. 20405

RE: **FAR Case 2000-305; Proposed Rulemaking Regarding Implementation of Section 4203 of the Clinger-Cohen Act of 1996 with respect to Commercially Available Off-the-Shelf Acquisitions (COTS).**

Dear Ms. Duarte:

I am writing on behalf of the International Electronics Manufacturers and Consumers of America (IEMCA) in response to the proposed rulemaking of the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) published in the *Federal Register* on January 15, 2004 (Vol. 69, No. 10, 2448). The proposed rule seeks comments regarding implementation of Section 4203 of the Clinger-Cohen Act of 1996 (the Act) with respect to government procurement of commercially available off-the-shelf (COTS) items. Section 4203 of the Act requires the Councils to identify certain provisions of law that should be deemed inapplicable to contracts for Federal acquisitions of COTS items. IEMCA strongly supports this effort as a means of ensuring that the Federal government can purchase a variety of items at commercially competitive prices. IEMCA specifically supports the Councils' recommendation that the final list of laws inapplicable to Federal procurement of COTS items include country-of-origin provisions of the 1979 Trade Agreements Act (TAA; Public Law 96-39, 19 U.S.C. 2501, *et. seq.*).

Founded in 1987, IEMCA is a trade association headquartered in Washington, D.C. Its members are world-class electronics, optical, telecommunications, and IT companies with U.S. investment exceeding $100 billion and U.S. sales exceeding $200 billion. IEMCA's members include, for example, Canon U.S.A., JVC Americas Corp., Matsushita Electric Corporation of America, Sanyo North America, Ricoh Corporation, Sharp Electronics Corporation, Thomson, and Toshiba America. IEMCA's mission is to advocate legislation and regulation that promotes freer trade. IEMCA's goal is to ensure that the electronics industry prospers and that its customers -- both government and non-government -- benefit from the widest possible choice of high-quality products at a fair price.

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Background. The TAA restricts most Federal agencies to purchasing products manufactured or substantially transformed in the U.S. or in "designated countries." The term "designated countries" refers to (1) countries that have signed the 1994 Government Procurement Agreement (GPA), an international procurement code originally negotiated under the General Agreement on Tariffs and Trade (GATT), (2) members of NAFTA, and (3) recipients of trade benefits under the 2000 Caribbean Basin Trade Partnership Act. Exceptions are allowed if the U.S. government does not receive any responses to a bid from a U.S. supplier or designated country supplier or if desired products are not available in sufficient quantity to meet the needs of Federal agencies. Members of IEMCA have experienced notable difficulties obtaining such waivers, however.

TAA Fails to Meet Objectives. U.S. lawmakers ostensibly included Federal procurement restrictions in the TAA to reward designated countries that allow U.S. companies access to their government markets with comparable freedom to participate in the U.S. government procurement process. The country-of-origin provisions are also aimed at providing an incentive to non-designated countries to ratify the GPA. The TAA has fallen far short of achieving the latter objective, in particular. The GPA went into effect on January 1, 1996. Of the 146 countries that are currently members of the World Trade Organization (WTO, successor organization to the GATT), less than 20 percent have ratified the GPA in the past eight years. It appears unlikely that significantly more WTO members will ratify the GPA in the near term.

TAA Limits the Government's Choices. Many of IEMCA's members and other leading U.S. electronics and information technology (IT) companies have been forced by the pressures of global competition to source key products and components from low-cost countries that are not GPA signatories. Among them are China, Indonesia, the Philippines and Taiwan. Some companies have shifted entire production operations to these and other non-designated countries. Those that have not are actively considering such action. This clearly is the wave of the future. The TAA will ultimately limit the ability of the U.S. government to purchase a vast array of competitively priced, cutting-edge electronics and information technology (IT) products. As a consequence, the ability of Federal agencies to operate efficiently and effectively in the "information age" may be compromised. In addition, the TAA could work against the U.S. government's post-9/11 mission to secure the U.S. homeland. For instance, trends indicate that many products with security applications, including surveillance and encryption, will continue to be manufactured in non-designated countries.

TAA Burdens Electronics and IT Companies With Substantial Costs. The TAA country-of-origin provisions cost electronics and IT companies millions of dollars in lost sales revenue. They also impose significant administrative burdens on vendors. Before bidding on a government contract, companies must pay thousands of dollars in legal and administrative expenses to determine whether their products have been substantially transformed in a designated country. Moreover, tracking must continue throughout the life of the contract -- and many contracts cover multiyear deliveries. As U.S. electronics and IT companies have globalized their operations, the tracking process has become so unwieldy and costly that many heretofore active, competitive vendors have decided (1) not to bid on Federal contracts, in general, or (2) to pull certain products from the Federal market. The net result is that the TAA denies the U.S. government access to state-of-the-art electronics products that are otherwise readily available to any non-governmental person or entity. Furthermore, the law costs the

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electronics and IT industries an estimated $100 million per year in lost sales revenue plus compliance-related expenses.

Conclusion. The country-of-origin restrictions in the TAA have not served the U.S. government as intended by Congressional authors. These provisions have not significantly broadened support in the WTO for the GPA. More important, the TAA has had the unforeseen impact of gravely limiting Federal acquisition of competitively priced electronics and IT products. IEMCA therefore strongly urges the Councils to maintain the TAA in the final list of laws deemed inapplicable to Federal procurement of COTS items.

Thank you for the opportunity to provide comments on a matter of vital importance to IEMCA's members. We look forward to continuing this dialogue with members of the Councils.

Sincerely,

Richard R. Gill

Richard R. Gill
Executive Director

2000-305-20

Ingersoll-Rand Company | 1100 Wilson Boulevard
Suite 2950
Arlington, VA 22209

March 15, 2004

General Services Administration
FAR Secretariat (MVA)
1800 F Street, NW, Room 4035
ATTN: Laurie Durarte
Washington, DC 20405

Subject: FAR Case 2000-305; Commercially Available Off-the-Shelf Item Acquisitions

Dear Ms. Duarte:

On behalf of the Ingersoll-Rand Company I wish to submit a positive comment regarding the above-referenced proposed regulatory change.

For your information, Ingersoll-Rand is a manufacturer and service provider for a multitude of commercially available off-the-shelf goods and services for various agencies of the United States, as well as various state and local governments. We value all of our government customers greatly, and strive constantly to provide the best quality and delivery of supplies or services at fair and reasonable prices. We have considered the proposed regulation and view it as supportive of commercial streamlining; it will facilitate our conduct of business with the Government.

If there are any questions about our position, please contact me directly. I can be reached by phone at (703) 527-2744 or by e-mail at gordon_stables@irco.com.

Sincerely,

Gordon W. Stables, Jr.
Director, Government Affairs and Sales

:jes

Via Fax to: (202) 501-4067

Received 3/15/04 MVA

2000-305-21

U.S. GENERAL SERVICES ADMINISTRATION
Office of Inspector General

March 15, 2004

FAR Secretariat (MVA)
1800 F Street, N.W.
Room 4035
Washington, D.C. 20405
Attn: Laurie Duarte

Re: Proposed FAR Case 2000-305-- Commercially Available Off-the-Shelf Items and List of Inapplicable Statutes

Dear Sir or Madam:

This letter transmits the comments of the General Services Administration, Office of Inspector General (OIG) on the above-referenced proposed FAR case. The FAR Case proposes to add additional statutes and authorities that would be made inapplicable to procurements of commercially available off-the-shelf (COTS) items. The rule implements authority provided to the Administrator of the Office of Federal Procurement Policy by Section 4203 of the Clinger-Cohen Act, Public Law 104-106 (1996). Our comments relate to the proposals to exempt COTS items procurements from the Comptroller General's audit authority and the requirements of the Trade Agreements Act. Many procurements under GSA's Multiple Award Schedule (MAS) program would qualify as COTS items procurements for purposes of the regulation. For the reasons noted below, we do not believe it is in the Government's best interest to exempt COTS items from these two statutory requirements.

Comptroller General Audit Authority Should Be Retained

The FAR case proposes to make the Comptroller General's audit authority, embodied in 41 U.S.C. § 254(d) and 10 U.S.C. § 2513(c) as well as 48 C.F.R. § 52.215(d), inapplicable to COTS procurements. The Comptroller General's audit authority is the last remaining general contractual audit authority applicable to commercial items contracts. In the case of GSA, for example, in 1997 the agency-specific postaward audit authority (embodied in the GSAR) was severely limited -- to checking only for overbillings and price reductions -- as to Multiple Award Schedule (MAS) program contracts. Further, the general FAR Audit-Negotiation clause was also made inapplicable to MAS and other negotiated contracts which involved commercial items by the Federal Acquisition Streamlining Act (FASA), Public Law 103-355 (1994), and the Clinger-Cohen Act. If the Comptroller General's authority to audit is also removed, the Government will have no routine audit authority (aside from more severe law

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enforcement tools generally utilized only when fraud indicators are present) in connection with COTS contracts. We believe this is an important authority to preserve.

We note that Congress has evidenced in legislative history that it intended to preserve, or at least not eliminate, the Comptroller General's audit authority when it made changes to other audit authorities in FASA and the Clinger-Cohen Act. The conference report relating to the Clinger-Cohen Act notes, in a section-by-section analysis relating to Section 4201 ("Commercial Items exception to requirement for cost or pricing data), that "In recognition of the authority of the General Accounting Office to audit contractor records, the conferees have removed the specific audit authorities in the Federal Acquisition Streamlining Act of 1994 that relate to information supplied by commercial suppliers in lieu of certified cost and pricing data." H. Rep.104-450 (1996). We acknowledge that the Clinger-Cohen Act technically requires statutory direction to eliminate a law or regulatory authority from the proposed inapplicable list. We submit, however, that this conference report statement evidences Congressional direction that the Comptroller General's authority be preserved.

Trade Agreements Act Requirements Should Be Retained

We also note our concerns regarding the proposed elimination of the Trade Agreements Act (TAA), 19 U.S.C. § 2501 et seq., as to COTS items procurements. The TAA applies to MAS commercial item procurements, and generally prohibits acquisition of products from nondesignated countries. We note that the United States Trade Representative has commented against exempting COTS items procurements from the TAA's provisions. We defer to those comments on the underlying trade policy issues. Further, we understand that commenters are suggesting a reason to eliminate the TAA's applicability is that the statute is obsolete and is not observed or enforced; we would note that our Office has active, pending investigations and cases currently where the primary allegations are violations of the TAA.

Please feel free to call my counsel, Kathleen S. Tighe, on (202) 501-1932 with any questions or concerns you may have regarding these comments.

Sincerely yours,

Daniel R. Levinson

Daniel R. Levinson
Inspector General

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March 15, 2004

2000-305-22

General Services Administration
Attn: Ms. Duarte
FAR Secretariat (MVA)
1800 F Street, NW Room 4035
Washington, DC 20405

Reference: FAR Case 2000-305

Dear Ms. Duarte:

Canon U.S.A., Inc. (CUSA) is headquartered in Lake Success, New York and is a leader in business and consumer imaging equipment and information systems. Our market leading products and digital solutions make it possible for businesses and consumers to capture, store, and distribute information and images. Canon has more than 9,000 employees across the United States.

Canon products include color and black-and-white copiers, printers, image filing systems, cameras, lenses, camcorders, broadcast, semiconductor and optical equipment. Canon is recognized as a leading provider of innovative, quality networked copier and printer products. Canon is listed by *Fortune* as one of the "World's Most Admired" and one of "America's Most Admired" companies. Canon also ranked #39 on *Business Week's* list of "Top 100 Brands" and one of "America's Best Managed Companies" by *Forbes*.

We at CUSA want to ensure Canon's quality innovative solutions are available to federal, state and local government agencies in the digital workplace of the 21st Century. That is why we strongly support the waiver of the Trade Agreements Act of 1979 in the above referenced rulemaking for federal purchases of "Commercially Available Off-the-Shelf Items (COTS)."

Thank you for the opportunity for Canon U.S.A., Inc. to comment on this important legislation.

Sincerely,

Tabitha A. Yothers

Tabitha A. Yothers
Assistant Director
Contracts & Compliance
Government Marketing Division

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mvr

2000-305-23

Eric L. Mensing
Vice President
Government Trade
and Government Affairs

March 15, 2004

General Services Administration
FAR Secretariat (MVA)
1800 F Street, NW
Room 4035, ATTN: Laurie Duarte
Washington, DC 20405

Re: FAR Case 2000-305, Federal Acquisition Regulations: Commercially Available Off-the-Shelf ("COTS") Items

American President Lines, Ltd. ("APL") submits these comments in response to the Notice of Proposed Rule in the January 15, 2004 *Federal Register* (69 *Fed. Reg.* 2448). APL operates 11 U.S.-flag container vessels in liner service to and from the United States. APL provides extensive and important ocean transportation service to the U.S. Department of Defense ("DOD"), to the U.S. Department of Agriculture and the U.S. Agency for International Development ("AID") in furtherance of their humanitarian aid programs, to the U.S. State Department, as well as to the commercial export/import community. In addition, APL employs nine of its U.S.-flag vessels under Maritime Security Program ("MSP") Agreements with the U.S. Maritime Administration ("MarAd"), and is a major participant in the DOD Voluntary Intermodal Sealift Agreement ("VISA") program. (MSP and VISA are discussed later in these comments.)

APL is filing these comments to urge that the Councils determine that it would be in the best interest of the United States not to include 10 U.S.C. 2631 (the Cargo Preference Act of 1904) and 46 U.S.C. App. 1241(b) (the Cargo Preference Act of 1954) in the FAR list of laws that are inapplicable to contracts for acquisition of commercially available off-the-shelf

APL Limited
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Washington, D.C. 20006
202.496.2480

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("COTS") items.[1/] We show below:

- that the 1904 and 1954 cargo preference laws are a fundamental cornerstone of the U.S. maritime and defense policy to maintain a U.S.-flag foreign commerce fleet;

- that inclusion of those laws in the list of laws that are inapplicable to contracts for the acquisition of COTS items could have the effect of depriving U.S.-flag vessels of vitally important cargo opportunities, thus threatening the viability of U.S.-flag liner service in the foreign trades and putting at risk two DOD programs – the MSP and VISA programs – that are essential to U.S. security interests; and

- that for, *inter alia*, the reasons just noted, the statutory "best interest" determination with respect to the two above-referenced cargo preference laws has already been made by the Councils in the directly analogous contexts of government contracts subject to the simplified acquisition threshold and for commercial items and those determinations are equally appropriate in the context of the Proposed Rule.[2/]

1. 10 U.S.C. § 2631, the Cargo Preference Act of 1904, reserves to U.S.-flag vessels – as distinguished from vessels that are registered by foreign nations – 100% of cargoes transported for the DOD on commercial, *i.e.*, non-government-controlled, vessels. 46 U.S.C. App. 1241(b), the Cargo Preference Act of 1954, correspondingly requires that 50% of the cargoes transported for U.S. civilian government agencies, or that are donated by the U.S. government to foreign nations or otherwise sponsored by the United States, must be shipped on U.S.-flag commercial vessels.

These cargo reservation statutes are a longstanding cornerstone of U.S. maritime and defense policy. They have the objective of encouraging vessel operators to operate U.S.-flag ships, subject to U.S. control, by providing a priority to U.S.-flag vessels for the large volume of commodities, equipment and other cargoes that are shipped by or for the U.S. government.

1/ The Proposed Rule proposes amendments to the FAR. If adopted, we assume equivalent amendments would be incorporated in the DFAR.

2/ We have an even more fundamental objection to the inclusion of the 1904 and 1954 cargo preference acts in the list of laws subject to the COTS acquisition provisions, namely, that in absence of clear legislative history – which cannot be found in the COTS legislation – Congress cannot be understood to have intended to abandon the longstanding and fundamental policy of the cargo preference laws incident to the enactment of procurement legislation of general applicability. We do not elaborate on this position here, because the position is on its face self-evident, see, *e.g.*, *Preston* v. *Heckler*, 734 F.2d 1359, 1367-69 (9th Cir. 1984); *Sierra Club-Black Hills Group* v. *United States Forest Service*, 259 F.3d 1281, 1287 (10th Cir. 2001); *OXY USA, Inc.* v. *Babbitt*, 122 F.3d 251, 258 (5th Cir. 1997), and because the Councils have, in effect, themselves recognized that principle incident to their "best interest" determinations as applied to the simplified acquisition threshold and commercial items acquisitions.

While the basic policy has been on the books for 100 years (in the case of DOD cargoes), and 50 years (in the case of all other U.S.-government cargoes), the policy has been repeatedly reaffirmed and updated by the Congress. Most recently, in the Maritime Security Act of 1996 providing government support for the MSP fleet of militarily useful, privately owned U.S. flag vessels (46 U.S.C. App. § 1187(a)), and in the provisions of the 2004 National Defense Authorization Act reauthorizing and expanding the MSP program (Public Law 108-136, adding 46 U.S.C. App. § 53106(d)), explicit recognition is given to the importance to participating U.S.-flag vessels of the government cargoes reserved to the U.S. flag by virtue of the 1904 and 1954 Cargo Preference Acts by providing that MSP vessels should carry such cargoes without adjustment of MSP payments.

The requirements of the 1904 and 1954 cargo preference laws are currently reflected in the FAR (48 CFR Subpart 47.5) and the DFAR (48 CFR Subpart 247.5).

2. The purpose of Section 4203 of the Federal Acquisition Reform Act (41 U.S.C. 431), which the Proposed Rule undertakes to implement, is to simplify and expedite government procurements by eliminating "government-unique policies, procedures, requirements, or restrictions for the procurement of property" with respect to "commercially available off-the-shelf products." H. Conf. Rept. No. 104-450, 4 U.S.C.C.A.N., 104th Cong. 2d Ses. p. 452. An important and here relevant qualification, which we discuss below, applies where it is determined that the elimination of a statutory requirement "would not be in the best interest of the United States." [*Id.*]

COTS are defined in the statute as "commercial items" "sold in substantial quantities in the commercial market place * * * [and] offered to the government without modification, in the same form" as the items are sold commercially. (41 U.S.C. § 431) "Commercial items," in turn, are defined (in the FAR, at 48 CFR §2.101) as any item "of a type customarily used by the general public" and sold or offered for sale to the general public.

For U.S.-flag liner operators such as APL, the COTS category represents the vast preponderance of cargo that is carried for or sponsored by the U.S. government.

- In 2003, APL moved 31,000 FEU of cargo for DOD. Of this, well over 50% represented cargo that fit within the COTS definition – in essence, everything that APL moved for DOD other than unit equipment, DOD mail, military household goods, and supplies that were unique to DOD requirements.

- In 2003, APL moved 27,000 FEU of humanitarian aid cargo sponsored by the Department of Agriculture and AID. 85% of this could be argued to be the type of items that qualify under the definition of COTS.

Currently, the ocean transportation services for the large preponderance of these cargoes are procured directly by the U.S. government or, in the case of humanitarian aid cargoes, by

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cooperating sponsors pursuant to instruction of the U.S. government. To the extent that the government (or a cooperating sponsor in the case of humanitarian aid cargoes) were to continue to procure the ocean transportation of these cargoes, i.e., is itself the shipper, the Proposed Rule would not directly impact upon the application of the 1904 and 1954 Acts because the COTS statute and the proposed rule does not apply to the procurement of ocean transportation as such. However, for those cargoes currently subject to the priority for U.S.-flag carriers afforded by the 1904 and 1954 Acts that the U.S. government acquires on a delivered basis, *i.e.*, inclusive of ocean transportation purchased by the supplier of the commodities or equipment, inclusion of those two statutes in the list of laws made inapplicable to the procurement of COTS items would have the effect of rendering the U.S.-flag preference inapplicable.[3/] DOD has estimated that 10-20% of DOD cargo is vendor direct at landed rates. This represents a significant volume of cargo, and in and of itself the effect of eliminating cargo preference for these cargoes would be to seriously diminish the pool of cargo available to APL, and more generally to the U.S.-flag liner fleet.

Even more threatening, by the expedient of modifying their procurement practices so as to purchase COTS items on a delivered basis, and thereby avoid the direct purchase of the ocean transportation services, government procurement officers could effectively avoid altogether for COTS items the U.S.-flag priority that Congress has established through the 1904 and 1954 Cargo Preference Acts if the application of those statutes to COTS items were to be eliminated as proposed in the Proposed Rule.

The effect would be to dramatically reduce the incentive for the continued operation of U.S.-flag liner vessels in foreign commerce. It is irrefutable, and well-documented, that operators of U.S.-flag vessels in foreign commerce are at a marked financial disadvantage as compared with their foreign competitors due, *inter alia*, to appreciably higher labor costs, vessel standards, and tax disadvantages.[4/] In direct consequence, the U.S.-flag commercial fleet serving the foreign trades has shrunk dramatically.[5/] Over the years, Congress has repeatedly enacted promotional programs intended to preserve a U.S.-flag fleet by offsetting in part the cost disadvantage that is inherent in operation of vessels under the U.S.-flag. The most recent of these is the MSP program enacted in 1996 and reauthorized and expanded during the last session of Congress in Title XXXV of the National Defense Authorization Act for Fiscal Year 2004. An important additional component of the Congressional policy to preserve a U.S.-flag presence is the statutory preference to U.S.-flag vessels of U.S.-government-generated cargoes stated in the 1904 and 1954 Cargo Preference Acts. As identified earlier, that preference was explicitly recognized in the 1996 Maritime Security Act and in last year's MSP reauthorization legislation both of which provide that payments to U.S. flag vessels under the MSP program "shall not" be reduced on account of the carriage of cargoes reserved to the U.S.-flag under the authority of the 1904 and 1954 cargo preference acts.

3/ Under the FAR, the cargo preference acts are to be applied not only when the U.S. procures ocean transportation directly, but also for cargo either that the government owns directly or where the cargo is identifiable for eventual use by the government. See 48 CFR § 47.503, § 247.572-1.

4/ See, e.g., S.Rep. No. 104-167, pp. 2-5.

5/ See, e.g., S.Rept. No. 104-167, supra note 4.

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3. The importance of a U.S.-flag foreign commerce fleet to U.S. commercial and security interests is no abstraction. That importance permeates the consideration of the legislative efforts that led to the establishment of the MSP program and to the reauthorization and expansion of that program last session. An essential component of participation in MSP is the agreement to enroll MSP vessels in an "Emergency Preparedness Program" which gives DOD access to the vessels and to the operator's associated infrastructure to the extent required for national security purposes. (46 USC App. § 1187b; Public Law 108-136, adding 46 USC App. § 53107) The emergency preparedness requirements have been implemented through the VISA program jointly administered by DOD and the Maritime Administration.

We attach as an exhibit to these comments an "information paper" submitted in August, 2001 to Congress by the then Commander in Chief of the U.S. Transportation Command ("USTRANSCOM") stressing that "[a] strong U.S. flag Merchant Fleet capable of meeting the military's need for surge and sustainment sealift and of maintaining a U.S. flag presence in international maritime commerce is vital to our national interest." The letter identified the importance of MSP to insuring the availability of that U.S.-flag presence, and suggested that in the absence of MSP, Maersk Line, the largest of the MSP operators – and by necessary inference, the other major operators using U.S.-flag MSP vessels, such as APL – could not profitably employ U.S.-flag vessels and might withdraw from the MSP and VISA programs, to the enormous detriment to national security interests.

The conclusion so stated as to MSP is equally applicable to cargo preference, which, like MSP, provides a necessary support for U.S.-flag operations. As Secretary of Transportation Norman V. Mineta emphasized earlier this month in a statement at the meeting of the Maritime Trades Department Executive Board:[6/]

> "The Maritime Security Program, the Jones Act and cargo preference laws are essential elements of America's national maritime policy. This administration supports these laws and programs and, in addition, we are examining other proposals to build on that foundation ..."

Secretary Mineta's position was echoed just last week (March 10, 2004) in a joint statement to the Senate Armed Services Committee Seapower Subcommittee by the Commander of TRANSCOM, the Commander of the Military Sealift Command and the Commanding General of the Surface Deployment and Distribution Command, supporting the "enforcement of cargo preference requirements * * * [and] the Maritime Security Program" in order to insure that DOD sealift requirements can be met.

Moreover, in an important respect, the unavailability of the U.S.-flag preference established in the 1904 and 1954 cargo preference acts would itself put at risk the MSP and VISA programs. Under the MSP reauthorization legislation enacted last term, operators of U.S.-flag vessels must decide by October, 2004 whether or not to enroll their U.S.-flag vessels in

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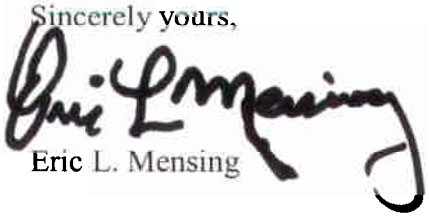
[6/] The statement is quoted in the March 5, 2004 edition of the *Congressional Information Bureau*, p. 3.

the reauthorized MSP program. APL cannot opine for any of the other U.S.-flag carriers. As for APL itself, however, we can state categorically that the unavailability of cargo preference for COTS items would make the continued operation of U.S.-flag vessels, and the participation in MSP and VISA, very difficult to justify on economic grounds.

4. It is unnecessary, however, for us to belabor the position that withdrawing the statutory U.S.-flag preference for COTS items would not be in the best interest of the United States. That determination has in effect already – and very recently – been made. The Federal Acquisition Streamlining Act of 1994 included a provision directly analogous to the COTS legislation establishing an exemption of Federal government contracts or subcontracts below the simplified acquisition threshold from government-unique requirements applicable to procurement of property or services. 41 U.S.C. § 429. That legislation, however, established the same exception contained in the COTS legislation for provisions of law for which it was determined that "it would not be in the best interest of the Federal government" to establish the exemption. In a series of rulings the Councils have determined that the cargo preference acts should apply to contracts awarded using simplified acquisition procedures, and so provided in both the FAR and DFAR. FAR Case 98-604, 65 Fed. Reg. 24324 (Apr. 25, 2000); DFARS Case 2000-D014, 67 Fed. Reg. 38020 (May 31, 2002). So too, under a similar provision relating to the acquisition of commercial items (41 U.S.C. § 430) the Councils determined that contracts for the procurement of commercial items should not be exempted from the cargo preference statutes. While the Councils have exempted certain subcontracts for the acquisition of commercial items from those laws so as to avoid "disruption of commercial delivery systems," in doing so they stressed that that rule was drafted "to ensure compliance with cargo preference statutes if ocean cargoes are clearly destined for Government use." FAR Case 1999-024, 68 Fed. Reg. 13202 (March 18, 2003).

5. The policy so stated by the Councils in the 2003 rulemaking relating to commercial items, the decision of the Councils in the rulemakings addressed to the simplified acquisition threshold, as well as, importantly, the analysis that we have provided earlier in these comments, necessarily dictates that the 1904 and 1954 cargo preference acts be excluded from the statutes to be listed in the current COTS rulemaking.

Sincerely yours,



Eric L. Mensing

305-23

COMMANDER IN CHIEF
UNITED STATES TRANSPORTATION COMMAND
SCOTT AIR FORCE BASE IL 62225-5357
20 August 2001

The Honorable John B. Breaux
United States Senate
503 Hart Senate Office Building
Washington DC 20510-1803

Dear Senator Breaux

As a follow-up to our recent visit, attached is an information paper giving my perspective on the implications of current requirements for membership in the Voluntary Intermodal Sealift Agreement (VISA) and Maritime Security Program (MSP). This perspective relates to the request by Maersk Lines Limited (MLL) for a statutory exception from certain provisions of these requirements.

I hope this information helps to resolve this issue in a manner that ensures the continued viability of VISA and MSP; and, in that context, the continued participation of MLL in both programs.

Sincerely

Tony Robertson

CHARLES T. ROBERTSON, JR.
General, USAF

Attachment:
MSP Paper

305-23

SUBJECT: Strategic Sealift RE: VISA and MSP

USTRANSCOM POSITION: USTRANSCOM's equity in any issue related to either VISA or MSP is directly related to its responsibility for ensuring coordinated, seamless, and guaranteed access to commercial sealift and intermodal capability to augment DOD organic sealift capabilities during conflict.

DISCUSSION: To meet this objective, the ultimate resolution of Maersk's (an A.P. Moller Group subsidiary) request should ensure:

- Guaranteed access to sufficient intermodal assets during conflict;
- Sustainment of the MSP and VISA programs;
- A robust U.S. maritime industry able to meet the needs of DOD;
- Access to an adequate pool of trained, qualified U.S. Merchant Mariners;
- Compatibility with streamlined commercial business practices; and
- Continued Maersk Lines Limited (MLL) participation in MSP.

BACKGROUND:

- MSP, which is administered by the Maritime Administration (MARAD), provides first priority for subsidies to participating vessels owned and operated by "Section 2 corporate citizens" as defined by Section 2 of the Shipping Act, 1916, 46 App. USC 802. The law also allows a limited "documentation citizen" exception that permits "documentation citizens" to receive first priority for subsidies for a maximum of five vessels if several conditions are met. (NOTE: See Appendix 1 for an explanation of the requirements for a U.S. "documentation" corporate citizen and the more demanding requirements for a U.S. "Section 2" corporate citizen.)

- A.P. Moller Group itself is not a U.S. company and, hence, is neither a "Section 2" citizen nor a "documentation" citizen. However, Maersk Lines Limited (MLL), a "documentation" citizen subsidiary of Maersk Inc. (a U.S. corporation and subsidiary of the A.P. Moller Group), time charters 15 MSP vessels operated by an independent "Section 2" company, US Ship Management Inc. (USSMI), and operates four MSP vessels under the limited "documentation" citizen exception in the statute. At the time of the exception, Maersk was the only company that qualified for the statutory exception. MLL requests that the limited statutory exception be broadened to permit all 19 of its vessels to receive MSP subsidy, even though they are owned and operated by only a "documentation" citizen. This would allow MLL to eliminate the costs and bureaucracy associated with the time charters from USSMI, while continuing to take advantage of the subsidies. If the exception is not granted, Maersk has suggested, based on profitability concerns, that it might be required to withdraw entirely from both MSP and VISA, removing the U.S. flag from its vessels. Such a move would result in a serious degradation to the contributions of the commercial sealift leg of the Defense Transportation System to the National Security Strategy.

- Maersk, through its U.S. subsidiaries, currently operates 19 vessels in the MSP and 25 vessels overall in VISA, as well as 8 vessels under time charter to MSC. These vessels comprise 40% of the MSP fleet, and 43% of MSP's total TEU capacity. A Maersk withdrawal from MSP and VISA and re-flagging of its vessels would also significantly diminish our intermodal systems capability, including port facilities and computer capabilities, to which DOD requires access in national emergencies. To replace these assets, we estimate, would cost $9 billion for initial construction and an annual expense of more than $1 billion for operations and maintenance, excluding crewing and support of a comparable intermodal infrastructure. That said, regarding "crewing", these U.S. flag vessels, operated by Maersk, and required to use U.S. mariners, employ a significant portion of the available U.S. merchant mariner pool upon whom we rely to crew our Ready Reserve Fleet (RRF) ships for contingencies. Currently, 3000 U.S. mariners are required

during full mobilization and need to be rapidly hired to build RRF crews. Preliminary studies suggest a 1,000 U.S. mariner shortfall by 2005 with a large percentage in critical ratings. A Maersk withdrawal from MSP, VISA, and the U.S. flag would critically exacerbate that shortfall.

- Some are concerned as to whether such an expanded waiver would impair USTRANSCOM's access to the vessels in a time of crisis. In fact, our review of the appropriate statutes suggests that the United States would retain significant powers to obtain access to the vessels during a contingency, even if the Maritime Security Act was amended to permit more MLL vessels, or vessels operated by all "documentation" citizens, to be eligible for the top tier of vessels competing for MSP payments.

-- First, a "documentation" citizen would be required to execute the same VISA contingency contracts with DOD that "Section 2" citizens now must execute in order to receive MSP payments. A contractually binding requirement to deliver vessel capacity for DOD would remain.

-- Second, in the unlikely event that a VISA participant would refuse to honor its contractual commitment, a "documentation" citizen would be just as subject to contract remedies under U.S. law and requisitioning (under 46 App. USC 1242) as would a "Section 2" citizen.

-- Third, current law restricting the re-flagging of U.S. flag vessels is applicable to both "documentation" citizens and "Section 2" citizens.

-- Fourth, if new laws were considered necessary to assure DOD access to U.S. flag vessel capacity, new laws could be applied to "documentation" citizens in the same manner as to "Section 2" citizens.

- A strong, US flag, Merchant Fleet capable of meeting the military's need for surge and sustainment sealift and of maintaining a US flag presence in international maritime commerce is vital to our national interest. National military security depends on our ability to transport military forces worldwide and to sustain them by sea once deployed. National economic security depends on the trade that crosses those same oceans in peacetime. The United States should make every effort to ensure that investing in US flag shipping is viewed as no more risky than maritime investments generally. We must ensure maritime policies enable US flag shipping to compete in international markets against ships operated under flags of countries which view their merchant fleets as instruments of national economic policy and insulate their shipping from economic forces of the shipping market. The continued participation of Maersk Lines Limited in MSP and VISA under the U.S. flag is essential to these objectives.

APPENDIX 1: Section 2 vs Documentation Citizen

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Section 2 vs. Documentation Citizen

Section 2 Corporate Citizen

- Reference: Sect. 2 of the Shipping Act, 1916, 46 App. USC 802
- Section 2 corporate citizen must be incorporated under the laws of a state or the U.S. and certain officers & directors must be U.S. citizens
- Section 2 requires:
  - Controlling interest to be owned by U.S. Citizens
  - For any corporation operating a vessel in the coastwise trade, controlling interest is 75%
  - For corporations not operating a vessel in the coastwise trade, controlling interest is a majority, presumably 51% of stock
- Section 2 defines controlling interest such that even proper stock ownership is not sufficient if "by any other means whatsoever" a non-citizen can control the corporation.

Documentation Citizen Corporation

- Reference: 46 App. USC 12101
- Documentation Citizen Corporation must:
  - Be incorporated under the laws of a state or the U.S. and certain officers & directors must be U.S. citizens
- Documentation Citizen Corporation could:
  - Be a U.S. corporation without the appropriate controlling interest owned by U.S. citizens
  - Be a U.S. corporation with the appropriate controlling interest owned by U.S. citizens, yet subject to control by non-U.S. citizens due to::
    - Fiduciary responsibility to non-U.S. citizens
    - Power to vote stock in favor of non-U.S citizens
    - Or any other technique whereby actual control is exercised by non-U.S. citizens

AMERICAN ROLL-ON ROLL-OFF CARRIER, LLC
85 Chestnut Ridge Road • Montvale, NJ 07645 • Phone: (201) 307-1626 • Fax: (201) 307-9172

March 15, 2004

2000-305-24

General Services Administration
FAR Secretariat (MVA)
1800 F Street, N.W., Room 4035
Washington, DC 20405
Attention: Ms. Laurie Duarte

RE: Federal Acquisition Regulation; Commercially Available Off-the-Shelf (COTS) Items
FAR Case 2000-305; 69 Fed. Reg. 2447, et seq., January 15, 2004

Dear Ms. Duarte:

American Roll-On Roll-Off Carrier, LLC. ("ARC") is a United State company that provides American-flag vessel carrier service in the foreign commerce of the United States. ARC is a major figure in the important task of supporting the transportation needs of the United States government, both its civilian and military components.

ARC has committed five (5) United States-flag vessels to this service on a regularly schedule carrier deployment. These ships carry all manner of roll-on roll-off cargo for the government from Abrams tanks, helicopters and Humvees to agricultural and road-building equipment. ARC's service is dedicated to the United States government and to the carriage of flag-impelled cargoes reserved to U.S.-flag carriage under the various cargo preference laws of the United States. In addition, ARC has committed its entire fleet of five (5) U.S.-flag vessels to the Voluntary Intermodal Sealift Agreement ("VISA") program so that these vessels of superior military usefulness are available to the military in support of its missions in times of emergency.

The thing that permits a carrier such as ARC to make this commitment of transportation assets worth over $250 million to the defense and other governmental needs of this country is our ability to rely on the steady flow of cargoes that are vouchsafed to U.S.-flag carriers under the cargo preference laws. Any derogation of that cargo base is a serious financial threat to all United States flag vessel carriers.

We have carefully reviewed the comments that have been drafted and filed by the Transportation Institute. Their comments thoroughly cover the concerns that ARC has with regard to the devastating effect implementation of this proposed rule would have on ARC and on all American Flag carriers. ARC takes this opportunity to lend its complete support to those comments.

There is no way that the negative impact of implementation of this rule can be overstated as to American carriers and, in turn, their ability to meet the needs of the United States for ocean transportation of critical cargoes in peacetime and in times of emergency. ARC, in support of the position of the Transportation Institute and others, wishes to go on record as vigorously opposing adoption of this rule. By this letter, ARC expresses its strong concurrence with the views set forth in the Transportation Institute filing and our conviction that this rule is misguided and a potential devastation of the United States-flag support base for the transportation needs of this country.

Respectfully Submitted,

James W. Wells

James W. Wells
Executive Vice President

rec'd 3/15/04

2000-305-25

PATRIOT HOLDINGS, LLC • AMERICAN SHIP MANAGEMENT, LLC • PATRIOT CONTRACT SERVICES, LLC

March 12, 2004

General Services Administration
FAR Secretariat (MVA)
1800 F Street, N.W., Room 4035
ATTN: Laurie Duarte
Washington, DC 20405

Re: FAR Case No. 2000-305, Commercially Available Off-the-Shelf (COTS) Items - Federal Register Notice January 15, 2004, Proposed Rules by the Civilian Agency Acquisition Council and the Defense Acquisition Requisition Council

Dear Ms. Duarte:

This letter responds to the January 15, 2004 Federal Register Notice of the Civilian Agency Acquisition Council and the Defense Acquisition Council for proposed rules to exclude certain laws from federal acquisition requirements for COTS items. American Ship Management, LLC (ASM) opposes the proposed rules to the extent they would exclude cargo preference laws of 10 U.S.C. 2631 and 46 App. U.S.C. 1241(b) (and any other cargo preference laws) and existing implementing regulations, agreements, and other documents.

ASM is a U.S. citizen-owned company operating nine U.S.–flag container vessels in the U.S. foreign commerce. The vessels are under long-term time charters to American President Lines, Ltd., fixed at a time when the government rules for cargo preference were quite specific. The vessels compete vigorously with foreign-flag vessels in the highly competitive transpacific trades and carry both military and civilian preference cargoes. The vessels are also committed to the U.S. Department of Defense for security purposes pursuant to Voluntary Intermodal Sealift Agreements (VISA). Their continued successful commercial operation is essential to the maintenance of a viable competitive commercial U.S.-flag presence in the Far East and to the country's continued security in its confrontation with terrorists. U.S. expenses are higher than foreign expenses and continued viability of these ships under the United States registry hinges on their continued participation in the Maritime Security Program (MSP), VISA and to the continued availability of cargo preference. Given the very broad definition of COTS items, the exclusion of cargo preference from their carriage would remove all but the most peculiarly military items from coverage of cargo preference laws. It is believed that the consequences of the proposed exclusion of the cargo preference requirements would be a crippling blow to the viability of these ships. It would also be inequitable. ASM has relied upon the present understanding of cargo preference requirements and taken irrevocable business actions in reliance upon that understanding.

2175 N. California Blvd., Suite 1000 • Walnut Creek, CA 94596 • 925•296-2000

Received 3/16/04

305-25

Further, the current Maritime Security Program expires next year and Congress has enacted a replacement effective October 1, 2005. ASM and others hope to participate in the new program. In order for the renewed program to be effective, cargo preference is essential to assure that operations under U.S. registry will likely be viable.

The cargo preference laws were enacted as one major means to encourage the maintenance of a U.S.-flag fleet to meet the needs of this country and to have the economic sea lanes open to U.S. commerce as well as to have an auxiliary naval force in times of national crises. Those needs would be jeopardized by the proposed rules with little discernible gain to the country.

Finally, ASM wholeheartedly supports the extensive comments filed this date by the American Maritime Congress, the Transportation Institute and the Maritime Institute for Research and Industrial Development in opposition to the proposed rulemaking.

Sincerely,

Jordan Truchan

Richard N. Kuyath
Counsel

Office of General Counsel

2000-305-26

March 10, 2004

General Services Administration
FAR Secretariate (MVA)
1800 F Street, N.W.
Room 4035
Attention: Laurie Duarte
Washington, DC 20405
farcase.2000-305@gsa.gov

Subject: Proposed FAR Amendment: Commercially Available Off-The-Shelf (COTS) Items; 69 Fed. Reg. 2447 (January 15, 2004); FAR Case 2000-305

3M Company appreciates the opportunity to provide its comments on the proposed rule. Before we make these comments, it will be useful to provide some background regarding 3M Company ("3M").

3M is a large U.S. corporation with over $18 billion a year in sales. 3M has approximately 67,000 employees and makes over 50,000 different products. 3M invests over $1 billion a year in internal research. Approximately 58% of 3M's sales are made outside of the U.S. 3M has operations in more than 60 different countries and manufacturing facilities in 28 different countries.

3M is primarily a commercial company. Most of the 50,000 different products it makes are commercial products and only a few of them are Government-unique products. Only a small percentage of 3M's sales is made to the Government.

The proposed rule would implement section 4203 of the Clinger-Cohen Act of 1996 with respect to commercially available off-the-shelf Item acquisitions. The Act requires that the FAR list certain provisions of law that are inapplicable to contracts for acquisitions of commercially available off-the-shelf items.

The proposed rule would add a definition of "commercial off-the-shelf (COTS) items" to the FAR, and make 20 statutes inapplicable to Federal Government contracts for COTS items. 3M agrees with the proposed exemption of each of the 20 statutes to procurements of COTS items. In particular, 3M agrees with the elimination of the applicability of the Buy

Minnesota Mining and
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Rcvd 3/16/04

305-26

American Act (41 USC 10a) and the Trade Agreements Act (19 USA 2501 et seq) to procurements of COTS items.

The Buy American Act (BAA) establishes a price evaluation preference for products manufactured in the U.S. and whose cost of components is over 50% attributable to U.S.-manufactured components. The BAA only applies to contracts valued under a relatively low threshold (currently $175,000). The Trade Agreements Act (TAA) is far more significant in practice, since most commercial item purchasing (including Federal Supply Schedule orders) occurs in contracts valued above the $175,000 monetary threshold. The TAA ensures equal treatment of domestic products and those produced in countries that have entered the World Trade Organization's Agreement on Government Procurement (AGP), the North American Free Trade Agreement (NAFTA), the United States-Singapore Free Trade Agreement, the United States-Chile Free Trade Agreement, the Caribbean Basin Initiative, and/or the Israeli Trade Act. It also generally prohibits acquisition of end products produced in any other countries.

Almost all major developed trading countries are eligible to supply the Federal Government under one of these treaties. However, several Asian and certain other countries that are significant producers of commercial items – notably electronics – are ineligible. Examples include Malaysia, India, China, Taiwan and Brazil.

The location of component manufacture is not an issue under the TAA, since the TAA rule of origin is based only on where the materials and componetry are "substantially transformed" to create the end item. However, international manufacturers face a dilemma in determining where to assemble commercial items which are also used by the Federal Government. Some non-AGP countries may offer significant cost advantages. If the Federal Government market is small relative to the market as a whole, it may not be worth setting up production in a TAA country. This deprives the Federal Government of some commercial items. In some cases, manufacturers maintain more than one manufacturing location, at least one of which is TAA-qualified. But, in many instances, the volume of demand of the Federal Government is insufficient to support two locations. Moreover, there is administrative expense (and sometimes error) associated with tracking the origin of particular units for purposes of supplying Federal Government customers. In addition, the cost of the TAA-eligible item may be higher than what the Government could obtain without the source restriction. Therefore, by eliminating the TAA for

procurements of COTS items, the Federal Government may have more items to choose from, at a lower cost, while manufacturers' lives will be simplified.

The complexity of the BAA and the TAA and the fact they have different rules to determine the country of origin make it expensive for commercial companies to determine the country of origin for Federal Government sales.

A major burden of the BAA and TAA are their certification requirements, which expose manufacturers to civil false claims and other sanctions even when they have made a good faith effort to comply with the BAA's and TAA's government-unique requirements. Many contractors have had to establish and maintain costly, labor-intensive product management and tracking systems that are neither required nor necessary to manage their commercial business.

Even when a contractor certifies that all commercial items being delivered are compliant end products under the BAA or TAA, it must continue to monitor that contract at considerable expense for its entire duration to assure that any manufacturing source changes do not invalidate the certification made at the time of contract award.

Given the fact that commercial sales of off-the-shelf technology far outstrip Federal purchases, Government-unique requirements such as those imposed by the BAA and TAA rarely drive manufacturing decisions. Nevertheless, some companies will occasionally make exceptions and maintain a limited degree of manufacturing in a designated country solely to meet the Federal Government demand. This is unusual, however, because in most cases the additional cost cannot be passed on to the Federal Government due to the Federal Government's insistence on paying no more for COTS than a manufacturer's published commercial price or most favored customer price.

By imposing BAA-related and TAA-related restrictions on Federal Government procurements, the Federal Government may be restricting its own access to the most productive, cost-effective technologies available in the marketplace. The financial and administrative burdens and the potential liability that accompany BAA and TAA certification requirements are forcing contractors to consider whether to withhold or withdraw certain products from the Federal Government marketplace. Others simply cannot afford to create and maintain the tracking systems, leaving them no recourse but to forego bidding on Federal Government contracts. In either case, competition and choice are diminished for the Government.

The requirements under the TAA and BAA to determine country of origin for Federal Government sales are inconsistent with commercial practice. Therefore, elimination of the applicability of the BAA and TAA to procurements of COTS items is consistent with Section 4203 of the Clinger Cohen Act.

Because of the foregoing points, 3M strongly supports the elimination of the applicability of the 20 statutes (including the BAA and TAA) to Federal Government procurements of COTS items.

3M again notes its appreciation for the opportunity to comment on the proposed rule.

Sincerely,

Richard N. Kuyath

Richard N. Kuyath
Counsel

RNK/other/031004 proposed FAR amendment-COTS items.doc

2000-305-27

RPL MANAGEMENT RESOURCES INC.

LEADERS IN EEO / AA COMPLIANCE

March 9, 2004

General Service Administration
FAR Secretariat (MVA)
1800 F. Street, N.W., Room 4035
ATT'N Laurie Duarte
Washington DC 20405

Dear Ms. Durate:

Reference: FAR case 2000-305

I object to this proposal. At a time when our nation is at war and our veterans are returning home seeking employment there should be every effort made to ensure their employment rather than limit their opportunities. The obligation to list with the State Employment Agencies, etc. is a small price to pay for the sacrifices they make in our behalf. This proposal brings back memories of the treatment we received returning from the Vietnam Conflict. I am a veteran, and a small business owner and have no problem complying with the regulations protecting our disabled and veterans.

R. P. Landreville
President

Rcvd 3/16/04

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2000-305-28

"Kathryn Coulter" <kcoulter@coalgovpro.org>

To: "'farcase.2000-305@gsa.gov'" <farcase.2000-305@gsa.gov>
cc:
Subject: Re: FAR case 2000-305

03/16/2004 09:00 AM

March 15, 2004

General Services Administration
FAR Secretariat (MVA)
ATTN: Laurie Duarte
1800 F Street, NW
Room 4035
Washington, DC 20405

RE: FAR case 2000-305

Dear Ms. Duarte:

The Coalition for Government Procurement appreciates this opportunity to comment on the proposed rule released January 15, 2004. The proposed rule exempting commercial off the shelf (COTS) procurements from the Trade Agreements Act (TAA), the Buy American Act (BAA) and a host of other contract requirements, if approved, has the potential to alleviate many of the costly, time-consuming compliance responsibilities that drive up the costs of commercial products purchased by the federal government and increase the turn-around time of products from contractor to government consumer-creating a more streamlined, efficient procurement system.

The Coalition for Government Procurement is an association of over 300 companies selling commercial services and products to the federal government. Our members include large, medium, and small firms from a wide variety of industry segments. Together, our members account for over $20 billion in sales to the US government each year and approximately 70% of the sales made through GSA's Multiple Award Schedule program. Since 1979 we have worked with leaders in government to institute common sense procurement practices.

Despite the passing of the Clinger-Cohen Act eight years ago, the US government and its taxpayers have missed out on potentially valuable opportunities to purchase COTS products in a streamlined environment with the enhanced competition more flexible rules can bring. These government-only regulations included in this proposed rule place hurdles in the way of agencies that want to buy commercial items in a manner more like the commercial sector. These government mandates imposed on contractors are inevitably passed as extra costs to the government customer and keep some firms out of the market completely. The time has come to bring about the change intended nearly a decade ago by implementing the regulatory and contractual requirements enacted by Section 4203 of the Clinger-Cohen Act authorizing the elimination non-commercial contract clauses from COTS procurements.

Acquisition rules can help, not hamper, the contractor's ability to assist the government in meeting its need to access a streamlined, efficient solutions to meet it's diverse needs. With the global economy constantly growing and the Unites States' international relationships transcending new lines, it is becoming more difficult for companies to comply with what are increasingly out-moded procurement rules and still move at the speed of the government's need. It is for these reasons that Coalition supports the proposed rule.

Coalition members state that it is increasingly difficult, if not

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impossible, for some of them to determine the source of origin of their products given the global structure of the commercial market. As such, the rules imposed upon these companies are no longer based in market realities. Even the most diligent company could find itself tripped up by a sudden change in where their items are made.

In order to lower the cost of manufacturing and maintain competitiveness, some companies are having their systems manufactured in non-designated countries. Because of the restrictions imposed by the TAA/BAA, and in order to comply, manufacturers are running dual production lines in two separate countries. Higher costs are then being transferred to end-users. These restrictions necessitate additional costly administrative and managerial burdens, such as maintaining two separate inventories, one for the private sector and the other for the public sector. Today, under the micro-purchase threshold, the Government buys millions of dollars worth of items from non-designated countries. Yet, contractors cannot sell one dollar's worth under GSA's Multiple Awards Schedule Program.

Still other companies maintain separate production points simply to serve the government market. These government unique facilities have higher costs and produce only a limited number of models in comparison to commercial market assembly lines. Government contractors must account for higher production costs when offering commercial items and their customers simply do not have access to today's technology today. This impacts the profitability of this business and may result in companies eventually withdrawing products.

It makes sense to waive the requirements of the Trade Agreements Act for such companies. As they stand, the Trade Agreement Act and Buy American Act regulations make the US government second-class users of technology. Maintaining obsolete regulations for government users denies access to solutions that are readily available to commercial customers. The commercial market, however, is not the only place where this technology is available. International terrorist organizations and others who oppose the US government can use it, and use against our government and its citizens. Thus, procurement rules make our homeland security and national defense mandates more difficult to achieve. The Clinger Cohen Act was passed nearly a decade ago to prevent this, yet the full flexibilities envisioned by that Act have not been realized until now.

The Coalition believes, however, that the provision exempting COTS procurements from the Buy American and Trade Agreement Acts should be modified in one area. At this time, an anti-dumping case is being prepared by the furniture industry to be heard by the World Trade Organization surrounding allegations of the illegal dumping of Chinese furniture products in the US at below market prices. These actions have inflicted harm upon American furniture companies that are also feeling the impact of the poor economy. Together, these twin afflictions have resulted in massive layoffs and economic difficulties for many furniture manufacturers.

In fact, the only market segment where furniture firms have had any recent consistent business has been at the federal government level. It has largely been the federal government and its furniture procurements that have kept some furniture companies from collapse. The Coalition believes strongly that this market should not be open to unfair competition from foreign sources that may already be dumping product in the commercial market. This is one instance where the US maintains a strong domestic manufacturing presence that can compete anywhere on fair terms. The Coalition urges, therefore, that furniture procurements, defined as those actions taking place for products in the Federal Supply Classification group 71, not be exempt from the Trade Agreements Act. We strongly request that the proposed rule be modified to reflect this and protect American manufacturers from

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unfair market competition.

In addition to product source concerns, the Coalition is also concerned that the separate shipping and transportation systems contractors must now retain are also counterproductive. We support, therefore, the provision in the proposed rule that calls for the elimination of the requirement that commercial items be shipped on US-flagged vessels. This special, government-only requirement needlessly adds delivery time and costs to federal acquisitions.

The Coalition also supports the other exemptions in the proposed rule as they bring the government closer to buying COTS items more like commercial customers. While there will always be inherent differences between these two markets, the Coalition generally supports policies that allow commercial items to purchased quickly and with a minimum number of government unique provisions. Of particular merit are provisions waiving rights in technical data clauses and drug free-work-place requirements. We would point out that such clauses were intended primarily for companies making government unique items and, in the case of drug-free workplace rules, many companies already have stringent anti-drug policies making government rules redundant.

Finally, the issue of small business participation and success is one gaining great attention in government procurement. Government unique rules such as the Buy American and Trade Agreements Acts create significant hurdles to small business participation in this market. The cost of setting up compliance programs is difficult for many small firms to incur and acts as a significant barrier to entry. The Coalition believes that waiving these rules for COTS procurements is perhaps the best of all recent proposals we have seen to reduce these barriers and encourage small business participation in the government market. We observe that it is the rare instance indeed where adding new rules helps businesses of any size.

The Coalition believes that lightening the regulatory burdens on COTS contractors by exempting government procurements from the Trade Agreements Act, the Buy American Act, and a host of other contract requirements is a step in the right direction. It will lower acquisition costs and increase competition, especially in the small business arena. It will enable the government to get today's technology today and allow contractors to better support the diverse and important missions the government is called upon to meet in today's world.

The Coalition would be pleased to discuss these comments with you if so requested.

Thank you for this opportunity to comment. We look forward to continuing our work together on common sense procurement.

Sincerely,

Kathryn Coulter
Director of Policy

Upcoming Coalition for Government Procurement Events!

June 8, 2004 @ 8:00 a.m.
Coalition Spring Seminar
Sheraton Crystal City Arlington, Virginia

For More information, please contact Charles Robinett at

2000-305-29

"Marquez, John"
<John.Marquez@marad.dot.gov>

03/15/2004 06:01 PM

To: "'farcase.2000-305@gsa.gov'" <farcase.2000-305@gsa.gov>
cc: "Marquez, John" <John.Marquez@marad.dot.gov>
Subject: FAR Case 2000-305 - Comments of the U.S. Maritime Administration

Attached are the comments of the U.S. Maritime Administration in response to FAR Case 2000-305. Due to the size of the file, the comments and attachments are being sent as two separate files. This is message one of two.

<<Maritime Administration Comments-FAR Case 2000-305.pdf>>

Maritime Administration Comments-FAR Case 2000-

305-29

BEFORE THE
GENERAL SERVICES ADMINISTRATION
WASHINGTON, D.C.

MAR 15 2004

Federal Acquisition Regulation (FAR)) FAR Case 2000-305

COMMENTS OF THE
UNITED STATES MARITIME ADMINISTRATION

I. Introduction

The Department of Defense ("DOD"), General Services Administration ("GSA"), and National Aeronautics and Space Administration ("NASA"), collectively referred to herein as the "FAR Council,"[1] have issued a Proposed Rule ("Proposed Rule"), 69 Fed. Reg. 2448 (Jan. 15, 2004), to implement section 4203 of the Clinger-Cohen Act ("Clinger-Cohen Act") of 1996, Pub. L. No. 104-106, 41 U.S.C. § 431. The Clinger-Cohen Act was enacted in 1996 as part of ongoing legislative efforts to further streamline the process for the procurement of property and services by the Federal Government. The FAR Council promulgates and administers the Federal Acquisition Regulation ("FAR") and the Defense Federal Acquisition Regulation Supplement ("DFARS"), 48 C.F.R. Chapters 1-99, which govern the Federal acquisition process.

Section 4203 of the Clinger-Cohen Act requires that a list of provisions of law that will be deemed inapplicable to the Federal procurement of "commercially available off-the-shelf items" ("COTS")[2] must be published in the FAR. The effect of the statute would be to effectively eliminate a great many legal obligations traditionally applicable to Federal acquisition and procurement of COTS. The Proposed Rule sets forth a list of provisions of law that will no longer apply to the Federal procurement of COTS; however, the Proposed Rule also states that the list of laws is merely a list of the universe of laws that could potentially be determined to be inapplicable to COTS and does not represent a final decision on any of the laws included on the

[1]The FAR Council is comprised of two components. The Civilian Agency Acquisition Council ("CAAC") oversees the development of procurement regulations by civilian agencies and the Defense Acquisition Regulations Council ("DAR Council") oversees the development of procurement regulations for Defense agencies. The CAAC and the DAR Council are collectively referred to as the FAR Council.

[2]*See infra* note 3 at pp. 2-4.

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list. 69 Fed. Reg. 2448 (Jan. 15, 2004). Of particular interest to the United States Maritime Administration ("MARAD") is the potential of the Proposed Rule to eliminate from coverage under the FAR and DFARS the requirement for Government contracts for the procurement of COTS to comply with the Cargo Preference Act of 1904, 10 U.S.C. § 2631, and the Cargo Preference Act of 1954, 46 U.S.C. App. § 1241(b), (hereinafter the "Cargo Preference Laws").

The Cargo Preference Laws require that a certain portion of the goods purchased by or for the Government ("Government-impelled" cargo) be transported on U.S.-flag vessels. Through these laws, U.S.-flag carriers are assured a base of cargo that enables vessels to remain under the U.S. flag, supports investment in new vessels, and provides continued employment of skilled U.S. citizen mariners. Within the Department of Transportation, MARAD oversees compliance with the Cargo Preference Laws to foster a U.S.-flag fleet capable of meeting the Nation's needs in times of peace and war. The potential waivers of the Cargo Preference Laws, therefore, could adversely affect programs vital to the economy and national security.

If compliance with the Cargo Preference Laws is waived for Government procurement of COTS, the Cargo Preference Program would be decimated. Cargo Preference is an integral part of the scheme of laws designed to support the U.S.-flag merchant marine. Cargo Preference is supported by the Administration and is a key component of two programs, the Voluntary Intermodal Sealift Agreement ("VISA") and the Maritime Security Program ("MSP"), both of which have great implications for national security and the future of the U.S. ocean carriers.

The U.S. Merchant Marine is vital to the economic and defense security of our Nation, providing essential sealift capability in times of crisis and protecting our farmers, manufacturers, and consumers in peacetime and enhancing our balance of payments. In addition, the ships that carry these cargoes provide important jobs for American seafarers who will be available in time of national emergency to crew the sizeable fleet of reserve Government vessels.

The Proposed Rule seeks comments that the Administrator for Federal Procurement Policy ("Administrator") will use in determining whether to waive compliance with Government-specific requirements and procedures in the procurement of commercially available off-the-shelf items.[3] MARAD submits the following comments objecting to any waivers of the

[3] Section 4203 of the Clinger-Cohen Act provides that the Federal Acquisition Regulation shall include a list of provisions of law that are inapplicable to contracts for the procurement of commercially available off-the-shelf items. A provision of law that, as determined by the Administrator of Federal Procurement Policy, imposes Government-unique policies, procedures, requirements, or restrictions for the procurement of property or services may be included on this list unless:

(1) the provision of law provides for criminal or civil penalties (41 U.S.C. § 431(b)); continued:

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Cargo Preference Laws for COTS, as such waivers would be counter to Administration policy supporting Cargo Preference and the U.S.-flag merchant marine and would endanger the implementation of VISA and MSP. Accordingly, MARAD urges the Administrator to make a written determination pursuant to 41 U.S.C. § 431(a)(3) that it is not in the best interest of the United States to list the Cargo Preference Laws as inapplicable to the procurement of COTS.

II. Summary of the Proposed Rule and Relevant Acquisition Reforms

The Proposed Rule, 69 Fed. Reg. 2448 (Jan. 15, 2004), implements Section 4203 of the Clinger-Cohen Act of 1996, Pub. L. No. 104-106. Section 4203 basically seeks to ease the Government's acquisition processes by adding a new section to the Office of Federal Procurement Policy Act (41 U.S.C. § 401 et seq.) which provision mandates that the FAR include a list of provisions of law that are inapplicable to contracts for the procurement of "commercially available off-the-shelf"[4] items. The term "commercially available off-the-shelf" is defined very broadly to include "commercial items"[5] which are sold in substantial quantities in

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(2) the provision of law specifically refers to 41 U.S.C. § 431, and provides that, notwithstanding this section, such provision of law shall be applicable to contracts for the procurement of commercially available off-the-shelf items (41 U.S.C. § 431(b); or

(3) the Administrator makes a written determination that it "it would not be in the best interest of the United States to exempt such contracts from the applicability of that provision of law." (41 U.S.C. § 431(a)(3).

41 U.S.C. § 431

[4] The term "commercially available off-the-shelf item" is defined as follows:

(c) (1) As used in this section, the term "commercially available off-the-shelf item" means, except as provided in paragraph (2), an item that –

(A) is a commercial item (as described in section 403(12)(A) of this title);
(B) is sold in substantial quantities in the commercial marketplace; and
(C) is offered to the Government, without modification, in the same form in which it is sold in the commercial marketplace.

(2) The term "commercially available off-the-shelf item" does not include bulk cargo, as defined in section 1702 of title 46, Appendix, such as agricultural products and petroleum products.

41 U.S.C. § 431

[5] The term "commercial item" as used in defining as "commercially available off-the-shelf item means:

(A) Any item, other than real property, that is of a type customarily used by the general public or by nongovernmental entities for purposes other than governmental purposes, and that -
(i) has been sold, leased, or licensed to the general public; or
(ii) has been offered for sale, lease, or license to the general public.

continued:

the commercial marketplace, and which are offered to the Government, without modification, in the same form in which they are sold in the commercial marketplace. The term does not include bulk cargo, as defined in section 3 of the Shipping Act of 1984 (46 U.S.C. App. § 1702), such as agricultural products and petroleum products. 41 U.S.C. § 431(c)(2).

Provisions of law to be included on this list include those laws determined by the Administrator to impose Government-unique policies, procedures, requirements, or restrictions for the procurement of property or services. Laws to be excluded from this list consist of provisions of law that provide for criminal or civil penalties, and provisions of law that specifically refer to this section and provide that, notwithstanding this section, such provision of law shall be applicable to contracts for the procurement of commercially available off-the-shelf items. In addition, the Administrator may make a written determination that it would not be in the best interest of the United States to exempt Government contracts from the applicability of any provision of law that would otherwise be included on the list. 41 U.S.C. § 431(a)(3).

The Proposed Rule contains a prospective list of laws pertaining to Government-specific acquisition requirements, standards, and procedures that could be waived for the procurement of COTS. Inasmuch as the Cargo Preference Laws apply to items procured for or on behalf of the Government, they could potentially be included on this list absent a written determination by the Administrator that it would not be in the best interest of the United States.

It is important to note that a proposed waiver of the Cargo Preference Laws for COTS is not a new issue and that such a waiver was previously addressed by MARAD and the Office of Federal Procurement Policy in a similar context. The Federal Acquisition Streamlining Act ("FASA") of 1994, Pub. L. No. 103-355, 108 Stat. 3242, which preceded the Clinger-Cohen Act's proposed waiver for COTS, was designed to increase the efficiency and reduce the cost of the federal acquisition and procurement process through similar provisions that eliminated certain Government-unique procurement requirements. FASA required the FAR Council to identify laws that "set forth policies, procedures, requirements or restrictions for the procurement of property or services by the Federal Government," and render those laws "inapplicable" to contracts and subcontracts "for the procurement of commercial items" unless a finding is made that it is not in the best interest of the Federal Government to exclude such laws. 41 U.S.C. § 430. The FAR Council proposed a series of rules[6] beginning in March of 1995 in which it developed two lists of laws that would be deemed inapplicable to Government contracts and

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41 U.S.C. § 403(12)(A).

[6]The proposed rule was published in the Federal Register in three stages. The first publication, FAR case 94-790, detailed the majority of the proposed rule and stated that more specific information would be provided in a continued:

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subcontracts. The Cargo Preference Laws were included on the lists of laws that were deemed to be inapplicable to subcontracts, but were not included on the list of laws that would be deemed inapplicable to contracts.

The Department of Transportation ("DOT"), on behalf of MARAD, took the position that Congress did not intend to grant authority to the FAR Council in FASA to waive the Cargo Preference Laws as such waivers were inconsistent with ongoing maritime reform legislation and the regime of laws that are designed to support the U.S.-flag merchant marine. Accordingly, DOT filed comments strongly opposing any waivers of the Cargo Preference Laws.

On July 11, 1995, following the submission of DOT's comments, the first in a series of meetings spanning more than nine months was held between members of the FAR Council, the National Economic Council, representatives from industries that supply the Government with various goods, representatives from the maritime industry, and MARAD to discuss the effect of the proposed waivers of the Cargo Preference Laws for subcontracts and to find a possible compromise.[7] Several solutions resulted from these meetings. First, an agreement was reached which called for the inclusion of some "firewall language"[8] in the regulation to constrain the impact of any waivers so that they would apply only to that relatively small portion of preference cargoes which the FAR Council claimed were targeted by the rule in order to achieve military/commercial integration. The second part of the compromise solution was the issuance of additional guidance regarding the limited nature of the waivers of the Cargo Preference Laws for subcontracts. This guidance was issued in the form of a memorandum on May 1, 1996, from

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subsequent notice in the Federal Register. 60 Fed. Reg. 11198 (March 1, 1995). The second publication, FAR case 94-791, supplied the list of laws that would be inapplicable to Federal acquisitions for contracts and subcontracts. 60 Fed. Reg. 15219 (March 22, 1995). The third notice furnished minor corrections to the previously published proposal. 60 Fed. Reg. 17184 (April 4, 1995).

[7]Congress mandated in the National Defense Authorization Act of 1996 that the effective date of the rule be suspended to May 1, 1996 in order to ensure that adequate time was allotted to develop a satisfactory compromise between the agencies. Section 809, P.L. 104-106. The delay of the effective date of the rule to May 1, 1996 was published in the Federal Register for the DFAR at 60 Fed. Reg. 61586, 61599 (Nov. 30, 1995) and for the FAR at 60 Fed. Reg. 48231, 48250 (Sept. 18, 1995).

[8]The "firewall language" included in the FAR to limit the application of the rule as it pertains to civilian agencies states that:

> the [subcontractor] exception does not apply to grants-in-aid shipments, such as agricultural and food-aid-shipments, to shipments covered under Export-Import Bank loans or guarantees, and to subcontracts under Government contracts or agreements for ocean transportation services.

60 Fed. Reg. 48231, 48250 (Sept. 18, 1995) (codified at 48 C.F.R. § 47.504).

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Dr. Steve Kelman, then Administrator of Federal Procurement Policy, to all Agency Senior Procurement Executives and the Deputy Under Secretary of Defense (Acquisition Reform) (Attached as Tab A). Dr. Kelman's memorandum was widely distributed to civilian and defense procurement officials within the Government and was published in the Defense Acquisition Desk Book that provides procurement guidance to contracting officers in the Department of Defense.

Furthermore, the provisions of this guidance memorandum were later incorporated in the FAR and DFAR through various rulemakings. During the negotiations leading up to Dr. Kelman's memorandum (which was the basis of the compromise reached between the various agencies, the Office of Federal Procurement Policy and the maritime industry) the FAR Council was preparing an Advanced Notice of Proposed Rulemaking ("ANPRM") requesting comments on the development of a list of laws that would be deemed inapplicable to the procurement of COTS. The ANPRM was published on May 13, 1996, 61 Fed. Reg. 22010, as FAR Case 96-308, two weeks after the issuance of Dr. Kelman's memorandum. Because the COTS regulation would waive Cargo Preference at the prime contracting level, waivers of the Cargo Preference Laws for COTS, as indicated by their inclusion in the ANPRM, would have rendered void the painstakingly negotiated compromise that was reached between the Office of Federal Procurement Policy, the various agencies, and the maritime industry regarding waivers of subcontracts for commercial items. Consequently, Dr. Kelman assured MARAD and the maritime industry that although the Cargo Preference Laws would be included in the ANPRM on the list of Government-unique procurement laws that could potentially be waived, the ANPRM merely included a laundry list of all Government-unique procurement laws that could be covered by COTS and that there was no intention to waive the Cargo Preference Laws for COTS. MARAD did not file comments in response to the ANPRM and relied upon the Office of Federal Procurement Policy to make a written finding that it would not be in the best interest of the United States to waive the Cargo Preference Laws for COTS. However, no further action was taken on the rule for almost 6 years.

III. The Cargo Preference Laws

The central purpose of the Cargo Preference Laws is to further the development of a merchant marine capable of carrying a substantial portion of the Nation's export and import commerce and of meeting the U.S. defense needs in times of national emergency. This is accomplished by requiring that Government-impelled cargoes be carried on U.S.-flag vessels, which significantly contributes to the continued viability of the U.S.-flag fleet. As noted above, the Cargo Preference Act of 1904 requires that 100 percent of the supplies purchased for the

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military be transported on U.S.-flag vessels. 10 U.S.C. § 2631; *see* 48 C.F.R. Part 247.5 ("DFARS"). The Cargo Preference Act of 1954 dictates that at least 50 percent of the supplies procured for, or financed by, Federal agencies must be transported on privately owned U.S.-flag vessels. 46 U.S.C. § 1241(b); *see* 48 C.F.R. Part 47, subpart 47.5 ("FAR").

In reporting the 1904 Act, the House Committee on the Merchant Marine and Fisheries, reacting to a shortage of American merchant ships during the Spanish-American War, stated that "if the United States Government itself supports foreign ships when American ships might be employed, Congress must realize that a sufficient supply of the latter cannot be on hand when the Government itself needs them."[9] The wisdom and necessity of this policy has been proven repeatedly in World War II, the Korean War, Vietnam, Bosnia, Operations Desert Shield and Desert Storm, and most recently in Operation Enduring Freedom and Operation Iraqi Freedom.

The Cargo Preference Laws have historically been only one segment of the laws designed to foster a healthy U.S.-flag merchant marine. However, the role of Cargo Preference has been greatly enhanced through the development of VISA and MSP. Both of these programs utilize preference cargo as an incentive to U.S.-flag carriers to participate, thus providing the necessary sealift capabilities both to support the United States in times of war and to carry a portion of the international cargo vital to the United States economy. Accordingly, any action that diminishes the critical base of cargo that the Cargo Preference Laws provide would severely hamper both VISA and MSP and potentially jeopardize the viability of these programs.

The recent operations in Iraq underscore the importance of MSP and the U.S.-flag merchant marine that the Cargo Preference Laws support. In just the first 6 months of 2003, more than 7,600 U.S. merchant mariners participated in the movement of cargo for Operation Iraqi Freedom. One hundred and thirty-one U.S.-flag vessels, including thirty-five of the forty-seven MSP vessels, supported DOD in Operation Iraqi Freedom. Without the commercial U.S.-flag merchant marine and its pool of skilled U.S. citizen mariners that also crew the Government-owned fleet, the United States would have been forced to rely on foreign flag vessels with foreign crews to support its military operations in Operation Iraqi Freedom.

IV. The Voluntary Intermodal Sealift Agreement

In late 1994, as a result of lessons learned during the Persian Gulf War, MARAD initiated the development of a new sealift agreement known as VISA to replace the existing Sealift Readiness Program ("SRP"). The objective of the program is to promote

[9] H. REP. NO. 1893, 58th Cong., 2d Sess. at 3, 4 (1904).

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and facilitate DOD's use of existing commercial integrated intermodal transportation systems -- from ships to containers to management systems -- while at the same time attempting to minimize disruption to commercial operations. VISA was approved as the DOD's principal commercial sealift readiness program on January 30, 1997. As of October 1, 2003, there were 56 participants and 125 ships in the program.

VISA provides for a seamless, time-phased transition from peace to wartime operations through coordinated prenegotiated contracts for the type and quantity of sealift capacity, when and where necessary, to deploy and sustain U.S. forces. This effort represents a remarkable step in a Government-industry partnership, allowing DOD to take advantage of the U.S. commercial fleet's multi-billion dollar capital base and its door-to-door transportation capabilities. The U.S. commercial ship operating industry contributes to this partnership with its significant capital assets, a trained U.S. citizen mariner pool, a shoreside employment workforce located throughout the world, distribution logistics support and in-transit visibility, and access to infrastructure that includes nearly 600 ports worldwide, terminals, warehousing and handling equipment, as well as an intermodal network consisting of ships, rail, double-stack trains and trucks. In July of 2000, the U.S. Transportation Command estimated the cost of replicating the VISA fleet with organic assets at $9 billion for initial construction, and more than $1 billion annually for operations and maintenance costs. Thus, the continued availability of a fleet of U.S.-flag commercial vessels saves the U.S. taxpayer a great deal of money.

VISA established a Joint Planning Advisory Group ("JPAG") to provide a mechanism for industry and Government to develop plans of action, identify problem areas, and work out solutions to sealift issues. By using an advanced planning mechanism, DOD is able to avoid dependency on massive ship-by-ship chartering initiatives at the outset of hostilities, as well as capital acquisitions and annual operation and maintenance costs to cover surge lift and sustainment requirements.

VISA and the JPAG include crucial features which demonstrate an unparalleled level of commitment and cooperation between the Government and the private sector. For the first time in peacetime history, classified military contingency plans are disseminated to ocean carriers. Secondly, through the Defense Production Act of 1950, 50 App. U.S.C. § 2158, commercial carriers involved in the transportation of DOD cargo in time of national emergency have been granted approval by the Department of Justice ("DOJ") to avail themselves of an affirmative defense to the anti-trust laws; in effect, granting limited anti-trust immunity to the carriers. Although this authority had been in existence for 45 years prior to VISA, it has only been used for a voluntary agreement for

tankers to move petroleum products in a national emergency. VISA marks the first time liner carriers have been granted approval by both DOJ and the Federal Trade Commission to take advantage of this affirmative defense, which is a reflection of the Government's commitment to the VISA program.

However, VISA is placed at risk by any significant degradation of the Cargo Preference Program. One premise of VISA is the availability of preference cargoes for carriers participating in the program. Consequently, any reduction in the pool of preference cargoes removes the incentive for U.S.-flag carriers to participate in the VISA program.

V. The Maritime Security Program

The Maritime Security Act ("MSA") of 1996, Pub. L. No. 104-239, 104 Stat. 3118, established a new Maritime Security Program ("MSP") under Title VI of the Merchant Marine Act, 1936, 46 U.S.C. App. § 1171 et seq. This program provides support for up to 47 U.S.-flag vessels in the foreign commercial trade of the United States and is funded annually at $100 million per year through 2005. The Maritime Security Act of 2003 ("MSA 2003"), Pub. L. No. 108-36, renewed MSP for an additional 10 years and expanded the program to cover 60 U.S.-flag vessels. MSP 2003 is subject to an annual appropriation and requires payments to participants of $2.6 million per ship per year during fiscal years 2006-2008 for a total annual cost of $156 million, increasing to $3.1 million per ship per year at an annual cost of $186 million by 2012. In return for this operating assistance, MSP operators are required under Section 53107 of MSA 2003 to make their ships and commercial transportation systems available to DOD during a national emergency through enrollment in an Emergency Preparedness Program. This requirement is satisfied through enrollment in VISA.

Payments under MSP, however, are not sufficient to offset the cost differential between operating under the U.S. flag and operating under a foreign flag. Because the payments under MSP only partially compensate a carrier for the increased cost of operating under the U.S. flag, the importance of additional inducements such as cargo preference is critical.

In addition to providing ships and mobilization assets to the military, MSP operators help to maintain the Nation's pool of trained U.S. citizen merchant mariners. The availability of trained mariners to crew the U.S. Government controlled fleet is of critical importance to future sealift contingencies. The mariners that work on our

Nation's commercial fleet ultimately crew the Ready Reserve Force ("RRF")[10] and other Government owned ships. Without a U.S.-flag merchant marine, the majority of the current pool of U.S. mariners will disappear. Therefore, the future of MSP will also affect our ability to crew the RRF and the Government fleet.

The importance of MSP to our nation's security should not be underestimated. In testimony (Attached at Tab B) before the House Armed Services Committee, Merchant Marine Panel on the Maritime Security Program, General John W. Handy, USAF, Commander in Chief United States Transportation Command, emphasized how crucial MSP is to the Department of Defense and the security of our nation:

> MSP is a critical component of our strategy which recognizes and relies upon significant augmentation from the U.S. commercial sealift industry to support the warfighter's needs. We limit our organic fleet to those assets that the commercial sector cannot provide. Only 33% of the vessels we may require reside in our organic fleets. The remainder of the sealift capacity needed to transport military equipment and supplies comes from the commercial sector. Looking ahead, the War on Terrorism could eventually push our baseline requirement for commercial sealift even higher.
>
> MSP reauthorization is, without question, the linchpin in our wartime U.S. commercial sealift capability, through its integral support of the Voluntary Intermodal Sealift Agreement (VISA). VISA is a three-phased program that enables time-phased access to militarily useful U.S. Flag commercial dry cargo sealift capacity. VISA is cost-efficient because it contractually provides assured access to commercial U.S. sealift assets, mariners, and intermodal capacity when required, releasing the American taxpayer from otherwise bearing the procurement, overhead, and maintenance costs of a profoundly larger organic military capability. Our current organic military fleet is much improved over just 10 years ago and is structured to support our surge requirements in time of conflict. However, the bulk of large-scale sustainment sealift in times of major conflict resides with the commercial sector that we also depend on for day-to-day support of peacetime requirements. That is what makes the VISA-MSP link such a perfect fit. MSP and VISA are truly complementary force multipliers. We need both MSP and VISA. MSP's guaranteed access to vessels, combined with VISA's

[10]The RRF program was initiated in 1976 as a subset of the MARAD's National Defense Reserve Fleet ("NDRF") to support the rapid worldwide deployment of U.S. military forces. The RRF is composed of 68 vessels that are kept in various states of readiness so that they can be deployed in anywhere from 4 to 20 days. A key element of Department of Defense ("DOD") strategic sealift, the RRF supports transport of Army and Marine Corps unit equipment, combat support equipment and initial resupply during the critical surge period before commercial ships can be marshaled.

capacity and supporting global intermodal infrastructures fulfills the sealift requirements to meet war fighter needs.

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We simply cannot, as a nation, fight the fight without the partnership of the commercial maritime industry. We rely on the commercial maritime industry to provide the primary source of manpower to crew our organic vessels. Our nation's organic sealift capability, in the form of highly capable prepositioned, fast sealift ships (FSS), large medium speed roll on and roll off ships (LMSR), and Ready Reserve Force (RRF) ships which provide emergency and surge response capabilities to globally deploy our combat and support forces, would literally be useless without the support of the commercial maritime industry. As such, MSP supports not only our commercial wartime sealift, but is absolutely essential to providing the labor pool of U.S. merchant mariners for our organic fleet. This is a huge aspect of MSP. Given that the events of 9/11 have forever changed how we view the world, the absolute, unequivocal necessity for U.S. mariners, ready and able to crew a guaranteed fleet of U.S. flagged vessels in times of crisis, mandates MSP reauthorization.[11]

Congress obviously agreed with General Handy's assessment of the importance of MSP and the support that it provides for the commercial maritime industry: MSA 2003 was enacted, expanding MSP and reauthorized the program for ten years. As General Handy noted, the approach to maritime policy must be a holistic approach. Cargo Preference is an integral part of our overall maritime policy and any reduction in the amount of available preference cargoes endangers other key programs such as MSP and VISA, and indeed the entire regime of our maritime laws and policy. Clearly, it is not in the best interest of the United States to make such substantive changes to established maritime policy through regulatory actions designed to advance procurement reforms.

VI. Impact of the Proposed Rule on the U.S. Maritime Industry

Waiver of the Cargo Preference Laws for Government contracts for the procurement of COTS would effectively dismantle the Cargo Preference Program and the U.S.-flag merchant marine. More than half of the cargo covered by the Cargo Preference Laws, as measured by revenue, is subject to a waiver under the proposed COTS regulation. Virtually all categories of

[11] *Reauthorization of the Maritime Security Program*, October 8, 2002: *Hearings on H. Before the Special Oversight Panel on the Merchant Marine of the House Committee on Armed Services*, 107th Cong. 2D SESS. (2002) (statement of General John W. Handy, USAF, Commander in Chief United States Transportation Command).

cargo carried by U.S.-flag vessels under the Cargo Preference Laws can be defined as "commercially available off-the-shelf items," including: all commissary and exchange cargoes, packaged food aid supplied by the Agency for International Development and the Department of Agriculture (with the exception of bulk cargoes as defined in section 3 of the Shipping Act of 1984 (46 U.S.C. App. § 1702), which are excluded under Section 4203), project cargoes, foreign military sales, all purchases by contractors and subcontractors made pursuant to DOD and other U.S. Government contracts, and all DOD and other U.S. agency purchases that are not military unit equipment. Even some military unit equipment could be included in the definition as many military items such as ammunition, trucks and tractors can be purchased on the commercial market.

The preference cargo that would be subject to the proposed waivers under COTS amounts to approximately 2.5 million metric tons of cargo that currently provides nearly $1.2 billion in annual revenues to U.S.-flag carriers. Without the cargo and revenue generated from the Cargo Preference Laws, U.S.-flag carriers would not be able to afford the extra cost of operating under the U.S.-flag.

VII. Significant Regulatory Action

The FAR Council has determined that the Proposed Rule is not a "significant regulatory action" that is subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30,1993, and that the rule is not a major rule under 5 U.S.C. § 804, Pub. L. No. 104-121. 69 Fed. Reg. 2448 (Jan. 15, 2004). MARAD disagrees with this determination.

Section 3(f) of Executive Order 12866 defines a "significant regulatory action" as any regulatory action that meets any one of several factors, including (1) whether it may "have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities" or (2) whether it will "create a serious inconsistency or otherwise interfere with an action taken or planned by another agency."

As noted, the Proposed Rule could result in the potential loss of nearly $1.2 billion in revenue to U.S.-flag operators from the loss of preference cargoes covered by COTS. The impact of this loss to the economy is far greater if the loss of U.S. jobs are taken into consideration. In addition, the Proposed Rule is inconsistent with the Administration's maritime

policy that is supported through the Cargo Preference Laws, VISA and MSP; therefore, the rule should have been classified as a "significant rule" under Executive Order 12866.

The Proposed Rule also qualifies as a "major rule" under the Congressional Review Act of 1996, Pub. L. No. 104-121, 5 U.S.C. §§ 801 et. seq. A major rule is defined as any rule that the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget finds has resulted in or is likely to result in:

> (A) an annual effect on the economy of $100,000,000 or more;
>
> (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or
>
> (C) significant adverse effects on competition, employment, investment, productivity, innovation or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

5 U.S.C. § 804(2).

The Proposed Rule satisfies the economic impact threshold for a major rule, because, again, the potential loss of revenue to U.S.-flag carriers from the loss of preference cargo that is subject to the proposed COTS rule is nearly $1.2 billion. Furthermore, preference cargoes provide an important base of cargo that enables U.S.-flag carriers to be more competitive with lower cost foreign carriers; therefore, the proposed waivers of the Cargo Preference Laws for COTS would result in a significant adverse effect on the ability of U.S.-flag carriers to compete with lower cost foreign-based carriers in U.S.-foreign trade.

The Proposed Rule clearly meets the threshold requirements to be classified as a significant rule under Executive Order 12866 and as a major rule pursuant to 5 U.S.C. § 804(2). Accordingly, the FAR Council should request that the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget review the Proposed Rule and its impact.

VIII. Conclusion

Over time, a statutory framework has been developed to assist the U.S. maritime industry, and, in turn, enable the industry to make its assets available to provide sealift support during wars and national emergencies. No single statute or provision is intended to be the sole solution that will produce all of these benefits, but rather each one is an element in a comprehensive scheme of laws which supports the maritime industry. The current regime for

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providing commercial sealift to DOD places increased importance on the Cargo Preference Laws. The significance of preference cargo to MSP and VISA cannot be overemphasized. Payments under MSP would not be a sufficient incentive by themselves to keep ocean carriers under the U.S. flag. Likewise, VISA, which represents a truly innovative and advanced private sector/public sector sealift partnership, is dependent on preference cargoes to induce carriers to participate.

A waiver of the Cargo Preference Laws in the Proposed Rule would not merely reduce an already shrinking pool of preference cargo, but rather would effectively scuttle the Cargo Preference Program. Without an adequate pool of preference cargoes, both VISA and MSP, which are key to the survival of the U.S.-flag fleet and are supported by the Administration and in particular by the Department of Defense, could fail. Waivers of the Cargo Preference Laws for commercially available off-the-shelf items are not necessary to achieve adequate commercial/military integration nor are such waivers in the best interest of the United States. The deleterious effects of eliminating preference cargoes far outweigh any procurement benefits to be rendered by waivers of the Cargo Preference Laws.

For all these reasons, MARAD requests that the Administrator make a written determination pursuant to 41 U.S.C. § 431(a)(3) that it is not in the best interest of the United States to waive the Cargo Preference Laws for the procurement of commercially available off-the-shelf items.

Respectfully Submitted,

William G. Schubert
Maritime Administrator

Attachments

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TAB A

EXECUTIVE OFFICE OF THE PRESIDENT

OFFICE OF MANAGEMENT AND BUDGET

WASHINGTON, D.C. 20503

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Office of Federal

Procurement Policy

May 1, 1996

MEMORANDUM FOR AGENCY SENIOR PROCUREMENT EXECUTIVES

AND THE DEPUTY UNDER SECRETARY OF DEFENSE

ACQUISITION REFORM)

FROM Steven Kelman

Administrator

SUBJECT Waiver of Cargo Preference Laws for Subcontractors

Under a Government Contract for Commercial Items

This memorandum clarifies the policy and intent of amendments to the Federal Acquisition Regulation (FAR) published in the Federal Register as a Final Rule on September 18 1995 60 Fed. Reg 48231, and to amendments to the Defense Federal Acquisition Regulation Supplement (DFARS), published in the Federal Register as an Interim Final Rule IFR) on November 30 60 Fed. Reg 61586 (collectively referred to as the "rule") The relevant amendments waive requirements for the preference of U.S.-flag vessels required under the Cargo Preference Act of 1954 (1954 Act), 46 U.S.C § 1241(b), and the Preference Act of 1904 (1904 Act) 10 U.S.C § 2631 When ocean transportation is required under a subcontract for the acquisition of commercial Items or commercial components This memo further explains the policy and objectives of the rule, cites examples of situations to which the rule does not apply

and announces FAR Council plans to jointly review the implementation of this provision of the rule by the Federal Acquisition Regulatory Council (FAR Council) with the Maritime Administration (MARAD) over the next year to assess the impact of the implementation of these provisions of the rule

A Background

The Federal Acquisition Streamlining Act of 1994 (FASA), Pub L. No. 103-355 provides authorities that streamline the acquisition process and minimize burdensome Government-unique requirements. Amendments to the FAR and DFARS were made to encourage the acquisition of commercially available end Items and components by Federal agencies as well as contractors and subcontractors at all levels Included in these revisions were amendments which waive the provisions requiring preference for U.S.-flag vessels when ocean transportation is required for supplies purchased under a Government contract These provisions are the following

-- FAR Subpart 12.504(a)(14) makes the 1954 Act 46 U.S.C § 1241(b), which requires preference for privately owned U.S.-flag vessels for 50% of the goods purchased by or for the Government, inapplicable to subcontracts at any tier for the purchase of commercial items or commercial components

-- FAR Subpart 47.504(e) makes clear that the subcontracting waiver does not apply to grants-in-aid shipments, such as agricultural and food-aid shipments, to shipments covered under Export-Import Bank loans or guarantees, and to subcontracts under Government contracts or agreements for ocean transportation services

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-- FAR Subpart 52.244-6 provides that after May 1, 1996 Contractor is no longer required to flowdown the FAR provision requiring compliance with the Cargo Preference Act of 1954 to a subcontractor for commercial items or commercial components at any tier

DFARS Subpart 212.504(a)(14) makes the 1904 Act, 10 U.S.C. § 2631, which requires preference for U.S.-flag vessels for all goods purchased by or for DOD, inapplicable to subcontracts at any tier for the purchase of commercial items or commercial components

-- DFARS Subpart 247.572-1 provides that the 1904 Act does not apply to subcontracts for the acquisition of commercial items or commercial components when ocean transportation is not the subject or the contract and when it is incidental to a contract for supplies, services or construction

-- DFARS Subpart 247.572-2 requires that subcontracts under Government contracts or agreements for the direct purchase of ocean transportation remain subject to the 1904 Act

DFARS Subpart 252.247-7023 amends the definition of "subcontractor" so that the term does not include a supplier, materialman, distributor, or vendor of commercial items or commercial components

Subparts 12.504(a) (14), 47.504(e), 52.244-6, 212.504(a)(14), 247.572-1, and 252.247-7023 become effective on May 1, 1996 Over the past several months, inquiries have been received regarding the implementation of the rule and the potential impact in particular situations.

B Policy

The purpose of the rule is to provide flexibility for contractors and subcontractors which require ocean transportation to supply the same manufactured goods both in the commercial

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market place and to the United States Government (hereinafter "Government") The primary intent is to avoid interference with established commercial practices of contractors which subcontract for commercial component parts and which possess established commercial delivery systems relating to the supply of those commercial component parts Where the contractor and subcontractor have an established system to supply commercial component parts for both commercial and Government sales, the rule grants the subcontractor relief from the continuing requirement to segregate that portion of the commercial component parts attributable to the Government contract

The rule is intended, however, to have a limited impact on the carriage of Government cargoes by U.S.-flag carriers Government contracting officers should encourage the use of U.S.-flag carriers for government contracts in furtherance of the government's policy supporting the U.S.-flag merchant marine While the rule is intended to avoid disruption of commercial relationships and delivery systems for the procurement of commercial items t is not intended to waive compliance with the Cargo Preference Laws for ocean cargos clearly destined for eventual military or government use

The following examples remain subject to the Cargo Preference Laws.'

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Shipments of construction materials and commercial items transported under a construction contract (versus a supplies contract);

Commissary and exchange cargoes that may be transported outside of the Defense Transportation System (see Section 334, National Defense Authorization Act of 1996, Pub L No 104-106)

Contract shipments in support of military contingencies, exercises, and U.S forces deployed in connection with United Nations or North Atlantic Treaty organization peacekeeping missions

Non-commercial component parts

Furthermore, the rule does not permit contractors to alter existing practices to avoid compliance with the Cargo Preference Laws by merely creating subcontracting arrangements. For example, components and items may not be procured by the prime contractor FOB destination simply to avoid Cargo Preference

C Review of the Rule by Government Agencies

The list of examples above is by no means exhaustive More cases may arise which circumvent the intent to the rule

Therefore, MARAD and other Government Agencies will review the application of the rule to decide how particular situations could be addressed and to establish policy guidelines for the implementation For example relevant DOD decisions in specific situations and the resulting policy guidelines will be included in the Reference Set of the DoD Acquisition Deskbook

MARAD is mandated by Congress to monitor and report on compliance with the Cargo Preference Laws MARAD provides the Congress with information regarding programs that are not in compliance with the Preference Laws, and informs the companies and government contracting officers of the requirement that certain cargoes be shipped on U.S.-flag vessels. MARAD, in consultation with other agencies, will closely monitor the implementation of the rule In addition, MARAD and other agencies will work together to streamline the reporting process to provide more real time information to facilitate MARAD's oversight duties and monitoring of the implementation of the rule Requests for clarification or guidance should be directed to MARAD and the agency responsible for the contract Finally, before May 1, 1997, MARAD and other Federal agencies will conduct a comprehensive review to assess the impact of the implementation of these provisions of the rule and take appropriate action at that time

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TAB B

★ HOUSE ARMED SERVICES COMMITTEE ★

305-29

STATEMENT OF
GENERAL JOHN W. HANDY, USAF
COMMANDER IN CHIEF
UNITED STATES TRANSPORTATION COMMAND

BEFORE THE
HOUSE ARMED SERVICES COMMITTEE
MERCHANT MARINE PANEL
ON THE MERITIME SECURITY PROGRAM (MSP)

OCTOBER 8, 2002

Mr. Chairman, Congressman Allen, and Members of the Merchant Marine Panel of the House Armed Services Committee, I appreciate the opportunity to testify on the Maritime Security Program (MSP).

I wholeheartedly support reauthorization of MSP beyond expiration of the current authority on September 30, 2005. The MSP is a vital element of our military's strategic sealift and global response capability. As we look at operations on multiple fronts in support of the War on Terrorism, it is clear that our limited defense resources will increasingly rely on partnerships with industry to maintain the needed capability and capacity to meet our most demanding wartime scenarios. That makes MSP reauthorization even more important as we look toward the future. MSP is a cost effective program that assures guaranteed access to required commercial U.S. Flag shipping and U.S. Merchant Mariners, when needed. The alternative to MSP is, ultimately, reliance on foreign flag vessels manned by foreign crews during crisis. MSP provides the security of resources we must have in a very uncertain world fraught with asymmetric threats. MSP ensures the development and sustainment of critical strategic partnerships favorable to the United States. And, MSP helps ensure the viability of America's merchant mariner pool needed to activate the Reserve Fleet. MSP makes sense. We can't afford not to invest in MSP. I strongly advocate for swift reauthorization.

MSP is a critical component of our strategy which recognizes and relies upon significant augmentation from the U.S. commercial sealift industry to support the warfighter's needs. We limit our organic fleet to those assets that the commercial sector cannot provide. Only 33% of the vessels we may require reside in our organic fleets. The remainder of the sealift capacity needed to transport military equipment and supplies comes from the commercial sector. Looking ahead, the War on Terrorism could eventually push our baseline requirement for commercial sealift even higher.

MSP reauthorization is, without question, the linchpin in our wartime U.S. commercial sealift capability, through its integral support of the Voluntary Intermodal Sealift Agreement (VISA). VISA is a three-phased program that enables time-phased access to militarily useful U.S. Flag commercial dry cargo sealift capacity. VISA is cost-efficient because it contractually provides assured access to commercial U.S. sealift assets, mariners, and intermodal capacity when required, releasing the American taxpayer from otherwise bearing the procurement, overhead, and maintenance costs of a profoundly larger organic military capability. Our current organic military fleet is much improved over just 10 years ago and is structured to support our surge requirements in time of conflict. However, the bulk of large-scale sustainment sealift in times of major conflict resides with the commercial sector that we also depend on for day-to-day support of peacetime

requirements. That is what makes the VISA-MSP link such a perfect fit. MSP and VISA are truly complementary force multipliers. We need both MSP and VISA. MSP's guaranteed access to vessels, combined with VISA's capacity and supporting global intermodal infrastructures fulfills the sealift requirements to meet war fighter needs.

The U.S. commercial maritime industry has markedly reduced in the face of economic competition from less costly and, in some cases, greatly expanding, foreign firms. To ensure the existence of a U.S. flagged fleet to meet wartime requirements, MSP incentives help defray the added costs to sail commercial vessels under the U.S. flag. The overall state of the domestic maritime industry is indeed an issue for national debate, but not one which should preclude timely reauthorization of MSP. We need MSP now. MSP in its current construct offers great return on investment supporting a sizeable and capable fleet of 47 U.S flagged vessels for relatively little annual cost. If we fail to reauthorize or make program participation unattractive, the potential erosion and eventual disappearance of a viable U.S. flagged fleet and, ultimately, the U.S. merchant mariner pool, would force increased and potentially total reliance on ships of foreign registry, entrusting precious military cargo to non-U.S. crews in times of great crisis. This cannot happen if the U.S. is to retain an ability to "go it alone."

Our actions now are critical. MSP reauthorization will indeed be a landmark decision for the U.S. maritime industry. The United States Transportation Command's (USTRANSCOM) industry and labor partners have all indicated their strong support for MSP and we all agree that we need a holistic approach. I firmly believe that industry has a responsibility to come to consensus on a plan that is right for them and right for the country. I am confident industry can meet this challenge.

While MSP offers guaranteed capability, it also provides the security we, as a nation, must have to "go it alone." While foreign companies dominate the world maritime market, MSP ships sail under the U.S. flag, are crewed by U.S. mariners, are operated by U.S. companies, and are subject to U.S. laws. As a warfighter and as a concerned American this is what I must have, and I have it in MSP. Currently, MSP comprises both Section 2 and Documentation Citizens. Both Section 2 and Documentation Citizens must execute the same contingency contracts with DOD committing vessels to VISA Stage III and thereby assuring us we will have access to their vessels. This is important because VISA Stage III is our highest sealift mobilization level and provides government access to all 47 ships enrolled in MSP. As a warfighter, my requirements are met by both Section 2 and Documentation Citizens.

We simply cannot, as a nation, fight the fight without the partnership of the commercial maritime industry. We rely on the commercial maritime industry to provide the primary source of manpower to crew our organic vessels. Our nation's organic sealift capability, in the form of highly capable prepositioned, fast sealift ships (FSS), large medium speed roll on and roll off ships (LMSR), and Ready Reserve Force (RRF) ships which provide emergency and surge response capabilities to globally deploy our combat and support forces, would literally be useless without the support of the commercial maritime industry. As such, MSP supports not only our commercial wartime sealift, but is absolutely essential to providing the labor pool of U.S. merchant mariners for our organic fleet. This is a huge aspect of MSP. Given that the events of 9/11 have forever changed how we view the world, the absolute, unequivocal necessity for U.S. mariners, ready and able to crew a guaranteed fleet of U.S. flagged vessels in times of crisis, mandates MSP reauthorization.

Our latest assessment indicates a requirement range of 50-60 dry cargo ships in MSP. This scenario driven assessment is based upon wartime requirements resident in the Mobility Requirements Study (MRS-05), a study that is already 2

years old and predates the War On Terrorism. More specifically, MRS-05 requires a U.S. Flag commercial container capacity of about 130 thousand Twenty-foot Equivalent Units (TEUs) and 825 thousand square feet of roll-on/roll-off capacity, assuming moderate risk, against a two major theater war (2 MTW) scenario. This equates to approximately 50-60 ships required in MSP. The number of ships is variable because the exact number needed is driven by size, speed, capacity, and cycle time considerations which are largely scenario dependent. It is possible that War on Terrorism scenarios, when factored into a future MRS-05 like baseline, could drive the aforementioned capacity requirements higher. From a warfighting perspective, it is in USTRANSCOM's interest to maintain a mix of dry cargo ships which optimize support for the multiple scenarios considered in MRS-05 while meeting the most demanding requirement of the 2 MTW scenario.

We need MSP reauthorization soonest. Guaranteed access to U.S. Flag shipping, the viability of the U.S. merchant mariner pool, and the associated security requirements mandate MSP reauthorization. An improved, long-term program, adequately funded, which provides stability for the government and industry is the right approach from the warfighting perspective. MSP reauthorization now is a national security imperative of the highest magnitude. I thank you for your continuing service to our great nation and urge your continued support for this crucial program.

House Armed Services Committee
2120 Rayburn House Office Building
Washington, D.C. 20515

2000-305-30

Kenneth_C_Gaulden/MaerskLL@MLLNET.COM
Sent by:
SCote@mllnet.com

To: farcase.2000-305@gsa.gov
cc:
Subject: Comments on FAR COTS Rule

03/15/2004 05:49 PM

Please find attached Maersk Line, Limited's comments on Federal Acquisition Regulation: Commercially Available Off-the-Shelf (COTS) Items, FAR Case 2000-305, Federal Register, Vol. 69, No. 10, January 15, 2004, Proposed Rule.

Thanks very much for your attention to this matter.

(See attached file: Comments on FAR COTS Case 2000-305 Proposed Rule.doc)

Best Regards,

Ken Gaulden
Senior Vice President
Chief Commercial Officer

Comments on FAR COTS Case 2000-305 Proposed Ri

305-30

MAERSK Line, Limited

March 15, 2004

FAR Secretariat (MVR)
Attention: Ms. Laurie Duarte
General Services Administration
Room 4035
1800 F Street, N.W.
Washington, D.C. 20405

RE: Federal Acquisition Regulation: Commercially Available Off-the-Shelf (COTS) Items, FAR Case 2000-305, Federal Register, Vol. 69, No. 10, January 15, 2004, Proposed Rule

Dear Ms. Duarte:

Maersk Line, Limited ("Maersk") is this Nation's largest U.S.-flag carrier with twenty-seven vessels operating in the foreign commerce of the United States. Maersk also is the largest participant in the Voluntary Intermodal Sealift Program (VISA), which is the emergency preparedness program, established the Federal Government under the Defense Production of 1950 to ensure that commercial sealift and intermodal resources are available to the Department of Defense during national emergencies. Indeed, Maersk has transported the equivalent of approximately twenty-five thousand (25,000) forty-foot containers loads of military cargo in support of Operation Enduring Freedom and Operation Iraqi Freedom. In addition, Maersk transports tens of thousands of military shipments every year to support DoD's peacetime operational requirements.

I am writing to express our strong opposition to the inclusion of U.S.-flag cargo preference laws on the list of laws inapplicable to contracts and subcontracts for the acquisition of commercially available off-the-shelf (COTS) items.

Maersk concurs with the thoughtful comments filed by the Transportation Institute and the American Maritime Congress (AMC) in opposition to this rulemaking. For the sake of conciseness, we will not repeat the Transportation Institute's cogent analysis of current Federal maritime policy, or the painstaking legislative and regulatory history and rationale presented in AMC's comments. Rather, we will simply highlight two of the many salient reasons why long-standing U.S. cargo preference laws should not be put on the list of certain laws that would be inapplicable to contracts and subcontracts for the acquisition of commercial-of-the-shelf (COTS) items.

1530 Wilson Boulevard, Suite 650, Arlington, VA 22209
Telephone: 703-351-9200. Fax: 703-351-0130

305-30

MAERSK Line, Limited

Federal Maritime Policy -- The legislative and executive branch of the U.S. Government have long recognized the importance of maintaining a strong U.S. merchant fleet. One hundred years ago, Congress enacted the Cargo Preference Act of 1904 (10 U.S.C. § 2631), which requires that all military cargo be carried by U.S. flag vessels. Fifty years later, Congress enacted the Cargo Preference Act of 1954 (46 U.S.C. § 2631), which require that a majority of civilian cargo be transported on U.S. flag vessel. Just last year, Congress reauthorized and expanded the Maritime Security Program to maintain a fleet of sixty U.S. flag merchant vessels that would operate in the foreign commerce of the United States during peacetime, and would be available for activation by the U.S. military during national emergencies.

One hundred years of Federal maritime policy should not be tampered with in the name of acquisition reform. Well-intentioned and seemingly small changes in acquisition policy can have disastrous unintended consequences on Federal maritime policy and the U.S. maritime industry. Here, the proposed rulemaking has the potential of gutting cargo preference laws because most of the cargo transported today under cargo preference laws are COTS items, and that percentage will only increase in the future. Without robust cargo preference laws as a supporting pillar, the Maritime Security Program (MSP) and its associated Voluntary Intermodal Sealift Agreement (VISA) program would never have been established and certainly will not survive over the long term. Similarly, ocean carriers operating U.S. flag vessels have invested millions of dollars to modernize the U.S. merchant fleet and the infrastructure that supports this fleet based on expected revenues from preference cargoes. Indeed, Maersk has invested tens of millions of dollars to establish a direct U.S. flag service between the United States and the Middle East to support the DoD's operational requirements. Without robust cargo preference laws, continued investment in the U.S. maritime resources will disappear.

Precedence -- Our Nation's legal system is based on precedent. Once a final decision is made, that decision should not be changed absent compelling circumstances. Adhering to precedent is necessary to add predictability to highly regulated world in which Government and industry leaders must operate. Predictability is a prerequisite to efficient and effective business relationships between the Government and industry.

As the American Maritime Congress points out in their comments, the issue of removing COTS items from the scope of cargo preference laws has been addressed and decided several times during the past ten years. In 1994, Congress specifically considered and rejected all attempts to reduce the scope of cargo preference laws during its deliberations for the Federal Acquisition Streamlining Act (FASA). Subsequently, the Executive Branch implemented the "Kelman Compromise" to stop regulatory attempts to impose the same reductions in cargo preference that Congress had rejected legislatively. Now, ten years later, the proposed rulemaking has once again reopened the debate. However, no compelling circumstances exist that justify overturning past decisions on the proper scope of cargo preference. To the contrary, the events since September 11th have confirmed the continuing need for a robust U.S. merchant marine.

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2000-305-30

MAERSK Line, Limited

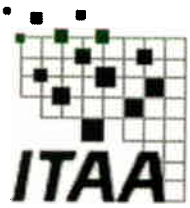
In sum, cargo preference laws should not be included on the list of laws that are inapplicable to contracts and subcontracts for COTS items. Cargo preference laws are a fundamental component to Federal maritime policies designed to support national security requirements and enhance the Nation's position in international commerce. The wisdom of cargo preference laws has been confirmed repeatedly by Congress, Federal agencies responsible for maritime policy, and the military commands that depend on the U.S. merchant fleet to support military operations. The proposed rulemaking will gut cargo preference laws, which in turn will undermine Federal maritime policy and severely weaken the U.S. merchant fleet. While the proposed change may seem relatively harmless to acquisition professionals who may not be familiar with intricacies of U.S. maritime issues, pulling the cargo preference thread can unravel decades of hard work and investment aimed at maintaining a viable U.S. merchant fleet for national defense and international commerce. Accordingly, we strongly urge the Councils to remove cargo preference laws from the proposed list of statutes that are inapplicable to contracts and subcontracts for COTS items.

Respectfully Submitted,

Kenneth C. Gaulden
Senior Vice President
Maersk Line, Limited

1530 Wilson Boulevard, Suite 650, Arlington, VA 22209
Telephone: 703-351-9200. Fax: 703-351-0130

2000-305-31



March 15, 2004

General Services Administration
FAR Secretariat (MVA)
1800 F Street, NW
Room 4035
ATTENTION: Laurie Duarte
Washington, D.C. 20405

RE: FAR Case 2000-305
Federal Acquisition Regulation; Commercially Available Off-the-Shelf (COTS) Items; Proposed Rule

Dear Ms. Duarte:

The Information Technology Association of America ("ITAA") is pleased to submit these comments in response to the January 15, 2004 Notice of Proposed Rulemaking (the "2004 Notice") regarding the implementation of section 4203 of the Clinger-Cohen Act of 1996, 41 U.S.C. 431, with respect to Commercially Available Off-the-Shelf (COTS) Item acquisition. That act requires that the Federal Acquisition Regulation (FAR) list certain provisions of law that are inapplicable to contracts for acquisitions of commercially available off-the-shelf items, and the Notice provides a proposed list of the laws that would be declared inapplicable. ITAA strongly supports the addition by this Notice of the Trade Agreements Act, 19 U.S.C. 2501, et seq. and 19 U.S.C. 2512 et seq. to the list of laws from which COTS acquisitions are exempt, and we continue to support the listing of the Buy American Act, 41 U.S.C. 10a, et seq. In addition, we request that the FAR council consider modifying the definition of COTS items to make sure that, like the Trade Agreements Act, it applies to services as well as goods. In addition, we also note our strong support for a general modification allowed by the Notice that relaxes restrictions on advance payments, thereby making it possible for contractors supplying COTS items, consistent with sound commercial practice, to be paid on receipt of proper invoices rather than upon acceptance, which if product testing is involved can take place much later. Finally, ITAA believes there is an inadvertent gap in the FAR clause coverage for subcontracts that should be filled in the final rule.

Trade Agreements Act

This January 15, 2004 Federal Register notice follows an earlier advanced notice of proposed rulemaking dated January 30, 2003. The current 2004 notice reports that 7 comments were received in response to the earlier 2003 Notice. Of those, 3 comments – from the Information Technology Association of America; the Information Technology

Information Technology Association of America
1401 Wilson Blvd. - Suite 1100, Arlington, Virginia 22209-2318 ■ Phone: (703) 522-5055 Fax: (703) 525-2279

Industry Council and the Public Contracts Section of the American Bar Association – urged adding the Trade Agreements Act to the list of laws from which COTS acquisition should be exempt. ITAA strongly supports the decision of the FAR council to respond favorably to those comments with the current listing of the Trade Agreements Act (TAA).

The rationale laid out in previous comments in support of including the TAA remains as true today as it has ever been. The TAA clearly satisfies the Clinger-Cohen criterion of imposing a "Government-unique" policy or restriction. In addition, the TAA meets none of the exceptions permitting exclusion from the list. The TAA provides for neither criminal nor civil penalties, and it does not contain any references to the inapplicability of Clinger-Cohen to its restrictions.

ITAA strongly believes that it is in the best interest of the United States to exempt COTS acquisitions from the restrictions of the TAA. First, the TAA's restrictions place information technology and other U.S. companies at a distinct disadvantage in the worldwide commercial market. U.S. companies often must source products and components globally to remain cost competitive in the worldwide commercial market. Moreover, in some cases the sourcing decision may be mandated by manufacturing or supply constraints. As a result, the TAA sometimes causes a "catch-22" situation, where a contractor must choose between being competitive in the worldwide commercial market and being competitive in the Government market, but not both. As a practical matter, because virtually all information technology companies derive the vast majority of their revenues in the private sector, contractors typically choose to remain competitive in the commercial market and forego the potential government sales when faced with the need to make this choice. The result, unfortunately, is that the Government may be denied access to state-of-the-art information technologies – the latest and most powerful versions – that almost anyone else in the world may acquire.

In addition, the TAA and its related FAR certifications impose significant administrative burdens on contractors, which must be backed up by certifications subject to the False Claims Act. For purposes of the TAA's "substantial transformation" test for determining the country of origin (only products from a limited set of countries designated under the WTO procurement agreement, NAFTA and the Caribbean Basin Initiative, as well as the US itself, are eligible to be bid), contractors must monitor closely their own manufacturing processes and those of their suppliers, and determine precisely the point in which a product may be deemed "substantially transformed." Bear in mind that this monitoring must continue even during contract performance, because contractor manufacturing and supply-chain decision often change, based on changed circumstances in the global market that cannot be tailored to government-specific needs. Experience has shown that it is quite possible for a compliant product to be offered to the government only to have the manufacturing location of the product subsequently shift to a country not covered by the TAA, bringing the product out of compliance unless special steps are taken to maintain manufacturing facilities in the compliant country dedicated to production of the product dedicated to government

customers. This is contrary to the entire philosophy of COTS acquisition, which takes as a main goal bringing to the government the efficiency and effectiveness of the commercial marketplace. That cannot be accomplished with "Government Specific Solutions." Further adding to the complexity, burden and compliance challenges posed by the TAA is the fact that many contracts require deliveries over the course of several years.

All of these reasons support including the TAA in the list of laws inapplicable to COTS procurement under Clinger-Cohen.

Buy American Act

ITAA appreciates and supports the continued listing of the Buy American Act (the BAA) in the 2004 Notice. The TAA fundamentally operates as a waiver of the BAA's provisions, so without the BAA listing, a TAA listing could be construed as requiring BAA compliance for all COTS acquisitions. The BAA test combining domestic manufacturing requirements with domestic component content does not meet the reality test of the worldwide commercial marketplace in which COTS products are conceived and produced. It is essential that the BAA continue to be listed.

Another important reason to continue to list the BAA has to do with its relationship to the TAA under the trade laws of the United States. ITAA suggests that the BAA listing remains important in order to support the conclusion that there will be no impact on US international trade agreement obligations from listing the TAA in this proceeding. We agree with the comments filed in the last round by the American Bar Association Section of Public Contract Law, noting that the principle purpose of the TAA and the WTO Procurement Agreement (referred to at the time as the GATT Procurement Code) that it implemented, was "to discourage discrimination against foreign suppliers," by permitting the President to waive provisions of the BAA that discriminated against foreign purchases by use of price preferences for domestic items. See S.Rep.No. 96-249, 96th Cong., 1st Sess. 129 (1979), reprinted in 1979 U.S.C.C.A.N. 381, 515, as cited by comments of the American Bar Association Section of Public Contract Law dated March 31, 2003 at page 2. As those comments further note, if the BAA itself, with its price preferences, does not apply to a particular class of procurements, the TAA provisions no longer are needed to discourage discrimination against foreign suppliers.

Definition of COTS

The proposed definition of COTS in the 2004 Notice should be clarified to ensure consistency with the definition set out in Clinger-Cohen Act, as well as the definition in the TAA. The proposed rule's definition defines COTS as any "item of supply," which could be read to mean that the rule will not apply to the procurement of services. The "item of supply" language is not included in the Clinger-Cohen Act's definition of COTS. In fact, its inclusion is inconsistent with the Act (codified at 41 U.S.C. 431(b)), which

provides that the Administrator of the OFPP is to develop a list of each provision of law that imposes Government-unique policies, requirements, or restrictions "for the procurement of property or services." (Emphasis added). Therefore, the Act explicitly indicates that Congress had intended to benefit service providers as well as suppliers. It is clear that COTS versions of service offerings exist in the marketplace.

In addition, this change is necessary in light of the fact that the TAA explicitly applies to acquisitions of services as well as goods. Under the general authority granted the President by the TAA, he may waive the discriminatory purchasing requirements of the BAA for the "eligible products" of any "designated country" under the WTO Procurement Agreement (and other identified trade agreements). 19 U.S.C. 2511(a). The term "eligible products" is defined in the TAA to mean "a product ***or service*** of that country or instrumentality which is covered under the Agreement for procurement by the United States;" 19 U.S.C. 2518(A)(i) (emphasis added). The United States committed to coverage of a wide variety of services under the terms of the WTO Procurement Agreement. Details of the US commitments may be found on the WTO website.[1]

Advance Payment Restrictions

In addition, ITAA supports including 31 U.S.C. 3324, Restrictions on Advance Payments, on the list of laws being excluded. The proposed rule includes an "Alternative I" to FAR 52.212-4, which would allow agencies to pay upon receipt of invoice rather than upon acceptance. Exclusion of the prohibition against advance payment is consistent with sound and commonly accepted commercial practice, i.e., payment due upon receipt. Contractors have sometimes reported having to wait months to be paid while delivered items go through lengthy "networthiness" or other testing. We appreciate the FAR Council including this provision in the list of laws proposed to be waived under Clinger-Cohen.

Inadvertent Gap In Subcontract Coverage

Finally, ITAA notes that there is a gap in coverage for subcontracts for COTS items and requests that this gap be repaired in the final rule. The proposed rule sets out a new clause, FAR 52.212-XX, Contract Terms and Conditions Required to Implement Statutes or Executive Orders--Commercially Available Off-the-Shelf (COTS) Items. This clause would set out a reduced list of mandatory flow down requirements for *COTS subcontractors under COTS prime contracts*. The proposed rule also modifies FAR Clause 52.244-6, which is for prime contracts *other than commercial items*, to set out the reduced list of mandatory flow down requirements for *COTS subcontracts under non-commercial prime contracts*. The rule has a gap, however, when it comes to COTS flow down requirements under *commercial prime* contracts. That is, the language of 52.212-5, applicable to commercial item prime contracts, does not set out the reduced list of mandatory flow down requirements for COTS subcontracts under commercial

[1] http://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm

prime contracts. We respectfully request that the FAR Councils modify FAR 52.212-5 consistent with proposed FAR 52.212-XX and the proposed revision to FAR Clause 52.244-6.

ITAA appreciates the opportunity to provide these comments on this important matter of commercial government procurement and we would be happy to answer any additional questions you and your colleagues may have.

Very truly yours,

Harris N. Miller
President

2000-305-32

burl@b2gsolutions.com
03/15/2004 05:01 PM

To: farcase.2000-305@gsa.gov
cc: william.shafley@bestbuy.com
Subject: approve of change

Hello

I have reviewed the changes to the FAR and agree. I am a small business selling IT products to the federal government. It is a heavy administrative burden to my company to research and identify COT's products that are meet all the FAR requirements including Trade Agreements. I have found that countries of origin change frequently and many IT products are not made in any trade compliant countries. I have a hard time finding a notebook computer, monitor, mouse, keyboard, USB peripherals, projectors, or even LCD displays that are trade compliant and if they are today they may not be tomorrow. The burden of tracking and maintaining compliance on contracts is very costly to me and the government. Additionally distribution does not segment inventories between trade compliant products and non trade compliant products, I have to physically verify compliance, this costs me time, money and delays shipments.

On Government contracts the customer has to split orders between COTS items that meet the FAR (TAA) and Non TAA COTS products needed in conjunction with TAA COTS IT products ordered. Open market is the only way to sell COTS products that do not meet TAA. This is burdensome to the government customer and the supplier.

This is very prevalent in the IT industry.

Please change the rule to remove the FAR requirements outlined in this case.

Thank you
Burl Williams
B2G Solutions, Inc.
7346 Kensington Lane
Warrenton, VA 20187
540-341-1017

2000-305-33

"Munden, Selma (DC)" <SelmaM@prestongates.com>

03/15/2004 04:56 PM

To: farcase.2000-305@gsa.gov
cc: "Koehl, G. Matthew (DC)" <mkoehl@prestongates.com>
Subject: Comments on Proposed COTS Rule

Attached please find our comments on the proposed rule.

<<GSA Letter.pdf>>

Thank you,
Selma Munden
Legal Secretary for Matt Koehl
Preston Gates Ellis & Rouvelas Meeds LLP
1735 New York Avenue, NW
Suite 500
Washington, DC 20006
202.661.3734

selmam@prestongates.com GSA Letter.pdf

2000-305-33

Preston|Gates|Ellis & Rouvelas|Meeds LLP

William A. Shook
Attorney at Law
billsh@prestongates.com
202-662-8456

March 15, 2004

Via Electronic Mail (farcase.2000-305@gsa.gov)

General Services Administration
FAR Secretariat (MVA)
1800 F Street, N.W.
Attn: Ms. Laurie Duarte
Washington, D.C. 20528

Re: FAR Case 2000-305, Proposed Rule with Request for Comments: Commercially Available Off-the-Shelf (COTS) Items (48 CFR Parts 2, 3, 12, et al.), 69 Fed. Reg. 2447 (January 15, 2004)

Dear Ms. Duarte:

Preston, Gates, Ellis & Rouvelas Meeds LLP (Preston Gates) respectfully submits the following comments on the above-referenced proposed rule issued by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils). The proposed rule relates to implementation of section 4203 of the Clinger-Cohen Act of 1996, 41 U.S.C. 431 (the Act), in particular the Act's requirement that the Federal Acquisition Regulation (the FAR) list certain provisions of law that are inapplicable to contracts for acquisitions of commercially available off-the-shelf (COTS) items. Preston Gates represents a broad range of companies supplying COTS items to the Federal Government.

A. Definition of Commercially Available Off-The-Shelf (COTS) (FAR 2.101)

We recommend that the Councils revise the proposed definition of COTS to clarify that it encompasses service items. The proposed rule amends FAR 2.101(b) to add a COTS definition:

> Commercially available off-the-shelf item (COTS)--(1) Is a subset of a commercial item and means any item of supply that is—
>
> (i) A commercial item (as defined in this section);
> (ii) Sold in substantial quantities in the commercial marketplace; and
> (iii) Offered to the Government, without modification, in the same form in which it is sold in the commercial marketplace.

By providing that COTS applies to "any item of supply," the definition could be interpreted to

305-33

mean that COTS applies to supplies but not to services. The "item of supply" language is not part of the Act's definition of COTS:

> As used in this section, the term "commercially available off-the-shelf item" means, except as provided in paragraph (2), an item that -
>
> (A) is a commercial item (as described in section 403(12)(A) of this title);
> (B) is sold in substantial quantities in the commercial marketplace; and
> (C) is offered to the Government, without modification, in the same form in which it is sold in the commercial marketplace.

41 U.S.C. 431(c). Further, the Act provides that the Office of Federal Procurement Policy Administrator is to develop a list of each provision of law that imposes Government-unique policies, requirements, or restrictions "for the procurement of property *or services*." *41 U.S.C. 431(b) (emphasis added).* Therefore, the Act explicitly indicates that Congress intended that the Act's exclusions apply both to COTS products and services. The "item of supply" qualifying provision is inconsistent with the Act and should be removed from the final rule.

Second, the Councils should clarify that the rule would permit commercial items sold in substantial quantities to qualify as COTS items even if the item is configurable based on the customer's selection of specific options. An item with numerous configuration options might arguably not be sold "without modification, in the same form in which it is sold in the commercial marketplace." However, where the available option selections are standard and not Government-unique, the item must still be considered COTS.

B. Trade Agreements Act (Proposed FAR 12.505)

We support the proposed inclusion of the Trade Agreements Act, Pub. L. No. 96-39 (TAA) on the list of laws that would be inapplicable to acquisitions of COTS items. The TAA and its implementing FAR clause (52.225-5) require contractors to certify that they will exclusively supply "U.S.-made, designated country, Caribbean Basin country, or NAFTA country" end products. The TAA applies to all solicitations above its current applicability threshold of $175,000. The TAA applies to all purchases in connection with the General Services Administration's Multiple Award Schedule program, which program now accounts for more than 50% of the Federal Government's IT purchases. Accordingly, the TAA covers virtually all Federal Government acquisitions of IT products.

To properly execute the TAA certification, a contractor must determine, throughout the term of its contract, whether each of the end products it supplies was last "substantially transformed" in a country covered by the TAA. This determination can be especially difficult for COTS IT products, because the supply chain is often located in non-TAA countries, and because product country of origin can change swiftly and frequently based on factors such as cost, factory capacity and product availability. Moreover, in many instances, the same item will be concurrently manufactured in both a TAA and a non-TAA country, making it especially difficult operationally to segregate and to supply TAA-compliant product.

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The TAA has no counterpart in the commercial marketplace, making compliance with its Government-unique requirements especially costly, both for the contractor and, in many cases, the ordering agency. Elimination of the TAA for COTS items would improve efficiency and cost-effectiveness in Government acquisitions, especially with respect to commercial IT products.

C. Restrictions on Advance Payments (Proposed FAR 12.505)

We support the proposed inclusion of Restrictions on Advance Payments, 31 U.S.C. 3324, on the list of laws that would be inapplicable to acquisitions of COTS items. It is standard industry practice to offer COTS IT support packages encompassing a wide variety technical support functions, such as on-line assisted support, interactive on-line technical conferences, on-line incident reporting, product newsflashes and critical problem alerts. COTS IT support packages can significantly enhance the value and usefulness of a customer's substantial IT infrastructure investment. Vendors are able to offer COTS IT support packages with aggressive prices because the packages, while content-rich, are not generally customized to specific customer requirements, allowing the contractor to cost-effectively leverage the technical support package content across a large customer base.

It is standard industry practice for customers to purchase COTS IT technical support packages via a single payment at the beginning of the term, much like the customer would purchase a warranty. Government ordering agencies are sometimes reluctant or unwilling to purchase COTS IT support packages based upon a concern that the "up front" payment terms violate the advance payment prohibition. While this may not be a correct application of the advance payment prohibition, at least with respect to many COTS IT support packages, it is a persistent concern among ordering agencies. There is no analogy to this prohibition in the commercial marketplace.

To accommodate the advance payment concerns of (some) Government ordering agencies, the contractor must establish Government-unique versions of the support program with separate (more frequent) billing processes, terms of sale and terms of use. These Government-unique requirements impose a burden and cost on contractors, which may increase Government acquisition cost; or, in certain cases, the contractor may simply decline to offer the program to the Government under the requested, Government-unique terms. By eliminating the advance payment prohibition, the rule as proposed would remove an obstacle to the cost-effective acquisition of COTS items under commercial marketplace terms. This would ensure, Government-wide, the option of acquiring COTS IT support packages that often substantially enhance the value of the Government's IT investment.

We appreciate the opportunity to submit these comments.

Respectfully submitted,

PRESTON GATES ELLIS
& ROUVELAS MEEDS LLP

By
William A. Shook

WS:MK:sjm

March 15, 2004

Ms. Laurie Duarte
FAR Secretariat (MVA)
General Services Administration
1800 F Street, N.W.
Room 4035
Washington. D.C. 20405

Ref: FAR Case 2000-305

Dear Ms. Duarte:

On behalf of Matsushita Electric Corporation of America, which directly and indirectly sells products to the Federal government under the "Panasonic" name, I am pleased to submit comments in response to the Proposed Rule published in the January 15, 2004, edition of the Federal Register, Volume 69, No. 10 at 2447-2451 (the "Proposed Rule"). In the Notice publicizing the Proposed Rule, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council asked the public to provide comments on making certain provisions of law inapplicable to contracts for acquisitions of commercially available off-the-shelf ("COTS") items. We understand the comments to this notice will be used by the Administrator for Federal Procurement Policy in making a determination whether it would be in the best interests of the Government to maintain or to waive certain of these laws and regulations.

Background

Among other laws and regulations, the Proposed Rule at FAR 12.505 suggests that 19 D.S.C. 2501 *et seq.*, Trade Agreements Act (see 52.225-5), 19 U.S.C. 2512, *et seq.*, Trade Agreements Act (see 52.225-5), and 41 U.S.C. 10a, *et seq.*, Buy American Act (see 52.225-1 and 52.225-3) should not be applicable to contracts or subcontracts for the acquisition of COTS items. With the qualification later stated in these comments about use of the post script "*et seq.*", Panasonic agrees that these three provisions should not be applicable to contracts and subcontracts for the acquisition of COTS items.

The U.S. Congress passed the Trade Agreements Act (the "TAA"), which refers back to the Buy American Act, to comply with its responsibilities under the GATT Agreement on Government Procurement ("GPA"), a multilateral agreement negotiated and signed as part of the 1979 Tokyo Round of Multilateral Trade Negotiations. Congress enacted the TAA to reward countries who had signed the GPA by providing reciprocal access to the U.S. Government market and to encourage other countries to sign the GPA. The TAA implementing legislation requires most federal agencies to purchase products manufactured or "substantially transformed" in "designated countries" that have signed the GPA. Although most IT and electronics

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manufacturing now occurs in Asia, only four Asian countries have signed the GPA - Hong Kong, Japan, Singapore, and South Korea. Asian countries not signatories to the GPA include China, Indonesia, Malaysia, the Philippines, and Taiwan.

U.S. Only Country to Bar Procurement Access

We understand the United States is the only GPA signatory country, however, to enact a law specifically barring access to the U.S. government market for countries that have not signed the GPA. This purchasing restriction, which is included in the section of the TAA codified at 19 U.S.C. 2512(a), is not mandated by any treaty or international agreement. Since it became effective in 1981, fewer than 30 countries have become signatories to the GPA (and most of them joined shortly after its effective date). It is apparent, therefore, that barring access to the U.S. government market has not been a successful incentive to encourage additional countries to sign the GPA. Just as important, Panasonic believes that the incentive posed by the TAA's restriction on procurement of items not made in GPA signatory countries is now outweighed by the growing inability of federal agencies to acquire advanced technology manufactured in non-designated countries that is readily available in the commercial marketplace and which is needed to perform federal agency missions more efficiently.

Economies of Scale

The TAA procurement restriction is a particular problem for information technology and other electronics companies. In 2003, Panasonic had approximately $16 million in potential federal sales subject to TAA restrictions. As Panasonic moves some of its manufacturing to more cost-effective locations, even more potential sales could be jeopardized. Panasonic and most electronics companies that sell IT and electronics products and components around the world manufacture these products in a few Asian countries because of cost and supply requirements. These countries, however, including China and the Philippines, are not GPA signatories. In addition, to remain competitive in the commercial marketplace, Panasonic and other manufacturers have tried to promote economies of scale by consolidating manufacturing in one or two factories. As only a small percentage of Panasonic's total annual revenues comes from Federal government sales, Panasonic and other manufacturers cannot easily justify establishing separate manufacturing capabilities simply to meet an arbitrary U.S. requirement. Therefore, as these new, consolidated factories open, items originally sold to the Federal government are dropped from availability because of the TAA restrictions.

Compliance Risks

In many cases, Panasonic and its vendors have chosen not to make its products available to the U.S. government because of the liability risk if violations to the certification requirement were found to occur and the modest proportion of total revenue that the U.S. government business brings for the company. The result is to limit competition among suppliers, which drives up the price of goods to the U.S. Government, and which deprives the government of the most productive, cost-effective technologies and best quality products that are available in the

commercial marketplace. In other words, the U.S. Government is offered "second-tier products" while state-of-the-art products are available to other countries' governments. Perhaps worse, the U.S. Government is thus compelled to buy products in the open market at commercial rates rather than government rates.

For instance, Panasonic can provide products capable of responding to the security needs of Federal, state and local agencies, allowing them to record, review, and analyze activities in public places, facilities, bases, buildings, etc. All manufacturers of the basic components of a security system -- the camera and the monitor -- have moved to countries that are not "designated countries," as that term is used in the TAA. As a result, some government agencies end up seeking the product on the open market through an open bidding process, resulting in additional administrative costs to the government, as well as higher prices than they would face by purchasing off the GSA schedule.

Conflicts with Other Government Mandates

Finally, the purchasing restrictions of the TAA conflict with other Congressionally mandated purchasing requirements, placing Federal procurement officials in a "Catch-22." For instance, the 1998 amendments to Section 508 of the Rehabilitation Act of 1973 require the Federal government to purchase electronic and information technology products that are accessible to government employees with disabilities. Panasonic is a leader in providing advanced digital and other technology products to people with disabilities. For example, Panasonic is well known for the accessibility features of its facsimile machines, mobile phones and cordless phones. Unfortunately, these products are not available to the Federal government because they are made in non-GPA signatory countries in Asia. Consequently, Federal purchasing officers also are limited in their choices of innovative accessibility technologies because of the TAA restriction.

Federal procurement officers also face the same restrictions in purchasing mandated energy efficient products. Executive Order 13101, dated September 16, 1998, and Executive Order 13123, dated June 8, 1999, both require Federal purchasing agents, where feasible, to acquire products that are registered as energy efficient by the Energy Star Program. Panasonic and its vendors would be pleased to offer, for example, Energy Star cordless phones and Energy Star compact fluorescent lighting to the Federal government, but it is restricted by the TAA requirements, thereby depriving the government of any competitive choices.

Delete "*Et Seq.*"

Finally, we believe reference to 19 U.S.C. 2501 *et seq.*, Trade Agreements Act (see 52.225-5) should be deleted from the proposed rule. We also believe certain other references in the Proposed Rule that include the post script "*et seq.*" in the citation, including the reference to 19 U.S.C. 2512 *et seq.*, should be scrutinized to avoid confusion as to the exact scope of the reference and, thus, the precise reach of the exemption.

2000-305-34

We believe that the use of phrase "*et seq*." in combination with the reference to 19 U.S.C. 2501 is over-inclusive and could be interpreted as deleting the entirety of the Trade Agreements Act from application to COTS items. In as much as 19 U.S.C. 2501 defines the "Trade Agreements Act of 1979" as all of 19 U.S.C. Chapter 13, covering 43 sections in all, we do not believe it was the intent of the drafters of the Proposed Rule to exclude the Trade Agreements Act in its entirety. Therefore, we believe the postscript "*et seq*." should be deleted along with the citation to 19 U.S.C. 2501. For the same reason, we believe, in order to avoid confusion, the post script "*et seq*." should be deleted from the citation of 19 U.S.C. 2512 *et seq*. in the Proposed Rule. Finally, we note that the FAR 12.505 in the Proposed Rule also recommends that COTS items be exempted from certain other laws that include the post script "*et seq*." These too should be scrutinized to avoid the same problem of over-inclusiveness.

Conclusion

We applaud the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council for proposing a Rule that would free agency officials from burdensome prohibitions not applicable in the commercial marketplace and that restrict agencies from considering the full range of technologies and competition available on the open market.

Respectfully submitted,

Peter M. Fannon
Vice President
Technology Policy & Regulatory Affairs

305-35

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15 March, 2004

General Services Administration
FAR Secretariat (MVA)
1800 F Street, N.W., Room 4035
ATTN: Laurie Duarte
Washington, D.C. 20405

RE: FAR Case 2000-305

EMAIL ADDRESS: farcase.2000-305@gsa.gov

Dear Ms. Duarte:

The Hewlett-Packard Company ("HP") respectfully submits these comments in response to the Proposed Rule published in the January 15, 2004 edition of the Federal Register (69 FR 2448). HP supports the inclusion of the Trade Agreements Act of 1979, 19 U.S.C. § 2501, *et seq.* ("TAA"), and the Buy America Act, 41 U.S.C. § 10a, *et. seq.* ("BAA"), in the proposed list of provisions of law that should be waived for federal purchases of commercially available off-the-shelf ("COTS") products. For the reasons given below, HP urges that both the TAA and the BAA be retained in the Final Rule.

1. **HP Is a Global Corporation and Must Remain Competitive on a Global Basis.**

The Hewlett-Packard Company provides technology solutions to consumers, businesses and institutions globally. We are a U.S.-headquartered company with tens of thousands of employees based in the United States. HP's offerings span information technology infrastructure, personal computing and access devices, global services and imaging and printing.

HP is a U.S. corporation that demonstrates the best of American entrepreneurialism and success. However, HP is also a member of the global community and competes in the global market with other U.S., as well as foreign, corporations. This means that we must continually evaluate how to provide the best quality products at the lowest price. In order to compete in the highly competitive information technology market, HP – like our competitors – must source many of our products and components from countries outside the United States. Because of BAA and TAA restrictions, this means that some of these products are not available for purchase by the United States Government.

2. **The BAA and TAA are Inconsistent with Commercial Practice, and Prevent the Government from Acquiring HP's Most Technologically Advanced Standard Commercial Off-The-Shelf Products at the Best Price.**

The Federal Acquisition Streamlining Act of 1994 (Public Law 103-355) sets forth the Federal Government's preference for the acquisition of commercial items. The Federal Acquisition Regulation (48 C.F.R. 1.000 et seq.) implements this policy by establishing acquisition policies designed to "more closely resemble those of the commercial marketplace." FAR 12.000.

305-35

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Neither the BAA nor TAA has a counterpart in commercial practice. Moreover, both often have the unfortunate, and likely unintentional, effect of preventing the U.S. Government from acquiring the most technologically advanced COTS products that U.S. information technology providers such as HP have to offer at the lowest price available to the global market. In order to ensure compliance with these statutes, government contractors need to implement non-standard, costly processes to track the origin of products and product components, or to maintain separate production facilities solely for purposes of Government sales. These non-standard processes in turn lead to higher acquisition costs for the Government. Thus, HP respectfully submits that the ultimate effect of these statutes is to harm to the U.S. Government, its U.S.-based contractors and the U.S. taxpayer.

3. **The TAA Has Not Accomplished Its Intended Result.**

HP continues to support, as a U.S. Government objective, the negotiation of a comprehensive, inclusive and commercially reasonable multinational agreement on government procurement. However, at present no such agreement exists. To the extent that the TAA's restrictions were intended to encourage membership in the World Trade Organization and the Agreement on Government Procurement ("GPA"), they have not been successful in this regard. Since TAA was passed in 1979, twenty-five years ago, only twenty-nine countries have signed the GPA. HP thus respectfully submits that barring or limiting access to the U.S. Government market has not provided the expected leverage to open foreign government markets. In contrast, many U.S. corporations, including HP, have successfully accessed non-signatory countries' government markets without the formal government-to-government agreements intended by the TAA.

The TAA's restrictions are not required by any treaty or international agreement, including the GPA. To our knowledge, the United States is the only GPA signatory country to enact a law such as the TAA.

As a consequence, the provisions in the TAA actually restrict the options of U.S. Government agencies and adversely affect the ability of U.S. corporations to compete for U.S. Government business. While a comprehensive GPA should be an important United States policy objective, until that objective is actually obtained, U.S. corporations' abilities to compete for U.S. Government business and to compete globally should not be compromised by the TAA.

Conclusion

The TAA harms the U.S. Government in that it prevents the U.S. Government from acquiring the most technologically current COTS products at the lowest price from U.S. corporations. The TAA has not met its intended goal, and worse, it hinders the ability of U.S. corporations to compete with foreign companies whose home countries are signatories to the GPA since those countries are not required to, and have not, imposed any TAA-like restriction upon their Government purchases.

HP believes that the U.S. Government should be able to acquire state-of-the art COTS products at competitive prices. We also strongly support the Government's stated policy of acquiring such products in a manner that is consistent with commercial marketplace practices. The TAA and BAA are inconsistent with both of these goals. Therefore, HP respectfully urges the FAR Council to retain both the Trade Agreements Act of 1979 and the Buy America Act in the Final Rule as statutes that are inapplicable to the Government's purchases of COTS items.

2000-305-35

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HP appreciates this opportunity to provide its comments in response to the Proposed Rule published in the January 15, 2004 edition of the Federal Register (69 FR 2448). I, or any member of my executive staff, would be pleased to meet with the FAR Council to further discuss these comments.

Sincerely,

Bruce Klein
Vice President
HP Federal

2000-305-36

"Latvanas, Barbara"
<barbara.latvanas@mail.va.gov>

03/15/2004 03:58 PM

To: "'farcase.2000-305@gsa.gov'" <farcase.2000-305@gsa.gov>
cc: "'jerry.zaffos@gsa.gov'" <jerry.zaffos@gsa.gov>, "'rose.jordan@gsa.gov'" <rose.jordan@gsa.gov>, "'laura.smith-auletta@gsa.gov'" <laura.smith-auletta@gsa.gov>, "'ralph.destefano@gsa.gov'" <ralph.destefano@gsa.gov>, "Creighton, Paulette" <paulette.creighton@mail.va.gov>, "Kaliher, Donald" <donald.kaliher@mail.va.gov>, "Latvanas, Barbara" <barbara.latvanas@mail.va.gov>
Subject: FAR Case 2000-305, COTS Items

This is in response to proposed rule RIN 9000-AJ55, FAR Case 2000-305, titled Federal Acquisition Regulation: Commercially Available Off-the-Shelf (COTS) Items, which was published in the Federal Register on January 15, 2004. The Department of Veterans Affairs (VA) offers the following objections to a number of the provisions contained in this proposed rule. The provisions are listed below in the order shown at proposed section 12.505.

The rule proposes to remove Federal Acquisition Regulation (FAR) clause 52.222-36, Affirmative Action for Workers with Disabilities, from application to COTS acquisitions (see 12.505(a)(4)). The vast majority of the VA's acquisitions for supplies are for COTS items. Many of the nation's veterans are handicapped as a result of their service to their country. I fail to see why firms who sell vast quantities of COTS items to the Federal Government, especially to VA, should not be required to comply with the provisions of 29 U.S.C. 793 and this FAR clause and be exempt from the requirement to provide affirmative action to employ and advance in employment qualified individuals with disabilities, especially disabled veterans.

The rule proposes to remove 31 U.S.C. 3324 from application to COTS acquisitions (see 12.505(a)(5)). This statute restricts the advance of public money. The only reason for removal of this provision of Law appears to be to allow payment for goods that have been shipped but not yet received at the Government destination. Removal of an entire statute from application to COTS acquisition shouldn't be necessary to implement this minor optional provision. This proposed action would remove a significant provision of Law to solve a relatively minor problem and will result in many requests for payment in advance under COTS contracts when such advance payment would not be appropriate. If 31 U.S.C. 3324 is excluded at all, its exclusion should be specifically limited to those situations involving payment for items shipped and not yet received. 31 U.S.C. 3324 should otherwise apply to all other COTS acquisitions. The Federal Government should not be paying in advance for routine COTS acquisitions and contracting officers should not be put in the position of having to defend denial of such advance payments without the backup of statute.

The rule proposes to remove FAR clause 52.222-35, Equal Opportunity for Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans, from application to COTS acquisitions (see 12.505(a)(8)). By removing these provisions, virtually all companies that sell supplies to VA would no longer be obligated by contract to provide equal opportunities to veterans. With the current situation in the Gulf, removal of this clause would send the wrong message to all veterans. Veterans have sacrificed for this nation and deserve to be treated fairly in the job market.

The rule proposes to remove FAR clause 52.222-37, Employment Reports on Special Disabled Veterans and Veterans of the Vietnam Era, from

2000-305-36

application to COTS acquisitions (see 12.505(a)(9)). This clause requires contractors to file reports on their employment of veterans (the VETS-100 Report). The majority of companies that sell supplies to civilian agencies of the Federal Government would no longer be required by contract to file VETS-100 Reports. Congress has taken a keen interest in the VETS-100 Report, as evidenced by section 1354 of Public Law 105-339. Whether or not contractors are required to file employment reports is a matter that should be determined by Congress rather than by administrative change to the FAR.

The rule proposes to remove the provisions of 42 U.S.C. 6962(c)(3)(A)(ii) from application to COTS acquisitions (see 12.505(b)). This section of U.S. Code requires contractors on contracts over $100,000 to estimate the percentage of the total material used in the performance of the contract which is recovered materials. We are concerned that this may preclude contractors from having to indicate on their products the percent of recycled materials contained therein. Information on recovered material content is necessary in order for agencies to carry out the intent of the Resource Conservation and Recovery Act and Executive Order 13101.

For the above reasons, VA objects to the removal of the above clauses and provisions of Law from application to COTS acquisitions. The actions proposed in this rule could have a negative impact on veterans and on veteran-owned and service-disabled veteran-owned small businesses. We urge reconsideration of this proposal.

Please direct any questions regarding the above comments to Mr. Don Kaliher at 202-273-8819 or me at the telephone number shown below.

Also, this e-mail mirrors the written comments submitted by VA's Deputy Assistant Secretary for Acquisition and Materiel Management, Mr. David Derr, which were provided to the FAR Secretariat today via fax to fax number 202-501-4067.

Thank you,
Barbara Latvanas
Chief, Acquisition Policy Division
Department of Veterans Affairs (049A5A)
Telephone 202-273-7808
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E-mail barbara.latvanas@mail.va.gov

2000-305-37

NEMA
Setting Standards for Excellence

March 15, 2004

General Services Administration
FAR Secretariat (MVA)
1800 F Street, NW
Room 4035
ATTN: Laurie Duarte
Washington, DC 20405

Transmitted by electronic mail to farcase.2000-305@gsa.gov

Dear Ms. Duarte,

I am writing in response to the January 15, 2004 *Federal Register* notice regarding FAR Case 2000-305 and the Civilian Agency Acquisition Council and Defense Acquisition Regulations Council proposed rule to exempt commercially available off-the-shelf (COTS) items from certain provisions of law.

NEMA is the largest trade association representing the interests of U.S. electrical industry manufacturers. Our more than 400 member companies manufacture products used in the generation, transmission, distribution, control, and use of electricity. These products are used in utility, industrial, commercial, institutional and residential installations.

Specifically, we agree with the proposal that the following provisions of law should not be applicable to contracts or subcontracts, at any tier, for the acquisition of commercial items or COTS items:

- 19 USC 2501 *et seq.*, Trade Agreements Act
- 19 USC 2512 *et seq.*, Trade Agreements Act
- 41 USC 10a *et seq.*, Buy American Act – Supplies

Furthermore, in the context of both the increasingly global economy and potential cost savings, we suggest the Councils strongly consider expanding the proposed rule to add the following provision to the lists of laws not applicable to contracts or subcontracts, at any tier, for the acquisition of commercial items or COTS items:

- 41 USC 10b *et seq.*, Buy American Act – Construction Materials

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Manufacturers Association
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Rosslyn, VA 22209
(703) 841-3200
FAX (703) 841-5900

2000-305-37

We agree with the Initial Regulatory Flexibility Act Analysis (IRFA) cited in the *Federal Register* notice that the proposed rule will "have a beneficial impact on industry because it proposes to exempt purchases of commercially available off-the-shelf items from many Government-unique requirements."

Thank you for your consideration of these remarks.

Sincerely,

Kyle Pitsor

Kyle Pitsor
Vice President, Government Relations

2000-305-38

EMERGENCY COMMITTEE FOR AMERICAN TRADE

March 15, 2004

General Service Administration
FAR Secretariat (MVA)
1800 F Street, N.W.
Room 4035
ATTN: Laurie Duarte
Washington, D.C. 20405

Re: FAR case 2000-305

Dear Sir or Madam:

The Emergency Committee for American Trade (ECAT) is pleased to submit these comments in response to the January 15, 2004 proposed rule regarding commercially available off-the-shelf (COTS) items and the implementation of section 4203 of the Federal Acquisition Reform Act of 1996 (the so-called Clinger-Cohen Act), Pub. L. No. 104-106. ECAT is an organization of leading U.S. companies with global operations representing all major sectors of the American economy.

Pursuant to the mandate of the Clinger-Cohen Act, the proposed modification to the Federal Acquisition Regulation (FAR) identifies those laws that would be inapplicable to Federal Government acquisitions of COTS items in order to permit the U.S. Government to purchase COTS items under commercial and competitive terms. ECAT strongly supports the proposed listing of laws and, in particular, the identification of the Buy American Act (41 U.S.C. 10a et seq.) and the Trade Agreements Act (19 U.S.C. 2501 et seq.) as laws that should not be applied to COTS acquisitions.

Both the Buy American Act (BAA) and the Trade Agreements Act (TAA) represent "Government-unique . . . requirements" that the Clinger-Cohen Act seeks to eliminate. The BAA and related FAR clauses generally require offerors to certify that products are manufactured in the United States with at least 50 percent U.S. component parts, with certain exceptions, or be penalized in the source selection process. The TAA and FAR implementing clauses require that offerors certify that each end product is U.S.-made or made ~~by~~ in a designated country (a signatory of the WTO Government Procurement Code), a Caribbean Basin country or a NAFTA country, also with certain exceptions.

As a result of the BAA and TAA requirements, U.S. companies seeking to sell COTS items to the Government must engage in an increasingly difficult, time-consuming and costly analysis of the origin of each product and, in the case of BAA its component parts (as well as continued monitoring during the duration of the contract) that is not normally performed for commercial sales. Given the increasing globalization of production, segregated inventories and transportation systems are increasingly required to ensure country-of-origin or content compliance. As a result, the BAA and TAA requirements increase significantly overhead costs,

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2000-305-38

as well as production and delivery delays, not only for the U.S. companies producing the items, but also for government customers.

The BAA and TAA requirements also unnecessarily limit the Government's ability to have access to state-of-the art technologies. This is particularly true in the information technology (IT) and other sectors where, to be able to compete effectively in the global commercial marketplace, U.S. companies rely upon multiple sources of supply for components around the world. The reliance on these global production networks make it increasingly difficult for U.S. companies to comply with the BAA and TAA requirements, such that U.S. companies may be prevented from offering their COTS items to government customers. Such global production networks should not, however, be discouraged given that they are themselves a key factor in promoting the innovation, the competitiveness and the high quality of U.S. IT products and have been a significant factor in promoting economic growth here in the United States, as documented in ECAT's *Mainstay IV: Technology, Trade and Investment: The Public Opinion Disconnect (2002).*

Exempting COTS acquisitions from both the BAA and TAA requirements will substantially streamline and promote the Government's access to commercial products, including state-of-the-art technologies, on commercial terms and at commercial prices as sought by the Clinger-Cohen Act. Eliminating these unnecessary requirements will allow U.S. companies to focus their time and resources on their most important mission, providing the government customer and the commercial marketplace with the highest quality products on commercial terms.

ECAT appreciates the opportunity to provide these comments and is available to provide additional information if needed.

Respectfully,

Calman Cohen

Calman J. Cohen
President

2000-305-39

March 12, 2004

General Services Administration
FAR Secretariat (MVA)
Attn: Laurie Duarte
1800 F Street NW, Room 4035
Washington, DC 20405

Re: FAR Case 2000-305

Dear Ms. Duarte:

We are writing you regarding the FAR Case 2000-305 proposed FAR changes, and specifically the proposed changes for Section 12.505 addressing, in part, applicability of the Trade Agreements Act **("TAA")** to commercially available off-the-shelf items.

Extreme Networks, Inc., designs, develops, and manufactures network switching systems that deliver the most effective applications and services infrastructure by creating networks that are faster, simpler and more cost-effective than conventional solutions. Headquartered in Santa Clara, Calif., Extreme Networks markets its network switching solutions in more than 50 countries. The Company currently has approximately 825 employees in the United States. In Fiscal Year 2003, Extreme Networks had revenue of approximately $350 million. Approximately 90% of the revenue represented "commercial" sales and 10% represented sales to the United States Government.

The commercial market for products and services similar to those supplied by Extreme Networks is highly competitive – both from technological and price perspectives. Margins are narrow at best. Moreover, Extreme Network faces both domestic and foreign competition. Approximately 50% of its revenue is earned from overseas sales. In this setting, market segments that create significant added costs must be carefully evaluated. Imposition of the **TAA** in the Government market creates significant administrative and cost burdens to Extreme Networks. If these burdens become too great, we cannot continue to sell in that market.

Significant, relevant characteristics of our network switching business are as follows:

- Our subcontract/supplier base consists of almost 100% commercial vendors.
- Our suppliers often have multiple manufacturing facilities with the common feature of almost all manufacturing facilities being foreign, with

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305-39

some foreign manufacturing facilities in TAA compliant countries, others not.

- As commercial vendors, our subcontract/vendor base companies often do not know of the TAA requirements and, thus, are unable to advise us whether or not their products are TAA compliant.

- Some products used by Extreme Networks are used by all network equipment manufacturers (shared components).

- An example of shared components is GigaBit Interface Converters (GBIC's). GBIC's are used in conjunction with networking equipment to create high-speed networks within a building or groups of buildings. All of the primary, major GBIC manufacturers (Agilent, FINISAR, JDSU) currently only provide non-TAA compliant GBIC's.

Given this setting, imposition of the TAA in the Government sales market creates the following consequences to Extreme Networks and to the Government:

A. Consequences to Extreme Networks:

1. Extreme Network must establish internal administrative processes, procedures, and controls to identify TAA vendors and parts and match those parts with Government sales. There are often reiterative communications with vendors to identify TAA compliance, followed by segregation of work-in-process into TAA sub-compliant and non-TAA compliant components, time consuming matching of TAA components to products to be delivered to a Government buyer (creation of a federal version of a standard product), and often duplicative inventory stores. All of these increased administrative and manufacturing tasks add cost to the production process – costs that are not incurred by competitors that do not sell to the Government.

2. Vendors are chosen based on TAA compliance rather than lowest cost. This fact also creates an increase in production costs -- costs that are not incurred by competitors that do not sell to the Government.

3. Vendors are sometimes selected based on TAA compliance rather than technical superiority.

4. For components or products such as GBIC's that are not readily available from normal commercial sources, Extreme Networks must affirmatively seek out smaller "boutique" TAA compliant suppliers. These suppliers sometimes raise special problems including: (a) non-competitive prices, (b) credit risks, (c) delivery volume limitations

(particularly if the vendor has other regular buyers to which it gives preferential treatment) and, on occasion, (d) interface or quality issues. Moreover, as with the issues discussed above, successful identification of a TAA compliant boutique supplier requires inventory segregation, duplication, tracking, and matching (creation of a federal version of a standard product). Again, all of this effort adds cost -- costs that are not incurred by competitors that do not sell to the Government

5. A product may be represented as TAA compliant based on a vendor misunderstanding of the law. (Vendors often apply BAA or Commerce Department Source rules instead of TAA rules). Moreover, because vendors are neither knowledgeable in TAA rules nor sensitive to TAA requirements, decisions are innocently made that create non-compliance. A manufacturer may have, for example, facilities in both designated and non-designated countries. Shipments may initially be from a plant in the designated country, but shifted without announcement by administrative personnel to a non-designated country due to production problems, holidays, labor strife or simply inventory control.

6. Because Extreme Network utilizes a typical, commercial standard cost system to account for production costs, the increased costs associated with TAA compliance cannot easily be captured and identified to the responsible order; rather, the added cost becomes part of the standard, average cost of all similar systems, commercial and Government alike. Thus, Extreme Network's competitive position in its larger commercial market is eroded as a result of its election to sell to the Government.

7. As an overlay to all of these issues, Extreme Networks must be concerned with liability imposed by even innocent non-compliance. An undetected error in any of the administrative procedures and controls discussed can result in shipments of non-compliant product. Such an event can result in administrative and even criminal audits and investigations and sanctions. This is not a concern in its commercial market.

B. Consequences to the Government

1. As a result of TAA Compliance, the Government pays more money. The administrative and manufacturing costs described above ultimately are included into the sales price of Extreme Network products – as is the case with all contractors' products.

2. The Government may well not receive the most current technology. Subcontractors/Vendors must be chosen based on TAA

compliance. An innovative supplier with a non-TAA compliant product cannot be used.

3. To some undeterminable degree, the Government incurs increased risk under the TAA. The need to utilize vendors that are either "boutique" sellers or sellers with which Extreme Network has limited experience, necessarily increases performance risks.

4. Because special, select vendors must be used for some components, an inventing of those items may not be readily available should the Government have an immediate need.

Finally, this change is unlikely to significantly affect U.S. jobs. As noted, almost all of these components – and most of the products – in the IT industry are manufactured overseas. The distinction simply is whether the components and products are manufactured in a foreign "eligible" country or a foreign "ineligible" country. Either way, these components and products likely still will be manufactured overseas.

Extreme Networks strongly supports the proposed changes to FAR Section 12.505 (a.) We believe these changes are in the best interest of the Government and industry. In the world of commercial IT products, sub-contract manufacturers outside of the United States currently perform most manufacturing, which makes certifying TAA compliance very challenging, costly, and sometimes, impossible.

We thank you for considering our input and strongly hope the proposed FAR changes are adopted.

Respectfully,

Gordon Stitt
President & CEO

2000-305-40

March 12, 2004

General Services Administration
FAR Secretariat (MVA)
1800 F Street, N.W.
Room 4035
Washington, D.C. 20405

ATTN: Laura Duarte

RE: FAR CASE 2000-305 (Commercially Available Off-the-Shelf (COTS) Items)

Dear Ms. Duarte:

The Contract Services Association of America (CSA) appreciates this opportunity to comment on the proposed amendment to the Federal Acquisition Regulation (FAR) on Commercially Available Off-the-Shelf (COTS) Items (*Federal Register, Vol. 69, No. 10, 2448-2451).*

By way of background, CSA is the premier industry representative for private sector companies that provide a wide array of services to Federal, state, and local governments. Our members are involved in everything from maintenance contracts at military bases and within civilian agencies to high technology services, such as scientific research and engineering studies. Many of our members are small businesses, including 8(a)-certified companies, small disadvantaged businesses, women-owned and veteran-owned businesses, HUBZone firms, and Native American owned firms. CSA's goal is to put the private sector to work for the public good.

The proposed rule implements section 4203 of the 1996 Clinger-Cohen Act (41 U.S.C. 431), which requires the FAR to list certain provisions of law that are inapplicable to contracts for acquisitions of commercially-off-the-shelf (COTS) items.

CSA generally supports the proposed rule. We agree with the assessment made under the section on the Regulatory Flexibility Act that the rule may have a beneficial impact on a substantial number of small entities since those providing COTS items will be exempted from many Government-unique requirements. This will relieve those firms from significant administrative burdens and should encourage more commercial small firms to do business with the Government.

The Government's acquisition policies maximizing competition and supporting the use of commercial products and processes depends on the availability and willingness of commercial firms to do business with the Government. These policies have been in existence for years, and were further supported in the passage of the 1994 Federal Acquisition Streamlining Act (FASA) and the 1996 Clinger-Cohen Act. The implementing regulations (FAR Part 12 and DFARS Part 212) also were intended to include the minimum number of Government-unique provisions applicable to commercial firms offering commercial products. The proposed rule should further encourage firms to participate in Federal procurements at all tiers.

With respect to the proposed language, we have strong reservations concerning the proposed definition because it does not sufficiently address commercially available off-the-shelf software and other information technology products. We believe that software and other information technology products are sufficiently distinct from other COTS items due to the unique element of intellectual property rights, and the oftentimes blurred distinction between services and supplies. We strongly urge the following addition be inserted into the proposed definition below (i), and the subsequent subsections renumbered appropriately:

> *(ii) A commercial item (as defined in this section), where internal implementation specifications (i.e., source code for software) are unavailable and the vendor provides periodic releases for functional growth.*

Consistent with this proposed clarification in the definition of COTS, we further strongly recommend the instruction for proposed FAR 27.409(a)(1)(viii) state:

> *(viii) An acquisition for commercially available off-the-shelf items, in which case the following clauses also do not apply: FAR 52.227-15, Representation of Limited Rights Data and Restricted Computer Software; FAR 52.227-16, Additional Data Requirements, FAR 52,227-18; Rights in Data – Existing Works; and FAR 52.227-19, Commercial Computer Software – Restricted Rights.*

From the perspective of CSA member companies, they need the flexibility and intellectual property rights similar to the commercial market regarding the data and software delivered to the Government in conjunction with their service contract obligations. For example, if COTS software is being supplied to a facility for purposes of accurate exchange of data, the policy in FAR 12-211 is completely inconsistent with a requirement to identify data or software in a format that effectively waives the commercial license rights that the contractor (or contractor's vendor) is entitled to retain under a commercial item or COTS acquisition.

Furthermore, we also, question the inclusion of § 12.505(15), which exempts the acquisition of COTS items from the requirements of 41 U.S.C. § 253g and 10 U.S.C. § 2402, Prohibition on Limiting Subcontractor Direct Sales to the United States. FAR § 52.203-6, which implements this prohibition, already exempts the sale of commercial items from its coverage, except to the extent that any prime/subcontractor agreement results in the Federal Government being treated differently from any other prospective purchaser. Although the goal of the rule is to limit the number of laws applicable to COTS acquisition, § 12.505(15) has some potential of harming one of the anticipated beneficiaries of the rule, small business concerns, and the Federal Government itself. We recommend that this subsection of the proposed rule be deleted.

Finally, although CSA generally supports the proposed rule, we note a particularly troublesome development in the proliferation of Government-unique requirements – apart from the statutes addressed by this rule – imposed on companies wanting to sell commercial products directly to

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the Government. This undermines the Congressional objectives aimed at enabling the use of commercial items, including:

- Attracting non-traditional, commercial sources to doing business with the Government;
- Encouraging innovative small businesses;
- Increasing the likelihood that the best American technology can be acquired for the Government;

While it is important for existing Government prime contractors to be able to attract commercial subcontractors and suppliers through minimal flow-down of Government-unique requirements, these same commercial companies also should be encouraged to deal directly with the Government. Needlessly requiring more FAR-unique clauses when the Government buys commercial items or services directly is counterproductive to that goal.

Again, CSA supports the proposed rule with the reservation expressed above. If you have any questions, please feel free to call me, or Cathy Garman, CSA's Senior Vice President for Public Policy, at 703-243-2020.

Sincerely,

Gary Engebretson
President
Contract Services Association of America
1000 Wilson Blvd., Suite 1800
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2000-305-41

March 15, 2004

FAR Secretariat (MVR)
Attention: Ms. Laurie Duarte
General Services Administration
Room 4035
1800 F Street, NW
Washington, DC 20405

Re: Commercially Available Off-the-Shelf Items
FAR Case No. 2000-305

Dear Ms. Duarte:

Farrell Lines Incorporated ("Farrell") respectfully submits the following comments in response to the Notice of Proposed Rulemaking, Federal Register Notice, 69 Fed. Reg. 2448 (January 15, 2004) titled Federal Acquisition Regulation: Commercially Available Off-the-Shelf (COTS) Items, FAR Case No. 2000-305.

1. Farrell is a vessel operating ocean common carrier that time charters five U.S.-flag vessels and bareboat charters a sixth U.S.-flag vessel. Farrell's time chartered vessels are in the U.S. Maritime Security Program and Farrell itself is a VISA Program participating carrier. Farrell is strongly opposed to the provisions of the Proposed Rule that would make the Cargo Preference Act of 1904 (10 U.S.C. 2631), which covers Defense Department generated cargoes, and the Cargo Preference Act of 1954 (46 U.S.C. 1241(b)), covering non-military cargoes, subject to waiver under Section 4203 of the Clinger-Cohen Act of 1996 (41 U.S.C. 431).

2. The general legal and factual reasons why these portions of the Proposed Rule cannot be made final are set forth convincingly in the comments submitted by the American Maritime Congress ("AMC"), which comments are adopted by Farrell as if fully set forth herein. As AMC shows in its comments, it is clear that in relation to the promulgation of the Clinger-Cohen Act, Congress did not intend that cargo preference laws be considered for inclusion on the list of laws for waiver. All efforts to include cargo preference cargoes within waiver authority were expressly eliminated from the legislation that resulted in Clinger-Cohen. Where Congress has strongly indicated that

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administration of cargo preference laws is to be treated as a separate matter, the General Services Administration ("GSA") and the National Aeronautics and Space Administration ("NASA") should not interpose their own interpretation to the contrary.

3. There are facts particular to Farrell that the GSA and NASA should also consider. Farrell has examined the list of items that would be considered COTS and determined that the majority of what Farrell carries in cargo preference cargoes would be covered by waivers if the proposed rule becomes final. Farrell believes that MRE's, uniforms, commissary items, and other items which are carried by Farrell would clearly fall under the waiver rule. Thus, if a waiver were allowed, the results could be devastating to Farrell in that it would be denied cargo upon which it has relied under existing law to make the economic commitment to use higher cost U.S.-flag vessels and to commit these vessels to the U.S. government for national security purposes under the VISA Program. Without this promised preference cargo, the Department of Defense, which heretofore could count on having the vessels of U.S.-flag commercial operators such as Farrell available for its sealift needs, could lose the services of some of these vessels. Where the military has stressed the need for U.S.-flag vessels for the current military operations in Iraq and elsewhere, this is no time for GSA and NASA, against the wishes of Congress and the Department of Defense, to force Farrell and other U.S.-flag operators to examine a possible curtailing of their services because cargo preference cargo will instead be given through the proposed GSA/NASA action to foreign flag vessels.

Farrell appreciates the opportunity to comment on the proposed rulemaking in FAR Case No. 2000-305. For the reasons stated herein and in the comments filed by the AMC, Farrell requests that the final rule should not include the Cargo Preference Act of 1904 or the Cargo Preference Act of 1954, among those on the list of laws to be waived under the Clinger-Cohen Act.

Thanks you for your consideration.

Sincerely,

Hoppel, Mayer & Coleman

By: Paul D. Coleman
Attorneys for:
Farrell Lines Incorporated

2000-305-42

POGO
<pogo@pogo.org>
03/15/2004 11:37 AM

To: farcase.2000-305@gsa.gov
cc:
Subject: FAR Case 2000-305

Dear Ms. Duarte:

Attached in a Word document is POGO's comment on FAR Case 2000-305. If you have any questions regarding this submission please do not hesitate to contact me.

Thank you,

Danielle Brian

Executive Director

Project On Government Oversight

Project On Government Oversight

Watchdog Since 1981

www.pogo.org

COTS3-15-04.doc

305-42

March 15, 2004

General Services Administration
FAR Secretariat (MVA)
1800 F Street, NW, Room 4035
ATTN: Laurie Duarte
Washington, DC 20405

Via email: farcase.2000-305@gsa.gov

Subject: FAR Case 2000-305

Dear Ms. Duarte:

Thank you for the opportunity to comment on the proposed rule to amend the Federal Acquisition Regulation (FAR) regarding "Commercially Available Off-the-Shelf (COTS) Items" that was published in the Federal Register on January 15, 2004 (69 FR 2447). The Project On Government Oversight (POGO) is a non-partisan, non-profit organization that has, for 23 years, investigated, exposed and worked to remedy abuses of power, mismanagement and subservience to special interests by the federal government. POGO has a particular interest in government contracting matters.

POGO strongly objects to the proposed revisions to FAR 12.505, "Applicability of certain laws to contracts and subcontracts for the acquisition of COTS items" to remove the applicability of 41 U.S.C. 254d(c) and 10 U.S.C. 2513(c), "Examination of Records of Contractor," as implemented through FAR 52.215-2.

That clause provides for Comptroller General access to the directly pertinent records involving transactions related to a contract or a subcontract, there under. Removal of this clause from so-called COTS contracts would improperly restrict the Comptroller General's ability to review and examine contractor records related to the expenditure of public funds.

POGO also notes that based on the recent passage of the Services Acquisition Reform Act (SARA), that so-called "commercial item" procedures may soon be available to agencies to use wasteful time-and-material and labor hour (T&M/LH) contracts. To the extent that any COTS items are deemed to be appropriate for T&M/LH contract awards, it will be necessary to include FAR 52.215-2 in those contracts, in order to determine whether costs or hours claimed by contractors are properly billed to the government.

We urge the FAR Councils to retain this provision for all government contracts, including those for so-called COTS.

Sincerely,
Danielle Brian, Executive Director
Project On Government Oversight www.pogo.org
pogo@pogo.org

2000-305-43

UNITED STATES TRANSPORTATION COMMAND
508 SCOTT DRIVE
SCOTT AIR FORCE BASE, ILLINOIS 62225-5357

15 March 2004

Ms. Lauri Duarte
General Services Administration
FAR Secretariat (MVA)
1800 F Street NW, Room 4035
Washington DC 20405

Dear Ms. Duarte

The United States Transportation Command (USTRANSCOM) submits the following comments relative to Federal Acquisition Regulation (FAR) Case 2000-305 with respect to the implementation of section 4203 of the Clinger-Cohen Act of 1996, 41 U.S.C. 431, concerning acquisition of Commercially Available Off-the-Shelf (COTS) items. The Act requires that the FAR list certain provisions of law that are inapplicable to contracts for acquisition of COTS items. We oppose the inclusion of the Cargo Preference Act of 1904 - "10 U.S.C. 2631," the Cargo Preference Act of 1954 - "10 U.S.C. 1241(b)," and the Fly America Act -"49 U.S.C. 40118" under the proposed FAR subpart 12.505 with regard to contracts for the acquisition of COTS items to the extent that it makes cargo preference laws less applicable to acquisition of COTS items than to "commercial items." That is, 10 U.S.C. 2631, 10 U.S.C. 1241(b), and 49 U.S.C 40118 should be applicable to contracts for the acquisition of COTS items as they are for the acquisition of commercial items, consistent with FAR 12.503 and 12.504. Nevertheless, consistent with the text at FAR 12.504(a), 10 U.S.C. 2631, and 10 U.S.C. 1241 could be made not applicable to subcontracts at any tier for the acquisition of COTS items, except for the types of subcontracts listed at FAR 47.504(d).

In 1997, representatives from the Department of Defense (DOD), USTRANSCOM, Maritime Administration (MARAD), and the maritime industry met at the White House with the Director, Office of Federal Procurement Policy (OFPP) and representatives from the national Economic Council to discuss the effects of the Federal Acquisition Streamlining Act on Cargo Preference laws. At this meeting, it was agreed that: (1) language clarifying the OFPP, 1 May 1996 memorandum (Atch 1) would be placed in the Defense Acquisition Deskbook used by DOD contracting personnel; (2) the Defense Federal Acquisition Regulation Supplement (DFARS) would be amended to incorporate appropriate regulatory coverage, and; (3) all parties would evaluate the potential for developing an improved mechanism for reporting DOD's cargo preference data to MARAD. The modifications to FAR 12.504; 47.504(d); and 52.247-64 as well as DFARS 212.504; 247.572-1; 252.247-7023; and 252.247-7024 (Atch 2) achieved a balance between the objectives of acquisition reform and DOD's support for the U.S.-flag maritime industry.

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The proposed inclusion of "10 U.S.C. 2631" and "10 U.S.C. 1241" under FAR 12.505, with regard to COTS items, is a significant departure from the 1997 agreement. We believe the balance achieved for commercial item acquisitions should be maintained for COTS item acquisitions. Therefore, DOD requests that 10 U.S.C. 2631, 10 U.S.C. 1241(b), and 49 U.S.C. 40118 be excluded from the list of laws under proposed FAR 12.505 that is not applicable to contracts for the acquisition of COTS items.

My point of contact for this issue is Ms Gail Jorgenson, Chief, Command Acquisition, (618) 229-1887.

Sincerely

CARLOS D. PAIR
Major General, U.S. Army
Chief of Staff

Attachments:
1. OFPP Memorandum, 1 May 1996
2. Modified FAR language

cc:
OSD (AT&L TP)
Maritime Administration

2000-305-44

OKI

Oki, Network Solutions for a Global Society

March 15, 2004

General Services Administration
FAR Secretariat (MVA)
1800 F Street, NW Room 4035
Attn: Laurie Duarte
Washington, DC 20405

Ref: FAR Case 2000-305

Dear Ms. Duarte:

On behalf of Oki Data Americas, Inc., I am submitting this letter commenting on the proposed regulations that would implement a list of "provisions of law" that would be inapplicable to contracts for the procurement of commercially available off-the-shelf (COTS) items.

Oki Data Americas is the U.S. subsidiary of Oki Data Corporation of Japan, a global manufacturer of printers and fax machines. Oki Data products are sold under the Oki Data name and also under the name of other manufacturers. Oki Data Americas has overall responsibility for sales and service activities for Oki Data products in North, Central and South America, and performs some limited manufacturing within the United States.

Oki Data Americas strongly supports the proposal to make the Trade Agreements Act (TAA) inapplicable to contracts for the purchase of COTS information technology (IT) equipment. Specifically, the prohibition on purchases of a product that is not "U.S.-made, designated country, Caribbean Basin country, or NAFTA country end product" implemented through FAR 52.225-5 interferes with our ability to offer Oki Data's most advanced COTS IT products to the U.S. government, and to prime contractors making sales to the U.S. government, at competitive prices.

We understand that the goal of prohibiting purchases from the currently ineligible countries is to encourage those countries to enter into multilateral or bilateral agreements on government procurement practices.[1] However, because Oki Data's sales of products for the U.S. government represent an extremely small percentage of overall sales, our decisions on whether or not to manufacture in those countries are not influenced by the TAA. Accordingly, we do not believe that the prohibition on purchasing COTS IT items has any impact other than to deny to the U.S. government the ability to purchase IT products at the best prices. We note in this regard that we are not aware of any other country that imposes a prohibition of this nature.

[1] Japan is a member of the WTO Government Procurement Agreement, and both Japanese and U.S. origin components are used in Oki Data products. But to remain competitive in the commercial marketplace, Oki Data – like other IT product manufacturers – must use some components from ineligible countries and assemble many of its products in those countries.

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OKI

Oki, Network Solutions for a Global Society

In summary, Oki Data believes that the U.S. government would benefit greatly from the stimulation of competition that would result from lifting the TAA prohibition from purchases of COTS IT products, and that the elimination of the prohibition would not interfere with other governmental policy goals.

Thank you for giving us this opportunity to comment on the proposed rule.

Respectfully submitted,
Oki Data Americas, Inc.

David L. Vaughn
Senior Manager, Legal Affairs

THE DOCUMENT COMPANY
XEROX

2000-305-45

Michael D. Brannigan
SVP, NASG Sales Operations
Xerox Corporation
100 Clinton Ave. South - 29
Rochester, NY 14644
Phone: (585) 423-4321

March 11, 2004

General Services Administration
FAR Secretariat (MVA)
1800 F Street, N.W., Room 4035
Attention: Laurie Duarte
Washington, DC 20405

Re: FAR Case 2000-305

Dear Ms. Duarte:

Xerox, a New York corporation, with headquarters in Stamford, Connecticut and numerous manufacturing, research and sales facilities throughout the United States, would like to take this opportunity to comment on the proposed rule published January 15, 2004. The proposed rule exempting commercial off-the-shelf (COTS) procurements from the Trade Agreements Act (TAA) is an important provision that will allow Xerox to market and sell all our leading products to the Federal Government without incurring significant additional costs. As a longstanding vendor to the Federal Government, Xerox believes the TAA exemption is consistent with commercial practices and will allow the U.S. government unhindered access to commercial products in a more streamlined and efficient manner.

Xerox continues to maintain a strong manufacturing base in the United States especially for our leading edge digital publishing and production equipment. In addition, Xerox continues to conduct a very significant portion of all our research and development in the United States. However, TAA has become a significant administrative burden for suppliers of information technology products to the Federal Government. To meet the requirements of a fiercely competitive global environment, Xerox manufactures its products in locations around the world, with parts and components sourced from multiple suppliers who have operations in multiple countries. As Xerox brings more and more products to market to meet the ever-demanding requirements of our customers from the United States and around the world, TAA has become a more serious administrative burden for companies such as Xerox who take pride in their sales to the Federal Government. The requirement to track where products are made or transformed requires Xerox to maintain a costly administrative and labor-intensive system solely to meet the unique provisions of TAA and the Federal Government.

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Moreover, TAA's restrictions are not required by any treaty or international agreement, including the GPA. In fact, the United States is the only GPA signatory country to enact such a law. The Clinger-Cohen Act enacted almost a decade ago clearly sought to streamline and mirror commercial buying practices for the Federal Government. Section 4203 of the Clinger-Cohen Act specifically authorizes the Federal Government to eliminate non-commercial contract clauses from commercial off-the-shelf procurements for the Federal Government and Xerox applauds the Federal Acquisition Regulatory Council for addressing these remaining government-unique requirements.

As Xerox and the global economy continue to grow and the United States' international relationships transcend new lines, as does Xerox's, it is becoming more difficult for companies to comply with what are increasingly out-moded and obsolete procurement rules and still move at a pace fast enough to meet the dynamic customer requirements of the Federal Government. Xerox deeply values its business with Federal Government agencies, and we believe the elimination of the TAA provisions will help ensure these relationships continue to grow and allow the Federal Government unhindered access to all leading information technology products at competitive prices.

Thank you for this opportunity to comment.

Sincerely,

<original signed by>

Michael D. Brannigan
Senior Vice President, NASG Sales Operations

2000-305-46

INFORMATION TECHNOLOGY INDUSTRY COUNCIL

1250 Eye Street, NW Suite 200
Washington, DC 20005
202-737-8888 www.itic.org

March 12, 2004

General Services Administration
FAR Secretariat (MVA)
1800 F Street, NW Room 4035
Attn: Laurie Duarte
Washington, DC 20405

Ref: FAR Case 2000-305

Dear Ms. Duarte:

I am pleased to submit comments on behalf of ITI, the Information Technology Industry Council, in response to the above referenced rulemaking, published in the January 15, 2004 edition of the Federal Register (69 FR 2448). We are very pleased that the Trade Agreements Act of 1979 was included in the proposed list of "provisions of law" that should be waived for federal purchases of "Commercially Available Off-the-Shelf Items," or COTS. We urge that it be retained in an expedited Final Rule.

Background

The Proposed Rule seeks input regarding the implementation of section 4203 of the Federal Acquisition Reform Act of 1996 (FARA), which was an integral component of Pub. L. No. 104-106, commonly known as the Clinger-Cohen Act. In passing this landmark legislation, Congress sought to identify and remove statutory and regulatory barriers that were preventing the federal government from fully participating in the commercial marketplace. The law's authors recognized that government-unique requirements imposed on commercial contractors were driving up costs and creating inordinate delays in the procurement process. FARA directed the Administrator of Federal Procurement Policy to identify the burdensome laws and minimize their impact on COTS acquisitions.

In January 2003, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (together, "the Councils") published an Advanced Notice of Proposed Rulemaking (68 FR 4874) to solicit comments on a preliminary list of "provisions of law" that should not apply to federal COTS purchases. They also invited recommendations of other statutes. ITI filed detailed comments urging the Councils to add perhaps the most significant obstacle to unfettered government access to

COTS, the Trade Agreements Act of 1979 (P.L. 96-39, 19 U.S.C. 2501 et seq., hereafter "TAA"). We are grateful that it was indeed added in the Proposed Rule.

TAA in the Context of the WTO

The TAA requires that all products delivered to federal agencies be wholly manufactured or "substantially transformed" in "designated countries." They are the United States, Caribbean Basin countries, "NAFTA" countries or countries that have acceded to the World Trade Organization's (WTO) Agreement on Government Procurement (GPA). The latter is a voluntary WTO agreement by which signatories commit to open their government markets to competition from businesses of other signatory countries.

The U.S. was one of the first countries to embrace the GPA. To encourage other countries to sign on as well, Congress passed the TAA, which in effect grants exclusive federal market access privileges to GPA signatory countries. Such restrictions are not required by this agreement or any other treaty. Moreover, the U.S. is the sole GPA signatory to impose such restrictions.

Despite the incentives built into the TAA, it has not spurred widespread adoption of the GPA. The GPA came into force in the mid-1990s. Of the current 145 WTO member countries, only 28 have acceded to the GPA, 23 of which were *original* signatories. Another seven members (Bulgaria, Estonia, Jordan, the Kyrgyz Republic, Latvia, Panama and Taiwan) are in the process of negotiating accession, but there is no time limit on negotiations or assurance that they will be successfully completed. A handful of other WTO members have "observer" status. Most importantly, none of the Asian countries that produce a large amount of IT products and components (China, Malaysia and Taiwan) are GPA signatories.

The difficulty of securing accession to the GPA has been further demonstrated by the results of US bilateral trade negotiations. While each recently concluded free trade agreement (FTA) includes important and meaningful commitments to liberalize government procurement, none of them included commitments by non-GPA signatory countries to accede to this agreement (the US-Singapore FTA incorporated GPA provisions but Singapore has been a GPA signatory since 1997). Bilateral negotiations are widely considered to be an area where the US enjoys maximum negotiating leverage, but even in these contexts our trading partners remain unwilling to accede to the GPA.

Given the dim near-term prospects for completion of a new round of WTO commitments, and the staunch opposition to GPA accession on the part of our trading partners even in the context of bilateral FTAs, the IT industry sees little opportunity for relief from TAA procurement constraints for the foreseeable future. In addition to this bleak outlook, there are other sound arguments for waiving TAA:

- **The TAA is not needed to open government IT markets.** IT companies have been highly successful in gaining access to foreign government markets by offering world class products and services. For example, in 2003, U.S. computer equipment exports to Singapore, Chile and

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Australia reached a combined $2.685 billion, a 10 percent increase over 2002 revenues. Ironically, the TAA's procurement restrictions provide foreign governments with *greater* access to U.S. IT products than our own federal agencies.

- **The TAA is making it increasingly costly to compete for federal business.** The law's government-unique certification requirements add an estimated 10 percent to a vendor's overall costs, when the entire supply chain is taken into consideration. For the most part, these costs cannot be passed on to agencies due to the aggressive price competition that is the hallmark of federal contracting. Of equal concern is the law's sourcing restrictions, which can disqualify many IT manufacturers from competing on government contracts. While the value of potential lost sales is difficult to quantify, industry experts estimate that it exceeds hundreds of millions of dollars per year. Given that government sales account for only two to five percent of a typical IT vendor's annual revenues, for many companies, it is getting increasingly difficult to justify participating in the federal marketplace.

- **The TAA is making it increasingly risky to compete for federal business.** The TAA's certification requirements potentially expose commercial manufacturers to Lantham Act, civil False Claims and other legal sanctions, even when they have taken extraordinary steps to comply with the TAA. The expanding use of multi-year contracts magnifies the risk, since TAA certifications cover the life of contracts and make no allowance for changes in sourcing decisions or market conditions.

- **The TAA is hampering the government's ability to fully implement federal policies.** Diminished competition for federal business leads to fewer choices and reduced access to the latest commercial technology. This can hinder the government's ability to use its considerable purchasing power to implement new policies, such as the 1998 amendments to Section 508 of the Rehabilitation Act of 1973. Among other things, the amendments require federal agencies to purchase IT products that are accessible to government employees with disabilities. However, if such products are being manufactured or assembled in non-TAA qualified countries, which is typically the case for new commercial IT products, they may be off-limits to government buyers and thereby impede efforts to comply with the accessibility law.

Summary

The Trade Agreements Act of 1979 is unnecessarily limiting U.S. Government access to some of the most productive, cost-effective commercial IT products available on the market today. This is exactly a circumstance Congress sought to reverse with the Clinger-Cohen Act. Given the staunch opposition of our trading partners to GPA accession even with the TAA as an incentive, and the significant success IT companies are achieving in gaining access even to foreign government markets of non-GPA signatories, there is no rationale for maintaining the TAA's costly, burdensome procurement restrictions here in the U.S.

Accordingly, ITI urges the Councils to retain the Trade Agreements Act of 1979 in the list of provisions of law to be waived. Further, we urge that publication of a Final Rule be expedited so that this much-needed relief will be available to the government and IT contractors prior to the start of the Fiscal Year 2005 procurement cycle.

Thank you for inviting us to comment on this critical matter. We would welcome the opportunity to meet with the Councils or any other interested party to provide further information to support our recommendations.

Sincerely,

Rhett

Rhett B. Dawson
President & CEO

2000-305-47

AMERICAN MARITIME CONGRESS
Franklin Square, 1300 I Street, NW, Suite 250 West, Washington, DC 20005-3314

March 15, 2004

FAR Secretariat (MVR)
Attention: Ms. Laurie Duarte
General Services Administration
Room 4035
1800 F Street, N.W.
Washington, D.C. 20405

RE: Federal Acquisition Regulation: Commercially Available Off-the-Shelf (COTS) Items, FAR Case 2000-305, Federal Register, Vol. 69, No. 10, January 15, 2004, Proposed Rule

Dear Ms. Duarte:

The American Maritime Congress (AMC) is a labor/management association of U.S.-flag ship operating companies and the Marine Engineers' Beneficial Association (MEBA). AMC member companies have vessels in the domestic and international shipping trades; MEBA is our Nation's oldest maritime labor organization. On behalf of the American Maritime Congress and the Marine Engineers' Beneficial Association, I am writing to express our strong opposition to the inclusion of U.S.-flag cargo preference laws on the list of laws inapplicable to contracts and subcontracts for the acquisition of commercially available off-the-shelf (COTS) items.

The Proposed Rule seeks comments on whether the Cargo Preference Act of 1904 (10 U.S.C. 2631), covering Defense Department generated cargoes, and the Cargo Preference Act of 1954 (46 U.S.C. 1241(b)), covering civilian agency generated cargoes, should be placed on the list of laws to be waived pursuant to Section 4203 of the Clinger-Cohen Act of 1996 (41 U.S.C. 431).[1] Under the definition of a "commercially available off-the-shelf item," bulk cargo ("cargo that is loaded or carried in bulk without mark or count") is explicitly excluded as a COTS item.[2]

In this Proposed Rule, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) maintain that including certain laws on the list of laws in the Proposed Rule that "could be determined to be inapplicable to COTS" does not

[1] At **TAB A** is a copy of 10 U.S.C. 2631; at **TAB B** is a copy of 46 U.S.C. 1241 (b); and at **TAB C** is a copy of Section 4203 and the Conference Report explanation of this section.
[2] See **TAB D** for the full definition of a COTS item.

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represent "a final decision" as to the inapplicability of these laws. This is cold comfort to the U.S.-flag maritime industry for three reasons.

First, as is noted below in detail, for sound policy reasons and given the long history and consideration of this issue by the Executive Branch, the Congress, and our industry concerning the application of U.S.-flag cargo preference law in the context of acquisition reform, cargo preference laws should have been determined not be included on the list of inapplicable laws and so stated in this Proposed Rule. Indeed, the record is so clear on this history that inclusion of these laws would appear either, in the most charitable description possible, an attempt to take "another bite of the apple," or a decision undertaken with no knowledge or understanding of this history.

Second, two provisions of law[3] were listed in the January 30, 2003 Advance Notice of Proposed Rulemaking (ANPRM) in the Federal Register (68 FR 4874) that "could be determined inapplicable" to COTS. However, they are not listed or mentioned, and their absence is not explained by the Councils in the Proposed Rule (as were two[4] on the January 30, 2003 list). The rationale for this absence should be set forth. If the Councils could decide not to include these two provisions, why not the cargo preference laws? This inconsistent application encourages the belief that inclusion on the list in this proposed rule may be more than a simple, dispassionate listing to gather comments to be used in a statutory determination.

Third, the January ANPRM did not mention 10 U.S.C. 2631. The Proposed Rule does, along with several other significant laws that the Councils note have raised "concerns" by other Departments and agencies. Why are all these laws now included on the list but not in the earlier ANPRM, particularly when waiving these laws has been controversial for years? Waivers of the Cargo Preference Act of 1904 has been equally controversial as waivers of the Cargo Preference Act of 1954. Why was the 1954 Act included in January 2003 and not the 1904 Act? Poor drafting is not an adequate excuse for such inconsistent treatment, particularly with well known laws long embroiled in acquisition reform developments.

Furthermore, the use of the word "additional" referring back to the ANPRM would imply that 10 U.S.C. 2631 is among those laws already "determined to be inapplicable to all commercial items as a result of the implementation of the Federal Acquisition Streamlining Act of 1994" (FASA). The Councils know that 10 U.S.C. 2631 (or, for that matter, 46 U.S.C. 1241(b)) was never included on any list at any time of laws to be waived under FASA for contracts. These laws were put on the list of laws to be waived for subcontracts for commercial items, but this was subsequently limited to a restricted subset of cargo pursuant to subcontracts under the Simplified Acquisition Threshold (see Federal Acquisition Regulation (FAR) Final Rule, 48 CFR Parts 47 and 52, Federal Register, Vol. 65, No. 80, April 25, 2000, and Defense Federal Acquisition Regulation Supplement (DFARS) Final Rule, 48 CFR Parts 213, 247, and 252, Federal Register, Vol. 67, No. 105, May 31, 2002). There was, therefore, no explanation of or advance notice that the Cargo Preference Act of 1904 would be placed on this list.

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[3] 5 U.S.C. 522a, Privacy Act and 41 U.S.C. 423(e)(3), Administrative Actions.

[4] 42 U.S.C. 6962(c)(3)(A)(ii), Estimate of Percentage of Recovered Materials Content for EPA-Designated Products and 41 U.S.C. 422, Cost Accounting Standards.

For these reasons and given the lengthy history discussed on pp. 6-18, below, we view the inclusion of U.S.-flag cargo preference law on the COTS list as reflecting intent and thus a serious threat to the future of the U.S. Merchant Marine, and America's sealift and national security.

We oppose inclusion of cargo preference laws on this list for the following reasons which will be discussed in detail below:

- Inclusion of the Cargo Preference Act of 1904 and the Cargo Preference Act of 1954 would undermine and could render without meaning these longstanding cargo preference laws of the United States. This would deprive U.S.-flag vessels of cargo that is vital to such vessels remaining under the U.S. flag;

- Inclusion of U.S.-flag cargo preference laws on the list of laws to be waived ignores the extensive recent history, compromises, and official assurances on the usage of such waivers and is contrary to the intent of the Congress – and without approval of, consideration by, or consultation with the committees of jurisdiction in the Congress for such laws;

- Inclusion of these laws represents a fundamental national policy change with respect to the law, Defense and Transportation Department sealift and transportation policy, and the President's national maritime policy; and

- Inclusion of these laws would undermine the extended and expanded Maritime Security Program (MSP), signed into law by the President on November 16, 2003 and, indeed, undercut its very premise of strengthening our Nation's defense sealift and manpower capabilities. It would impose costs to the United States, the Department of Defense, homeland security, and the President's budget far out of proportion to any conceivable gain.

Before turning to these considerations, we would like to make several observations. This Proposed Rule would appear to have been devised in isolation. Since September 11, 2001, the U.S. Government and the American people have been focused on the broad range of efforts in the War on Terrorism. This Proposed Rule does not comport with the commitment of the President of the United States, the Congress, and the American people to a long-term War on Terrorism, and the ongoing combat in Afghanistan and Iraq.

It ignores this unfolding history by proposing a rule that could extinguish much of our Nation's U.S.-flag fleet, denying cargoes it needs to survive, even as our Nation's military commanders stress the importance of the U.S. Merchant Marine to current operations. It ignores the fact that such a rule would decimate the private-sector mariner crew base, requiring one more task to be shouldered by our already over-extended uniformed Armed Forces personnel.

This Proposed Rule lightly tosses out for consideration a significant policy change as if it was just another routine rule, as if circumstances had not changed, as if it is more important to promote "acquisition reform" than to ensure security. It reflects "business as usual." Yet

business as usual is no longer acceptable. Every action we take, even every rule we publish, should be looked at in terms of how it helps American jobs, the American economy, and American security at home and abroad. In the light of September 11th and the long-term war on which we have embarked, this Proposed Rule fails that test.

This Proposed Rule is clearly at odds with the stated policy of support for cargo preference by our Nation's most senior military commanders responsible for defense transportation. As General John W. Handy (USAF), Commander, United States Transportation Command, Vice Admiral David L. Brewer III (USN), Commander, Military Sealift Command, and Major General Ann E. Dunwoody (USA), Commanding General, Surface Deployment and Distribution Command, jointly told the Seapower Subcommittee of the Senate Armed Services Committee on March 10, 2004:

> *"USTRANSCOM, MSC, SDDC, and MARAD support the maintenance of a viable U.S. mariner pool through enforcement of cargo preference requirements . . . [emphasis added]"*

This Proposed Rule is also clearly at odds with the stated policy of the Bush Administration emphasized by Secretary of Transportation Norman Y. Mineta, responsible for America's Marine Transportation System and maritime industry, on March 4, 2004 at a major policy speech in Hollywood, Florida:

> *"The Maritime Security Program, the Jones Act, and cargo preference laws are essential elements of America's national maritime policy. This Administration supports those laws and programs . . . [emphasis added]"*

These expressions of policy are not new. In 1992, current White House Chief of Staff, Andrew H. Card, Jr., then Secretary of Transportation, told the Congress[5] that:

> *"[cargo preference] laws guarantee the availability of cargo to U.S.-flag ships and, for some operators, their continued existence . . . Existing preference cargo requirements should continue to be enforced."*

Although the policy is not new, the times certainly are. There is, however, no evidence that our Armed Forces transportation commanders, or the Secretary of Transportation, or those responsible for cargo policy under them were consulted on this Proposed Rule since the defining events of September 11th and the opening guns of the War on Terrorism.

Therefore, although there is a mystery as to how the provisions of this Proposed Rule can be justified, the bigger mystery is that it was published at all.

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[5] In a June 17, 2002 statement before the Subcommittee on Merchant Marine of the Committee on Commerce, Science, and Transportation, U.S. Senate.

Inclusion of the Cargo Preference Act of 1904 and the Cargo Preference Act of 1954 on the list of laws to be waived for the acquisition of COTS would undermine and could render without meaning longstanding cargo preference laws of the United States. This would deprive U.S.-flag vessels of cargo that is vital to such vessels remaining under the U.S. flag.

Section 4203 established a new category of items for which longstanding laws of the United States may be waived – for purchases of "commercially available off-the-shelf items." In fact, this category is so close to the "commercial items" category in the Federal Acquisition Streamlining Act of 1994 (FASA) (P.L. 103-355) that it will have the practical effect of eliminating most preference cargoes carried by private-sector U.S.-flag commercial operators. It will allow these cargoes to go on foreign-flag vessels that provide no defense capability to the United States, pay no taxes in the United States or contribute to our nation's economy and balance of payments, and which will not only deprive American citizens of thousands of jobs but, as well, cripple the merchant mariner manpower base for Defense Department (DOD) and commercial sealift vessels.

We take this position because most cargoes carried by U.S.-flag vessels under the cargo preference laws proposed to be waived can and will be defined by U.S. Government shipper agencies, or by contractors, subcontractors, and government contracting officers, as "commercially available off-the-shelf items." This would include all commissary and exchange cargoes, military and other U.S. Government household goods, USAID and Department of Agriculture bagged, boxed, or processed food aid and development project cargoes, purchases by contractors and subcontractors made pursuant to DOD and other U.S. Government contracts, and all DOD and other U.S. agency purchases that are not military unit equipment (and even this could be open to interpretation as free of cargo preference under Section 4203 as many military items can be purchased on the commercial market – for example, "Hummers," certain helicopters, electronic components).

Additionally, unlike the very limited set of waivers of cargo preference under FASA for "commercial items" (subcontracts only and only subcontracts under the $100,000 Simplified Acquisition Threshold) that was permitted after years of consideration (see below), waivers pursuant to Section 4203 will be for contracts as well as subcontracts. This makes the impact of COTS waivers significantly larger.

Furthermore, no amount of definition or specificity in the eventual Final Rule as to cargoes to be excluded from or included in cargo preference waivers can rectify the impact of including any cargo preference laws on the list. The reality is that contracting officers and contractors will use the provision to evade cargo preference and, at best, U.S.-flag operators' only remedy will be lengthy and expensive legal challenges while cargo moves foreign flag.

This is not idle speculation. A number of U.S. Government agencies have a long history of seeking to avoid the use of U.S.-flag vessels whenever possible – despite existing U.S. law.

Government and non-government shippers will often time shipments, construct contracts, or select embarkation or delivery ports so as to orchestrate U.S.-flag "non-availability." For example, even in the midst of the Iraq War with U.S.-flag vessels and crews supporting combat operations, the U.S. Agency for International Development (USAID), on three occasions, declared a shipment of food aid cargo to Africa to be "emergency" aid but then withdrew the cargo tender when a U.S.-flag vessel was ready to carry the cargo (**TAB E**). This occurred over a period of four months. In May-June 2003, also in the midst of the war, USAID attempted to misuse the word "emergency" and evade shipping food aid U.S.-flag to Yemen and Zambia. It relented only when faced with the threat of legal action (see **TAB F**). With the definition of "commercially available off-the-shelf items" in hand, a loophole of almost unlimited proportions will be available, and, with past as prologue, it will be used.

In short, inclusion on the list of laws to be waived under Section 4203 would gut U.S.-flag cargo preference. This would destroy the U.S.-flag fleet in the highly competitive international trades as these vessels are dependent on cargo preference, which provides the critical base of cargo for their continued operation under our flag.

The American Maritime Congress believes that the Proposed Rule will result eventually in more than 100 U.S.-flag vessels in the international trades leaving the U.S. flag. This would greatly diminish our Nation's maritime defense industrial base, national defense sealift fleet and personnel, severely curtail secure, reliable power projection capability, cost American jobs and foreign exchange, and reduce Federal tax revenues. These consequences dwarf to any conceivable benefit such waivers might bring to acquisition reform.

Inclusion of U.S.-flag cargo preference laws on the list of laws to be waived ignores the extensive recent history, compromises, and official assurances on the usage of such waivers and is contrary to the intent of the Congress – and without approval of, consideration by, or consultation with the committees of jurisdiction in the Congress for such laws.

When reviewed in the context of extensive Legislative and Executive Branch history since FASA was introduced in the Congress in 1993, raising this issue once again speaks either of proceeding without knowing this history or proceeding with deliberate intent in spite of it.

FASA History with Respect to Waivers of Cargo Preference

This history began in late 1993 when the Federal Acquisition Streamlining Act, S.1587, was introduced by then-Senator John Glenn, Governmental Affairs Committee Chairman. It was designed to make massive and far reaching changes in the way the U.S. Government would purchase goods and services.

FASA legislation was the result of a multi-year effort, for the most part, run out of the Department of Defense in its acquisition reform office in concert with major defense contractors

and private-sector associations representing them. The U.S.-flag maritime industry was never consulted during this formative process, nor was the Department of Transportation's Maritime Administration (MARAD), the U.S. Government's expert agency regarding commercial shipping. One of the central thrusts of this effort was to free DOD contractors and subcontractors as much as possible from U.S. Government-specific rules and laws – everything from "Buy America," to labor supported issues, to cargo preference.

As introduced, S.1587 would have waived cargo preference entirely – military and civilian – for all contracts under the Simplified Acquisition Threshold of $100,000 and for all contracts and subcontracts for "commercial items," no matter what the value. The U.S.-flag maritime industry viewed this as a devastating threat to the viability of the entire U.S.-flag fleet in the international trades, because virtually all cargoes could have either been grouped or split up to fit under this threshold or defined as a "commercial item" (such as P.L. 480 Food for Peace wheat or shipping containers).

At the Senate Governmental Affairs Committee markup of FASA on April 26, 1994, Senator Ted Stevens of Alaska offered an amendment to strike all waivers of cargo preference in the bill. Senator Stevens' amendment was considered and adopted by the Committee unanimously. In fact, it was the only amendment adopted. This action was affirmed, after explicit consideration, by the Committee on Armed Services the same day.

These committees adopted this amendment removing the provisions waiving the cargo preference laws because, as the record demonstrates, the cargo preference provisions went beyond what was necessary to meet the bill's objectives with regard to the acquisition of commercial items and because FASA was not the place to address changes in cargo preference laws.

The record of both committees' markups on April 26, 1994 and subsequent events during Congressional consideration of S.1587 clearly support the conclusion that Congress did not intend FASA to apply to cargo preference laws:

- No attempt was made to reinsert the stricken cargo preference language or a variation thereof, during House or Senate floor debate, or in the subsequent House/Senate Conference. This was the case despite Chairman Glenn's statement during the April 26 markup that he reserved the right to insert that provision on the floor, and that DOD was working on compromise language.

- There was full recognition and reaffirmation that the objectives of acquisition policy must have due regard for applicable laws (41 U.S.C. 401 et seq.) and the program activities of the executive agencies, and that this requirement precluded inclusion of the cargo preference laws in S.1587. Senator Stevens felt that inclusion of the cargo preference laws went beyond what was necessary to accomplish the objectives of FASA.[6] And then-Chairman Sam Nunn recognized

[6] Markup of S.1587, The Federal Acquisition Streamlining Act of 1994; Senate Committee on Governmental Affairs' transcript, April 26, 1994.

that, when balanced against the national interest objectives of the cargo preference laws, the cargo preference exemptions in S.1587 were inappropriate.[7]

- DOD was unable to reconcile an intrusion into the cargo preference laws with its efforts to streamline acquisition procedures, even though Chairman Nunn said he understood DOD and the Department of Transportation (DOT) were trying to do so. No compromise was ever forthcoming from DOD.[8]

- On the question of the applicability of the cargo preference laws, the two Committee Chairmen were persuaded to give deference to the expertise and activity of the Senate Commerce Committee which was engaged in a contemporaneous effort to streamline the cargo preference laws in the context of maritime security legislation. Indeed, Chairman Glenn said: "[The Commerce Committee has] gone into [the cargo preference issue] in greater depth than we did in this, and that is the reason we took it out, because they are going to take action in the Commerce Committee. The Commerce Committee's efforts are still underway."[9]

The House of Representatives, for its part, also made clear its intention that cargo preference waivers were not to be part of acquisition reform legislation. H.R. 2238, the House counterpart to S.1587, had no reference to cargo preference (140 Cong. Rec. 5094-5168, June 27, 1994). Indeed, Chairman Ron Dellums of the House Armed Services Committee, responsible along with the Committee on Government Operations for this legislation in the House, explicitly refused to include cargo preference waivers and later during the legislative process wrote to President Clinton strongly urging against such waivers.[10]

Thus, waivers of cargo preference law as part of acquisition reform were explicitly considered and rejected by the Congress. The words "cargo preference" or any implicit reference to them never appeared again in the legislative record of S.1587, and FASA was adopted by the Congress and then signed into law in the Fall of 1994.

DOD's Implementing Regulations, 1995

Accordingly, when FASA became law, Senator Stevens and the maritime industry believed that the issue of preference waivers had been put to rest. However, when the Defense

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[7] Markup of S.1587, The Federal Acquisition Streamlining Act of 1994; Senate Committee on Armed Services; (S.HRG 103-578, pp. 7-8, April 26, 1994).

[8] Indeed, in furtherance of the Senate Armed Services Committee's hope that DOD could reconcile the conflicting objectives of the two laws, a maritime industry task force, including AMC, met with representatives of DOD in the office of and with the Deputy Under Secretary of Defense (Acquisition Reform). At that meeting, acquisition reform officials refused to compromise the position which the two Senate Committees had already rejected.

[9] See letter to Senator John Glenn, April 19, 1994, from Commerce, Science, and Transportation Committee Chairman Ernest Hollings and Subcommittee on Merchant Marine Chairman John B. Breaux.

[10] Chairman Ron Dellums, February 9, 1994 statement to the House Armed Services Committee and Letter to President Clinton, April 22, 1994, from Chairman Dellums and Merchant Marine and Fisheries Chairman, Gerry Studds.

Acquisition Regulations Council (DAR Council) in March 1995 published proposed regulations to implement FASA,[11] cargo preference was put on a long list of statutes to be waived for subcontracts for commercial items or components – using a provision (Section 8003) of FASA to give the Executive Branch widespread waiver authority. This widespread waiver authority never mentioned preference laws or, for that matter, any other specific laws to be waived on any issue. This provision had been quietly inserted into the legislation at the last moment by conferees' staff and escaped notice.

Both the Department of Transportation and a maritime industry coalition submitted comprehensive statements for the record opposing these waivers, citing the legislative history of FASA, existing maritime and procurement laws, the President's policy of commitment to the U.S. Merchant Marine, and five decades of American maritime policy. This point of view was buttressed by a May 23, 1995 letter (**TAB G**) to the Secretary of Defense from Senators Hollings, Stevens, Breaux, Lott, and Cohen declaring that inclusion of waivers in the proposed rule contradicted the intent of the Congress during the enactment of FASA and urging that all such waivers not be included in the Final Rule. This position on Congressional intent was reiterated by Senators Lott, Breaux, Stevens, and Inouye in a June 1996 letter to the Administrator of the Office of Federal Procurement Policy and in a letter from these Senators and Senator Hutchison to the Secretary of Defense in April 1997 (both letters are at **TAB H**; the point on intent is further reinforced in the May 2, 2000 letter at **TAB S**, below).

Waiver proponents still refused to delete cargo preference waivers from the proposed rule, despite MARAD opposition and meetings with the President's Special Assistant for Economic Policy. As a result, Senator Stevens introduced an amendment (**TAB I**) to S.1026, the FY 96 defense authorization legislation. Senator Stevens' amendment would have prohibited the Secretary of Defense from making cargo preference inapplicable to subcontracts for commercial items which included ocean transportation services.

After discussions held under the auspices of Senator Stevens (with staff representing Senators Lott, Thurmond, Smith, Inouye, Breaux, and Hollings, as well as White House, DOD, and maritime industry representatives), the Administration agreed to delay implementation of these waivers for subcontracts until May 1, 1996. At the request of Senate and Administration acquisition reform proponents at these discussions, it was also agreed by all parties that neither side would attempt anything further for or against cargo preference in the DOD bill. This delay was provided in order to give both sides time to think through and devise an appropriate compromise solution short of legislation. Senator Stevens made this compromise delay certain by including it in the renumbered DOD bill, as passed (Section 809 of S.1124, also at **TAB C**). It is worth noting that this same law included the subject of this NPRM, Section 4203 (see below).

The Final Rules concerning waivers of cargo preference for subcontracts for the acquisition of commercial items were published in the Federal Register on September 18th and

[11] FAR Case 94-970, Federal Register, Vol. 60, No. 40, March 1, 1995, pp. 11198-11217; FAR Case 94-791, Federal Register, Vol. 60, No. 55, March 22, 1995, pp. 15220-15223, and Federal Register, Vol. 60, No. 64, April 4, 1995, pp. 17184-17186.

November 30, 1995.[12] They noted the delay until May 1, 1996, and they also included a limit on such waivers, at the insistence of the Maritime Administration, that made clear that waivers would not apply to "grants-in-aid shipments, such as agricultural and food-aid shipments, to shipments covered under Export-Import Bank loans or guarantees, and to subcontracts under Government contracts or agreements for ocean transportation."

The "Kelman Compromise," 1996

With this as a deadline, all the parties (maritime industry representatives, MARAD, DOD, and White House staff) were assembled in late April 1996 at a meeting chaired by the Administrator of the Office of Federal Procurement Policy (OFPP), Dr. Steven Kelman. The result was an advisory directive to all agency senior procurement executives and the Deputy Under Secretary of Defense (Acquisition Reform) from Dr. Kelman (**TAB J**) that represented a compromise on the issue of cargo preference waivers for subcontracts for commercial items. This compromise was the basis for subsequent cargo preference waiver discussions with DOD, and it was strongly endorsed at the time by Senators who were continuing to take an active interest in this issue (see June 10, 1996 letter at already noted **TAB H**).

This compromise provided the following: (1) while it permitted limited waivers of cargo preference for subcontracts for commercial items under the $100,000 Simplified Acquisition Threshold, it did not allow blanket waivers for items or services under this threshold. It stressed that "the rule is intended, however, to have a limited impact on the carriage of Government cargoes by U.S.-flag carriers;" (2) it noted that there was no intent "to waive compliance with the Cargo Preference Laws for ocean cargoes clearly destined for eventual military or government use;" (3) the compromise went on to cite four examples (or exceptions) where cargo preference still applied: construction shipments, commissary and exchange cargoes, military contingency and exercise shipments, and non-commercial component parts; (4) the compromise document emphasized an additional safeguard for preference by stressing that subcontracting arrangements created simply to avoid cargo preference were prohibited, and it even cited one such example – procuring items FOB destination by the prime contractor; (5) and finally, the compromise not only emphasized the preeminent role of MARAD in cargo preference but it mandated also a review of the impact of the compromise in one year, an improved monitoring process to be developed by MARAD and other agencies, and placement of the compromise in the DOD Acquisition Deskbook as guidance for all contracting officers.

Attempting to Implement the "Kelman Compromise," 1996-1997

After this, discussions continued between DOD, MARAD, and the maritime industry coalition over what should actually be in the DOD Deskbook. As this process was underway, in 1997 an important cargo preference "test" issue arose when the maritime industry learned that a contract had been let in September 1996 for the purchase in Turkey of 2,200 side-loading ammunition containers for the U.S. Air Force. Not only was the contractor told by the contracting officer that, because of the $100,000 Simplified Acquisition Threshold in FASA, U.S.-flag vessels did not have to be used, but the contractor also maintained that he was "adding

[12] Federal Register, Vol. 60, No. 180, September 18, 1995, pp. 48231-48250 (FAR); Federal Register, Vol. 60, No. 230, November 30, 1995, pp. 61586-61600 (DFARS).

value" to the containers simply by arranging their purchase and movement to the United States. FASA explicitly stipulated that unless the prime contractor adds value to an item received from a subcontractor the prime contractor may not take advantage of waivers of various laws. We would note here that this kind of behavior reinforces our point made earlier that interpretation and other stratagems will be used in the COTS context to evade cargo preference.

Because there was no effective reporting system for DOD generated cargoes, this incident did not come to the attention of the maritime industry or MARAD until nearly four months after it had been let – and then quite by chance. All this arose despite the fact that these containers were a military item (specifically for use in carrying military ammunition) and "clearly destined for eventual military or government use." The first 200 of these containers went foreign flag even though two U.S.-flag carriers were in the area and could have taken them.

Eventually, the rest of the containers did go U.S. flag, as a result of a senior-level USTRANSCOM decision. This was not before the Joint Traffic Management Office and the DOD General Counsel's office had weighed in in favor of shipping foreign flag, with the argument that the "Kelman compromise" and memorandum were not in the Federal Acquisition Regulation (FAR) and Defense Federal Acquisition Regulation Supplement (DFARS) and therefore had no standing or authority.

This incident provided several lessons: the need for an effective monitoring system for DOD generated cargoes, the need for vigilance at the contracting officer level, and the need to have the "Kelman compromise" formally in the FAR and DFARS (as DOD acquisition reform representatives had promised in the April 1996 joint meeting chaired by Dr. Kelman).

Nearly a year was then spent trying to make sure that the DOD Acquisition Deskbook for all contracting officers, the DFARS, and the FAR accurately reflected the compromise embodied in Dr. Kelman's memorandum. On several occasions, the maritime industry was asked, in essence, to "compromise the compromise." In the spring of 1997, interested Senators urged Secretary of Defense Bill Cohen that DOD adhere to the compromise (see the Senators' April 18, 1997 letter (**TAB H**) to Secretary Cohen and his June 24, 1997 response, at **TAB K**). OFPP Administrator Kelman even had to reassemble all the parties to his office on July 22, 1997 and emphasize that his memorandum did have standing and authority and that the compromise should be reflected faithfully in the DOD Acquisition Deskbook, the FAR, and the DFARS (see meeting summary letter of July 25, 1997 to Dr. Kelman by Acting Maritime Administrator John Graykowski at **TAB L**).

The ink was scarcely dry on the agreement reached at this second meeting of all parties with Dr. Kelman before Acquisition Reform officials began to backtrack. While the 1996 Kelman memorandum was put into the DOD Deskbook as a subsidiary attachment, an interpretive policy statement was placed foremost in the Deskbook. This interpretive policy statement undercut the key elements considered essential to keep cargo preference from being gutted through the use of FASA waivers. This interpretive statement was, in its final version, presented as a fait accompli to our industry and to MARAD.

The staff of the Majority Leader, Trent Lott, communicated directly with Secretary Cohen's top staff and both made clear (see **TABS H and K**) to appropriate DOD officials the need to continue discussions so as to close the gap between the differing points of view. As a result, on September 19, 1997, maritime industry coalition representatives and MARAD cargo preference officials met at the Pentagon with the Assistant Deputy Under Secretary of Defense (Transportation Policy) and DOD acquisition reform officials. At this meeting, a revised version of the DOD Deskbook language was agreed upon. It picked up most of the maritime industry and MARAD suggestions. The Deskbook language was then posted for all DOD acquisition officials. It was also agreed, once more, that the Deskbook compromise language would be used to reflect accurately the compromise in formal regulatory language to be inserted in the DFARS.

Agreement Reached with DOD, 1998

During the next five months, there were still efforts by acquisition reform officials to back away from having regulatory language proposed for the DFARS accurately reflect the compromise reached for the DOD Acquisition Deskbook. Finally, in meetings held under the auspices of the Assistant Deputy Under Secretary of Defense (Transportation Policy), all the parties (the maritime industry coalition, MARAD, the staff of the Assistant Deputy Under Secretary of Defense (Transportation Policy), and acquisition reform officials) agreed to DOD Acquisition Deskbook guidance and proposed DFARS language on this issue. This compromise, word for word in both documents, was formally recommended to the Director, Defense Procurement in early April 1998 (**TAB M**). The recommended DFARS language followed very closely the 1996 Kelman memorandum guidance. It should be noted that there was no mention of waiving cargo preference for all subcontracts under the $100,000 Simplified Acquisition Threshold.

This compromise was, as well, reiterated in an unambiguous letter (**TAB N**) by the Assistant Deputy Under Secretary to the maritime industry in late May 1998 stating that the office of the Director of Defense Procurement, the office of the Deputy Under Secretary of Defense (Acquisition Reform), and the Department of Defense as a whole supported the proposed DFARS compromise modification sent forward in April.

Not only did the maritime industry and MARAD sign off on this compromise, the United States Transportation Command (USTRANSCOM) did as well, with a very strong note of its concern for any adverse impact on the U.S. Merchant Marine (**TAB O** – March 27, 1998 letter from the Deputy Commander in Chief, Lieutenant General Roger Thompson). With the support evidenced in the May 29, 1998 letter covering all of DOD and General Thompson's letter on the part of USTRANSCOM, the maritime industry once more believed – as did the Senators that had been involved in this issue – that this issue had finally been settled. This was not, however, to be the case.

Final Resolution

The recommended compromise DFARS language was sent to the Defense Acquisition Regulations Council. Despite inquiries, the maritime industry heard nothing specific until June 22, 1999 when the Proposed Rule to implement the compromise was published in the Federal

Register. The Proposed Rule (DFARS Case 98-D014) did incorporate the critical exceptions from waivers enunciated in the 1996 Kelman document and the April 1998 compromise recommendations. However, it went beyond these limited waivers and proposed to exempt all subcontracts below the $100,000 Simplified Acquisition Threshold from cargo preference – effectively undermining the compromise that had been achieved after years of work on this issue involving the White House, OFPP, the National Economic Council, DOD acquisition and transportation officials, USTRANSCOM, MARAD, and the maritime industry.

Both the maritime industry 36-member coalition and MARAD (**TAB P**) filed comments against the Proposed Rule as worded. The industry coalition stressed that waiving cargo preference for purchases under the $100,000 Simplified Acquisition Threshold would be entirely at variance with the compromise and the recognition of the importance of cargo preference shown by the Deputy Commander in Chief of USTRANSCOM (**TAB O**)and the Commander of the Military Traffic Management Command (**TAB Q**).

Because the maritime industry and MARAD had been reassured by DAR Council staff that these proposed waivers would be deleted and dealt with in a separate rule, the industry and MARAD were, therefore, surprised when the DAR Council issued its Final Rule for DFARS Case 98-D014, effective immediately, on March 16, 2000. This rule included the waiver for subcontracts below the Simplified Acquisition Threshold that had been the focus of MARAD and industry coalition comments on the rule. The Final Rule never even addressed the points made in the maritime industry coalition and MARAD comments.

Additionally, it is important to note that this Final Rule did not even comply with the law whose authority the DAR Council invoked – Section 33 of the Office of Federal Procurement Policy Act (OFPPA), 41 U.S.C. 429. Neither the Cargo Preference Act of 1904 nor the Cargo Preference Act of 1954 had ever been listed as laws inapplicable to contracts or subcontracts at or below the Simplified Acquisition Threshold – as required, pursuant to Section 33 of the OFPPA. Furthermore, the Final Rule made a modification in one section of the DFARS that was never even discussed in the Proposed Rule for public comment (amendments to Section 247.573(b) which said that cargo preference did not apply to purchases under the threshold).

This Final Rule scarcely reflected the kind of teamwork that had been achieved since 1996 between USTRANSCOM, MARAD, and the maritime industry implementing the Maritime Security Program (MSP) and the Voluntary Intermodal Sealift Agreement (VISA) to provide DOD guaranteed access to private-sector vessels, intermodal assets, and trained crews for national defense sealift (see pp. 23-24 below). It was viewed very seriously by the U.S.-flag maritime industry and the Maritime Administration because of the effect it would have on MSP, VISA, and carriers' ability to remain under the U.S. flag. On March 30th, the Maritime Administrator wrote to the Assistant Deputy Under Secretary of Defense (Transportation Policy) and a week later to the Commander in Chief of USTRANSCOM (**TAB R**). The Administrator noted that the waiver for subcontracts below the Simplified Acquisition Threshold had no statutory basis and that it would be counter to the DOD/MARAD/industry sealift partnership that all parties had worked so well to strengthen.

It was also viewed very seriously by Senators who had been involved in the cargo preference waivers issue since FASA began. On May 2, 2000, Senators Lott, Breaux, and Hollings wrote to Senators Stevens and Inouye clearly indicating that enough was enough and the time had come to take action legislatively given the lengthy history of "broken promises" by rulemakers (**TAB S**). As these Senators stated in response to what they described as "regulatory overreach":

> *"Such a prospect is deeply disturbing, particularly in light of FASA's legislative history, the often-expressed views of Congress, and a pattern of broken promises by those charged with implementing the law. For more than five years, the U.S.-flag maritime industry attempted to reach agreement with acquisition reform officials in the Defense Department so that the process could be streamlined without impairing vitally important cargo preference programs. During this long effort, carefully balanced compromises were reached, only to be repeatedly undone.*
>
> *As you know, it was never the aim of Congress to waive any cargo preference requirements through FASA. This point was clearly made during markup of the bill in the Governmental Affairs Committee, where your leadership led to adoption of language removing all proposed waivers of cargo preference under the Act. Although general waiver authority remained in the legislation as passed by both Houses, the recent rulemaking defies specific and well-known congressional intent.*
>
> *We believe the time has come to resolve any remaining questions within the executive branch and mandate the applicability of cargo preference requirements to all relevant aspects of FASA. We cannot allow cargo preference programs to be dismantled by regulatory overreach. Likewise, we are not seeking wider scope for cargo preference, but rather a return to the letter and spirit of existing laws which have so well-served our merchant marine, industrial base, and national defense."*

In early May, both DOD transportation leaders responded to the Maritime Administrator (also at **TAB R**). They affirmed the absence of any legal authority to waive cargo preference below the threshold, noted the absence of any data on the amount of cargo that would have been affected, stressed the importance of the U.S. Merchant Marine, and stated that they were recommending that the proposed waiver be removed and the DFARS be modified to reflect this. This action by senior DOD officials reflected their continuing emphasis on the growing partnership and was viewed very favorably by MARAD and the industry.

The final chapter in the efforts to resolve the implementation of FASA began in November 2000 when the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council published a Proposed Rule that implemented for the FAR (not the DFARS)[13] the 1996 and 1998 compromises. It was faithful to these compromises (with the exception of the prohibition of cargo preference waivers for "non-commercial component parts"). The Final Rule in the case (FAR 99-024) was published in the Federal Register on March 18, 2003 (**TAB T**).

The effort to have the DFARS reflect these compromises moved to a favorable conclusion with the publication on September 11, 2001 of a Proposed Rule that applied cargo preference to purchases of commercial items below the $100,000 Simplified Acquisition Threshold[14]. Apart from comments as regards maintaining the ability to monitor cargo preference compliance (some of which were later incorporated in the Final Rule), both MARAD and the maritime industry responded favorably. The Final Rule was issued on May 31, 2002 (also at **TAB T**).

Section 4203 History with Respect to Waivers of Cargo Preference

To understand the full implications of Section 4203 with respect to waivers of cargo preference laws, one must return to the situation in the latter part of 1995, discussed above, concerning waivers of cargo preference for subcontracts for the procurement of commercial items or components. Executive Branch acquisition reform officials would not budge from their position that cargo preference should be waived for subcontracts for the procurement of commercial items (even though, as noted above, the Congress had made its intent clear in striking all cargo preference waivers during the markup of FASA in April 1994). For this reason, Senator Stevens had proposed an amendment to ensure that even these officials would understand that cargo preference was to be off the table (see **TAB I**, above).

It is worth noting Senator Stevens' explanation of his intent in proposing this amendment:

> *"During consideration of the Federal Acquisition Streamlining Act of 1994 (P.L. 103-355), the Senate Committee on Governmental Affairs and the Senate Committee on Armed Services adopted amendments which struck proposed provisions that would have made existing cargo preference requirements inapplicable to certain contracts.*

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[13] Even on the FAR side, getting to this resolution was not easy. In July 1999 (FAR Case 98-604), a Proposed Rule to implement these compromises did agree that cargo preference would apply to contracts and subcontracts both above and below the Simplified Acquisition Threshold of $100,000, but it did not include other key parts of the compromises. It proposed waiving preference for subcontracts for commercial items or components, without limit. Both MARAD and the maritime industry coalition responded that this Proposed Rule was not faithful to the compromises and should be amended to be so. FAR Case 98-604 was superceded by FAR Case 99-024. The Proposed Rule for FAR Case 99-024 was published in the Federal Register on November 7, 2000, Vol. 65, No. 216, pp. 66920-22.

[14] DFARS Case 2000-D014, Federal Register, Vol. 66, No. 176, September 11, 2001, pp. 47153-54.

> *On March 1, 1995, the Department of Defense, General Services Administration and National Aeronautics and Space Administration issued proposed regulations to implement P.L. 103-355 which would exempt subcontracts for the acquisition of commercial items from the existing cargo preference requirements of 46 U.S.C. 1241 (b) and 10 U.S.C. 2631. These proposed regulations go beyond the scope and authority provided by P.L. 103-355, and would have an effect similar to the provisions rejected by the Senate Committee on Governmental Affairs and Senate Committee on Armed Services during consideration of P.L. 103-355."*

As noted earlier, after a subsequent meeting, held under the auspices of Senator Stevens, at which a compromise was reached to delay the Administration's proposed cargo preference waivers until May 1, 1996, Senator Stevens withdrew this amendment and made certain that this delay would be adhered to by making it part, as Section 809 (**TAB C**) of the FY 96 DOD Authorization Bill (S. 1124) which became law early in 1996.

It should be emphasized that at this same meeting all parties (including Senator Thurmond's representative) agreed that nothing further would be done for or against cargo preference in the FY 96 DOD Bill. Nevertheless, the COTS provision was inserted in conference by Senator Thurmond (see **TAB C**, above, for the provision and explanation as provided in the Conference Report 104-450 to accompany S.1124, the re-numbered National Defense Authorization Act for Fiscal Year 1996).

Section 4203 was inserted at the last minute in the legislative process leading up to the enactment of the FY 1996 DOD Bill. It was not in the House version of the bill passed in June 1995 or in the Senate version passed in September 1995. Nor was it in H.R. 1670, the separate acquisition reform bill passed by the House on September 14, 1995. Section 4203 was never the subject of hearings by <u>any</u> committee, and it was not discussed or debated at all on the House and Senate floors before being included as an entirely new section during House and Senate floor consideration of the DOD Authorization Bill Conference Report in December. Section 4203 was mentioned in the end only in the most general, and very limited, cursory manner describing the bill's contents. Both the House and Senate were silent as to precisely what laws should be included on the list (apart from a general description of types of law) and no specific consideration was given as to whether or not U.S.-flag cargo preference laws should be included on the list.

There is no record of Congressional intent to include cargo preference waivers in the FY 96 DOD bill – and, indeed, the inclusion of Section 809 (sponsored by several Senators and unanimously approved) would indicate Congressional sentiment to the contrary. In fact, Senators Lott, Breaux, Stevens, and Inouye reiterated that Congress never intended cargo loss to U.S.-flag vessels either in FASA or in "the recently passed FY 96 Defense Department Authorization Legislation" in their June 10, 1996 letter to the Administrator of the Office of Federal Procurement Policy (see **TAB H**, above). Had it been believed that Section 4203 would be used to accomplish what the Congress had explicitly rejected in FASA, there is no doubt that

Senator Stevens and others would have secured cargo preference explicitly from such waivers – particularly given that, in the August 1995 meeting held under Senator Stevens auspices (see p. 9 and p. 16, above), all parties had given their word that no further action would be taken on cargo preference in the FY 96 DOD bill. There also is no indication that the Maritime Administration, the expert agency responsible by law for the maintenance and promotion of the U.S. Merchant Marine, was ever consulted by other U.S. Government agencies or the U.S. Congress as to the impact of Section 4203 before it was added to the bill. Certainly no one in the private-sector maritime industry was consulted.

The U.S.-flag maritime industry and MARAD made clear their strong opposition to including cargo preference laws on any list of laws to be waived pursuant to Section 4203 when the Advance Notice of Proposed Rulemaking (ANPRM) was published in February 1996 to implement this Section. There was no further action on this until Section 4203 came up in the context of the compromise concerning subcontracts for commercial items reached under the leadership of the OFPP Administrator and noticed in the Administration's May 1, 1996 memorandum (see discussion above on p.10 and the memorandum above at **TAB J**). Subsequent to that meeting, on May 6, the OFPP Administrator called AMC's President to assure her personally that despite cargo preference being included on a list of laws to be waived in a new Federal Register ANPRM, to be published in the very near future on May 13, the government had no intention of waiving preference laws under Section 4203[15]. This was logical since a COTS waiver would be at the prime contract level and thus render the very compromise just achieved useless and without meaning.

Shortly thereafter, MARAD sent a follow-up memorandum (also at **TAB J**) to the Special Assistant to the President for Economic Policy and to the Director of International and Commercial Systems Acquisitions at the Department of Defense to address the next steps to be taken after the issuance of the Kelman Memorandum. The next steps would include: 1) publication of the Kelman Memorandum in the Federal Register; 2) enhancement of DOD/MARAD coordination on methods to monitor compliance with cargo preference; and 3) ensuring that there would not be waivers of the cargo preference laws under the upcoming COTS proposed regulation.

This MARAD memorandum notes that Dr. Kelman had provided assurances to both MARAD and AMC's President that cargo preference would not be included in the Final Rule. It also stated that MARAD was encouraged by Dr. Kelman's verbal assurances and had refrained from submitting formal comments objecting to the rule in the hope that a solution could be reached through continued meetings. Accordingly, MARAD urged that Dr. Kelman be asked to make the required finding under the law that it would not be in the best interest of the United States to include cargo preference laws on the list of laws inapplicable to the procurement of COTS items. At the request of the Special Assistant to the President for Economic Policy, MARAD then provided a one-page draft justification for an OFPP finding to exclude cargo preference laws from COTS waivers.

The COTS regulation then went into a long period of limbo, never advancing to the Notice of Proposed Rulemaking (NPRM) stage, held up by interagency conflicts over labor and

[15] FAR Case 96-308, Federal Register, May 13, 1996, pp. 22010ff.

Buy America Act provisions. The FAR Council finally closed the case on September 7, 2000. In September 2001, OFPP did attempt within the Executive Branch to revive the COTS regulatory process of implementation, and MARAD reiterated at the time its opposition to inclusion of cargo preference laws on the list of laws to be waived. Nothing further was heard by MARAD or the maritime industry for another sixteen months.

The regulatory process did start again on January 30, 2003 (**TAB U**) with an ANPRM (FAR Case 2000-305) that included the Cargo Preference Act of 1954, but not the Cargo Preference Act of 1904. The NPRM issued on January 15, 2004 (also at **TAB U**) and the subject of these comments added the Cargo Preference Act of 1904 to its revised list. In both the case of the ANPRM and the NPRM, the Maritime Administration (let alone the maritime industry) was never advised or consulted beforehand in regard to the inclusion of cargo preference laws. To our knowledge, DOD transportation officials and USTRANSCOM as well were not advised or consulted.

Concluding Comments on FASA and COTS History

This seven-year history has several aspects worth stressing before moving on to the rest of our comments.

First, acquisition reform proponents tried at the beginning explicitly in the Congress to waive cargo preference through FASA. They were explicitly rejected by the Congress. They then tried to waive it using a provision of FASA never intended by the Congress to waive cargo preference laws. They then attempted to use a different provision of law (Section 4203) also never intended for such use. Now, as if no one would remember this history, acquisition reform proponents are attempting once again, despite earlier assurances from the most senior Executive Branch procurement official, to legislate by regulation. It is one more chapter in a long, disturbing history of actions on this issue so well encapsulated by Senators Lott, Breaux, and Hollings in their May 2, 2000 letter quoted above on page 14 that led them to the inescapable conclusion they then proposed.

Second, at no time in this seven-year process have these proponents gone to the committees of jurisdiction over cargo preference law in the Congress, demonstrating a belief, with the unwavering certainty of a convert, that acquisition reform stands above any other national policy. In all this history, these committees of jurisdiction have never been given the courtesy of consultation or consideration, let alone approval or disapproval of proposals with such significant impact on matters for which they are responsible.

Third, time and again in this seven-year history, Members of Congress have felt the necessity of reiterating the importance of cargo preference laws to our nation's security and economy.

We have included this lengthy history so that not knowing the record will no longer serve as an excuse and urge that those who consider this issue remember Santayana's maxim – "Those who cannot remember the past are condemned to repeat it."[16]

[16] George Santayana, The Life of Reason, Vol. 1, 1905.

Inclusion of cargo preference laws represents a fundamental national policy change with respect to the law, Defense and Transportation Department sealift and transportation policy, and the President's national maritime policy.

The Cargo Preference Act of 1904 and the Cargo Preference Act of 1954 have been law for 100 years and 50 years respectively. These laws themselves have a lengthy history; they have been the object of frequent reconsideration in the Congress and in the Executive Branch; they are a key component in Defense Department and Transportation Department (MARAD) sealift policy particularly as reflected in the Voluntary Intermodel Sealift Agreement; they are part of Department of Transportation National Transportation System policy; and they are part of the President's national maritime policy. Stripped of all pretense, inclusion of cargo preference on the list of laws to be waived would amount to legislation and reversal of national policy by regulation alone.

Support for these laws has been reiterated by the Congress over and over. Given the history discussed above, changing these laws in word or effect is clearly against the interest of the Congress and its intent concerning these laws.

Cargo reserved for U.S.-flag commercial vessels is also a critical component of Defense Department sealift policy. Today the commercial U.S.-flag fleet is essential to national defense sealift. Personnel to crew U.S. Navy sealift vessels and those in the Ready Reserve Force, for initial "surge" sealift – as well as the commercial fleet's provision of follow-on or "sustainment" sealift – are drawn from the vessels and intermodal assets available to DOD through the DOD/MARAD Voluntary Intermodal Sealift Agreement (VISA, described in more detail in the following section).

Allowing cargo preference laws to be waived for COTS, and thus eliminating much of the base of cargo essential to a vessel being able to remain under the U.S. flag, would be tantamount to declaring that VISA itself is null and void, no longer necessary. That is not the policy of the Departments of Defense or Transportation and certainly not a decision to be made in the limited and inappropriate context of writing a regulation to implement legislation enacted for a purpose far less than the security of our Nation and its citizens.

Furthermore, National Security Sealift Policy which was signed by President Bush in 1989 makes clear that our nation must maintain a civilian maritime capability and resources to support U.S. national security. Again, given the potential impact of this Proposed Rule, a *de facto* decision to change this Presidentially approved sealift policy by regulation, without the explicit and unconditional support of the departments responsible for national defense, Armed Forces sealift, the U.S. Merchant Marine, and the National Transportation System, is without wisdom or authority.

Finally, support for the U.S. Merchant Marine has not only been our Nation's policy since 1789, but it has been reiterated by every President from President Franklin Roosevelt to President George Bush. As President Bush stated in May 2003 on National Maritime Day:

> *"Today, as in the past, America depends on our maritime services to help ensure our security, promote our prosperity, and advance the universal hope of freedom. We honor the service and proud history of our merchant mariners and also recognize their important contributions in strengthening our economy. For generations, merchant mariners and commercial sailors have assisted in the defense of our Nation. Most recently, more than 5,000 merchant mariners supported Operations Enduring Freedom and Iraqi Freedom by serving aboard 157 ships moving essential supplies to our troops. As they continue to support our troops in the ongoing war on terror, their mission continues to be dangerous and difficult, and remains vital to our efforts to defend the peace."*

Unhinging this policy of our Nation's President and using the relatively obscure regulatory process to do so, is, as well, without wisdom or authority.

Inclusion of the cargo preference laws on the list of laws to be waived would undermine the extended and expanded Maritime Security Program and, indeed, undercut its very premise of strengthening our Nation's sealift and manpower capabilities. It would impose costs to the United States, the Department of Defense, homeland security, and the President's budget far out of proportion to any conceivable gain.

Until the Persian Gulf War in 1990, it was far too fashionable to say that there would never be another global conflict requiring sealift on the scale of World War II, that massive sealift would no longer be necessary, that we could farm out our trade and sealift requirements to the lowest bidder around the world. In the Gulf War, we did need massive sealift; some foreign crews and vessels refused to deliver supplies to the Gulf; and foreign prices for shipping skyrocketed. In that conflict, we had friends, allies, secure ports – a global coalition at our side.

Until September 11th and the War in Iraq and Afghanistan, it was far too fashionable to say that reliable crews would always be there to follow the dollar and that military engagement would never occur without global acceptance, as if others' objectives would always be our own. Today, with Al Qaeda vessels on the sealanes of the world, terrorist cells connected to Al Qaeda in the very nations that provide a significant portion of the world's seafarers, and with marine related threats to homeland security as serious, if not more so, than any other terrorist vector, reliability is a value whose currency has gone from tin to gold even in the minds of many who heretofore dismissed its impact.

As much as ever in our history, the United States must have a merchant marine and the sealift it provides.

Without sealift, the United States would not be able to project its land-based forces to address anything but the most limited threats. Consistently, our military commanders have stressed that sealift is expected to carry 90-95 percent of equipment and supplies needed for a major conflict beyond our shores. The War in Iraq is proof again that reliable U.S.-flag sealift is essential.

That this point is accepted national policy was made clear just two months before this Proposed Rule was published. On November 16, 2003, President Bush signed into law an extended and expanded Maritime Security Program that had been passed unanimously by both houses of the Congress. As noted in these comments, the use of commercial U.S.-flag vessels, intermodal assets, and U.S.-citizen crews is now essential to sealift for our Armed Forces. This rule, by driving MSP vessels out of the program and out of our flag's fleet, would undo the very action taken by the Congress and the President literally weeks before.

In today's budget climate, it simply is not possible for the U.S. Government to acquire and maintain the vessels and critical intermodal/management capabilities entirely as organic assets. In August 2001, the Commander in Chief of USTRANSCOM told the Congress that it would cost DOD more than $9 billion to replace current commercial sealift capacity and an additional $1 billion annually for operations and maintenance. And this figure does not include the expense of providing crews and replicating private-sector infrastructure. These exist already in the commercial sector. They are continually updated as part of normal competitive commercial operations. They are cutting-edge technology. They come virtually free to DOD. They are readily available to DOD through the Maritime Security Program and the Voluntary Intermodal Sealift Agreement. They free up resources and allow DOD to focus on combat missions that only it and our Armed Forces can perform. And, the funds they save dwarf any conceivable savings to the U.S. Government from any limitations on U.S.-flag cargo requirements resulting from acquisition reform.

Even were it possible to acquire or charter the requisite vessels (not to mention the intermodal assets), these vessels must be crewed by highly trained officers and seamen whose competence, reliability, and loyalty are unquestioned. Each vessel represents not only a very costly asset itself, but the equipment it carries is essential to enable the United States to project military power overseas. Much equipment would take years to replace; one cannot simply replace it by packing up another vessel and sending it on its way. Thus, there is no margin for error or terror: crews must be trained and experienced, and they must be loyal to the United States of America.

With American mariners, there is no question about loyalty and readiness. Since our nation began, American merchant mariners have proven that they will serve every time they are asked. In World War II, their casualty rate was second only to the U.S. Marine Corps, and they have answered the call without hesitation more recently in the Persian Gulf War, in the 1999 conflict in the Balkans, and more than 8,000 have helped provide support for our Armed Forces in Iraq and Afghanistan.

Furthermore, U.S. Armed Forces personnel today are already over-extended. Taking on the full responsibility for global sealift by uniformed personnel is not a realistic option given budgets and the need for uniformed personnel to do the tasks, such as combat, which only they can do. Therefore, civilian personnel of the U.S. Merchant Marine remain essential for sealift manning even of U.S. Government owned, "gray-hull" vessels – such as Large Medium Speed Roll On/Roll Off (LSMR) vessels, Fast Sealift Ships (FSS), and Ready Reserve Force (RRF) vessels. Additionally, American merchant mariner personnel are also trained and re-trained at private-sector, state-of-the-art, labor/management schools – at no expense to the U.S. Government. But without the manpower base generated by everyday private-sector commercial operations, the necessary sealift manning would not be possible.

Finally, there is the issue of political reliability. Those who seek to eliminate or limit cargo preference want to have the cheapest foreign-flag rate in peacetime, but then expect to have a U.S. Merchant Marine to turn to when something more than lower contract costs is at stake. They cannot have it both ways. Just as the United States must spend for the Armed Forces in peacetime in order to be ready for war, so too must it support and maintain the U.S.-flag merchant marine if this crucial defense asset is to be ready for war. To do otherwise is no less a folly than to hire Third World mercenaries at lower cost in peace to bear our arms, but still expect them to march to the beat of our drum in conflicts, with little more than a paycheck for inspiration. If the United States does not rely on less-expensive foreign personnel and assets for the rest of the Armed Forces, how can it then be sound security policy to do this for sealift, which is expected to move rapidly nearly all military equipment and combat support in any major overseas deployment? Given September 11th and the Nation's War on Terrorism, it is no small measure of the tunnel vision at hand that a Proposed Rule should force this point to be made at all.

There simply is no continually reliable source of substantial foreign-flag sealift. The only ally that has stood with us in every crisis in the last decade is Great Britain, and, during the Balkans conflict, they had to seek U.S. sealift for their deployment. With the world increasingly fragmented by political, ethnic, and religious antagonism, with a significant increase of the number of the world's seafarers coming from China, the Philippines, Indonesia, Pakistan, Bangladesh, India, Croatia, other parts of the former Yugoslavia, and former Soviet Union nations, it would be naïve in the extreme for U.S. Armed Forces to rely on foreign merchant mariners when America's interests or the lives of its men and women in uniform are at stake.

For the last decade, our military commanders, DOD leadership, and MARAD have been working to transform defense logistics, to adapt it to the rapidly changing technologies of the new century. They have understood that a solid, reliable partnership with the private sector is not just the best way; it is, in fact, the only way.

If this Proposed Rule results in the demise of the two most important U.S.-flag cargo preference laws, it could undo this partnership by depriving the U.S.-flag fleet of the very base of cargo it needs to survive. As the maritime industry has stated on many occasions, U.S.-flag vessels must compete against state run fleets, heavily subsidized vessels, fleets tied closely to or, indeed, part of the corporate structure of our strongest international corporate competitors, and vessels under flags of convenience. The crews of these foreign-flag vessels are often paid bare

subsistence wages; the vessel owners, corporate and individual, pay far less in taxes; and these competitors often adhere only to minimal or laxly enforced rules, regulations, safety, labor, and environmental standards. U.S.-flag vessels, by contrast, operate under tax and regulatory regimes that are second to none in the level of burden imposed. And unlike the air transport industry, ocean carriers do not have limits on foreign competition under a regime of bilateral government-to-government agreements.

As a result, U.S.-flag vessels continue to carry less than three percent of our nation's entire oceanborne import/export cargo. The wonder, thus, is not how the world's leading economic and military power arrived at such a position. The wonder now is that why today encouraging a decline still further merits serious consideration.

The U.S.-flag maritime industry, working with the Maritime Administration, has, in recent years, built a salutary partnership with the Department of Defense. This partnership and the two programs that embody it – the Maritime Security Program and the Voluntary Intermodal Sealift Agreement – provide the only means to combine the factors of reliability and cost effectiveness so well.

As a result of experience during the Persian Gulf War, USTRANSCOM and MARAD determined that it was necessary for the national defense to enter into agreements with eligible U.S.-flag ocean carriers whereby each carrier would agree to become a VISA program participant and provide the use of their entire intermodal services/systems (i.e., vessels, management, cargo handling, rail, truck, and tracking capabilities) to satisfy DOD contingency sealift requirements. VISA now enables the Defense Department to have immediate and pre-planned access to modern U.S. commercial transportation systems – completely reliable and entirely under U.S. control – at a fraction of the cost that would be incurred if DOD had to set up its own systems. In short, the acquisition system has been strengthened by the use of existing state-of-the-art commercial capabilities rather than a government-specific system.

The VISA program has also been an essential component of a major USTRANSCOM effort to improve and streamline the management of defense transportation. This effort has meant substantial gains in defense transportation management and procurement, and reduced costs. It, as well as the VISA program itself, is the essence of what "acquisition reform" should be – better management, lower costs, and an enhanced U.S. defense industrial base, rather than procurement rules written simply because "theory" says they should be written.

The continued success of the VISA program is, however, dependent on the willingness and ability of U.S.-flag carriers to commit the substantial shipping services/systems which are required. And that means the participating carriers must, at a minimum, continue to be as economically viable as they are currently.

Should a substantial segment of their existing cargoes disappear, such as those from cargo preference, participating carriers almost certainly will be neither willing nor able to undertake the extensive commitments required by the VISA program. These carriers simply must have the base of cargo that cargo preference laws provide in order to remain economically viable under the U.S. flag.

Cargo preference in the context of acquisition reform is an issue that just will not die. Agreements are reached and then immediately subjected to renegotiation. Laws are passed and then immediately used to accomplish what the Congress rejected. Agencies responsible and committees of jurisdiction in the Congress are bypassed as if expertise and responsibility were attributes of no value. Rules are written as if there is one policy of supporting America's maritime power for the President, the Congress, the Secretaries of Defense, Transportation, and Homeland Security, and our military commanders – and a different policy for contracting officers and officials working to "reform" government purchasing.

Acquisition reform at any price is not responsible national policy. Despite the fact that acquisition reform is supposed to serve higher national goals such as reduced costs and a strengthened defense industrial base, cargo preference waivers have been pursued as if mere achievement of the theoretical sub-policy of "acquisition reform" is more important than these and other high national goals. This could be forgiven if no harm were to be done. But when such policy would destroy an industry, cost the U.S. Government money, undermine the President's budget, throw thousands of Americans out of work, and cripple America's defense sealift, then it should not stand.

For all these reasons, we strongly oppose inclusion of any cargo preference laws to any degree on any list of laws to be waived for the acquisition of COTS items. We thank you for consideration of our views on this important matter.

Sincerely yours,

Gloria Cataneo Tosi

Gloria Cataneo Tosi
President

CARGO RESERVATION[1]

MILITARY CARGO PREFERENCE ACT OF 1904.[2] (10 U.S.C. 2631 (2002)).

(a) Only vessels of the United States or belonging to the United States may be used in the transportation by sea of supplies bought for the Army, Navy, Air Force, or Marine Corps. However, if the President finds that the freight charged by those vessels is excessive or otherwise unreasonable, contracts for transportation may be made as otherwise provided by law. Charges made for the transportation of those supplies by those vessels may not be higher than the charges made for transporting like goods for private persons.

(b)(1) In each request for proposals to enter into a time-charter contract for the use of a vessel for the transportation of supplies under this section, the Secretary of Defense shall require that any reflagging or repair work on a vessel for which a proposal is submitted in response to the request for proposals be performed in the United States (including any territory of the United States).

(2) In paragraph (1), the term "reflagging or repair work" means work performed on a vessel—

(A) to enable the vessel to meet applicable standards to become a vessel of the United States; or

(B) to convert the vessel to a more useful military configuration.

(3) The Secretary of Defense may waive the requirement described in paragraph (1) if the Secretary determines that such waiver is critical to the national security of the United States. The Secretary shall immediately notify the Congress of any such waiver and the reasons for such waiver.

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[1] Note the Cargo Preference Penalties for Substandard Vessel Operations set forth in 46 U.S.C. 2302(e), page 185 infra.

[2] See also 10 U.S.C. 2631a, added by section 1173(a) of Public Law 103-160, approved November 30, 1993, providing:

10 U.S.C. 2631a (2001. Continency Planning: Sealift and Related International Transportation Requirements.

(a) **Consideration of Private Capabilities.** The Secretary of Defense shall ensure that all studies and reports of the Department of Defense, and all actions taken in the Departmetn of Defense, concerning sealift and related intermodal transportation requirements take into consideration the full range of the transportation and distribution capabilities that are available from operators of privately owned United States flag merchant vessels.

(b) **Private Capacities Presentations.** The Secretary shall afford each operator of a vessel referred to in subsection (a), not less often than annually, an opportunity to present to the Department of Defense information on its port-to-port and intermodal transportation capacities.

CARGO PREFERENCE ACT OF 1954-PUBLIC LAW 664. SECTION 901(b) OF THE MERCHANT MARINE ACT, 1936 (46 App. U.S.C. 1241(b) (2002)).

(b) **Cargoes Procured, Furnished or Financed by United States; Waiver in Emergencies; Exceptions; Definition.**

(1) Whenever the United States shall procure, contract for, or otherwise obtain for its own account, or shall furnish to or for the account of any foreign nation without provision for reimbursement, any equipment, materials, or commodities, within or without the United States, or shall advance funds or credits or guarantee the convertibility of foreign currencies in connection with the furnishing of such equipment, materials, or commodities, the appropriate agency or agencies shall take such steps as may be necessary and practicable to assure that at least 50 per centum of the gross tonnage of such equipment, materials, or commodities (computed separately for dry bulk carriers, dry cargo liners, and tankers), which may be transported on ocean vessels shall be transported on privately owned United States-flag commercial vessels, to the extent such vessels are available at fair and reasonable rates for United States-flag commercial vessels, in such manner as will insure a fair and reasonable participation of United States-flag commercial vessels in such cargoes by geographic areas: Provided, That the provisions of this subsection may be waived whenever the Congress by concurrent resolution or otherwise, or the President of the United States or the Secretary of Defense declares that an emergency exists justifying a temporary waiver of the provisions of section 901(b)(1) and so notifies the appropriate agency or agencies: And provided further, That the provisions of this subsection shall not apply to cargoes carried in the vessels of the Panama Canal Company. Nothing herein shall repeal or otherwise modify the provisions of Public

Resolution Numbered 17, Seventy-third Congress (48 Stat. 500), as amended. For purposes of this section, the term "privately owned United States-flag commercial vessels" shall not be deemed to include any vessel which, subsequent to the date of enactment of this amendment, shall have been either (a) built outside the United States, (b) rebuilt outside the United States, or (c) documented under any foreign registry, until such vessel shall have been documented under the laws of the United States for a period of three years: Provided, however, That the provisions of this amendment shall not apply where, (1) prior to the enactment of this amendment, the owner of a vessel, or contractor for the purchase of a vessel, originally constructed in the United States and rebuilt abroad or contracted to be rebuilt abroad, has notified the Maritime Administration in writing of its intent to document such vessel under United States registry, and such vessel is so documented on its first arrival at a United States port not later than one year subsequent to the date of the enactment of this amendment, or (2) where prior to the enactment of this amendment, the owner of a vessel under United States registry has made a contract for the rebuilding abroad of such vessel and has notified the Maritime Administration of such contract, and such rebuilding is completed and such vessel is thereafter documented under United States registry on its first arrival at a United States port not later than one year subsequent to the date of the enactment of this amendment.

(2) Every department or agency having responsibility under this subsection shall administer its programs with respect to this subsection under regulations issued by the Secretary of Transportation. The Secretary of Transportation shall review such administration and shall annually report to the Congress with respect thereto.

104TH CONGRESS
2d Session

HOUSE OF REPRESENTATIVES

REPORT
104–450

NATIONAL DEFENSE AUTHORIZATION ACT FOR FISCAL YEAR 1996

CONFERENCE REPORT

TO ACCOMPANY

S. 1124

JANUARY 22, 1996.—Ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE
21-996 WASHINGTON : 1996

SEC. 4203. INAPPLICABILITY OF CERTAIN PROCUREMENT LAWS TO COMMERCIALLY AVAILABLE OFF-THE-SHELF ITEMS.

(a) LAWS LISTED IN THE FAR.—The Office of Federal Procurement Policy Act (41 U.S.C. 401 et seq.) is amended by adding at the end the following:

"SEC. 35. COMMERCIALLY AVAILABLE OFF-THE-SHELF ITEM ACQUISITIONS; LISTS OF INAPPLICABLE LAWS IN FEDERAL ACQUISITION REGULATION.

"(a) LISTS OF INAPPLICABLE PROVISIONS OF LAW.—(1) The Federal Acquisition Regulation shall include a list of provisions of law that are inapplicable to contracts for the procurement of commercially available off-the-shelf items.

"(2) A provision of law that, pursuant to paragraph (3), is properly included on a list referred to in paragraph (1) may not be construed as being applicable to contracts referred to in paragraph (1). Nothing in this section shall be construed to render inapplicable to such contracts any provision of law that is not included on such list.

"(3) A provision of law described in subsection (b) shall be included on the list of inapplicable provisions of law required by paragraph (1) unless the Administrator for Federal Procurement Policy makes a written determination that it would not be in the best interest of the United States to exempt such contracts from the applicability of that provision of law. Nothing in this section shall be construed as modifying or superseding, or as being intended to impair or restrict authorities or responsibilities under—

"(A) section 15 of the Small Business Act (15 U.S.C. 644); or

"(B) bid protest procedures developed under the authority of subchapter V of chapter 35 of title 31, United States Code; subsections (e) and (f) of section 2305 of title 10, United States Code; or subsections (h) and (i) of section 303B of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253b).

"(b) COVERED LAW.—Except as provided in subsection (a)(3), the list referred to in subsection (a)(1) shall include each provision of law that, as determined by the Administrator, imposes on persons who have been awarded contracts by the Federal Government for the procurement of commercially available off-the-shelf items Government-unique policies, procedures, requirements, or restrictions for the procurement of property or services, except the following:

"(1) A provision of law that provides for criminal or civil penalties.

"(2) A provision of law that specifically refers to this section and provides that, notwithstanding this section, such provision of law shall be applicable to contracts for the procurement of commercial off-the-shelf items.

"(c) DEFINITION.—(1) As used in this section, the term 'commercially available off-the-shelf item' means, except as provided in paragraph (2), an item that—

"(A) is a commercial item (as described in section 4(12)(A));

"(B) is sold in substantial quantities in the commercial marketplace; and

"(C) is offered to the Government, without modification, in the same form in which it is sold in the commercial marketplace.

"(2) The term 'commercially available off-the-shelf item' does not include bulk cargo, as defined in section 3 of the Shipping Act of 1984 (46 U.S.C. App. 1702), such as agricultural products and petroleum products.".

(b) CLERICAL AMENDMENT.—The table of contents in section 1(b) of such Act is amended by inserting after the item relating to section 34 the following:

"Sec. 35. Commercially available off-the-shelf item acquisitions; lists of inapplicable laws in Federal Acquisition Regulation.".

SEC. 4204. AMENDMENT OF COMMERCIAL ITEMS DEFINITION.

Section 4(12)(F) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(12)(F)) is amended by inserting "or market" after "catalog".

SEC. 4205. INAPPLICABILITY OF COST ACCOUNTING STANDARDS TO CONTRACTS AND SUBCONTRACTS FOR COMMERCIAL ITEMS.

Paragraph (2)(B) of section 26(f) of the Office of Federal Procurement Policy Act (41 U.S.C. 422(f)) is amended—

(1) by striking out clause (i) and inserting in lieu thereof the following:

"(i) Contracts or subcontracts for the acquisition of commercial items."; and

(2) by striking out clause (iii).

TITLE XLIII—ADDITIONAL REFORM PROVISIONS

Subtitle A—Additional Acquisition Reform Provisions

SEC. 4301. ELIMINATION OF CERTAIN CERTIFICATION REQUIREMENTS.

(a) ELIMINATION OF CERTAIN STATUTORY CERTIFICATION REQUIREMENTS.—(1) Section 2410b of title 10, United States Code, is amended in paragraph (2) by striking out "certification and".

(2) Section 1352(b)(2) of title 31, United States Code, is amended—

(A) by striking out subparagraph (C); and

(B) by inserting "and" after the semicolon at the end of subparagraph (A).

(3) Section 5152 of the Drug-Free Workplace Act of 1988 (41 U.S.C. 701) is amended—

(A) in subsection (a)(1), by striking out "has certified to the contracting agency that it will" and inserting in lieu thereof "agrees to";

(B) in subsection (a)(2), by striking out "contract includes a certification by the individual" and inserting in lieu thereof "individual agrees"; and

sponsible offerors in procurements conducted under this authority be permitted to submit a bid, proposal, or quotation that shall be considered by the agency. The conferees intend that the flexible notice provision be implemented in a manner that would provide offerors with a reasonable opportunity to respond. The provision would also prohibit sole source procurement unless the need is justified in writing in accordance with section 2304 of title 10 or section 253 of title 41, United States Code. The authority for the use of simplified procedures under this section would expire at the end of the three-year period, beginning on the date of the issuance of the final implementing regulations.

Inapplicability of certain procurement laws to commercially available off-the-shelf items (sec. 4203)

The conference agreement includes a provision that would require that the Federal Acquisition Regulation include a list of provisions that are inapplicable to contracts for the procurement of commercially available off-the-shelf items. The list would be required to include each provision of law that, in the opinion of the Administrator of the Office of Federal Procurement Policy, imposes on persons who have been awarded contracts by the federal government for the procurement of commercially available off-the-shelf products government-unique policies, procedures, requirements, or restrictions for the procurement of property or services unless the Administrator determines that to do so would not be in the best interest of the United States. The list would include provisions of law uniquely applicable to government contractors, but would not include generally applicable provisions of law. The provision would specifically preclude several categories of statutes from being included on the list, such as any provision of law that provides for civil or criminal penalties. The provision would define commercially available off-the-shelf items as commercial items that are sold in substantial quantities to the general public and that are offered to the federal government in the same form in which they have been sold to the general public. The provision would specifically exclude from that definition bulk cargo such as agricultural products and petroleum products.

Amendment to commercial items definition (sec. 4204)

The conference agreement includes a provision that would make a clarifying amendment to the definition of "commercial services" in section 403(12)(F) of title 41, United States Code. For the purpose of this section, market prices are current prices that are established in the course of ordinary trade between buyers and sellers free to bargain and that can be substantiated from sources independent of the offeror.

Inapplicability of cost accounting standards to contracts and subcontracts for commercial items (sec. 4205)

The conference agreement includes a provision that would exempt contracts and subcontracts for commercial items from the application of the cost accounting standards promulgated under section 422 of title 41, United States Code. The Cost Accounting Standards Board, in consultation with the Director of the Defense

(B) For purposes of subparagraph (A), the allocable indirect private sector costs of a contractor are those costs of the contractor that are equal to the sum of—

(i) the incremental indirect costs attributable to such work; and

(ii) the amount by which the revenue attributable to such private sector work exceeds the sum of—

(I) the direct costs attributable to such private sector work; and

(II) the incremental indirect costs attributable to such private sector work.

(C) The total amount of allocable indirect private sector costs for a contract in any year of the agreement may not exceed the amount of indirect costs that a contractor would have allocated to its private sector work during that year in accordance with the contractor's established accounting practices.

(2) The cost reimbursement rules set forth in paragraph (1) may be modified by the Secretary of Defense if the Secretary of Defense determines that modifications are appropriate to the particular situation to facilitate achievement of the policy set forth in section 2501(b) of title 10, United States Code.

(c) IMPLEMENTATION.—Not later than 90 days after the date of the enactment of this Act, the Secretary of Defense shall establish application procedures and procedures for expeditious consideration of defense capability preservation agreements as authorized by this section.

(d) CONTRACTS COVERED.—An agreement entered into with a contractor under subsection (a) shall apply to each Department of Defense contract with the contractor in effect on the date on which the agreement is entered into and each Department of Defense contract that is awarded to the contractor during the term of the agreement.

(e) REPORTS.—Not later than one year after the date of the enactment of this Act, the Secretary of Defense shall submit to the congressional defense committees a report setting forth—

(1) the number of applications received and the number of applications approved for defense capability preservation agreements; and

(2) any changes to the authority in this section that the Secretary recommends to further facilitate the policy set forth in section 2501(b) of title 10, United States Code.

SEC. 809. SUBCONTRACTS FOR OCEAN TRANSPORTATION SERVICES.

Notwithstanding any other provision of law, neither section 901(b) of the Merchant Marine Act, 1936 (46 U.S.C. 1241(b)) nor section 2631 of title 10, United States Code, shall be included before May 1, 1996, on any list promulgated under section 34(b) of the Office of Federal Procurement Policy Act (41 U.S.C. 430(b)).

SEC. 810. PROMPT RESOLUTION OF AUDIT RECOMMENDATIONS.

Section 6009 of the Federal Acquisition Streamlining Act of 1994 (Public Law 103–355; 108 Stat. 3367) is amended to read as follows:

41 U.S.C. § 431

***

(c) "Commercially available off-the-shelf item" defined

(1) As used in this section, the term "commercially available off-the-shelf item" means, except as provided in paragraph (2), an item that -
(A) is a commercial item (as described in section 403(12)(A) of this title);
(B) is sold in substantial quantities in the commercial marketplace; and
(C) is offered to the Government, without modification, in the same form in which it is sold in the commercial marketplace.

(2) The term "commercially available off-the-shelf item" does not include bulk cargo, as defined in section 1702 of title 46, Appendix, such as agricultural products and petroleum products

41 U.S.C. § 403

(10) The term "item", "item of supply", or "supplies" means any individual part, component, subassembly, assembly, or subsystem integral to a major system, and other property which may be replaced during the service life of the system, and includes spare parts and replenishment spare parts, but does not include packaging or labeling associated with shipment or identification of an "item".

(11) The term "simplified acquisition threshold" means $100,000.

(12) The term "commercial item" means any of the following:

(A) Any item, other than real property, that is of a type customarily used by the general public or by nongovernmental entities for purposes other than governmental purposes, and that -
(i) has been sold, leased, or licensed to the general public; or
(ii) has been offered for sale, lease, or license to the general public.

(B) Any item that evolved from an item described in subparagraph (A) through advances in technology or performance and that is not yet available in the commercial marketplace, but will be available in the commercial marketplace in time to satisfy the delivery requirements under a Federal Government solicitation.

(C) Any item that, but for -
(i) modifications of a type customarily available in the commercial marketplace, or
(ii) minor modifications made to meet Federal Government requirements,
would satisfy the criteria in subparagraph (A) or (B).
(D) Any combination of items meeting the requirements of subparagraph (A), (B), (C), or (E) that are of a type customarily combined and sold in combination to the general public.
(E) Installation services, maintenance services, repair services, training services, and other services if -
(i) the services are procured for support of an item referred to in subparagraph (A), (B), (C), or (D), regardless of whether such services are provided by the same source or at the same time as the item; and
(ii) the source of the services provides similar services contemporaneously to the general public under terms and conditions similar to those offered to the Federal Government.
(F) Services offered and sold competitively, in substantial quantities, in the commercial marketplace based on established catalog or market prices for specific tasks performed and under standard commercial terms and conditions.
(G) Any item, combination of items, or service referred to in subparagraphs (A) through (F) notwithstanding the fact that the item, combination of items, or service is transferred between or among separate divisions, subsidiaries, or affiliates of a contractor.

U.S. Department
of Transportation
**Maritime
Administration**

400 Seventh Street, S.W.
Washington, D.C. 20590

December 23, 2003

Mr. Nathan Knuffman
OMB

Dear Nathan:

Per various discussions about "emergency" cargoes and vessel availability, I thought you might like to see some current correspondence on the topic.

Paragraphs 2 and 4 of the attached Euro-America letter seem to indicate that US-flag costs were the determining factor in canceling the tenders. The cargoes were tendered and canceled three times. Fortunately, each time there were one or more US-flag vessels available. To prevent gaming of the system is why MARAD needs to have final determination in non-availability matters.

Also unsettling is the demonstration that "emergency' cargoes are not always emergencies. When I telephoned AID about the cargo tenders, I was advised that the last tender was canceled because their intended vessel could not move it for thirty days. AID advised me that to maintain the appearance of emergency use for all prepositioned cargoes they have an internal policy of requiring such prepositioned cargoes to be moved within two weeks.

The constant shifts by AID had a domino effect. The liner vessel "Strong/American" was laid up for five weeks. The heavylift liner vessel "Virginian" is going into layup and could not be repositioned into the Pacific to handle some Navy cranes from Korea. The Military Sealift Command was delayed in moving the patrol boat to the Philippines and finally had to get a waiver from MARAD to move it on a foreign flag vessel.

Warmest good wishes for the holidays.

Sincerely,

Tom

Thomas W. Harrelson
Office of Cargo Preference

U.S. Department
of Transportation
**Maritime
Administration**

400 Seventh Street, S.W.
Washington, D.C. 20590

December 23, 2003

Mr. Obaid Ahmad
Euro-America Shipping & Trade, Inc.
Suite 303
1930 L Street, NW
Washington, DC 20036

Dear Obaid:

Thank you for your letter of December 18, 2003, referring to the events surrounding the multiple re-tenders of the Ethiopia cargoes from AID. We received similar verbal complaints from another US-flag operator, and expressions of concern from the Military Sealift Command who had a patrol boat movement frustrated due to the frequent re-tendering and ultimate cancellation of the AID cargo which would have served as a base cargo for a US-flag operator to move the patrol boat.

When I called AID to determine what was happening, I was advised the cargo would now be re-tendered yet again at the end of December.

With respect to your three specific questions, we generally leave to the discretion of the shipper of the cargo the determination of what are the required load and delivery dates, unless we find a deliberate effort is being made to avoid US-flag carriers. We do actively consult with the cargo shippers regarding vessel availability but usually intervene only if they are out of compliance with the law.

AID has an internal policy of naming any cargoes moving from their prepositioned stockpile as "emergency" cargoes since the justification for originally establishing the preposition stockpile was for emergency purposes. As you can see from this operation, AID, from time to time, appears to take liberties with the determination of "emergency" cargoes.

I am forwarding your letter to AID and requesting they provide a response to you with a copy to MARAD.

Warmest best wishes for the Holidays.

Sincerely,

Thomas W. Harrelson
Director, Office of
Cargo Preference

Cc: Ms. Denise Scherl -- AID

EURO-AMERICA SHIPPING & TRADE, INC.

1900 L STREET, N.W.
SUITE 303
WASHINGTON, D.C. 20036

TEL: (202)463-6690
FAX: (202)463-6695
TLX: 64595 EUROAM
E-MAIL: info@euroamerica.us

December 18, 2003

Mr. Tom Harrelson, Director
Office of Cargo Preference
Maritime Administration (MARAD)
Washington, D.C.

Re: Ethiopia Prepo Tenders

Dear Tom:

We are concerned about the chain of events that occurred regarding USAID tenders for the emergency and urgent shipment of food aid to Africa. The bizarre action surrounding these tenders caused us to drop all marketing efforts relating to the Strong/American and spend considerable time and attention in an effort to deliver the emergency food aid on an expedited basis. Our efforts turned out to be a colossal waste of time and money and we would appreciate your assistance in determining what happened in order to, hopefully, prevent such a situation from happening again.

Wilson Logistics issued a freight tender on behalf of the World Food Programme (WFP) on October 27, 2003 under the PL480 Title II program for emergency/preposition cargoes. This tender included parcels totaling 4,900 mmt bagged/cased commodities from Lake Charles to Djibouti for prompt/urgent shipment. We submitted an offer on October 29, 2003 on behalf of America Cargo Transport (ACT) for the vessel, Strong/American at a freight rate of $447.00 PMT with ETA Lake Charles November 3, 2003. As of November 3, 2003, USAID had not made any decision on flagging/award of cargo. In view of some back haul cargo, ACT reduced its rate to $389.00 PMT and advised WFP/USAID that the vessel was available to be in Lake Charles immediately for loading with direct service to Djibouti. We were subsequently advised later that day that USAID cancelled the tender since the USAID mission in Ethiopia had advised that these cargoes were not needed immediately and that it was not worth paying the high U.S. flag rate for this prompt shipment. We were advised at that time that the cargoes would be re-tendered at a later date.

On November 26, 2003, Freight Expediters issued a separate tender on behalf of Catholic Relief Services (CRS) under the PL480 Title II program for delivery of emergency/preposition cargoes. This tender was for 4,760 mmt bagged/cased cargoes from Lake Charles and Jacintoport to Ethiopian inland destinations via Djibouti. We submitted an offer on December 1, 2003 on this tender on behalf of ACT for the Strong/American at an ocean freight rate of $390.00 PMT with ETA Lake Charles December 5, 2003. On the morning of December 2, 2003, we were advised that this

12/18/03

tender was being cancelled and would be reissued on the same day alongwith a re-tender from WFP for their Ethiopia cargoes.

Both of these emergency/preposition re-tenders were issued on December 2, 2003. We again submitted our offer on December 4, 2003 for the Strong/American at a freight rate of $398.00 PMT for 6,000-6,300 nmt cargoes. On December 5, 2003, Freight Expediters inquired about the present position of the vessel, her speed, transit time, and itinerary. We advised them that the vessel could be in Lake Charles immediately for loading with a direct sailing to Djibouti. On December 9, 2003, USAID again decided to cancel these tenders advising us that the USAID mission in Ethiopia did not see the urgency of these cargoes to be shipped immediately. However, CRS office in USA was insisting that these cargoes should be shipped as early as possible.

The above are the course of events for the "urgent" Ethiopia preposition tenders. As a U.S. flag owner, ACT was quite surprised by the actions of USAID, and due to this process, the Strong/American remained idle for nearly 5 weeks. Despite presenting USAID with a spot vessel and direct sailing on three separate tenders, they decided not to award the cargoes to this vessel. If the rate was an issue, we believe USAID should have contracted the vessel and let MARAD run a fair and reasonable rate on the award.

In this regard, we kindly request MARAD to review these tenders and advise us the following:

1) Who decides if cargoes are to be tendered as "urgent"?
2) Once cargoes are tendered as "urgent", who decides that they are no longer "urgent" and can wait to be shipped at a later date?
3) Can MARAD play a role to help avoid such delays in the contracting of a U.S. flag vessel in the future?

If you need any clarifications or additional information, please contact us. We look forward to receiving your prompt response in this matter.

With best regards, we remain,

Very truly yours,
For and on Behalf of
AMERICA CARGO TRANSPORT, INC.

Obaid Ahmad
EURO-AMERICA SHIPPING & TRADE, INC.
As Brokers Only

4

June 2, 2003

Michael A. Hopkins
202-496-7835
mhopkins@mckennalong.com

VIA FACSIMILE

Denise Stone Scherl
U.S. Agency for International Development
Office of Procurement - Transportation Div.
(USAID - OP/Trans), Branch Chief
1300 Pennsylvania Ave., N.W.
Room 7.09.004 RRB
Washington, DC 20523

Re: U.S. Flag Preference for Yemen/Zambia Cargo

Dear Ms. Stone:

Maersk Line, Limited ("Maersk") has engaged McKenna Long & Aldridge LLP regarding certain tenders to transport food aid cargoes to Yemen and Zambia. Evidently, your office is contemplating actions to fix these cargoes on foreign flag vessels. Such actions would clearly violate federal cargo preference laws. Accordingly, we urge you to change course immediately and fix the cargo on U.S. flag vessels to avoid litigation over this matter.

Under federal cargo preference laws, the U.S. Agency for International Development (USAID) is required to administer its ocean transportation programs in accordance with regulations issued by the Department of Transportation through the Maritime Administration ("MARAD"). MARAD has repeatedly advised USAID that fixing the Yemen/Zambia cargo on foreign flag vessels would violate cargo preference laws because U.S. flag vessels are available at rates that MARAD has found to be fair and reasonable. Indeed, the Maersk Alaska will be available for loading on June 16, 2003, which is at the start of the specified lay period (June 15th through June 24th), and can complete the required voyage in 19 days after loading. Consequently, the Maersk Alaska can transport the cargo as quickly as any other vessel – regardless of flag – to satisfy any so-called "emergency" requirements.

USAID is mistaken if it believes that 7 U.S.C. § 1722(a) provides it with authority to cast aside cargo preference requirements. As a preliminary matter, it is doubtful that USAID can make a factual case that an "emergency" requires that these cargoes move on foreign flag vessels

since U.S. flag vessels will undoubtedly provide the same or faster delivery dates. In any event, USAID construes 7 U.S.C. § 1722(a) too broadly. The language of § 1722(a) simply does not trump the language of 46 U.S.C. App. § 1421(b), which contains its own provisions for waiving cargo preference requirements. Indeed, the legislative history of § 1722(a) makes clear that Congress did not intend that section to alter cargo preference requirements.

Given these facts, fixing these cargoes on foreign flag vessels would represent a deliberate violation of federal law. Deliberate violations of federal law can have adverse repercussions on the agency as well as the individual(s) involved in such violations. Make no mistake, Maersk will challenge a decision by USAID to book these cargoes on foreign flag vessels. The question that remains is whether USAID is willing to defend and accept the consequences of its actions under the facts present here. We hope that upon further reflection USAID will recognize that fixing the cargoes on U.S. flag vessels is the correct course of action.

Sincerely,

Michael A. Hopkins

cc: Thomas Harrelson, MARAD

AGENCY FOR
INTERNATIONAL
DEVELOPMENT

June 3, 2003

Timothy B Shea
Nemirow Hu & Shea
1101 Connecticut Ave, NW
Suite 900
Washington, DC 20036

VIA FACSIMILE

Dear Mr. Shea,

Thank you for your letter of June 2, 2003 to Denise Stone, Acting Chief of the Office of Procurement Transportation Division. As you raise legal issues, it is appropriate that I respond on behalf of that office.

Ms Stone has advised me that she and the Office of Food for Peace have reviewed further this shipment as a part of the World Food Program's Food Aid Response for Southern Africa. In exercising their discretion, they have decided in this particular situation that the interests of the program would be served if the shipment to Zambia were made by a U.S. carrier so that it will arrive earlier despite an additional cost.

In light of this programmatic decision, and the fact that many of the legal issues which you raise can best be addressed and resolved in the ongoing rule-making process, there is no need to respond to them at this time.

Sincerely,

Donald F. Gressett
Attorney-Advisor
Office of the General Counsel

1300 Pennsylvania Avenue, NW
Washington, DC 20523

United States Senate
COMMITTEE ON COMMERCE, SCIENCE,
AND TRANSPORTATION
WASHINGTON, DC 20510-6125

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May 23, 1995

The Honorable William Perry
Secretary of Defense
Department of Defense
The Pentagon
Washington, D.C. 20301

Dear Secretary Perry:

Last year, during consideration of the Federal Acquisition Streamlining Act of 1994 (FASA) (P.L. 103-355), the Senate chose not to adopt provisions proposed by the Administration that would have exempted government contracts of less than $100,000 and government contracts for the shipment of commercial items transported by entities other than federal agencies from U.S. cargo preference laws. The House of Representatives concurred, and the bill signed into law by the President did not include these provisions.

It has now come to our attention that regulations have been proposed to implement the FASA which would have the same effect as the provisions rejected by Congress during consideration of FASA last year. The proposed regulations (FAR Case 94-791) would exempt subcontracts for the acquisition of commercial items from certain cargo preference requirements, including the requirement that commercial items transported by entities other than federal agencies, pursuant to a contract or subcontract, be transported on U.S. vessels. We urge you not to include this change in the final rule.

As a matter of policy, we strongly believe that U.S. military and other U.S. government cargo should travel on U.S.-flagged vessels, and that the cargo preference laws are vital to our merchant marine, which is a key component of the nation's industrial base and armed forces sealift capability. The regulations as proposed would have a very serious impact on the U.S. merchant marine. In addition, these regulations contradict the clear intent of Congress, expressed during consideration of

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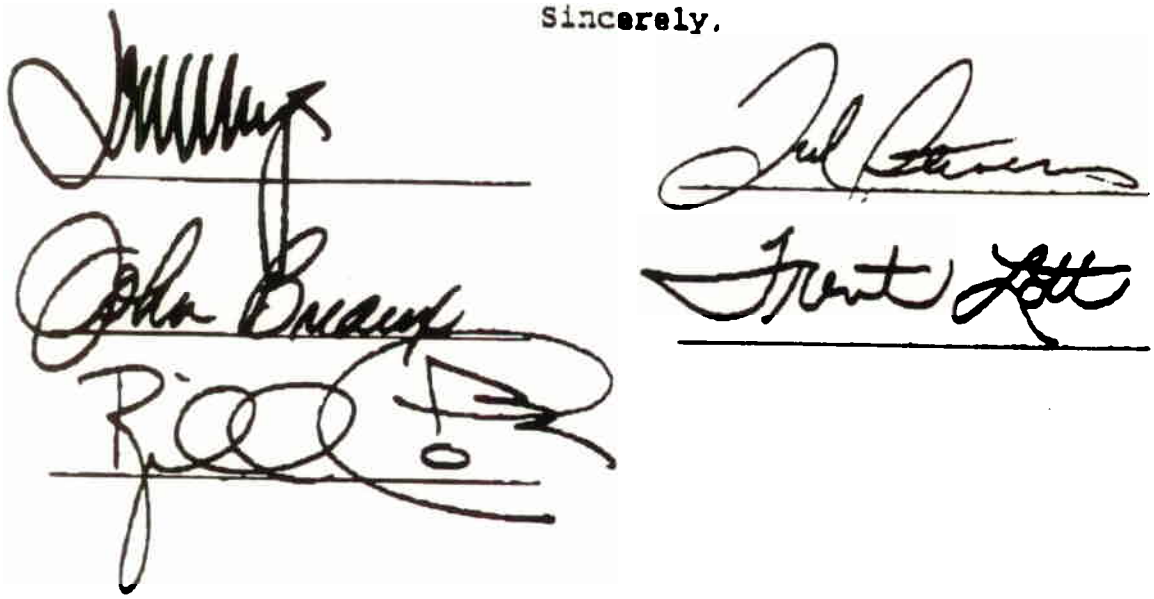
the FASA, that changes to the cargo preference laws should not be dealt with as part of procurement reform. Proceeding with broad-scale cargo preference changes as part the procurement reform regulatory process will undermine continued efforts in Congress to reform and improve these laws.

Again, we urge you not to include the proposed changes in the final rule which contradict the intent of Congress with regard to cargo preference requirements. Thank you for your consideration of this important matter.

Sincerely,



United States Senate

WASHINGTON, DC 20510

June 10, 1996

Dr Steven Kelman
Administrator, Office of Federal Procurement Policy
Office of Management and Budget
Old Executive Office Building
Washington, D.C. 20503

Dear Dr. Kelman:

We are pleased with your letter of guidance to all federal contracting officers concerning cargo preference waivers resulting from the implementation of the Federal Acquisition StreamLining Act of 1994. As you know, we are deeply concerned about these waivers because of the serious impact upon U.S.-flag merchant marine.

Your genuine consideration of our concerns is reflected in the guidance, and this is clearly a positive step. Your guidance will ensure that the effects of these waivers will not cause a massive loss of cargo for America's merchant ships. Congress never intended such a cargo loss when it approved either the Act or the recently passed FY 1996 Defense Department Authorization legislation. In fact, Congress supports revitalizing America's merchant marine. It would be intolerable for our nation, with global political, economic, and military responsibilities, to place its security entirely in the hands of foreign-flag shipping. That is why we have worked together for years in a bipartisan manner with both the current and past Administrations to strengthen policies and rules which support a strong maritime industry.

Again, thank you for your continuing concern over future cargo losses for U.S.-flag ships. We look forward to working with you during the implementation phase of your guidance. Your attention and leadership are greatly appreciated. With best wishes

Sincerely,

United States Senate
COMMITTEE ON APPROPRIATIONS
WASHINGTON, DC 20510-6025

April 18, 1997

The Honorable William Cohen
Secretary of Defense
U.S. Department of Defense
The Pentagon
Washington, D.C. 20301

Dear Bill:

In May 1995, a series of Senators wrote to Secretary Perry to urge that cargoes which ordinarily would travel on U.S.-flag vessels under the Cargo Preference Acts of 1904 and 1954 not be allowed to travel on foreign-flag vessels as a result of rules implementing the Federal Acquisition Streamlining Act of 1994. It was never the intent of Congress to undermine cargo preference laws through acquisition reforms. As you will recall, the Senate Committee on Governmental Affairs explicitly removed such waivers when it considered the Act in markup in April 1994, and the Committee on Armed Services confirmed the changes.

We believed that the issue of cargo preference waivers resulting from this Act had been resolved when the Administrator of the Office of Federal Procurement Policy issued guidance on May 1, 1996 to all agency senior procurement executives and the Deputy Under Secretary of Defense. This guidance represented a fair and balanced compromise between the objectives of acquisition reform and the maintenance of our U.S.-flag merchant marine for commerce and defense.

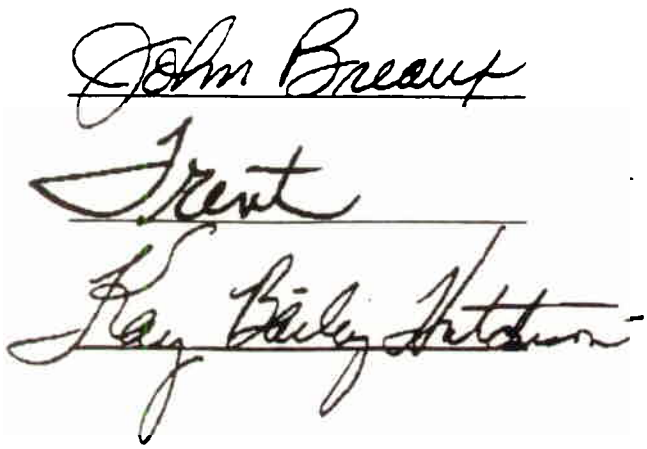
Now we have been informed that some Defense Department contracting officials may not be adhering to the terms of this compromise and have suggested that its key elements should be altered to allow more Defense cargo to be carried on foreign-flag vessels. If this is allowed to continue, the U.S.-flag fleet will suffer significant losses of cargo that would cripple its ability to provide national defense sealift.

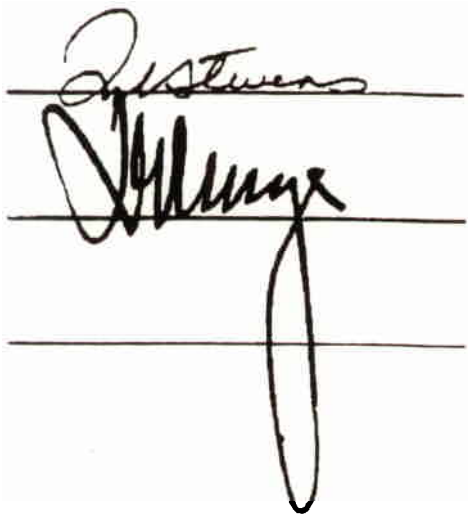
We are writing, therefore, to urge that the issue of cargo preference waivers be resolved clearly -- by implementing in Defense regulations the letter and the spirit of the May 1, 1996 guidance. It is our understanding that the Office of the Under Secretary of Defense for Acquisition and Technology and USTRANSCOM are now taking steps to work with the Maritime Administration to attempt to do this. We just want to be sure you are aware of our continuing interest in this issue and that we strongly support this effort. We believe that it should be made clear, as an expression

of Defense Department policy and regulation, that U.S.-flag vessels will be used for government-generated cargoes, and that any waivers of cargo preference laws should be within the reasonable parameters set forth in the May 1, 1996 guidance.

We thank you for your immediate attention to this important matter.

Sincerely,





AMENDMENT TO S. 1026

PURPOSE: TO PREVENT MISINTERPRETATION OF THE EFFECT OF THE FEDERAL ACQUISITION STREAMLINING ACT OF 1994 ON CARGO PREFERENCE REQUIREMENTS FOR SUBCONTRACTS FOR THE ACQUISITION OF COMMERCIAL ITEMS.

INTENDED to be proposed by Mr. Stevens

VIZ:

At the appropriate place in the bill, insert the following new section:

SEC._____. TECHNICAL CLARIFICATION.

Section 34(b) of the Office of Federal Procurement Policy Act (41 U.S.C. 430(b)) is amended by adding at the end thereof the following new paragraph:

"(5) Nothing in this subsection shall be construed to make inapplicable to subcontracts the requirements of section 901(b) of the Act of 1936 (46 U.S.C. 1241(b)), or section 2631 of title 10, United States Code, under either a contract for the procurement of commercial items or a subcontract for the procurement of commercial items.".

EXPLANATION

Existing U.S. law (46 U.S.C. 1241(b) and 10 U.S.C. 2631) requires that U.S. flag vessels be given preference when the transportation of government supplies by ocean is required.

During consideration of the Federal Acquisition Streamlining Act of 1994 (P.L. 103-355), the Senate Committee on Governmental Affairs and the Senate Committee on Armed Services adopted amendments which struck proposed provisions that would have made existing cargo preference requirements inapplicable to certain contracts.

On March 1, 1995, the Department of Defense, General Services Administration and National Aeronautics and Space Administration issued proposed regulations to implement P.L. 103-355 which would exempt subcontracts for the acquisition of commercial items from the existing cargo preference requirements

of 46 U.S.C. 1241(b) and 10 U.S.C. 2631. These proposed regulations go beyond the scope and authority provided by P.L. 103-355, and would have an effect similar to the provisions rejected by the Senate Committee on Governmental Affairs and Senate Committee on Armed Services during consideration of P.L. 103-355. The amendment proposed to S. 1026 would prevent P.L. 103-355 from being interpreted to make inapplicable to subcontracts the requirements of section 901(b) of the Act of 1936 (46 U.S.C. 1241(b)), or section 2631 of title 10, United States Code, under either a contract or a subcontract for the procurement of commercial items.

(2) Threats to the long-term security and well-being of the United States no longer derive primarily from the risk of external military aggression against the United States or its closest treaty allies but in large measure derive from instability from a variety of causes: population movements, ehtnic and regional conflicts including genocide against ethnic and religious groups, famine, terrorism, narcotics trafficking, and proliferation of weapons of mass destruction.

(3) To address such threats, the United States has increasingly turned to the United Nations and other international peace operations, which at times offer the best and most cost-effective way to prevent, contain, and resolve such problems.

(4) In numerous crisis situations, such as the massacres in Rwanda, the United Nations has been unable to respond with peace operations in a swift manner.

(5) The Secreatry-General of the United Nations has asked member states to identify in advance units which are available for contribution to international peace operations under the auspices of the United Nations in order to create a rapid response capability.

(6) United States participation and leadership in the initiative of the Secretary-General is critical to leveraging contributions from other nations and, in that way, limiting the United States share of the burden and helping the United Nations to achieve success.

(b) REPORT ON PLAN TO ORGANIZE VOLUNTEER UNITS.—Not later than 180 days after the date of the enactment of this Act, the President shall submit a report to Congress setting forth—

(1) a plan for—

(A) organizing into units of the Armed Forces a contingency force of up to 3,000 personnel, comprised of active-duty military personnel, who volunteer additionally and specifically to serve in international peace operations and who receive added compensation for such service;

(B) recruiting personnel to serve in such units; and

(C) providing training to such personnel which is appropriate to such operations; and

(2) proposed procedures to implement such plan.

(c) AUTHORIZATION.—(1) Upon approval by the United Nations Security Council of an international peace operation, the President, after appropriate congressional consultation, is authorized to make immediately available for such operations those units of the Armed Forces of the United States which are organized under subsection (b)(1)(A).

(2)(A) Subject to subparagraph (B), the President may terminate United States participation in international peace operations at any time and take whatever actions he deems necessary to protect United States forces.

(B) Notwithstanding section 5(b) of the War Powers Resolution, not later than 180 days after a Presidential report is submitted or required to be submitted under section 4(a) of the War Powers Resolution in connection with the participation of the Armed Forces of the United States in an international peace operation, the President shall terminate any use of the Armed Forces with respect to which such report was submitted or required to be submitted, unless the Congress has extended by law such 180-day period.

(d) AVAILABILITY OF FUNDS.—Funds available to the Department of Defense are authorized to be available to carry out subsection (c)(1).

(e) WAR POWERS RESOLUTION REQUIREMENTS.—Except as otherwise provided, this section does not supersede the requirements of the War Powers Resolution.

(f) MISSION STATEMENTS FOR ARMED FORCES.—(1) Section 3062(a) of title 10, United States Code, is amended—

(A) by striking out "and" at the end of paragraph (3);

(B) by striking out the period at the end of paragraph (4) and inserting in lieu thereof "; and"; and

(C) by adding at the end the following:

"(5) participating in international peacekeeping activities, humanitarian activities, and refugee assistance activities when determined by the President to be in the national interests of the United States.".

(2) Section 5062(a) of such title is amended—

(A) by inserting "(1)" after "(a)";

(B) by striking out the third sentence; and

(C) by adding at the end the following new paragraph:

"(2) The Navy is responsible for the preparation of naval forces necessary for the following activities:

"(A) Effective prosecution of war except as otherwise assigned and, in accordance with integrated joint mobilization plans, for the expansion of the peacetime components of the Navy to meet the needs of war.

"(B) Participation in international peacekeeping activities, humanitarian activities, and refugee assistance activities when determined by the President to be in the national interests of the United States.".

(3) Section 8062(a) of such title is amended—

(A) by striking out "and" at the end of paragraph (3);

(B) by striking out the period at the end of paragraph (4) and inserting in lieu thereof "; and"; and

(C) by adding at the end the following:

"(5) participating in international peacekeeping activities, humanitarian activities, and refugee assistance activities when determined by the President to be in the national interests of the United States.".

(g) DEFINITIONS.—In this section:

(1) The term "appropriate congressional consultation" means consultation as described in section 3 of the War Powers Resolution.

(2) The term "international peace operations" means any such operation carried out under chapter VI or chapter VII of the United Nations Charter or under the auspices of the Organization of American States.

DORGAN AMENDMENT NO. 21[illegible]

(Ordered to lie on the table.)

Mr. DORGAN submitted an amendment intended to be proposed by him to the bill, S. 1026, supra; as follows:

On page 32, strike out line 14 and insert in lieu thereof the following: "$9,283,148,000, of which—

"(a) not more than $407,900,000 is authorized to implement the national missile defense policy established in Section 233(2);".

DORGAN AMENDMENT NO. 2180

(Ordered to lie on the table.)

Mr. DORGAN submitted an amendment intended to be proposed by him to the bill, S. 1026, supra; as follows:

At the appropriate place, insert the following:

SEC. . LAND CONVEYANCE, WILLIAM LANGER JEWEL BEARING PLANT, ROLLA, NORTH DAKOTA

(a) CONVEYANCE.—The Administrator of the General Services Administration may convey, without consideration, to the Rolla Job Development Authority, an agency of the City of Rolla, North Dakota, authorized by the North Dakota Century Code (in this section referred to as the "Authority") all right, title, and interest of the United States in and to the parcel of real property consisting of approximately 9.77 acres, with improvements, comprising the William Langer Jewel Bearing Plant in Rolla, North Dakota, which has previously been owned by the Department of the Army as a contractor-operated facility manufacturing precision items used in avionics and inertial guidance systems.

(b) CONDITION OF CONVEYANCE.—The conveyance, authorized under subsection (a) shall be subject to the condition that the Authority—

(1) use the real property conveyed under that subsection for economic development purposes; or

(2) enter into an agreement with an appropriate public or private entity or person to lease such property and facility to that entity or person for such purposes, or

(3) enter into an agreement with an appropriate public or private entity or person to sell such property and facilities to that entity or person for such purposes.

(c) DESCRIPTION OF PROPERTY.—The exact acreage and legal description of the property conveyed under this section shall be determined by a survey satisfactory to the Administrator. The cost of such survey shall be borne by the Administrator.

(d) ADDITIONAL TERMS AND CONDITIONS.—Administrator may require such additional terms and conditions in connection with the conveyance under this section as the Administrator determines appropriate to protect the interests of the United States.

(e) PREFERENCE FOR DOMESTIC DISPOSAL OF JEWEL BEARINGS—In offering to enter into agreements pursuant to any provision of law for the disposal from the National Defense Stockpile of jewel bearings, the President shall give a right of first refusal on all such offers to the Rolla Jobs Development Authority or the appropriate public or private entity or person referred to in subsection (b).

(f) NATIONAL DEFENSE STOCKPILE DEFINED.—For the purposes of this section, the term "National Defense Stockpile" means the stockpile provided for in section 4 of the Strategic and Critical Materials Stock Piling Act (50 U.S.C. 98(c)).

(g) AUTHORIZATION FOR PRIOR-YEAR FUNDS.—The Department may use up to $1.5 million in prior-year funds to maintain the Plant as a going concern during the implementation of this section.

STEVENS AMENDMENTS NOS. 2181-2182

(Ordered to lie on the table.)

Mr. STEVENS submitted two amendments intended to be proposed by him to the bill, S. 1026, supra; as follows:

AMENDMENT NO. 2181

On page 306, beginning on line 22, strike all through line 11 on page 307 and insert in lieu thereof the following:

(1)(A) The Secretary of Defense shall establish a test program under which contracting activities in the military departments and the Defense Agencies are authorized to undertake one or more demonstration projects to determine whether the negotiation and administration of comprehensive subcontracting plans will reduce administrative burdens on contractors while enhancing opportunities provided under Department of Defense contracts for small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals. In selecting the contracting activities to undertake demonstration projects, the Secretary shall take such

action as is necessary to ensure that a broad range of the supplies and services acquired by the Department of Defense are included in the test program.

(B) Notwithstanding section 34(b) of the Office of Federal Procurement Policy Act (41 U.S.C. 430(b)), the Secretary of Defense may not make inapplicable to subcontracts which include ocean transportation services the requirements of section 901(b) of the Merchant Marine Act, 1936 (46 U.S.C. 1241(b)), or section 2631 of title 10, United States Code, under either a contract for the procurement of commercial items or a subcontract for the procurement of commercial items.

AMENDMENT No. 2182

On page 305, beginning on line 1, strike all through line 10 and insert in lieu thereof the following:

SEC. 802. PROCUREMENT NOTICE POSTING THRESHOLDS AND SUBCONTRACTS FOR OCEAN TRANSPORTATION SERVICES.

The Office of Federal Procurement Policy Act (41 U.S.C. 401 et seq.) is amended—

(1) in section 18(a)(1)(B) by—

(A) striking out "subsection (f)—" and all that follows through the end of the subparagraph and inserting in lieu thereof "subsection (b); and"; and

(B) inserting after "property or services" the following: "for a price expected to exceed $10,000, but not to exceed $25,000,"; and

(2) in section 34(b) by adding at the end thereof the following new paragraph:

"(5) Nothing in this subsection shall be construed to make inapplicable to subcontracts which include ocean transportation services the requirements of section 901(b) of the Merchant Marine Act, 1936 (46 U.S.C. 1241(b)) or section 2631 of title 10, United States Code, under either a contract for the procurement of commercial items or a subcontract for the procurement of commercial items.".

THURMOND AMENDMENT NO. 2183

(Ordered to lie on the table.)

Mr. THURMOND submitted an amendment intended to be proposed by him to the bill, S. 1026, supra; as follows:

At the appropriate place, insert:

( ) DEFENSIVE USE OF LANDMINES.—Nothwithstanding any other provision of law, United States military personnel may use antipersonnel landmines for defensive purposes, consistent with U.S. military interests and which reflect the practice adopted by western military forces.

SMITH AMENDMENT NO. 2184

(Ordered to lie on the table.)

Mr. SMITH submitted an amendment intended to be proposed by him to the bill, S. 1026, supra; as follows:

On page 468, strike lines 16 through 24 and insert the following: The requirements of subparagraph (B) shall not apply in any case in which the transfer of the property occurs or has occurred by means of a lease, without regard to whether the lessee has agreed to purchase the property or whether the duration of the lease is longer than 55 years. In the case of a lease entered into after September 30, 1995, with respect to real property located at an installation approved for closure or realignment under a base closure law, the agency leasing the property, in consultation with the Administrator, shall determine before leasing the property that the property is suitable for lease, that the uses contemplated for the lease are consistent with protection of human health and the environment, and that there are adequate assurances that the United States will take all remedial action referred to in subparagraph (B) that has not been taken on the date of the lease.".

CAMPBELL AMENDMENT NO. 2185

(Ordered to lie on the table.)

Mr. CAMPBELL submitted an amendment intended to be proposed by him to the bill, S. 1026, supra, as follows:

On page 304, between lines 8 and 9, insert the following:

SEC. 744. REPORT ON EFFECT OF CLOSURE OF FITZSIMONS ARMY MEDICAL CENTER, COLORADO, ON PROVISION OF CARE TO MILITARY PERSONNEL AND DEPENDENTS EXPERIENCING HEALTH DIFFICULTIES ASSOCIATED WITH PERSIAN GULF SYNDROME.

Not later than 90 days after the date of the enactment of this Act, the Secretary of Defense shall submit to Congress a report that—

(1) assesses the effects of the closure of Fitzsimmons Army Medical Center, Colorado, on the capability of the Department of Defense to provide appropriate and adequate health care to members and former members of the Armed Forces and their dependents who suffer from undiagnosed illnesses (or combination of illnesses) as a result of service in the Armed Forces in the Southwest Asia theater of operations during the Persian Gulf War; and

(2) describes the plans of the Secretary of Defense and the Secretary of the Army to ensure that adequate and appropriate health care is available to such members, former members, and their dependents, for such illnesses.

HELMS AMENDMENT NO. 2186

(Ordered to lie on the table.)

Mr. HELMS submitted an amendment intended to be proposed by him to the bill, S. 1026, supra, as follows:

On page 408, after line 16, add the following:

SEC. 1066. SENSE OF SENATE ON MIDWAY ISLANDS.

(a) FINDINGS.—The Senate makes the following findings:

(1) September 2, 1995, marks the 50th anniversary of the United States victory over Japan in World War II.

(2) The Battle of Midway proved to be the turning point in the war in the Pacific, as United States Navy forces inflicted such severe losses on the Imperial Japanese Navy during the battle that the Imperial Japanese Navy never again took the offensive against United States or allied forces.

(3) During the Battle of Midway, an outnumbered force of the United States Navy, consisting of 29 ships and other units of the Armed Forces under the command of Admiral Nimitz and Admiral Spruance, out-maneuvered and out-fought 350 ships of the Imperial Japanese Navy.

(4) It is in the public interest to erect a memorial to the Battle of Midway that is suitable to express the enduring gratitude of the American people for victory in the battle and to inspire future generations of Americans with the heroism and sacrifice of the members of the Armed Forces who achieved that victory.

(b) SENSE OF SENATE.—It is the sense of the Senate that—

(1) the Midway Islands and the surrounding seas deserve to be memorialized;

(2) the historical structures related to the Battle of Midway should be maintained, in accordance with the National Historic Preservation Act, and subject to the availability of appropriations for that purpose.

(3) appropriate access to the Midway Islands by survivors of the Battle of Midway, their families, and other visitors should be provided in a manner that ensures the public health and safety on the Midway Islands and the conservation and natural resources of those islands in accordance with existing Federal law.

LOTT AMENDMENT NO. 2187

(Ordered to lie on the table.)

Mr. LOTT submitted an amendment intended to be proposed by him to the bill, S. 1026, supra, as follows:

On page 202, line 16, insert "or upgrade" after "award".

THURMOND AMENDMENT NO. 2188

(Ordered to lie on the table.)

Mr. THURMOND submitted an amendment intended to be proposed by him to the bill, S. 1026, supra, as follows:

On page 114, beginning on line 9, strike out "READY RESERVE COMPONENT OF THE READY RESERVE FLEET." and insert in lieu thereof "THE NATIONAL DEFENSE RESERVE FLEET.".

On page 114, beginning on line 20, strike out "of the Ready Reserve component"

HEFLIN (AND SHELBY) AMENDMENT NO. 2189

(Ordered to lie on the table.)

Mr. HEFLIN (for himself and Mr. SHELBY) submitted an amendment intended to be proposed by them to the bill, S. 1026, supra, as follows:

On page 58, line 13, insert ", except that Minuteman boosters may not be used as part of a national missile defense architecture" before the period at the end.

HELMS AMENDMENT NO. 2190

(Ordered to lie on the table.)

Mr. HELMS submitted an amendment intended to be proposed by him to the bill, S. 1026, supra, as follows:

Beginning on page 359, strike out lines 20 and 21, and insert in lieu thereof the following:

(b) SENSE OF CONGRESS.—It is the sense of Congress that—

HEFLIN (AND SHELBY) AMENDMENT NO. 2191

(Ordered to lie on the table.)

Mr. HEFLIN (for himself and Mr. SHELBY) submitted an amendment intended to be proposed by them to the bill, S. 1026, supra, as follows:

On page 69, between lines 9 and 10, insert the following:

SEC. 242. BALLISTIC MISSILE DEFENSE TECHNOLOGY CENTER.

(a) ESTABLISHMENT.—The Director of the Ballistic Missile Defense Organization shall establish a Ballistic Missile Defense Technology Center within the Space and Strategic Defense Command of the Army.

(b) MISSION.—The missions of the Center are as follows:

(1) To maximize common application of ballistic missile defense component technology programs, target test programs, functional analysis and phenomenology investigations.

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

OFFICE OF FEDERAL PROCUREMENT POLICY

May 1, 1996

MEMORANDUM FOR AGENCY SENIOR PROCUREMENT EXECUTIVES
AND THE DEPUTY UNDER SECRETARY OF DEFENSE
(ACQUISITION REFORM)

FROM: Steven Kelman SK
Administrator

SUBJECT: Waiver of Cargo Preference Laws for Subcontractors Under a Government Contract for Commercial Items

This memorandum clarifies the policy and intent of amendments to the Federal Acquisition Regulation (FAR), published in the Federal Register as a Final Rule on September 18, 1995, 60 Fed. Reg. 48231, and to amendments to the Defense Federal Acquisition Regulation Supplement (DFARS), published in the Federal Register as an Interim Final Rule (IFR) on November 30, 1995. 60 Fed. Reg. 61586 (collectively referred to as the "rule"). The relevant amendments waive requirements for the preference of U.S.-flag vessels required under the Cargo Preference Act of 1954 (1954 Act), 46 U.S.C. § 1241(b), and the Cargo Preference Act of 1904 (1904 Act), 10 U.S.C. § 2631, when ocean transportation is required under a subcontract for the acquisition of commercial items or commercial components. This memo further explains the policy and objectives of the rule, cites examples of situations to which the rule does not apply, and announces FAR Council plans to jointly review the implementation of this provision of the rule by the Federal Acquisition Regulatory Council (FAR Council) with the Maritime Administration (MARAD) over the next year to assess the impact of the implementation of these provisions of the rule.

A. Background

The Federal Acquisition Streamlining Act of 1994 (FASA), Pub. L. No. 103-355, provides authorities that streamline the acquisition process and minimize burdensome Government-unique requirements. Amendments to the FAR and DFARS were made to encourage the acquisition of commercially available end items and components by Federal agencies as well as contractors and subcontractors at all levels. Included in these revisions were amendments which waive the provisions requiring preference for U.S.-flag vessels when ocean transportation is required for supplies purchased under a Government contract. These provisions are the following:

-- FAR Subpart 12.504(a)(14) makes the 1954 Act, 46 U.S.C. § 1241(b), which requires preference for privately owned U.S.-flag vessels for 50% of the goods purchased by or for the Government, inapplicable to subcontracts at any tier for the purchase of commercial items or commercial components.

-- FAR Subpart 47.504(e) makes clear that the subcontracting waiver does not apply to grants-in-aid shipments, such as agricultural and food-aid shipments, to shipments covered under Export-Import Bank loans or guarantees, and to subcontracts under Government contracts or agreements for ocean transportation services.

-- FAR Subpart 52.244-6 provides that after May 1, 1996, a Contractor is no longer required to flowdown the FAR provision requiring compliance with the Cargo Preference Act of 1954 to a subcontractor for commercial items or commercial components at any tier.

-- DFARS Subpart 212.504(a)(14) makes the 1904 Act, 10 U.S.C. § 2631, which requires preference for U.S.-flag vessels for all goods purchased by or for DOD, inapplicable to subcontracts at any tier for the purchase of commercial items or commercial components.

-- DFARS Subpart 247.572-1 provides that the 1904 Act does not apply to subcontracts for the acquisition of commercial items or commercial components when ocean transportation is not the subject of the contract and when it is incidental to a contract for supplies, services or construction.

-- DFARS Subpart 247.572-2 requires that subcontracts under Government contracts or agreements for the direct purchase of ocean transportation remain subject to the 1904 Act.

-- DFARS Subpart 252.247-7023 amends the definition of "subcontractor" so that the term does not include a supplier, materialman, distributor, or vendor of commercial items or commercial components.

Subparts 12.504(a)(14), 47.504(e), 52.244-6, 212.504(a)(14), 247.572-1, and 252.247-7023 become effective on May 1, 1996. Over the past several months, inquiries have been received regarding the implementation of the rule and the potential impact in particular situations.

B. Policy

The purpose of the rule is to provide flexibility for contractors and subcontractors which require ocean transportation to supply the same manufactured goods both in the commercial

market place and to the United States Government (hereinafter "Government"). The primary intent is to avoid interference with established commercial practices of contractors which subcontract for commercial component parts and which possess established commercial delivery systems relating to the supply of those commercial component parts. Where the contractor and subcontractor have an established system to supply commercial component parts for both commercial and Government sales, the rule grants the subcontractor relief from the continuing requirement to segregate that portion of the commercial component parts attributable to the Government contract.

The rule is intended, however, to have a limited impact on the carriage of Government cargoes by U.S.-flag carriers. Government contracting officers should encourage the use of U.S.-flag carriers for government contracts in furtherance of the government's policy supporting the U.S.-flag merchant marine. While the rule is intended to avoid disruption of commercial relationships and delivery systems for the procurement of commercial items, it is not intended to waive compliance with the Cargo Preference Laws for ocean cargos clearly destined for eventual military or government use.

The following examples remain subject to the Cargo Preference Laws:

- Shipments of construction materials and commercial items transported under a construction contract (versus a supplies contract);
- Commissary and exchange cargoes that may be transported outside of the Defense Transportation System (see Section 334, National Defense Authorization Act of 1996, Pub. L. No. 104-106);
- Contract shipments in support of military contingencies, exercises, and U.S. forces deployed in connection with United Nations or North Atlantic Treaty Organization peacekeeping missions;
- Non-commercial component parts.

Furthermore, the rule does not permit contractors to alter existing practices to avoid compliance with the Cargo Preference Laws by merely creating subcontracting arrangements. For example, components and items may not be procured by the prime contractor FOB destination simply to avoid Cargo Preference.

C. Review of the Rule by Government Agencies

The list of examples above is by no means exhaustive. More cases may arise which circumvent the intent to the rule.

Therefore, MARAD and other Government Agencies will review the application of the rule to decide how particular situations should be addressed and to establish policy guidelines for implementation. For example, relevant DOD decisions in specific situations and the resulting policy guidelines will be included in the Reference Set of the DOD Acquisition Deskbook.

MARAD is mandated by Congress to monitor and report on compliance with the Cargo Preference Laws. MARAD provides the Congress with information regarding programs that are not in compliance with the Preference Laws, and informs the companies and government contracting officers of the requirement that certain cargoes be shipped on U.S.-flag vessels. MARAD, in consultation with other agencies, will closely monitor the implementation of the rule. In addition, MARAD and other agencies will work together to streamline the reporting process to provide more real time information to facilitate MARAD's oversight duties and monitoring of the implementation of the rule. Requests for clarification or guidance should be directed to MARAD and the agency responsible for the contract.

Finally, before May 1, 1997, MARAD and other Federal agencies will conduct a comprehensive review to assess the impact of the implementation of these provisions of the rule and take appropriate action at that time.

U.S. Department
of Transportation

**Maritime
Administration**

Memorandum

Subject: Procurement Reform and Cargo Preference **Date:**

From: MARAD's "Flowdown" Team

**Reply to
Attn of:**

To: Dorothy Robyn
Special Assistant to the President for
Economic Policy
National Economic Council

Bill Mounts
Director, International and Commercial
Systems Acquisition
Department of Defense

This memorandum discusses several issues which require some follow-up now that the May 1, 1996 deadline has passed. There are three issues that require some additional work to complete the agreement reached at our meeting with Steve Kelman: 1) publication of the policy in the Federal Register; 2) enhancement of DOD/MARAD methods to track and monitor compliance with Cargo Preference and the impact of the rule; and, 3) assurance that Cargo Preference will not be waived for commercially available off-the-shelf items.

Publication of the Policy in the Federal Register: During the final preparation of the policy letter, some confusion arose whether it would be published in the Federal Register. It has always been our understanding (based on several conversations with both of you) that the policy letter from Steve would be the most expedient way to ensure that guidance on the rule was disseminated before the effective date of May 1. But we also agreed that the policy statement would be published in the Federal Register shortly after May 1. Do you have an idea where we are on publication of the letter?

Enhancement of DOD/MARAD Methods to Monitor Compliance with Cargo Preference: One key element of the agreement requires that MARAD and other agencies work together to streamline the reporting process to provide more real time information to facilitate our oversight duties and monitoring of the impact of the rule. While we agree that there are a several developments, such as increased use of electronic commerce, which have the potential to facilitate the tracking of preference cargo, these developments are not likely to come into being within the next year. Accordingly, it is important that we continue efforts to develop a better process and enhance cooperation between MARAD and other agencies, particularly DOD, so that we can monitor the impact of the rule over the next year. (This is especially critical to demonstrate to interested parties that our understandings and commitments have substance. In several of our conference calls we discussed using the Logistics Management Institute or some other research and development group to help develop a better process.

Can we pursue the use of one of these groups as an option as well as continued meetings between MARAD and DOD staff?

Commercially Available Off-the-Shelf Items: A waiver of the Cargo Preference Laws for commercially available off-the-shelf items (COTS) would totally eclipse any work that we have done thus far and virtually gut Cargo Preference. In earlier discussions on the subcontracting rule, Dorothy offered to provide some assurances that Cargo Preference would not be listed as inapplicable under COTS. While COTS was not made an issue during the subcontracting discussions, it has been implicit in our discussions that Cargo Preference would not be waived under COTS.

I have been apprized of a conversation between Steve Kelman and Gloria Tosi earlier this week in which he told her not to worry about the Federal Register notice to be published next week, which will list Cargo Preference as inapplicable under COTS, because the Office of Federal Procurement Policy has no intention of waiving Cargo Preference in the final rule. While I was certainly encouraged to hear this, I believe that it is important that we provide the maritime industry with a written commitment that a finding will be made that it is not in the best interest of the United States to waive the Cargo Preference Laws for COTS. Comments that would provide the basis for such a finding have already been submitted by the maritime industry; MARAD has refrained from submitting formal comments in hopes that we can resolve this issue through our continued meetings and discussions. Because the rulemaking process can take a considerable amount of time, I feel that it is necessary, in the absence of formal comments, to have a written commitment from Steve, as I believe was done for the small and disadvantaged businesses who also stand to be impacted by the rule.

Please give me a call to discuss any of these follow-up points, and if necessary, we can set up another conference call.

#

THE SECRETARY OF DEFENSE
WASHINGTON, DC 20301-1000

24 JUN 1997

Honorable Trent Lott
United States Senate
Washington, DC 20510

Dear Trent:

Thank you for your letter of April 18, 1997, concerning the issue of cargo preference waivers under the rules implementing the Federal Acquisition Streamlining Act of 1994 (FASA).

My staff, in coordination with the United States Transportation Command and the Maritime Administration, is currently reviewing the FASA, the Defense Federal Acquisition Regulation Supplement and related guidance and the May 1, 1996, memorandum provided by the Administrator, Office of Federal Procurement Policy (OFPP). The goal of that review is to determine if any further clarification of the OFPP memorandum is required to ensure that government efforts to enhance the acquisition of commercial items do not conflict with cargo preference laws intended to maintain the strength of our commercial U.S.-flag fleet for national security. If determined necessary, clarification of that guidance will be provided to the Defense acquisition work force.

I very much appreciate your views. They will be very helpful as the Department strives for a suitable balance between the objectives of acquisition reform and continuing support for the U.S.-flag commercial fleet.

Thank you again for your letter and for your interest in this issue.

Sincerely,

U.S. Department
of Transportation
**Maritime
Administration**

Administrator

400 Seventh Street, S.W.
Washington, D.C. 20590

25 JUL 1997

Dr. Steven Kelman
Administrator, Office of Federal Procurement Policy
Office of Management and Budget
Room 352, Old Executive Office Building
17th Street and Pennsylvania Avenue, N.W.
Washington, D.C. 20503

Dear Dr. Kelman:

I would like to thank you for taking time out of your busy schedule to meet with us on July 22 to review the impact of waivers of the Cargo Preference Laws for commercial items procured under a subcontract as well as the implementation of your May 1, 1996, guidance memorandum that circumscribes parameters in which those waivers may be granted. We believe that your May 1, 1996, memorandum represents a fair compromise between the goals of acquisition reform and the need to maintain a viable U.S.-flag merchant marine. Accordingly, I am pleased that we were able to agree at the meeting to take additional steps to incorporate your memorandum in the Defense Acquisition Deskbook (DAD) and the Defense Federal Acquisition Regulation Supplement (DFARS).

The key points agreed to at the meeting were as follows:

- The May 1, 1996, memorandum will be incorporated in the DAD by September 1st;
- The May 1, 1996, memorandum will be incorporated into the DFARS as soon as possible. MARAD and DOD will begin working together on language;
- DOD and MARAD will jointly evaluate options to improve MARAD's ability to monitor cargoes, taking into consideration the recommendations of the study to be completed by the Logistic Management Institute by the end of August and the MARAD suggestion to have any request for a waiver of U.S.-flag shipping sent to MARAD by the contracting officer; and,
- MARAD and DOD will work together to improve training for contracting officers on the cargo preference requirements.

As I stated at the meeting, I believe that it is important for MARAD and DOD to build a stronger working relationship in order to effectively deal with these issues. The cooperation between MARAD and DOD that has resulted from these meetings is certainly a positive step

in the right direction. I am confident that by working together to incorporate your guidance in the DAD and the DFARS we will be able to ensure a better process that will benefit everyone.

Once again, thank you for your assistance. If you have any questions or further suggestions, please give me a call.

Sincerely,

John E. Graykowski
Acting Maritime Administrator

cc: Dorothy Robyn (NEC)
Beau McBride (DOD)
Mary Lou McHugh (DOD)
William E. Mounts (DOD)
Donna Richbourg (DOD)
Gloria Cataneo Tosi (AMC)

OFFICE OF THE UNDER SECRETARY OF DEFENSE

3000 DEFENSE PENTAGON
WASHINGTON, DC 20301-3000

ACQUISITION AND TECHNOLOGY

02 APR 1998

MEMORANDUM FOR THE DIRECTOR, DEFENSE PROCUREMENT

SUBJECT: Cargo Preference Coverage in DFARS Subpart 247.5

Attached is a Defense Acquisition Regulation Supplement (DFARS) modification (Attachment 1) which implements and clarifies the May 1, 1996, Office of Federal Procurement Policy (OFPP) memorandum (Attachment 2), which mitigated the potential impact of the Federal Acquisition Streamlining Act (FASA) on Cargo Preference laws. In accordance with the agreement reached during a July 22, 1997, White House meeting, the attached DFARS modification is submitted for DAR Council approval. This modification has been extensively coordinated within the Department of Defense (DoD) and Maritime Administration (MARAD) and has been carefully worded to reflect the agreement that was previously reached and incorporated in the Defense Acquisition Deskbook (Attachment 3).

On July 22, 1997, representatives from the DoD acquisition and transportation communities, United States Transportation Command, MARAD and the maritime industry met at the White House with Dr. Kelman and representatives from the National Economic Council to discuss the effects of the FASA on Cargo Preference laws. At this meeting it was agreed that language clarifying the OFPP memo would be placed in the Defense Acquisition Deskbook and that the DFARS would be amended to incorporate appropriate regulatory coverage. Subsequently, language clarifying the OFPP memo was drafted by this office and coordinated within DoD, MARAD, and the maritime industry and placed in the Defense Acquisition Deskbook on September 30, 1997. This language is a balance between the objectives of acquisition reform and DoD's support for the U.S.-flag maritime industry and the Voluntary Intermodal Sealift Agreement program as a readiness enhancer.

I appreciate your assistance in bringing this issue to a successful conclusion. My point of contact is Mr. Adam Yearwood, 697-7286.

Mary Lou McHugh
Assistant Deputy Under Secretary
(Transportation Policy)

Attachments:
As stated

cc: DCINC, USTRANSCOM

Proposed DFARS Revision

Subject: Cargo Preference Coverage in DFARS Subpart 247.5

I. Problem: Section 8003 of the Federal Acquisition Streamlining Act of 1994 (FASA) made inapplicable the requirement of the Cargo Preference Act to subcontracts at any tier for the purchase of commercial items or commercial components. Section 8003 was implemented in DFARS 247.572-1 (a) and 252.247-7024 (b). However, applicability of this exemption was limited by OFPP Memorandum of May 1, 1996, "Waiver of Cargo Preference Laws for Subcontractors Under a Government Contract for Commercial Items." A change to the DFARS coverage is needed to implement the OFPP policy memorandum.

II. Recommendation: That DFARS coverage be modified as set forth in the attachment to this memorandum.

III. Discussion: The statutory preference for using U.S.-flag vessels for ocean transportation of supplies for U.S. armed forces is contained in the Cargo Preference Act of 1904 (10 U.S.C.2631). Defense contractors and subcontractors are generally required to comply with the Cargo Preference Act pursuant to DFARS clauses specified in 247.573. Although the FASA-authorized exemption from the Act applies to commercial items for eventual use by DoD, the applicability of this exemption was limited by the memorandum issued by OFPP. The intent is to avoid disruption of commercial relationships and delivery systems for the procurement of commercial items and to create a limited waiver of the Cargo Preference Act.

As explained in FAR 12.501(b), the requirement for adding value is intended to preclude establishment of unusual contractual arrangements solely for the purpose of Government sales. The OFPP memorandum points out that this rule precludes contractors from altering existing practices by creating subcontracting arrangements merely to avoid compliance with the Cargo Preference Act. Generally, therefore, a prime contractor does not add value where the commercial items or commercial components merely are shipped directly from a subcontractor to DoD. For example, components and items may not be procured by the prime contractor FOB Government destination simply to avoid the Cargo Preference Act. The purpose of the exemption is to provide flexibility for contractors and subcontractors that require ocean transportation to supply the same goods both in the commercial market place and to the United States Government. The primary intent is to avoid interference with established commercial practices of contractors that subcontract for commercial items or components from subcontractors that possess established commercial delivery systems relating to the supply of commercial items or components. Where the subcontractor supplies commercial items or components for both commercial and Government sales, the subcontractor is not required to segregate commercial items or components attributable to a Government contract.

ATTACHMENT 1

Proposed DFARS Change for
Waiver of Cargo Preference Laws for Subcontractors Under a Government Contract for Commercial Items

Revisions to the current DFARS language have been made using line-in/line-out method. Additions are underlined and deletions have a line through the text.

The following DFARS sections are revised as follows:

DFARS 212.504, Applicability of Certain Laws To Subcontracts For The Acquisition of Commercial Items.

(a) The following laws are not applicable to subcontracts at any tier for the acquisition of commercial items or commercial components:

(xxii) Effective May 1, 1996: 10 U.S.C. 2631, Transportation of Supplies by Sea (but see 247.572-1 for exceptions).

****

DFARS 247.572-1, Ocean Transportation Incidental To A Contract For Supplies, Services, Or Construction

(a) This subsection applies when ocean transportation is not the purpose of the contract. However, effective May 1, 1996, this subsection does not apply to subcontracts for the acquisition of commercial items or commercial components (see 212.504(a)(xxii)) except for example:

(1) items shipped in support of a prime contract for construction;

(2) items shipped in direct support of military contingencies, exercises, or U.S. forces deployed in peacekeeping missions;

(3) as is the case with all FASA-authorized subcontract exemptions, the prime contractor is reselling or distributing commercial items or components of the subcontractor to the Government without "adding value." (Regarding the latter, see 41 U.S.C. 430(b)(3) and FAR 12.501(b));

(4) non-commercial component parts; or

(5) commissary and exchange cargoes transported outside of the Defense Transportation System pursuant to 10 U.S.C. 2643.

Generally, a prime contractor does not add value where the commercial items or commercial components merely are shipped directly from a subcontractor to DoD. For example, components and items may not be procured by the prime contractor FOB Government destination simply to avoid Cargo Preference.

****

DFARS 252.247 - 7023, Transportation Of Supplies By Sea

(a) Definitions. As used in this clause ---

(5) Subcontractor means a supplier, materialman, distributor, or vendor at any level below the prime contractor whose contractual obligation to perform results from, or is conditioned upon, award of the prime contract and who is performing any part of the work or other requirement of the prime contract. However, effective May 1, 1996, the term does not include a supplier, materialman, distributor, or vendor of commercial items or commercial components, except in the case of commercial items or commercial components identified in (6) (iii) below.

(6) Supplies means all property, except land and interests in land, that is clearly identifiable for eventual use by or owned by the DoD at the time of transportation by sea.

****

(iii) With regard to a subcontract for a commercial item or commercial component, the following will be considered "supplies" for the purpose of this clause:

(1) items shipped in support of a prime contract for construction;

(2) items shipped in direct support of military contingencies, exercises, or U.S. forces deployed in peacekeeping missions;

(3) as is the case with all FASA-authorized subcontract exemptions, the prime contractor is reselling or distributing commercial items or components of the subcontractor to the Government without "adding value." (Regarding the latter, see 41 U.S.C. 430(b)(3) and FAR 12.501(b));

(4) non-commercial component parts; or

(5) commissary and exchange cargoes transported outside of the Defense Transportation System pursuant to 10 U.S.C. 2643.

****

DFARS 252.247-7024, Notification Of Transportation Of Supplies By Sea

(b) The Contractor shall include this clause, including this paragraph (b), revised as necessary to reflect the relationship of the contracting parties, in all subcontracts hereunder, except (effective May 1, 1996) subcontracts for the acquisition of commercial items or components other than identified in 247.7023 (a)(6)(iii).

ATTACHMENT

Waiver of Cargo Preference Laws for Subcontractors under a Government Contract for Commercial Items

This clarifies policy regarding shipment of commercial items or commercial components by a subcontractor and the limited extent to which exemption from the cargo preference laws are applicable in light of the memorandum Administrator, Office of Federal Procurement Policy (OFPP), May 1, 1996, same subject as above.

The statutory preference for using U.S-flag vessels for ocean transportation of supplies bought for U.S. armed forces is contained in the Cargo Preference Act of 1904 (10 U.S.C. 2631). Defense contractors and subcontractors are generally required to comply with the Cargo Preference Act pursuant to the clause at Defense Federal Acquisition Regulation Supplement (DFARS) 252.247-7023 ("Transportation of Supplies by Sea") for supplies that are clearly identifiable for eventual use by or owned by the Department of Defense (DoD) at the time of transportation by sea. Pursuant to Section 8003 of the Federal Acquisition Streamlining Act of 1994 (FASA), this requirement of the Cargo Preference Act and DFARS 252.247-7023 was made inapplicable to subcontracts at any tier for the purchase of commercial items or commercial components.

Although the FASA-authorized exemption from this Act applies to commercial items purchased for eventual use by DoD, the applicability of this exemption was limited by the memorandum issued by OFPP. The intent is to avoid disruption of commercial relationships and delivery systems for the procurement of commercial items and to create a very limited waiver of the Cargo Preference Laws. For example, the requirement of the Cargo Preference Act and DFARS 252.247-7023 to use U.S.-flag vessels shall apply for the shipment of commercial items or commercial components by a subcontractor in the following situations: (1) items shipped in support of a prime contract for construction; (2) commissary and exchange cargoes transported outside of the Defense Transportation System pursuant to 10 U.S.C. 2643; (3) shipments in direct support of military contingencies, exercises, or forces deployed on peacekeeping missions and; (4) non-commercial component parts; and , (5) as is the case with all FASA-authorized subcontract exemptions, the prime contractor is reselling or distributing commercial items or components of the subcontractor to the Government without "adding value." (Regarding the latter, see 41 U.S.C. 430(b)(3) and FAR 12.501(b)).

As explained in FAR 12.501(b), the requirement for adding value is intended to preclude establishment of unusual contractual arrangements solely for the purpose of Government sales. The OFPP memorandum points out that this rule precludes contractors from altering existing practices by creating subcontracting arrangements merely to avoid compliance with Cargo Preference laws. Generally, therefore, a prime contractor does not add value where the commercial items or commercial components merely are shipped directly from a subcontractor to DoD. For example, components and items may not be procured by the prime contractor FOB Government destination simply to avoid Cargo Preference.

The purpose of this FASA-authorized exemption is to provide flexibility for contractors and subcontractors which require ocean transportation to supply the same goods both in the commercial market place and to the United States Government. The primary intent is to avoid interference with established commercial practices of contractors which subcontract for commercial items or components from subcontractors that possess established commercial delivery systems relating to the supply of those commercial items or components. Where the subcontractor supplies commercial items or components for both commercial and Government sales, the subcontractor is not required to segregate commercial items or components attributable to a Government contract.

Government officials, including contracting officers, should encourage the use of U.S.-flag carriers for Government contracts in furtherance of the Government's policy supporting the U.S.-flag merchant marine.

Finally, in accordance with DFARS 247.572-2, subcontracts under Government contracts or agreements for ocean transportation services remain subject to the Cargo Preference Act.

EDITOR'S NOTE:

An amendment to the DFARS is being considered to incorporate appropriate regulatory coverage that reflects the May 1, 1996 OFPP Memorandum.

File Owner: William Mounts, ODUSD(AR)
Co-owner: Mr. H. F. Amerau, ADUSD(TP)

File Last Reviewed:

Lessons learned (e.g., Turkish Container incident) and questions and answers will be included.

OFFICE OF THE UNDER SECRETARY OF DEFENSE

3000 DEFENSE PENTAGON
WASHINGTON, DC 20301-3000

ACQUISITION AND
TECHNOLOGY

29 MAY 1998

Ms. Gloria Tosi
Executive Director
American Maritime Congress
Franklin Square
1300 Eye Street, NW, Suite 250 West
Washington, DC 20005

Dear Gloria:

Thank you for your support of the proposed Defense Federal Acquisition Regulation Supplement (DFARS) modification concerning Cargo Preference Laws for Subcontractors that was recently forwarded to the Defense Acquisition Regulation Council. In response to your letter dated April 17, 1998, I would like to provide you with information that I trust will clarify the Department of Defense position regarding the Acquisition Reform Working Group (ARWG) proposal.

Dr. Gansler sent a letter dated March 16, 1998, to the National Defense Industrial Association regarding the ARWG proposals on furthering acquisition reform. Dr. Gansler stated in his letter that the Department of Defense (DoD) does not endorse any of the ARWG's specific proposals. Additionally, it is my understanding that the ARWG has proposed similar changes to the cargo preference laws in the past.

We have been assured by the office of the Director, Defense Procurement that they support the above mentioned DFARS language that reflects last year's agreement that was reached between DoD and industry on cargo preference. Additionally, we have been assured by, the office of the Deputy Under Secretary of Defense (Acquisition Reform) that they are aware of the ARWG's proposals and remain committed to the cargo preference agreement and the proposed DFARS modification.

The Department will continue to uphold DoD's policy to support cargo preference laws and I appreciate your bringing this matter to my attention.

Sincerely,

Mary Lou McHugh
Assistant Deputy Under Secretary
(Transportation Policy)

UNITED STATES TRANSPORTATION COMMAND
508 SCOTT DR
SCOTT AIR FORCE BASE IL 62225-5357

27 Mar 98

MEMORANDUM FOR ASSISTANT DEPUTY UNDER SECRETARY OF DEFENSE
(TRANSPORTATION POLICY)

FROM: TCDC

SUBJECT Cargo Preference Policy (Your Memos, 27 February 1998 and 17 March 1998)

1. References

a. USTRANSCOM/TCCC Letter, 3 November 1997 (Atch 1).

b. USTRANSCOM/TCDC Memo, 29 November 1997 (Atch 2).

2. We have reviewed your most recent draft DFARS language and appreciate the changes that you made from your previous submission, based on my staff's comments. These changes will help ensure the long-term solvency of our strategic partnership with the U.S. Flag carrier industry as recognized in the recently issued Transportation Acquisition Policy.

3. In the references we commented on the DAD and requested your support, as well as clear guidance, concerning the Kelman memo and the relationship between the use of subcontractors and the applicability of Cargo Preference Laws regarding "any item shipped by a subcontractor directly to DOD." However, in the spirit of cooperation, we are now willing to concur with the draft language, which has been modified to better reflect the DAD. Further, we must all monitor the impact of the DAD/DFARS language, and, if our mobilization base in the commercial sector erodes, we must consider different language.

4 Additionally, in accordance with CFR Part 201.201-1, the language should be bracketed-in, not lined-in. We appreciate the opportunity to comment on the DFARS language. We stand ready to work with you on this critical strategic mobility readiness issue.

ROGER G. THOMPSON, JR.
Lieutenant General, U.S. Army
Deputy Commander in Chief

cc:
Director, Joint Staff

U.S. Department of Transportation
Maritime Administration

Administrator

400 Seventh Street S.W.
Washington D.C. 20590

AUG 4 999

Defense Acquisition Regulations Council
Attn.: Ms. Amy Williams
PDUSD (A&T) DP (DAR)
IMD 3D139
3062 Defense Pentagon
Washington, DC 20301-3062

Re: DFARS Case 98-D014

Dear Ms. Williams:

The Maritime Administration (MARAD), a component of the Department of Transportation, is pleased to provide comments on the proposed amendment of the Defense Federal Acquisition Regulation Supplement (DFARS), Parts 212 and 247. The amendment is intended to limit the types of subcontracts for which the waiver of 10 U.S.C §2631, which mandates the use of U.S.-flag vessels for carriage of military cargoes, is applicable.

As found by the Office of Legal Counsel (OLC), the Cargo Preference Law applies to all supplies purchased for the military, including supplies to which it does not have title at the time of shipment (i.e., subcontractor supplies). (Memorandum of Feb. 2, 1988, from Charles J. Cooper, Assistant Attorney General to Kathleen A. Buck, General Counsel, U.S. Department of Defense.) Subsequent to the OLC decision, the Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, provided authority to allow the amendment of the FAR and DFARS to waive cargo preference requirements for subcontractors providing commercial components. A memo issued on May 1, 1996, by the Administrator of the Office of Federal Procurement Policy advised that the streamlined rules governing purchases of commercial items were intended to have a limited impact on the carriage of Government cargoes by U.S.-flag carriers. The May 1, 1996 memo set out examples where the Cargo Preference Laws were still expected to apply, namely: (1) Shipments of construction materials and commercial items transported under a construction contract; (2) Commissary and exchange cargoes that may be transported outside of the Defense Transportation System; (3) Contract shipments in support of military contingencies, exercises, and U.S. forces deployed in connection with United Nations or North Atlantic Treaty Organization peacekeeping missions; and (4) Non-commercial component parts. Further, the memo would not permit contractors to avoid compliance with the Cargo Preference Laws by merely creating subcontracting arrangements.

The instant proposed rule faithfully includes these principles in the DFARS. As a general matter, we applaud this proposal. However, there is one issue that should be addressed. The revised §252.247-7023(h) would include the requirement to use U.S.-flag vessels only in those subcontracts that "exceed the simplified acquisition threshold in Part 2 of the Federal Acquisition Regulation." The present threshold is $100,000, except for purchases overseas in support of a contingency or a humanitarian or peacekeeping operation, where the threshold is $200,000. Please note that the use of U.S.-flag vessels is also required for subcontracts below the simplified acquisition threshold.

Certain laws are inapplicable to, and certain clauses may be omitted from, contracts under the simplified acquisition threshold. However, the Cargo Preference Laws do not fall into this category because 10 U.S.C. §2631 is not included on the list of laws in 48 CFR §13.005 that have been designated as inapplicable to procurements under the simplified acquisition threshold or included on the list of provisions of laws in 48 CFR §13.006 that have been designated as inapplicable to procurements under the simplified acquisition threshold. As there is no authority for waiver of 10 U.S.C. §2631 for purchases below the simplified acquisition threshold, the DFARS should not infer that such a waiver exists. Accordingly, please strike subparagraph §252.247-7023(h)(1).

Also, please note that in the proposed revision to §252.212-7001, paragraph (c) refers to contract terms "listed in paragraph (e)." It should read paragraph "(b)" instead of "(e)".

Thank you, in advance, for consideration of these comments.

Sincerely,

(sgd.) Clyde J. Hart, Jr.

Clyde J. Hart, Jr.
Maritime Administrator

U.S. Department of Transportation
Maritime Administration

400 Seventh Street S.W.
Washington D.C. 20590

August 23, 1999

Defense Acquisition Regulations Council
Attn: Ms. Amy Williams
PDUSD (A&T) DP (DAR)
IMD 3D139
3062 Defense Pentagon
Washington, DC 20301-3062

Re: DFARS Case 98-D-14

Dear Ms. Williams:

Further to the Maritime Administration comments in our letter of August 4, 1999 re the proposed amendment of DFARS Parts 212 and 247, we wish to provide you with a copy of the official Department of Transportation comments of 1995 on this topic.

We would like to clarify, consistent with the Department of Transportation's 1995 comments, that Congress did not grant the FAR Council or DFAR Council authority to waive the Cargo Preference Laws for contracts under the simplified acquisition threshold. The Congress considered and explicitly rejected waivers of the Cargo Preference Laws for contracts under the simplified acquisition threshold. Therefore, there is no basis to conclude that FASA explicitly or implicitly gives the FAR or DFAR Councils authority to waive the Cargo Preference Laws under the simplified acquisition threshold in the Federal Acquisition Streamlining Act (see DOT comments pages 6-10).

Subsequent to these 1995 comments, still applicable today, a compromise was carefully crafted between the OFPP, DOD, MARAD and the industry which in the words of the Assistant Deputy Under Secretary of Defense for Transportation Policy "...is a balance between the objectives of acquisition reform and DoD's support for the U.S.-flag maritime industry and the Voluntary Intermodal Sealift Agreement (VISA) program as a readiness enhancer." Excluding cargo preference from purchases below the simplified acquition threshold would violate not only the law but also this DoD policy.

Thank you for your attention to this topic.

Sincerely,

Thomas W. Harrelson
Director, Office of
Cargo Preference

Attachment: Comments of the United States Department of Transportation in FAR Cases 94-790 and 94-791.

Cc: M. Bloom
J. Marquez

2 Dec 99

MTOP-J (55a)

MEMORANDUM FOR

COMMANDER, MTMC DEPLOYMENT SUPPORT COMMAND, 663 SHEPPARD PLACE, FORT EUSTIS, VA 23604
COMMANDER, 598TH TRANSPORTATION GROUP, PSC 72, BOX 173, APO AE 09709
COMMANDER, 599TH TRANSPORTATION GROUP, BLDG 204, WHEELER ARMY AIR FIELD, SCHOFIELD BARRACKS, HI 96857-5008
HQMTMC STAFF PRINCIPALS

SUBJECT: MTMC Support of U.S. Flag Maritime Industry

1. Maintaining a strong U.S. Flag maritime industry is an essential element of this Nation's rapid force projection strategy. The strategic importance of this industry has long been recognized and continues to be reflected in the Nation's cargo preference laws. These laws require use of U.S. Flag vessels for Department of Defense (DOD) cargo.

2. To strengthen our strategic partnership and carry out the intent of our cargo preference laws, MTMC's policy is to use U.S. Flag vessels in accordance with Voluntary Intermodal Sealift Agreement (VISA) priorities to move DOD cargo whenever and wherever possible.

3. I expect my commanders and staff principals to strictly adhere to this policy and ensure all members of your staff fully understand the importance of supporting the U.S. Flag Maritime Industry.

//signed//

KENNETH L. PRIVRATSKY
Major General, USA
Commanding

U.S. Department of Transportation
Maritime Administration

Administrator

400 Seventh Street, S.W.
Washington, D.C. 20590

MAR 30 2000

Ms. Mary Lou McHugh
Assistant Deputy Under Secretary
(Transportation Policy)
Office of the Under Secretary of Defense
3000 Defense Pentagon
Washington, DC 20301-3000

Dear Ms. McHugh:

I am writing to request your assistance on an issue regarding waivers of the Cargo Preference Laws for certain Department of Defense (DOD) contracts. Specifically, the issue relates to a waiver of the Cargo Preference Laws for subcontracts at or below the simplified acquisition threshold. We discovered that such a waiver was included in the Defense Acquisition Regulation Supplement (DFARS) when we were commenting on DFARS Case 98-D014, which purported to amend the DFARS to incorporate the principles of Dr. Kelman's May 1, 1996, memorandum regarding waivers of the cargo preference laws for procurements of commercial items under a subcontract. When DOD, MARAD and the maritime industry reached agreement in the Spring of 1998 on the amendments to the DFARS regarding waivers of the Cargo Preference Laws for procurements of commercial items, we recognized that the regulation could not adequately address every potential case that might arise, and we agreed to work together as partners to address specific issues as they arose in the future. In keeping with this partnership, I would like to request your help in addressing this issue of a waiver of the cargo preference laws for subcontracts that do not exceed the simplified acquisition threshold.

The proposed amendments in DFARS Case 98-D014, 64 FR 33238 (June 22, 1999), included amendments to the ocean transportation clause found at 48 C.F.R. §252.247-7023 that is required to be used in all DOD contracts requiring ocean transportation. One of the revisions to the clause was an amendment to §252.247-7023(h) which provides that the contractor shall include the clause in all subcontracts that (1) exceed the simplified acquisition threshold in Part 2 of the Federal Acquisition Regulation and (2) that are for a type of supplies described in paragraph (b) of the clause. The requirements of subparagraph (h) would exempt from compliance with the Cargo Preference Laws all DOD subcontracts that are equal to or below the simplified acquisition threshold. We can find no statutory basis for the waiver and believe that it should be deleted from the regulations. Moreover, elimination of this important segment of the U.S.-flag cargo base undercuts DOD's otherwise strong support for the U.S.-flag merchant marine through the VISA program.

We provided the attached comments on the proposed regulation supporting the implementation of the principles from the Kelman memo, pointing out that there was no statutory authority for the additional waiver of the Cargo Preference Laws for subcontracts that do not exceed the simplified acquisition threshold, and requesting that the waiver in subparagraph (h) be deleted.

Following the submission of our comments, we were advised by the staff at the U.S. Transportation Command that DOD planned to address separately from this rulemaking waivers of the Cargo Preference Laws for subcontracts that do not exceed the simplified acquisition threshold. However, when the final rule for DFARS Case 98-D014 was published in the *Federal Register* on March 16, 2000, 64 FR 14440, the waiver of the Cargo Preference Laws for subcontracts that do not exceed the simplified acquisition threshold remained in the DFARS and there was no acknowledgment or discussion of either our comment or DOD's statutory authority for the waiver. Accordingly, I would like to ask for your help and assistance in correcting this error in the DFARS and removing any waivers of the Cargo Preference Laws for subcontracts that do not exceed the Simplified Acquisition Threshold.

If you or your staff would like to discuss this matter in further detail, please feel free to contact me at (202) 366-5823. Thank you in advance for your assistance. I look forward to working with you to ensure compliance with the Cargo Preference Laws.

Sincerely,

Clyde J. Hart, Jr.
Maritime Administrator

UNITED STATES TRANSPORTATION COMMAND
508 SCOTT DR
SCOTT AIR FORCE BASE, ILLINOIS 62225-5357

1 May 2000

The Honorable Clyde J. Hart, Jr.
Maritime Administrator
U.S. Department of Transportation
400 Seventh Street S.W.
Washington DC 20590

Dear Mr Hart Clyde -

Thank you for your 6 Apr 00 letter concerning implementation of cargo preference laws for DOD cargoes. As we've demonstrated many times over recent years, we view cargo preference as a central element to the long-term viability of the U.S. maritime industry.

Let me say at the outset that there has been no attempt to ignore or otherwise circumvent MARAD inputs on the proposed regulatory changes that you mentioned. To the contrary, we have worked within the DOD process, governed by the Defense Acquisition Regulations (DAR) Council, that affords the opportunity for input from all sectors, including industry and other government agencies. I can also assure you that we are doing everything within our power to ensure that support for the U.S. flag maritime industry is recognized within the defense acquisition community.

The Defense Federal Acquisition Regulation Supplement (DFARS) cases you cite address efforts by the DAR Council, as part of a larger acquisition streamlining effort, to revise DFARS Parts 212 and 247. Included among the many provisions affected are some, as you mentioned, that impact application of cargo preference laws. You are correct in stating that the 16 March 1999 Federal Register final rule retained an existing DFARS waiver (that had been in place since 1995) of the Cargo Preference Laws for certain subcontracts that do not exceed the simplified acquisition threshold.

At the time of that notice, we advised DOD that we were working with MARAD in an effort to obtain additional information that would allow us to determine the impact of removing the existing waiver on both the U.S. flag industry and DOD shippers. Our staffs were unable to come up with any such data. On 12 Apr 00, we subsequently advised DOD that since neither the 1904 nor the 1954 Cargo Preference Act expressly mentioned any dollar threshold, and absent compelling data to the contrary, the DFARS waivers for subcontracts should be removed.

Throughout this process, we have been in verbal contact with your staff to ensure we were aware of and sensitive to MARAD's concerns. At the same time, I know you appreciate the process in which we operate within DOD to bring acquisition issues to resolution, and we will continue to work with you on these issues of mutual interest.

Sincerely

Tony Robertson

CHARLES T. ROBERTSON, JR.
General, USAF
Commander in Chief

Attachment:
TCJ4-D Memo, 12 Apr 00

cc: ADUSD(TP)

ACQUISITION AND TECHNOLOGY

OFFICE OF THE UNDER SECRETARY OF DEFENSE

3000 DEFENSE PENTAGON
WASHINGTON DC 20301-3000

05 MAY 2008

Honorable Clyde J. Hart, Jr.
Administrator,
Maritime Administration
400 Seventh Street, S.W.
Washington, D.C. 20590

Dear Mr. Hart:

Thank you for your recent letter requesting my assistance on the issue of removal of any waivers of the Cargo Preference Laws for subcontracts that do not exceed the simplified acquisition threshold.

Over the past four months the U.S. Transportation Command has attempted to obtain data on the volume of shipments below the $100K simplified acquisition threshold from MARAD and DoD Components. Unfortunately, there is no data available to determine the amount of cargo in question.

In view of the unavailability of pertinent data and the absence of statutory authority for an exemption of Cargo Preference below the simplified acquisition threshold, I have submitted the attached memorandum to the Director, Defense Acquisition Regulations Council. The memorandum recommends that the Defense Acquisition Regulation Supplement (DFARS) be modified to apply Cargo Preference provisions and clauses in solicitations and resultant contracts with an anticipated value at or below the simplified acquisition threshold.

Thank you again for your letter and for your support of national defense.

Sincerely,

Mary Lou McHugh
Assistant Deputy Under Secretary
(Transportation Policy)

cc: General Robertson

UNITED STATES TRANSPORTATION COMMAND
508 SCOTT DR
SCOTT AIR FORCE BASE, ILLINOIS 62225-5357

12 APR 2000

MEMORANDUM FOR ASSISTANT DEPUTY UNDER SECRETARY OF DEFENSE (TRANSPORTATION POLICY)

FROM: TCJ4-D

SUBJECT: Cargo Preference Coverage in Defense Federal Acquisition Regulation Supplement (DFARS) Subpart 247.5 (OUSD/DP(DAR) Memo, 29 Nov 99)

1. This is a follow-up to our memorandum of 16 Feb 00 regarding Cargo (Atch 2).

2. We have attempted to obtain data on the volume of shipments below $100,000. However, neither MARAD nor DOD can provide any data telling us the amount of cargo in question. Absent such data, and after further review of the applicable statutes and FAR case background, we are prompted to revise the original recommendation put forth in our Feb memorandum.

3. Neither the 1904 Cargo preference act nor the 1954 Cargo Preference Act expressly mentions any dollar threshold for their application. FAR Case 98-604, which is in the final coordination stage, has eliminated the $100,000 threshold. Therefore, in keeping with our commitment to our strategic partners, we see no justification for retaining the $100,000 threshold for ocean transportation incidental to DOD contracts for supplies, construction, or services. We will continue our efforts to gather data. Should a significant impact on defense contractors surface, we will revisit the issue at that time.

4. Our POC is Ms. Barbara Fischer, TCJ4-AQ, DSN 576-6829.

FRANK P. WEBER
Deputy Director for Logistics
and Business Operations

Attachments:
1. OUSD/DP(DAR) Memo, 29 Nov 99
2. TCJ4-D Memo, 16 Feb 00

United States Senate

WASHINGTON, D.C. 20510

May 2, 2000

The Honorable Ted Stevens, Chairman
The Honorable Daniel Inouye, Ranking Member
Committee on Appropriations
Subcommittee on Defense
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman and Senator Inouye:

We are writing to bring your attention to a major concern regarding cargo preference waivers. Effective March 16, 2000, a final rule implementing cargo preference under the Federal Acquisition and Streamlining Act of 1994 (FASA) was issued by the Defense Acquisition Regulation (DAR) Council. The rule effectively waives cargo preference requirements for all Department of Defense subcontracts for shipping by sea which are below the simplified acquisition threshold of $100,000.

This administrative action subverts cargo preference statutes, with the potential to harm the commercial viability of the U.S. merchant marine. Furthermore, the new regulation promotes uncertainty as to what is and is not subject to cargo preference, and inevitably leads to more DoD-generated cargoes traveling on foreign-flag vessels. Recently, a DoD subcontractor utilized several foreign-flag vessels to ship housing units to Kwajalein Atoll in support of a ballistic missile defense program. If incidents like this are allowed to continue, the U.S.-flag fleet will suffer a significant loss of available sealift capacity for our armed services in a national emergency.

Such a prospect is deeply disturbing, particularly in light of FASA's legislative history, the often-expressed views of Congress, and a pattern of broken promises by those charged with implementing the law. For more than five years, the U.S.-flag maritime industry attempted to reach agreement with acquisition reform officials in the Defense Department so that the process could be streamlined without impairing vitally important cargo preference programs. During this long effort, carefully balanced compromises were reached, only to be repeatedly undone.

As you know, it was never the aim of Congress to waive any cargo preference requirements through FASA. This point was clearly made during markup of the bill in the Governmental Affairs Committee, where your leadership led to adoption of language removing all proposed waivers of cargo preference under the Act. Although general waiver authority remained in the legislation as passed by both Houses, the recent rulemaking defies specific and well-known congressional intent.

We believe the time has come to resolve any remaining questions within the executive branch and mandate the applicability of cargo preference requirements to all relevant aspects of FASA. We cannot allow cargo preference programs to be dismantled by regulatory overreach. Likewise, we are not seeking wider scope for cargo preference, but rather a return to the letter and spirit of existing laws which have so well-served our merchant marine, industrial base, and national defense.

Thank you for your continuing leadership. We look forward to working with you to address this important and urgent issue.

Sincerely,

TRENT LOTT

ERNEST F. HOLLINGS

JOHN B. BREAUX

price adjustment in conjunction with an award-fee incentive (see 16.404) and performance or delivery incentives (see 16.402–2 and 16.402–3) when the award fee or incentive is based solely on factors other than cost. The contract type remains fixed-price with economic price adjustment when used with these incentives.

[FR Doc. 03–6372 Filed 3–17–03; 8:45 am]
BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 12, 32, 47, and 52

[FAC 2001–13; FAR Case 1999–024; Item II]

RIN 9000–AI97

Federal Acquisition Regulation; Preference for U.S.-Flag Vessels—Subcontracts for Commercial Items

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) regarding the applicability of statutory requirements for use of U.S.-flag vessels in the transportation of supplies by sea. The FAR presently waives these requirements for subcontracts for the acquisition of commercial items. This rule would require the use of U.S.-flag vessels under certain subcontracts for commercial items.

DATES: *Effective Date:* April 17, 2003.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC, 20405, (202) 501–4755, for information pertaining to status or publication schedules. For clarification of content, contact Ms. Linda Klein, Procurement Analyst, at (202) 501–3775. Please cite FAC 2001–13, FAR case 1999–024.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule amends FAR Parts 12, 32, 47, and associated clauses to limit the types of subcontracts for which the waiver of cargo preference statutes is applicable. The rule is intended to ensure compliance with cargo preference statutes if ocean cargoes are clearly destined for Government use, while avoiding disruption of commercial delivery systems. This final rule also amends FAR Part 12 by adding 10 U.S.C. 2631 to the list of laws inapplicable to subcontracts for the acquisition of commercial items, except for certain subcontracts, since civilian agencies may buy supplies for use of military departments.

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 65 FR 66920, November 7, 2000. Four respondents submitted public comments during the comment period. These comments were considered in the formulation of the final rule. A summary of the comments and their respective disposition is as follows:

1. One respondent voiced opposition to the rule indicating that (1) neither the statute nor the legislative history grants authority to create an administrative deviation from the explicit requirement to use U.S.-flag vessels in the transportation of supplies bought for the Department of Defense (DoD) either by DoD or a civilian agency; (2) the rule should be considered a major rule under 5 U.S.C. 804; and (3) this rule will have a significant impact on a substantial number of small entities. The Councils did not concur. 41 U.S.C. 430(b), as added by the Federal Acquisition Streamlining Act (FASA) of 1994 (Pub. L. 103–355, Section 8003), requires that the FAR list those laws inapplicable to subcontracts for commercial items, and requires that covered laws as defined in 41 U.S.C. 430(c) be included on that list unless the FAR Council makes a written determination that it would not be in the best interest of the Federal Government to exempt commercial subcontracts from the applicability of the provision (see comment 2). In accordance with this statute, FAR 12.504(a)(10) currently lists 46 U.S.C. 1241(b), with the inapplicability effective May 1, 1996. This rule adds 10 U.S.C. 2631 to the FAR list, because civilian agencies may buy supplies for use of military departments. 10 U.S.C. 2631 is currently listed as inapplicable to commercial items at DFARS 212.504(a)(xxii), with the same exceptions now being incorporated in the FAR. This rule clarifies existing policy and limits the number of allowable waivers. The rule strengthens the Government support for the Cargo Preference statutes. The Office of Information and Regulatory Affairs reviewed the proposed rule before publication and did not declare it to be a major rule under 5 U.S.C. 804.

2. One respondent expressed opposition to the rule considering it to be inconsistent with FASA with respect to commercial item procurements. The respondent states that 10 U.S.C. Sec. 2631 is not specifically enumerated to remain unaffected by Title VIII of FASA, it does not provide for criminal or civil penalties, or contain any provisions that would override the provisions in Title VIII of FASA and, therefore, a written determination of the FAR Council is required to not exempt all commercial item subcontracts from the provisions of 10 U.S.C. Sec 2631. The FAR Council has made a determination in writing as required by the OFPP Act, 41 U.S.C. 430(b).

3. One respondent expressed concern regarding deletion of contracts awarded using the simplified acquisition procedures in Part 13 from the current list of exceptions to the preference for U.S.-flag vessels. This change was accomplished under FAR case 98–604, and is outside the scope of this case.

4. One respondent expressed concern that the rule does not waive Cargo Preference for commercial subcontracts if the prime contractor is redistributing or reselling without adding value. The Council did not concur. FASA specifically prohibits waiver of laws for subcontracts where the prime does not add value; the subcontractor then is held to all laws applicable to a prime contractor. The rule merely clarifies this portion of the law.

5. One respondent expressed concern regarding the difference between the requirements outlined in the statutes covering DoD and non-DoD cargo. The concern is that extension of the rule to civilian agency acquisitions places an insurmountable burden on Government contractors and subcontractors. The Councils did not concur as FAR 47.503(b)(2) already states that 10 U.S.C. 2631 is applicable if supplies being shipped are for use of military departments. This rule does not expand that applicability of 10 U.S.C. 2631 to other non-DoD cargo, but actually limits application of Cargo Preference, by providing waiver of 10 U.S.C. 2631, if it would otherwise be applicable.

6. One respondent contends that if the proposed rule is not withdrawn, it should be modified to require prime contractors to advise their subcontractors when the statutes apply. The Councils did not concur because the FAR currently requires the prime contractor to notify the subcontractors of any flow-down statutes.

7. Two respondents were concerned that the rule could be read to omit one major exception to cargo preference waivers for subcontracts for commercial

items—" non-commercial component parts" and requests clarification. The Councils did not concur because the rule only relates to commercial component parts.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because most ocean transportation companies are large business concerns. FAR Subpart 47.5 and the clause at FAR 52.247–64 do not generally apply to acquisitions by the Department of Defense.

C. Paperwork Reduction Act

The Paperwork Reduction Act (Pub. L. 104–13) applies because the final rule will increase the flow down of FAR clause 52.247–64, Preference for Privately Owned U.S.-Flag Commercial Vessels, to certain commercial subcontracts. This information collection requirement is currently approved by the Office of Management and Budget under OMB Control Number 9000–0061, Transportation Requirements, which also covers other transportation related information collection requirements. We estimate an increase of 9000 responses per year as a result of this final rule, and a corresponding increase of 900 burden hours per year. We received no comments on the information collection requirements published in the proposed rule.

List of Subjects in 48 CFR Parts 12, 32, 47, and 52

Government procurement.

Dated: March 12, 2003.

Laura G. Smith,

Director, Acquisition Policy Division.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 12, 32, 47, and 52 as set forth below:

1. The authority citation for 48 CFR parts 12, 32, 47, and 52 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 12—ACQUISITION OF COMMERCIAL ITEMS

2. In section 12.504, amend paragraph (a) by redesignating paragraphs (a)(1) through (a)(11) as (a)(2) through (a)(12), respectively; by adding a new paragraph (a)(1); and by revising the newly designated paragraph (a)(11) to read as follows:

12.504 Applicability of certain laws to subcontracts for the acquisition of commercial items.

(a) * * *

(1) 10 U.S.C. 2631, Transportation of Supplies by Sea (except for the types of subcontracts listed at 47.504(d)).

* * * * *

(11) 46 U.S.C. Appx 1241(b), Transportation in American Vessels of Government Personnel and Certain Cargo (see Subpart 47.5) (except for the types of subcontracts listed at 47.504(d)).

* * * * *

PART 32—CONTRACT FINANCING

32.1103 [Amended]

3. Amend section 32.1103 in the introductory text of paragraph (e) by removing "10 U.S.C. 101(a)(13)" and adding "2.101" in its place.

PART 47—TRANSPORTATION

4. Amend section 47.504 by revising paragraph (d) to read as follows:

47.504 Exceptions.

* * * * *

(d) Subcontracts for the acquisition of commercial items or commercial components (see 12.504(a)(1) and (a)(11)). This exception does not apply to—

(1) Grants-in-aid shipments, such as agricultural and food-aid shipments;

(2) Shipments covered under 46 U.S.C. Appx 1241–1, such as those generated by Export-Import Bank loans or guarantees;

(3) Subcontracts under—

(i) Government contracts or agreements for ocean transportation services; or

(ii) Construction contracts; or

(4) Shipments of commercial items that are—

(i) Items the contractor is reselling or distributing to the Government without adding value (see FAR 12.501(b)). Generally, the contractor does not add value to the items when it subcontracts items for f.o.b. destination shipment; or

(ii) Shipped in direct support of U.S. military—

(A) Contingency operations;

(B) Exercises; or

(C) Forces deployed in connection with United Nations or North Atlantic Treaty Organization humanitarian or peacekeeping operations.

5. Revise section 47.507 to read as follows:

47.507 Contract clauses.

(a)(1) Insert the clause at 52.247–64, Preference for Privately Owned U.S.-Flag Commercial Vessels, in solicitations and contracts that may involve ocean transportation of supplies subject to the Cargo Preference Act of 1954. (For application of the Cargo Preference Act of 1954, see 47.502(a)(3), 47.503(a), and 47.504.)

(2) If an applicable statute requires, or if it has been determined under agency procedures, that the supplies to be furnished under the contracts must be transported exclusively in privately owned U.S.-flag commercial vessels (see 47.502(a)(1) and 47.503(b)), use the clause with its Alternate I.

(3) Except for contracts or agreements for ocean transportation services or construction contracts, use the clause with its Alternate II if any of the supplies to be transported are commercial items that are shipped in direct support of U.S. military—

(i) Contingency operations;

(ii) Exercises; or

(iii) Forces deployed in connection with United Nations or North Atlantic Treaty Organization humanitarian or peacekeeping operations.

(b) The contracting officer may insert in solicitations and contracts, under agency procedures, additional appropriate clauses concerning the vessels to be used.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

6. Amend section 52.212–5 by revising the date of the clause and paragraph (e)(4) to read as follows:

52.212–5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

* * * * *

Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercial Items (Apr. 2003)

* * * * *

(e) * * *

(4) 52.247–64, Preference for Privately Owned U.S.-Flag Commercial Vessels (46 U.S.C. Appx 1241 and 10 U.S.C. 2631) (flow down required in accordance with paragraph (d) of FAR clause 52.247–64); and

* * * * *

7. Amend section 52.213–4 by revising the date of the clause and paragraph (b)(1)(xi) to read as follows:

52.213–4 Terms and Conditions—Simplified Acquisitions (Other than Commercial Items).

* * * * *

Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items) (Apr. 2003)

* * * * *

(b)(1) * * *

(xi) 52.247–64, Preference for Privately Owned U.S.-Flag Commercial Vessels (APR 2003) (46 U.S.C. Appx 1241). (Applies to supplies transported by ocean vessels (except for the types of subcontracts listed at 47.504(d).)

* * * * *

8. Amend section 52.244–6 by revising the section and clause heading, the date of the clause, and paragraph (c)(1)(v) to read as follows:

§ 52.244–6 Subcontracts for Commercial Items and Commercial Components.

* * * * *

Subcontracts for Commercial Items and Commercial Components (Apr. 2003)

* * * * *

(c)(1) * * *

(v) 52.247–64, Preference for Privately Owned U.S.-Flag Commercial Vessels (APR 2003) (46 U.S.C. Appx 1241 and 10 U.S.C. 2631) (flow down required in accordance with paragraph (d) of FAR clause 52.247–64).

* * * * *

9. Amend section 52.247–64 by—

a. Revising the date of the clause;

b. Removing "The" from the beginning of the introductory text of paragraph (a) and adding "Except as provided in paragraph (e) of this clause, the" in its place;

c. Removing the period at the end of paragraph (d) and adding ", except those described in paragraph (e)(4)." in its place;

d. Removing "and" at the end of paragraph (e)(2);

e. Removing the period at the end of paragraph (e)(3) and adding "; and" in its place;

f. Adding paragraph (e)(4);

g. Revising the date, introductory text, and paragraph (a) of Alternate I; and

h. Revising Alternate II to read as follows:

52.247–64 Preference for Privately Owned U.S.-Flag Commercial Vessels.

* * * * *

Preference for Privately Owned U.S.-Flag Commercial Vessels (Apr 2003)

* * * * *

(e) * * *

(4) Subcontracts or purchase orders for the acquisition of commercial items unless—

(i) This contract is—

(A) A contract or agreement for ocean transportation services; or

(B) A construction contract, or

(ii) The supplies being transported are—

(A) Items the Contractor is reselling or distributing to the Government without adding value. (Generally, the Contractor does not add value to the items when it subcontracts items for f.o.b. destination shipment); or

(B) Shipped in direct support of U.S. military—

(*1*) Contingency operations;

(*2*) Exercises; or

(*3*) Forces deployed in connection with United Nations or

North Atlantic Treaty Organization humanitarian or peacekeeping operations.

* * * * *

Alternate I (*Apr 2003*). As prescribed in 47.507(a)(2), substitute the following paragraphs (a) and (b) for paragraphs (a) and (b) of the basic clause:

(a) Except as provided in paragraphs (b) and (e) of this clause, the Contractor shall use privately owned U.S.-flag commercial vessels, and no others, in the ocean transportation of any supplies to be furnished under this contract.

* * * * *

Alternate II (*Apr 2003*). As prescribed in 47.507(a)(3), substitute the following paragraph (e) for paragraph (e) of the basic clause:

(e) The requirement in paragraph (a) does not apply to—

(1) Cargoes carried in vessels of the Panama Canal

Commission or as required or authorized by law or treaty;

(2) Ocean transportation between foreign countries of supplies purchased with foreign currencies made available, or derived from funds that are made available, under the Foreign Assistance Act of 1961 (22 U.S.C. 2353); and

(3) Shipments of classified supplies when the classification prohibits the use of non-Government vessels.

(4) Subcontracts or purchase orders under this contract for the acquisition of commercial items unless the supplies being transported are—

(i) Items the Contractor is reselling or distributing to the Government without adding value. (Generally, the Contractor does not add value to the items when it subcontracts items for f.o.b. destination shipment); or

(ii) Shipments in direct support of U.S. military—

(A) Contingency operations;

(B) Exercises; or

(C) Forces deployed in connection with United Nations or North Atlantic Treaty Organization humanitarian or peacekeeping operations. (*Note:* This contract requires shipment of commercial items in direct support of U.S. military contingency operations, exercises, or forces deployed in connection with United Nations or North Atlantic Treaty Organization humanitarian or peacekeeping operations.)

[FR Doc. 03–6373 Filed 3–17–03; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 29 and 52

[FAC 2001–13; FAR Case 2000–016; Item III]

RIN 9000–AJ39

Federal Acquisition Regulation; Federal, State, and Local Taxes

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to clarify the prescriptions for use of clauses relating to Federal, State, and local taxes. In addition, the rule deletes the clause at FAR 52.229–5, Taxes—Contracts Performed in U.S. Possessions or Puerto Rico, and updates and moves the definition of "local taxes."

DATES: Effective Date: April 17, 2003.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC, 20405, (202) 501–4755, for information pertaining to status or publication schedules. For clarification of content, contact Mr. Ralph De Stefano, Procurement Analyst, at (202) 501–1758. Please cite FAC 2001–13, FAR case 2000–016.

SUPPLEMENTARY INFORMATION:

A. Background

This final rule amends the FAR to clarify the prescriptions at FAR 29.401 for use of FAR clauses 52.229–3, Federal, State, and Local Taxes; 52.229–4, Federal, State, and Local Taxes (State and Local Adjustments). In addition, the rule deletes the clause at 52.229–5, Taxes—Contracts Performed in U.S. Possessions or Puerto Rico, and moves the definition of "local taxes" from the clause at 52.229–5 to the clauses at 52.229–3 and 52.229–4, and updates the definition by adding U.S. territories and the Commonwealth of the Northern Mariana Islands, which are no longer considered possessions of the United States.

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 67 FR 38552, June 4, 2002. Two sources

Cargo pref 1

3. A new subpart F, consisting of §§ 162.600, 162.605 and 162.610, is added to read as follows:

Subpart F—Standard Unique Employer Identifier

Sec.
162.600 Compliance dates of the implementation of the standard unique employer identifier.
162.605 Standard unique employer identifier.
162.610 Implementation specifications for covered entities.

Subpart F—Standard Unique Employer Identifier

§ 162.600 Compliance dates of the implementation of the standard unique employer identifier.

(a) *Health care providers.* Health care providers must comply with the requirements of this subpart no later than July 30, 2004.

(b) *Health plans.* A health plan must comply with the requirements of this subpart no later than one of the following dates:

(1) *Health plans other than small health plans*— July 30, 2004.

(2) *Small health plans*— August 1, 2005.

(c) *Health care clearinghouses.* Health care clearinghouses must comply with the requirements of this subpart no later than July 30, 2004.

§ 162.605 Standard unique employer identifier.

The Secretary adopts the EIN as the standard unique employer identifier provided for by 42 U.S.C. 1320d–2(b).

§ 162.610 Implementation specifications for covered entities.

(a) The standard unique employer identifier of an employer of a particular employee is the EIN that appears on that employee's IRS Form W–2, Wage and Tax Statement, from the employer.

(b) A covered entity must use the standard unique employer identifier (EIN) of the appropriate employer in standard transactions that require an employer identifier to identify a person or entity as an employer, including where situationally required.

Subparts G Through H—[Reserved]

4. Subparts G through H are reserved.

Dated: March 20, 2002.

Tommy G. Thompson

Secretary.

[FR Doc. 02–13616 Filed 5–24–02; 4:50 pm]

BILLING CODE 4120–01–P

DEPARTMENT OF DEFENSE

48 CFR Parts 213, 247, and 252

[DFARS Case 2000–D014]

Defense Federal Acquisition Regulation Supplement; Ocean Transportation by U.S.-Flag Vessels

AGENCY: Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD has issued a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to specify that requirements for use of U.S.-flag vessels, in the transportation of supplies by sea, apply to contracts at or below the simplified acquisition threshold as well as those that exceed the simplified acquisition threshold.

EFFECTIVE DATE: May 31, 2002.

FOR FURTHER INFORMATION CONTACT: Ms. Amy Williams, (703) 602–0328.

SUPPLEMENTARY INFORMATION:

A. Background

The clause at DFARS 252.247–7023, Transportation of Supplies by Sea, contains requirements for use of U.S.-flag vessels when transporting supplies by sea under a DoD contract. The clause requires a contractor to (1) submit any request for use of other than U.S.-flag vessels in writing to the contracting officer;

(2) provide a copy of the bill of lading to the contracting officer and the Maritime Administration after each shipment of supplies by sea; (3) provide with the final invoice a representation as to whether ocean transportation and U.S.-flag vessels were used in performance of the contract; and (4) include the clause in subcontracts for construction supplies, noncommercial items, and certain commercial items.

Prior to this rule, the DFARS exempted contracts and subcontracts at or below the simplified acquisition threshold from use of the clause at DFARS 252.247–7023. In accordance with 10 U.S.C. 2631, Supplies: Preference to United States Vessels, this rule eliminates the exemption. However, the rule prescribes an alternate version of the clause for contracts and subcontracts at or below the simplified acquisition threshold. The alternate version excludes the requirement for a contractor or subcontractor to provide a representation regarding ocean transportation with its final invoice.

DoD published a proposed rule at 66 FR 47153 on September 11, 2001. Five sources submitted comments on the proposed rule. A summary of the comments and the DoD response is provided below:

Comment: The rule is contrary to Section 4101 of the Federal Acquisition Streamlining Act of 1994 (FASA) (Public Law 103–355; 41 U.S.C. 429), which requires the Federal Acquisition Regulation (FAR) to include 10 U.S.C. 2631 in a list of laws that are inapplicable to contracts and subcontracts at or below the simplified acquisition threshold unless the Federal Acquisition Regulatory Council makes a written determination that it would not be in the best interest of the Federal Government to exempt such contracts and subcontracts.

DoD Response: The list of laws referred to by the respondent applies to laws enacted after FASA. 10 U.S.C. 2631 has been in existence since 1904. There is no statutory authority to exempt 10 U.S.C. 2631 for contracts or subcontracts at or below the simplified acquisition threshold. In addition, the policy in this DFARS rule is consistent with the FAR rule published at 65 FR 24324 on April 25, 2000, which applies the preference for U.S.-flag vessels to contracts awarded using simplified acquisition procedures.

Comment: The rule is contrary to Section 4201(a) of FASA (41 U.S.C. 427(a)), which requires that the FAR provide special simplified procedures for purchases of property and services for amounts not greater than the simplified acquisition threshold. Compliance with 10 U.S.C. 2631 for such purchases of property would impose unreasonable administrative burdens on affected contractors and subcontractors.

DoD Response: The rule is consistent with the provisions of 41 U.S.C. 427 in that it seeks to avoid overly burdensome reporting requirements for acquisitions at or below the simplified acquisition threshold. The rule does not require use of the provision at DFARS 252.247–7022, Representation of Extent of Transportation by Sea, or the clause at DFARS 252.247–7024, Notification of Transportation of Supplies by Sea, in acquisitions at or below the simplified acquisition threshold. Additionally, the rule limits the requirements of the clause at DFARS 252.247–7023, Transportation of Supplies by Sea, in contracts and subcontracts at or below the simplified acquisition threshold by excluding from those contracts and subcontracts the requirement for a contractor or subcontractor to provide a representation regarding ocean transportation with its final invoice.

Comment: DFARS 247.573(a)(2) exempts solicitations valued at or below

the simplified acquisition threshold from the requirement for offerors to represent whether or not ocean transportation will be used in performance of the contract. This representation (252.247–7022) helps to ensure that an offeror is cognizant of requirements for use of U.S.-flag vessels and that the contracting officer is aware of requirements for ocean transportation. Elimination of this representation is likely to increase incidents of non-compliance with Cargo Preference laws and adversely impact the U.S.-flag merchant marine. In addition, the new Alternate III for the clause at 252.247–7023, Transportation of Supplies by Sea, eliminates the following requirements for contracts and subcontracts at or below the simplified acquisition threshold: (1) The requirement for a contractor to provide a representation regarding ocean transportation with its final invoice; (2) The requirement for the Government to reject and return an invoice that does not contain the required representation; and (3) The right of the Government to equitably adjust the contract for unauthorized use of non-U.S.-flag vessels. Elimination of these requirements diminishes the ability of the contracting officer to monitor and enforce compliance with Cargo Preference laws.

DoD Response: Due to the increased potential for use of ocean transportation in contracts exceeding the simplified acquisition threshold, the DFARS requires contractors to provide multiple representations and requires contracting officers to determine whether ocean transportation will be required during the solicitation phase of an acquisition. These actions ensure that the contracting officer has the information needed to perform the appropriate level of oversight for high dollar value acquisitions. Since only a very limited number of procurements at or below the simplified acquisition threshold will require ocean transportation, the type of representations required above the simplified acquisition threshold would create an unnecessary burden on the majority of contractors receiving contracts at or below the threshold. Therefore, DoD believes that the costs of enforcing these requirements in contracts with an anticipated value at or below the simplified acquisition threshold would far outweigh the benefits and would be contrary to the provisions of 41 U.S.C. 427. DoD believes that the rule is an appropriate balance between the need to enforce the Cargo Preference laws and the need to impose minimal burden on contractors and subcontractors (many small businesses) when the value of the contract or subcontract does not exceed the simplified acquisition threshold.

Comment: The rule removes DFARS 247.572–1(c), which (1) requires the contracting officer to ask each offeror if it will transport supplies by sea, (2) requires a contractor that did not anticipate transportation of supplies by sea when it submitted its offer to notify the Government if it later intends to use ocean transportation, and (3) requires the contractor to use U.S.-flag vessels in the transportation of supplies by sea and comply with other requirements of the clause at 252.247–7023, Transportation of Supplies by Sea. Elimination of these requirements will decrease Government oversight and will allow offerors and contractors to circumvent the requirements of the Cargo Preference laws.

DoD Response: The DFARS still contains these requirements. The text at DFARS 247.572–1(c) was removed because it was redundant of the policy found at DFARS 247.571(a), 247.573(a), 252.247–7022, 252.247–7023, and 252.247–7024.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

B. Regulatory Flexibility Act

DoD certifies that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because most entities that provide ocean transportation of freight are not small businesses, and the rule minimizes the information required from offerors and contractors for acquisitions valued at or below the simplified acquisition threshold.

C. Paperwork Reduction Act

The Paperwork Reduction Act applies. This rule increases the number of contractors subject to the information collection requirements in paragraphs (d) and (e) of the clause at DFARS 252.247–7023. DoD estimates that this change will increase paperwork burden by approximately 240 hours. The Office of Management and Budget (OMB) has approved this information collection for use through July 31, 2004, under OMB Control Number 0704–0245.

List of Subjects in 48 CFR Parts 213, 247, and 252

Government procurement.

Michele P. Peterson,

Executive Editor, Defense Acquisition Regulations Council.

Therefore, 48 CFR Parts 213, 247, and 252 are amended as follows:

1. The authority citation for 48 CFR Parts 213, 247, and 252 continues to read as follows:

PART 213—SIMPLIFIED ACQUISITION PROCEDURES

2. Section 213.301 is amended in paragraph (2)(i)(E) by removing the word "and", and by adding paragraph (2)(i)(G) to read as follows:

213.301 Governmentwide commercial purchase card.

* * * * *

(2) * * *

(i) * * *

(G) Does not require transportation of supplies by sea; and

* * * * *

PART 247—TRANSPORTATION

247.572–1 [Amended]

3. Section 247.572–1 is amended by removing paragraph (c) and redesignating paragraph (d) as paragraph (c).

4. Section 247.573 is amended by revising paragraph (b)(1) and adding paragraph (b)(4) to read as follows:

247.573 Solicitation provision and contract clauses.

* * * * *

(b)(1) Use the clause at 252.247–7023, Transportation of Supplies by Sea, in all solicitations and resultant contracts, except those for direct purchase of ocean transportation services.

* * * * *

(4) Use the clause with its Alternate III in solicitations and contracts with an anticipated value at or below the simplified acquisition threshold.

* * * * *

PART 252—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

252.212–7001 [Amended]

5. Section 252.212–7001 is amended as follows:

a. By revising the clause date to read "(MAY 2002)"; and

b. In paragraph (b), in the entry "252.247–2023", by removing "(MAR 2000)" the first time it appears and adding in its place "(MAY 2002)".

6. Section 252.247–7023 is amended by revising the clause date, paragraph (e) introductory text, paragraph (f) introductory text, and paragraph (h), and by adding Alternate III to read as follows:

252.247–7023 Transportation of Supplies by Sea.

* * * * *

Transportation of Supplies by Sea (May 2002)

* * * * *

(e) The Contractor shall, within 30 days after each shipment covered by this clause, provide the Contracting Officer and the Maritime Administration, Office of Cargo Preference, U.S. Department of Transportation, 400 Seventh Street SW., Washington, DC 20590, one copy of the rated on board vessel operating carrier's ocean bill of lading, which shall contain the following information:

* * * * *

(f) The Contractor shall provide with its final invoice under this contract a representation that to the best of its knowledge and belief—

* * * * *

(h) In the award of subcontracts for the types of supplies described in paragraph (b)(2) of this clause, the Contractor shall flow down the requirements of this clause as follows:

(1) The Contractor shall insert the substance of this clause, including this paragraph (h), in subcontracts that exceed the simplified acquisition threshold in part 2 of the Federal Acquisition Regulation.

(2) The Contractor shall insert the substance of paragraphs (a) through (e) of this clause, and this paragraph (h), in subcontracts that are at or below the simplified acquisition threshold in part 2 of the Federal Acquisition Regulation.

* * * * *

Alternate III (May 2002)

As prescribed in 247.573(b)(4), substitute the following paragraph (f) for paragraphs (f), (g), and (h) of the basic clause:

(f) The Contractor shall insert the substance of this clause, including this paragraph (f), in subcontracts that are for a type of supplies described in paragraph (b)(2) of this clause.

[FR Doc. 02–13359 Filed 5–30–02; 8:45 am]

BILLING CODE 5001–08–P

DEPARTMENT OF DEFENSE

48 CFR Parts 226 and 252

[DFARS Case 2000–D024]

Defense Federal Acquisition Regulation Supplement; Utilization of Indian Organizations and Indian-Owned Economic Enterprises

AGENCY: Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD has adopted as final, without change, an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement Section 8022 of the DoD Appropriations Act for Fiscal Year 2001. Section 8022 provides for incentive payments to DoD contractors, and subcontractors at any tier, that use Indian organizations and Indian-owned economic enterprises as subcontractors.

EFFECTIVE DATE: May 31, 2002.

FOR FURTHER INFORMATION CONTACT: Ms. Angelina Moy, Defense Acquisition Regulations Council, OUSD(AT&L)DP(DAR), IMD 3C132, 3062 Defense Pentagon, Washington, DC 20301–3062. Telephone (703) 602–1302; facsimile (703) 602–0350. Please cite DFARS Case 2000–D024.

SUPPLEMENTARY INFORMATION:

A. Background

This rule implements Section 8022 of the DoD Appropriations Act for Fiscal Year 2001 (Public Law 106–259). Section 8022 provides funding for incentive payments to DoD contractors, and subcontractors at any tier, that use Indian organizations and Indian-owned economic enterprises as subcontractors.

DoD published an interim rule at 66 FR 47110 on September 11, 2001. The rule revised DFARS 226.104 and added a new clause at DFARS 252.226–7001. The new clause is similar to the clause at FAR 52.226–1, Utilization of Indian Organizations and Indian-Owned Economic Enterprises, but contains the DoD requirement to provide for incentive payments to subcontractors at any tier.

Nineteen sources submitted comments in response to the interim rule. A summary of the comments and the DoD response is provided below:

Comment: The DFARS policy excludes contracts awarded using FAR Part 12 (commercial item) procedures from the Indian Incentive Program. This exclusion should be removed.

DoD Response: This exclusion was established under previous DFARS Case 99–D300, published at 65 FR 19858 on April 13, 2000. A change to this exclusion is outside the scope of the present case. However, the DoD Office of Small and Disadvantaged Business Utilization is continuing to study this issue.

Comment: The definition of "Indian" should be amended to include Native Hawaiians.

DoD Response: Do not concur. The statutory basis for the Indian Incentive Program is 25 U.S.C. Chapter 17 (Section 1544). The definition of "Indian" provided in 25 U.S.C. Chapter 17 (Section 1452) does not include Native Hawaiians.

Comment: Prime contractors should be required to sponsor subcontractor claims for incentive payments.

DoD Response: Do not concur. The statute authorizing the Indian Incentive Program (25 U.S.C. 1544) provides that a contractor or subcontractor *may* be allowed an additional amount of compensation for subcontracts awarded to Indian organizations or Indian-owned economic enterprises. There is no statutory authority for DoD to require a contractor to submit or sponsor claims for incentive payments for its subcontractors.

This rule was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993.

B. Regulatory Flexibility Act

DoD certifies that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because DoD already was implementing the Indian Incentive Program through use of the clause at FAR 52.226–1, Indian Organizations and Indian-Owned Economic Enterprises. The FAR clause permits incentive payments to large and small contractors that use Indian organizations or enterprises as subcontractors. The new DFARS clause expands the incentive payments to subcontractors at any tier. While this expansion should benefit small businesses that award lower-tier subcontracts to Indian organizations or enterprises, the economic impact should not be substantial.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the rule does not impose any information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 226 and 252

Government procurement.

Michele P. Peterson,

Executive Editor, Defense Acquisition Regulations Council.

Interim Rule Adopted as Final Without Change

Accordingly, the interim rule amending 48 CFR Parts 226 and 252, which was published at 66 FR 47110 on

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 12, and 52

[FAR Case 2000–305]

RIN 9000–AJ55

Federal Acquisition Regulation; Commercially Available Off-the-Shelf Items

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Advance notice of proposed rulemaking.

SUMMARY: The Federal Acquisition Regulatory Council is soliciting comments regarding the implementation of section 4203 of the Federal Acquisition Reform Act (the Act) with respect to Commercially Available Off-the-Shelf Item Acquisitions. The Act requires the Federal Acquisition Regulation (FAR) to list certain provisions of law that are inapplicable to contracts for acquisition of commercially available off-the-shelf items. The statute excludes section 15 of the Small Business Act and bid protest procedures from the list. The list of statutes cannot include a provision of law that provides for criminal or civil penalties.

Certain laws have already been determined to be inapplicable to all commercial items as a result of the implementation of the Federal Acquisition Streamlining Act of 1994 (see FAR 12.503). The additional provisions of law that could be determined inapplicable to commercially available off-the-shelf items are listed under **SUPPLEMENTARY INFORMATION** below.

DATES: Comments are due on or before March 31, 2003.

ADDRESSES: Interested parties should submit written comments to—General Services Administration, FAR Secretariat (MVA), 1800 F Street, NW., Room 4035, *Attn:* Laurie Duarte, Washington, DC 20405.

Submit electronic comments via the Internet to—*farcase.2000–305@gsa.gov.*

Please submit comments only and cite FAR case 2000–305 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405, at (202) 501–4755 for information pertaining to status or publication schedules. For clarification of content, contact Ms. Victoria Moss, Procurement Analyst, at (202) 501–4764. Please cite FAR case 2000–305.

SUPPLEMENTARY INFORMATION: The provisions of law that could be determined inapplicable to commercially available off-the-shelf items are: 5 U.S.C. 552a, Privacy Act (*see* 52.239–1); 29 U.S.C. 793, Affirmative Action for Handicapped Workers (*see* 52.222–36); 31 U.S.C. 529, Restriction on Advance Payments (allow agencies to modify paragraph (i) in the clause at 52.212–4 to require payment upon notice of shipping); 38 U.S.C. 4212, Affirmative Action for Special Disabled Vietnam Era Veterans (*see* 52.222–35); 38 U.S.C. 4212(d)(1), Employment Reports on Special disabled Veterans and Veterans of the Vietnam Era (*see* 52.222–37); 41 U.S.C. 10, Buy American Act—Supplies (*see* 52.225–1 and 52.225–3); 41 U.S.C. 253d, Validation of Proprietary Data Restrictions (*see* section 12.211); 41 U.S.C. 253g and 10 U.S.C. 2482, Prohibition on Limiting Subcontractor Direct Sales to the United States (*see* 52.203–6); 41 U.S.C. 254d(c) and 10 U.S.C. 2513(c), Examination of Records of Contractor (*see* 52.215–2); 41 U.S.C. 418a, Rights in Technical Data (*see* section 12.211); 41 U.S.C. 442, Cost Accounting Standards (*see* section 12.214 and the FAR Appendix, 48 CFR Chapter 99); 41 U.S.C. 423(e)(3), Administrative Actions (*see* 3.104); 46 U.S.C. 1241(b), Transportation in American Vessels of Government Personnel and Certain Cargo (*see* 52.247–64); and 42 U.S.C. 6962(c)(3)(A)(ii), Estimate of Percentage of Recovered Material Content for EPA-Designated Products (see 52.223–9).

For purposes of this notice, a "commercially available off-the-shelf item"—

(a) Means any item of supply, other than real property, that—

(1) Is of a type customarily used by the general public for nongovernmental purposes;

(2) Has been sold in substantial quantities in the commercial marketplace; and

(3) Is offered to the Government, without modification, in the same form in which it is sold in the commercial marketplace.

(b) This does not include bulk cargo, as defined in 46 U.S.C. App. 1702, such as agricultural and petroleum products.

Dated: January 23, 2003.

Al Matera,

Director, Acquisition Policy Division.

[FR Doc. 03–1961 Filed 1–29–03; 8:45 am]

BILLING CODE 6820–EP–P

DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 2, 3, 12, 22, 23, 25, 27, 44, 47, and 52

[FAR Case 2000–305]

RIN 9000–AJ55

Federal Acquisition Regulation; Commercially Available Off-the-Shelf (COTS) Items

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are soliciting comments regarding the implementation of section 4203 of the Clinger-Cohen Act of 1996, 41 U.S.C. 431 (the Act) with respect to Commercially Available Off-the-Shelf Item acquisitions. The Act requires the Federal Acquisition Regulation (FAR) list certain provisions of law that are inapplicable to contracts for acquisitions of commercially available off-the-shelf items. The Act excludes section 15 of the Small Business Act and bid protest procedures from the list. The list of inapplicable statutes cannot include a provision of law that provides for criminal or civil penalties.

DATES: Interested parties should submit comments in writing on or before March 15, 2004 to be considered in the formulation of a final rule.

ADDRESSES: Submit written comments to General Services Administration, FAR Secretariat (MVA), 1800 F Street, NW., Room 4035, ATTN: Laurie Duarte, Washington, DC 20405.

Submit electronic comments via the Internet to— *farcase.2000–305@gsa.gov.*

Please submit comments only and cite FAR case 2000–305 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat at (202) 501–4755 for information pertaining to status or publication schedules. For clarification of content, contact Mr. Gerald Zaffos, Procurement Analyst, at (202) 208–6091. Please cite FAR case 2000–305.

SUPPLEMENTARY INFORMATION:

A. Background

Certain laws have already been determined to be inapplicable to all commercial items as a result of the implementation of the Federal Acquisition Streamlining Act of 1994 (*see* FAR 12.503). On January 30, 2003, the FAR Secretariat issued an Advanced Notice of Proposed Rulemaking in the **Federal Register** (68 FR 4874) that lists the additional provisions of law that could be determined inapplicable to commercially available off-the-shelf (COTS) items. Seven public comments were received. The Commercial Products and Practices Committee reviewed the public comments; identified potential changes to the FAR; and submitted a report, including a draft proposed rule for consideration by the Councils.

The Councils recognize the concerns raised by the U.S. Trade Representative, the Department of Labor, and other agencies regarding the listing of certain laws. The proposed rule does not represent a final decision on any of those laws. Rather, the proposed rule lists the universe of laws that could be determined inapplicable to COTS. The Council is seeking public comments that the Administrator for Federal Procurement Policy will use in making the statutory determination that it would be in the best interest of the Government to maintain certain of those proposed laws.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The changes may have a significant, but beneficial, economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule exempts the application of a number of laws to businesses, large and small, offering commercially available off-the-shelf items to the Federal Government. An Initial Regulatory Flexibility Act Analysis (IRFA) has been prepared and is summarized as follows:

The objective and legal basis of this rule is to implement the requirements of section 4203 of the Clinger-Cohen Act (Public Law 104–106). Available data indicates that many commercial sales to the Government will come from small businesses. The rule does not impose new reporting or record keeping requirements and does not duplicate, overlap, or conflict with any other Federal rules. The rule is expected to have a beneficial impact on industry because it proposes to exempt purchases of commercially available off-the-shelf items from many Government-unique requirements. Although the rule does not specifically propose different procedures for small versus large entities, existing preferences for small businesses, contained in FAR Part 19, remain unchanged. We believe that the relief from administrative burdens proposed by this rule may serve to motivate more small entities to do business with the Government.

The FAR Secretariat has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the FAR Secretariat. Comments are invited. The Councils will consider comments from small entities concerning the affected FAR parts 2, 3, 12, 22, 23, 25, 27, 44, 47, and 52 in accordance with 5 U.S.C. 610. Comments must be submitted separately and should cite 5 U.S.C. 601, *et seq.* (FAR case 2000–305), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act applies. It is anticipated that the rule will reduce annual information collection burdens. An estimate of the burden reduction is undetermined at this time. The reduction will be dependant on the estimated burden reductions taken for each provision of law that will be excluded from the final rule. Accordingly, a Paperwork Reduction Act Change to pertinent existing burdens will be submitted to the Office of Management and Budget under 44 U.S.C. 2502, *et seq.*

List of Subjects in 48 CFR Parts 2, 3, 12, 22, 23, 25, 27, 44, 47, and 52

Government procurement.

Dated: January 9, 2004.

Ralph De Stefano,

Deputy Director, Acquisition Policy Division.

Therefore, DoD, GSA, and NASA propose amending 48 CFR parts 2, 3, 12, 22, 23, 25, 27, 44, 47, and 52 as set forth below:

1. The authority citation for 48 CFR parts 2, 3, 12, 22, 23, 25, 27, 44, 47, and 52 is revised to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 2—DEFINITIONS OF WORDS AND TERMS

2. Amend section 2.101 in paragraph (b) by adding, in alphabetical order, the definition "Commercially available off-the-shelf item (COTS)" to read as follows:

2.101 Definitions.

* * * * *

(b) * * *

Commercially available off-the-shelf item (COTS)—(1) Is a subset of a

commercial item and means any item of supply that is—

(i) A commercial item (as defined in this section);

(ii) Sold in substantial quantities in the commercial marketplace; and

(iii) Offered to the Government, without modification, in the same form in which it is sold in the commercial marketplace.

(2) Does not include bulk cargo, as defined in section 3 of the Shipping Act of 1984 (46 U.S.C. App. 1702), such as agricultural products and petroleum products.

* * * * *

PART 3—IMPROPER BUSINESS PRACTICES AND PERSONAL CONFLICTS OF INTEREST

3. Revise section 3.503–2 to read as follows:

3.503–2 Contract clause.

The contracting officer shall insert the clause at 52.203–6, Restrictions on Subcontractor Sales to the Government, in solicitations and contracts exceeding the simplified acquisition threshold, except when contracts are for the acquisition of commercially available off-the-shelf items. For the acquisition of commercial items, other than COTS, the contracting officer shall use the clause with its Alternate I.

PART 12—ACQUISITION OF COMMERCIAL ITEMS

4. Amend section 12.102 by adding a sentence to the end of paragraph (a) to read as follows:

12.102 Applicability.

(a) * * * Unless indicated otherwise, all of the policies that apply to commercial items also apply to COTS items defined in 2.101.

* * * * *

5. Amend section 12.301 by—

a. Revising the section heading;

b. Adding a sentence to the end of paragraph (b)(3);

c. Revising the paragraph heading and the first sentence of paragraph (b)(4); and

d. Adding paragraph (b)(5) to read as follows:

12.301 Solicitation provisions and contract clauses.

* * * * *

(b) * * *

(3) * * * When acquiring a COTS item, contracting officers may include Alternate I of the clause when it is in the best interests of the Government.

(4) *The clause at 52.212–5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items (Other than COTS).* This clause incorporates by reference only those clauses required to implement provisions of law or executive orders applicable to the acquisition of commercial items, other than COTS items. * * *

(5) *The clause at 52.212–XX, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercially Available Off-the-Shelf (COTS) Items.* This clause incorporates by reference only those clauses required to implement provisions of law or Executive orders applicable to the acquisition of COTS items. The contracting officer shall attach this clause to the solicitation and contract and, using the appropriate clause prescriptions, indicate which, if any, of the additional clauses cited in 52.212–XX (b) or (c) are applicable to the specific acquisition. This clause may not be tailored.

* * * * *

Subpart 12.5—Applicability of Certain Laws to the Acquisition of Commercial Items and Commercially Available Off-the-Shelf Items

6. Revise the heading of Subpart 12.5 to read as set forth above.

7. Revise section 12.500 to read as follows:

12.500 Scope of subpart.

(a) As required by sections 34 and 35 of the Office of Federal Procurement Policy Act (41 U.S.C. 401, *et seq.*), this subpart lists provisions of law that are not applicable to—

(1) Contracts for commercial items;

(2) Subcontracts, at any tier, for the acquisition of commercial items; and

(3) Contracts and subcontracts, at any tier, for the acquisition of COTS items.

(b) This subpart also lists provisions of law that have been amended to eliminate or modify their applicability to either contracts or subcontracts for the acquisition of commercial items.

8. Amend section 12.502 by adding paragraph (c) to read as follows:

12.502 Procedures.

* * * * *

(c) The FAR prescription for the provision or clause for each of the laws listed in 12.505 has been revised in the appropriate part to reflect its proper application to prime contracts for the acquisition of COTS items. For subcontracts for the acquisition of COTS items or COTS components, the clauses at 52.212-XX, Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercially Available Off-the-Shelf (COTS) Items, and 52.244–6, Subcontracts for Commercial Items and Commercial Components, reflect the applicability of the laws listed in 12.505 by identifying the only provisions and clauses that are required to be included in a subcontract at any tier for the acquisition of COTS items or COTS components.

12.504 [Amended]

9. Amend section 12.504 in paragraph (a) by removing paragraph (a)(2) and redesignating paragraphs (a)(3) through (a)(12) as (a)(2) through (a)(11), respectively.

10. Add section 12.505 to read as follows:

12.505 Applicability of certain laws to contracts and subcontracts for the acquisition of COTS items.

(a) The following laws are not applicable to contracts or subcontracts, at any tier, for the acquisition of COTS items:

(1) 10 U.S.C. 2631, Transportation of Supplies by Sea (*see* 52.247–64).

(2) 19 U.S.C. 2501, *et seq.*, Trade Agreements Act (*see* 52.225–5).

(3) 19 U.S.C. 2512, *et seq.*, Trade Agreements Act (*see* 52.225–5).

(4) 29 U.S.C. 793, Affirmative Action for Handicapped Workers (*see* 52.222–36).

(5) 31 U.S.C. 3324, Restrictions on Advance Payments (*see* Alternate I to 52.212–4 which permits payment upon notice of shipping).

(6) 31 U.S.C. 1352, Limitation on Payments to Influence Certain Federal Transactions (*see* Subpart 3.8).

(7) 31 U.S.C. 1354(a), Limitation on use of appropriated funds for contracts with entities not meeting veteran's employment reporting requirements (*see* 22.1302).

(8) 38 U.S.C. 4212, Equal Opportunity for Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans (*see* 52.222–35).

(9) 38 U.S.C. 4212(d)(1), Employment Reports on Special Disabled Veterans, Veterans of the Vietnam Era, and Other Eligible Veterans (*see* 52.222–37).

(10) 41 U.S.C. 10a, *et seq.*, Buy American Act—Supplies (*see* 52.225–1 and 52.225–3).

(11) 41 U.S.C. 43, Walsh-Healey Act (*see* Subpart 22.6).

(12) 41 U.S.C. 416(a)(6), Minimum Response Time for Offers under Office of Federal Procurement Policy Act (*see* Subpart 5.2).

(13) 41 U.S.C. 418a, Rights in Technical Data (*see* sections 12.211 and 27.409).

(14) 41 U.S.C. 253d, Validation of Proprietary Data Restrictions (*see* sections 12.211 and 27.409).

(15) 41 U.S.C. 253g and 10 U.S.C. 2402, Prohibition of Limiting Subcontractor Direct Sales to the United States (*see* 52.203–6).

(16) 41 U.S.C. 254(a) and 10 U.S.C. 2306(b), Contingent Fees (*see* Subpart 3.4).

(17) 41 U.S.C. 254d(c) and 10 U.S.C. 2513(c), Examination of Records of Contractor (*see* 52.215–2).

(18) 41 U.S.C. 701, *et seq.*, Drug-Free Workplace Act of 1988 (*see* Subpart 23.5).

(19) 46 U.S.C. Appx 1241(b), Transportation in American Vessels of Government Personnel and Certain Cargo (*see* 52.247–64).

(20) 49 U.S.C. 40118, Fly American provisions (*see* Subpart 47.4).

(b) The requirement for a clause and certain other requirements related to 40 U.S.C. 327, *et seq.*, Requirements for a Certificate and Clause under the Contract Work Hours and Safety Standards Act (*see* Subpart 22.3), 41 U.S.C. 57(a) and (b), and 41 U.S.C. 58, the Anti-Kickback Act of 1986, and 42 U.S.C. 6962(c)(3)(A), Estimate of Percentage of Recovered Material EPA-Designated Product (limited to the certification and estimate requirements) (*see* 52.223–9) have been eliminated for contracts and subcontracts at any tier for the acquisition of COTS items (*see* 3.502).

(c) The applicability of 41 U.S.C. 254(d) and 10 U.S.C. 2306a, Truth in Negotiations Act (*see* Subpart 15.4) and 41 U.S.C. 422, Cost Accounting Standards (*see* section 12.214) have been modified in regards to contracts or subcontracts at any tier for the acquisition of COTS items.

PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

22.1310 [Amended]

11. Amend section 22.1310 by removing the word "Insert" from the introductory text of paragraph (a)(1) and adding "Except for the acquisition of commercially available off-the-shelf items, insert" in its place.

22.1408 [Amended]

12. Amend section 22.1408 in the introductory text of paragraph (a) by removing the comma after "$10,000" and adding "and are not for the acquisition of commercially available off-the-shelf items," in its place.

PART 23—ENVIRONMENT, CONSERVATION, OCCUPATIONAL SAFETY, AND DRUG-FREE WORKPLACE

23.406 [Amended]

13. Amend section 23.406 by removing the word "Insert" from paragraphs (a) and (b) and adding "Except for the acquisition of commercially available off-the-shelf items, insert" in its place.

PART 25—FOREIGN ACQUISITION

14. Amend section 25.401 by—

a. Removing the word "and" from the end of paragraph (a)(4);

b. Removing the period at the end of paragraph (a)(5) and adding "; and" in its place; and

c. Adding paragraph (a)(6) to read as follows:

25.401 Exceptions.

(a) * * *

(6) Acquisitions for commercially available off-the-shelf items.

* * * * *

15. Amend section 25.1101 by—

a. Removing from the introductory text of paragraph (a)(1) "or $15,000 for acquisitions as described in 13.201(g)(1)(ii)";

b. Removing the word "or" from the end of paragraph (a)(1)(ii);

c. Removing the period from the end of paragraph (a)(1)(iii) and adding "; or" in its place;

d. Adding paragraph (a)(1)(iv); and

e. Removing the word "Insert" from the introductory text of paragraph (b)(1)(i) and adding "Except for the acquisition of commercially available off-the-shelf items, insert" in its place. The added text reads as follows:

25.1101 Acquisition of supplies.

* * * * *

(a)(1) * * *

(iv) The acquisition is for commercially available off-the-shelf items.

* * * * *

PART 27—PATENTS, DATA, AND COPYRIGHTS

16. Amend section 27.409 by—

a. Removing the word "or" from the end of paragraph(a)(1)(vi);

b. Removing ". (*See* 27.408.)" from the end of paragraph (a)(1)(vii) and adding "(*see* 27.408); or" in its place; and

c. Adding paragraph (a)(1)(viii) to read as follows:

27.409 Solicitation provisions and contract clauses.

(a)(1) * * *

(viii) An acquisition for commercially available off-the-shelf items.

* * * * *

PART 44—SUBCONTRACTING POLICIES AND PROCEDURES

44.400 [Amended]

17. Amend section 44.400 by removing the period at the end of the sentence and adding "and section 4203 (Pub. L. 104–106)." in its place.

PART 47—TRANSPORTATION

47.507 [Amended]

18. Amend section 47.507 in paragraph (a)(1) by removing "Insert" and adding "Except for the acquisition of commercially available off-the-shelf items, insert" in its place.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

52.212–3 [Amended]

19. Amend section 52.212–3 by revising the date of the provision to read "(Date)"; and in paragraph (e) of the clause by removing the period after "$100,000" and adding ", except for the acquisition of commercially available off-the-shelf items." in its place.

20. Amend section 52.212–4 by adding Alternate I to read as follows:

52.212–4 Contract Terms and Conditions—Commercial Items.

* * * * *

(Alternate I (XX/XX)). As prescribed in 12.301(b)(3), substitute the following paragraph (i)(1) for paragraph(i)(1) in the basic clause:

(i)(1) *Items accepted.* Payment shall be made based upon the Contractor's submission of an invoice that is supported by evidence the Contractor has delivered the supplies to a post office, common carrier, or point of first receipt by the Government. Payment prior to acceptance shall not abrogate the Contractor's responsibilities to replace, repair, or correct—

(i) Supplies not received at destination;

(ii) Supplies damaged in transit; or

(iii) Supplies that do not conform to the contract.

21. Add section 52.212–XX to read as follows:

52.212–XX Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercially Available Off-the-Shelf (COTS) Items.

As prescribed in 12.301(b)(5), insert the following clause:

Contract Terms and Conditions Required To Implement Statutes or Executive Orders—Commercially Available Off-the-Shelf (COTS) Items (Date)

(a) The Contractor shall comply with the following Federal Acquisition Regulation (FAR) clause, which is incorporated in this

contract by reference, to implement provisions of law or Executive orders applicable to acquisitions of COTS items: 52.233–3, Protest After Award (Aug 1996) (31 U.S.C. 3553).

(b) The Contractor shall comply with the FAR clauses in this paragraph (b) that the Contracting Officer has indicated as being incorporated in this contract by reference to implement provisions of law or Executive orders applicable to acquisitions of COTS items: *[Contracting Officer check as appropriate.]*

___ (1) 52.219–3, Notice of Total HUBZone Set-Aside (Jan 1999) (15 U.S.C. 657a).

___ (2) 52.219–4, Notice of Price Evaluation Preference for HUBZone Small Business Concerns (Jan 1999) (if the offeror elects to waive the preference, it shall so indicate in its offer) (15 U.S.C. 657a).

___ (3)(i) 52.219–5, Very Small Business Set-Aside (June 2003) (Pub. L. 103–403, section 304, Small Business Reauthorization and Amendments Act of 1994).

___ (ii) Alternate I (Mar 1999) of 52.219–5.

___ (iii) Alternate II (June 2003) of 52.219–5.

___ (4)(i) 52.219–6, Notice of Total Small Business Set-Aside (June 2003) (15 U.S.C. 644).

___ (ii) Alternate I (Oct 1995) of 52.219–6.

___ (5)(i) 52.219–7, Notice of Partial Small Business Set-Aside (June 2003) (15 U.S.C. 644).

___ (ii) Alternate I (Oct 1995) of 52.219–7.

___ (6) 52.219–8, Utilization of Small Business Concerns (Oct 2000) (15 U.S.C. 637(d)(2) and (3)).

___ (7)(i) 52.219–9, Small Business Subcontracting Plan (Jan 2002) (15 U.S.C. 637(d)(4)).

___ (ii) Alternate I (Oct 2001) of 52.219–9.

___ (iii) Alternate II (Oct 2001) of 52.219–9.

___ (8) 52.219–14, Limitations on Subcontracting (Dec 1996) (15 U.S.C. 637(a)(14)).

___ (9)(i) 52.219–23, Notice of Price Evaluation Adjustment for Small Disadvantaged Business Concerns (June 2003) (Pub. L. 103–355, section 7102, and 10 U.S.C. 2323). (if the offeror elects to waive the adjustment, it shall so indicate in its offer).

___ (ii) Alternate I (June 2003) of 52.219–23.

___ (10) 52.219–25, Small Disadvantaged Business Participation Program—Disadvantaged Status and Reporting (Oct 1999) (Pub. L. 103–355, section 7102, and 10 U.S.C. 2323).

___ (11) 52.219–26, Small Disadvantaged Business Participation Program—Incentive Subcontracting (Oct 2000) (Pub. L. 103–355, section 7102, and 10 U.S.C. 2323).

___ (12) 52.222–3, Convict Labor (June 2003) (E.O. 11755).

___ (13) 52.222–19, Child Labor—Cooperation with Authorities and Remedies (Sep 2002) (E.O. 13126).

___ (14) 52.222–21, Prohibition of Segregated Facilities (Feb 1999).

___ (15) 52.222–26, Equal Opportunity (Apr 2002) (E.O. 11246).

___ (16) 52.225–13, Restrictions on Certain Foreign Purchases (Dec 2003) (E.O.'s proclamations, and statutes administered by the Office of Foreign Assets Control of the Department of the Treasury).

___ (17) 52.225–15, Sanctioned European Union Country End Products (Feb 2000) (E.O. 12849).

___ (18) 52.232–29, Terms for Financing of Purchases of Commercial Items (Feb 2002) (41 U.S.C. 255(f), 10 U.S.C. 2307(f)).

___ (19) 52.232–30, Installment Payments for Commercial Items (Oct 1995) (41 U.S.C. 255(f), 10 U.S.C. 2307(f)).

___ (20) 52.232–33, Payment by Electronic Funds Transfer—Central Contractor Registration (Oct 2003) (31 U.S.C. 3332).

___ (21) 52.232–34, Payment by Electronic Funds Transfer—Other than Central Contractor Registration (May 1999) (31 U.S.C. 3332).

___ (22) 52.232–36, Payment by Third Party (May 1999) (31 U.S.C. 3332).

(c)(1) Notwithstanding the requirements of the clauses in paragraphs (a) and (b) of this clause, the Contractor is not required to flow down any FAR clause, other than those in paragraphs (i) through (ii) of this paragraph in a subcontract for COTS items. Unless other-wise indicated below, the extent of the flow down shall be as required by the clause—

(i) 52.219–8, Utilization of Small Business Concerns (Oct 2000) (15 U.S.C. 637(d)(2) and (3)), in all subcontracts that offer further subcontracting opportunities. If the subcontract (except subcontracts to small business concerns) exceeds $500,000 ($1,000,000 for construction of any public facility), the subcontractor must include 52.219–8 in lower tier subcontracts that offer subcontracting opportunities.

(ii) 52.222–26, Equal Opportunity (Apr 2002) (E.O. 11246).

(2) While not required, the Contractor may include in its subcontracts for COTS items a minimal number of additional clauses necessary to satisfy its contractual obligations.

(End of clause)

22. Amend section 52.244–6 by—

a. Revising the date of the clause to read "(Date)";

b. In paragraph (a) of the clause by adding, in alphabetical order, the definition "Commercially available off-the-shelf item";

c. In paragraph (c)(1)(iii) of the clause by removing the semicolon at the end of the paragraph and adding ". (This clause does not apply to subcontracts for commercially available off-the-shelf items.)" in its place; and

d. Adding "(This clause does not apply to subcontracts for commercially available off-the-shelf items.)" to the end of paragraphs (c)(1)(iv) and (c)(1)(v) of the clause. The added definition reads as follows:

52.244–6 Subcontracts for Commercial Items.

* * * * *

Subcontracts for Commercial Items (Date)

(a) * * *

Commercially available off-the-shelf item has the meaning contained in the clause at 52.202–1, Definitions.

* * * * *

[FR Doc. 04–852 Filed 1–14–04; 8:45 am]

BILLING CODE 6820–EP–P

2000-305-48

AEROSPACE INDUSTRIES ASSOCIATION

March 19, 2004

General Services Administration
FAR Secretariat (MVA)
1800 F. Street NW
Room 4035
ATTN: Laurie Duarte
Washington, DC 20405

Dear Ms. Duarte:

The Aerospace Industries Association (AIA) appreciates the opportunity to provide comments on the proposed rule regarding the implementation of section 4203 of the Clinger-Cohen Act of 1996 (the Act) with respect to Commercially Available Off-the-Shelf (COTS) Item acquisition (FAR Case 2000-305). We suggest there be some changes to the interim rule prior to final publication as a final rule.

The Act requires that the Federal Acquisition Regulation (FAR) list certain provisions of law that are inapplicable to contracts for acquisitions of commercially available off-the shelf items. The Act excludes section 15 of the Small Business Act and bid protest procedures from the list. In addition, the list of inapplicable statutes cannot include a provision of law that provides for criminal or civil penalties.

The proposed rule segregates commercial item procurement from COTS procurement, and introduces a new FAR clause at 52.212-XX for use when the Government procures COTS items solely in a procurement. That proposed clause cannot be tailored. The proposed clause potentially uses a number of FAR clauses (largely EEO clauses) to satisfy the requirements of law and executive orders.

AIA has four (4) comments for your consideration:

(1) The proposed rule should be strengthened by adding a policy provision to the final rule instructing contracting officers to limit the imposition of non-commercial terms and conditions unless required to comply with statute or executive order and providing guidance on when they must use each of the FAR clauses listed in the proposed clause 52.212-XX(b). Since the contracting officer must select the appropriate FAR clauses from those listed and none of those FAR clauses are commonly used in COTS transactions in the commercial marketplace, the inclusion of any (particularly if unnecessary) will diminish the utility of the COTS procurement

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process. In fact, inclusion of extraneous or inapplicable FAR clauses likely will deter some offerors from responding.

(2) The proposed rule should instruct the contracting officer to accept the standard terms and conditions that are used for the sale of the COTS items in the marketplace. The contracting officer may accept them if they are "a minimal number of additional clauses necessary to satisfy its contractual obligations" per subparagraph 52.212-XX (b) (2). However, that grant of permission differs from a requirement to the contracting officer to accept the standard commercial terms associated with COTS items unless they violate law or executive orders. A COTS procurement should include the standard terms and conditions used in the commercial marketplace plus the special clauses required for the Government to satisfy the requirements of law and executive orders.

(3) The policy should clearly state that the contracting officer is not authorized to add any other clauses that are not commonly used with the COTS items being procured in the commercial marketplace, unless required to comply with statute or executive order. One of the leading complaints from our members is that the government's acquisition of commercial items is gradually increasing the number non-commercial clauses being required.

(4) With respect to DOD COTS procurements, the rule should specify that DFARS 212.504 still applies to make it clear that 10 USC 2320 & 2321 are waived.

If there are any questions or if we can be of further assistance, please contact the undersigned at (703) 358-1045 or sullivan@aia-aerospace.org.

Sincerely,

Patrick D. Sullivan
Assistant Vice President
Procurement and Finance

2000-305-49

U.S. Department of Labor

Assistant Secretary for Policy
Washington, D.C. 20210

March 15, 2004

General Services Administration
FAR Secretariat (MVA)
1800 F Street, N.W.
Room 4035
Attn: Laurie Duarte
Washington, DC 20405

This responds to the request for comments about the proposed rule to implement Section 4203 of the Federal Acquisition Reform Act of 1996 relating to acquisitions of commercially available off-the-shelf items (COTS). 69 Fed. Reg. 2448 (Jan. 15, 2004). The notice of proposed rulemaking invites public comments on both the definition of COTS and a list of laws that would be made inapplicable to COTS acquisitions. The Department of Labor opposes including two laws enforced by the Department on the list of laws inapplicable to COTS: the affirmative action provision of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (VEVRAA) and Section 503 of the Rehabilitation Act of 1973, as amended.

Taken together, VEVRAA and Section 503 require Federal contractors and subcontractors to provide equal employment opportunities for protected veterans and qualified individuals with disabilities. The proposal would make two sections of VEVRAA inapplicable to COTS: Section 4212(a), which requires Federal contractors and subcontractors to take affirmative action in employment for protected veterans, and Section 4212(d), which requires Federal contractors and subcontractors to annually file a VETS-100 report with the Labor Department.

The Department opposes including the affirmative action provision of VEVRAA (Section 4212(a)) and Section 503 on the "inapplicable" list in light of the extremely broad proposed definition of COTS items contained in the notice of proposed rulemaking. The COTS definition includes not only items that are literally purchased "off-the-shelf" in small quantities and of small value (such as pencils), but also items purchased in the commercial marketplace in large quantities and of large value (such as fleets of aircraft). COTS contracts could therefore be for millions of dollars individually and billions of dollars in the aggregate. Thousands of job opportunities may be created by COTS acquisition contracting dollars.

Making the affirmative action provision of VEVRAA and Section 503 inapplicable to such a broad range of contracts would substantially reduce important job opportunities and protections that could be afforded qualified individuals with disabilities and veterans.

If the definition of COTS were to be significantly narrowed, for example by limiting COTS items to small purchases that are actually completed through "off-the-shelf" buying from retailers, the Department would not object to including Section 503 and the affirmative action provisions of VEVRAA on the list of laws inapplicable to such purchases. Under such a narrow

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definition of COTS, the impact of the change on individuals with disabilities and protected veterans would, in turn. be greatly reduced. If the broad definition of COTS items contained in the current proposal is retained, the Department believes it is in the best interest of the Government to retain the applicability of the affirmative action provision of VEVRAA and Section 503 to the potentially billions of dollars worth of Federal contracts that will be generated through COTS acquisitions.

The relatively minor burdens imposed by the VEVRAA affirmative action provision are justified by the significant and direct benefits for individual protected veterans. Covered contractors are required to take affirmative action to employ and advance protected veterans, and are prohibited from discriminating against them in employment. An important element of the VEVRAA program is the job-listing obligation under Section 4212(a), which requires covered employers to list job openings with state employment agencies; the state employment agencies, in turn, provide job counseling to protected veterans and priority in referrals to job openings. This job-listing obligation is particularly important to the 215,000 to 225,000 veterans discharged from the military each year.

VEVRAA is the only law requiring job listing with the state employment agencies. At a time when we are asking so much of the men and women serving in the Armed Services, it is in the Nation's interest to assist their transition back into civilian society. Reducing job opportunities and protections for veterans could send the wrong message about the value of veterans' service to the Nation.

Similarly, the relatively minor burdens imposed on contractors by Section 503 are justified by the significant benefits the law provides for disabled job applicants and workers. The Census Bureau estimates that approximately 18.6 million American workers have disabilities. Section 503 requires, for example, that contractors recruit qualified applicants with disabilities for job openings, develop anti-disability harassment policies, and refrain from discriminating against qualified individuals with disabilities. Reducing protections for qualified job applicants and workers with disabilities would not be consistent with the President's *New Freedom Initiative*, designed to ensure that Americans with disabilities have the opportunity to learn and develop skills and to engage in productive work.

The Department is mindful of the need to reduce contracting burdens and to streamline the procurement process generally. Accordingly, the Department does not object to including the VETS-100 reporting requirement contained in Section 4212(d) of VEVRAA on the list of laws inapplicable to COTS. The primary purpose of the VETS-100 report is to monitor employment trends of protected veterans as a group. The VETS-100 report has less benefit for individual veterans than the affirmative action provisions of VEVRAA, described above.

Sincerely,

David E. Gray

David E. Gray
Acting Assistant Secretary for Policy

2000-305-50

OCEAN SHIPPING

March 15, 2004

FAR Secretariat (MVR)
Attention: Ms. Laurie Duarte
General Services Administration
Room 4035
1800 F Street, N.W.
Washington, D.C. 20405

RE: Federal Acquisition Regulation: Commercially Available Off-the-Shelf (COTS) Items, FAR Case 2000-305, Federal Register, Vol. 69, No. 10, January 15, 2004, Proposed Rule

Dear Ms. Duarte:

TECO Ocean Shipping is the largest owner and operator of United States flag ocean-going dry bulk vessels. We have been in business since 1959 and operate in the domestic and international trades of the United States. We are strongly opposed to the inclusion of U.S.-flag cargo preference laws on the list of laws inapplicable to contracts and subcontracts for the acquisition of commercially available off-the-shelf (COTS) items.

The Proposed Rule seeks comments on whether the Cargo Preference Act of 1904 (10 U.S.C. 2631), covering Defense Department generated cargoes, and the Cargo Preference Act of 1954 (46 U.S.C. 1241(b)), covering civilian agency generated cargoes, should be placed on the list of laws to be waived pursuant to Section 4203 of the Clinger-Cohen Act of 1996 (41 U.S.C. 431).

While the majority of TECO Ocean Shipping's business is U.S. domestic shipping, we do participate in international cargoes under the above referenced cargo preference statutes. These international cargoes are a very important part of our business. The elimination of the "Cargo Preference" requirements for COTS would be extremely detrimental to our business and, in our view, contrary to the long standing policies of the United States supporting the U.S.-flag merchant fleet.

"Performance You Can Count On"

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AN EQUAL OPPORTUNITY COMPANY

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2000-305-60

Please take our comments into consideration in your decision making process, and feel free to contact us with any questions.

Sincerely,

Sal Litrico
Vice President

2000-305-51

Laurie A. Duarte
03/22/2004 01:58 PM

To: LaRhonda M. Erby-Spriggs/MVA/CO/GSA/GOV@GSA
cc:
Subject: DOC Comments on COTS Rule

LaRhonda,

Please ensure that this comment from Dept. of Commerce gets logged. I gave this source the extra time for submittal.

Thanks.

May your day be well,

Laurie A. Duarte
Supervisor
Regulatory Secretariat
Office of Acquisition Policy
General Services Administration
202.501.4225

----- Forwarded by Laurie A. Duarte/MVA/CO/GSA/GOV on 03/22/2004 01:58 PM -----

nbarrere@doc.gov
03/22/2004 01:56 PM

To: farcase.2000-305@gsa.gov
cc: laurie.duarte@gsa.gov, jerry.zaffos@gsa.gov, Alan.Schoenberg@hhs.gov, angie.jackson@dhs.gov, anthony.robinson@sba.gov, barbara.latvanas@mail.va.gov, brian.wolfe@ost.dot.gov, clement.linda@epa.gov, dvissering@doc.gov, dan.cronin@ssa.gov, dean.koppel@sba.gov, deborah.erwin@gsa.gov, delia_emmerich@ios.doi.gov, denise.wright@pr.doe.gov, Demmer8@aol.com, elaine.wheeler@ost.dot.gov, ginesgg@state.gov, gschutter@peacecorps.gov, john.cornell@gsa.gov, Joe.DARAGAN@usda.gov, katherine.hughes@hhs.gov, kathy.strouss@dhs.gov, kevin.whitfield@do.treas.gov, karen_A._maris@omb.eop.gov, linda.hall@gsa.gov, lloydre@state.gov, matthew.urnezis@gsa.gov, michael.righi@pr.doe.gov, mblum@omb.eop.gov, murphy-lawrence@dol.gov, nbarrere@doc.gov, paulette.creighton@mail.va.gov, richard.holcombe@usda.gov, rita.williams@ost.dot.gov, roger.waldron@gsa.gov, saylor-jeffrey@dol.gov, wyborski.larry@epa.gov, rhonda.cundiff@gsa.gov, cecelia.davis@gsa.gov, linda.nelson@gsa.gov, jeritta.parnell@gsa.gov, julia.wise@gsa.gov, edward.loeb@gsa.gov, craig.goral@gsa.gov, mls2@nrc.gov, jsefchick@ftc.gov, laura.smith-auletta@gsa.gov, ralph.destefano@gsa.gov, rod.lantier@gsa.gov, mSade@doc.gov, cMakris@doc.gov, lAndrecs@doc.gov, Dvissering@DOC.GOV, John_Liuzzi@ita.doc.gov, David_Weems@ita.doc.gov, MLangstein@doc.gov
Subject: DOC Comments on COTS Rule

SUBJECT: Department of Commerce Comments Regarding FAR Case 2000-305 (Proposed Rule)

SUMMARY

305-51

This is a communication from the Department of Commerce in response to the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) solicitation for comments in Federal Register notice Vol. 69, No. 10, Thursday, January 15, 2004. The Federal Register notice contains proposed rule 2000-305 (the proposed rule) to amend the Federal Acquisition Regulation regarding Commercially Available Off-the-Shelf (COTS) acquisitions. The Department does not support the proposed rule as drafted. The Department notes that waivers of procurement restrictions are currently available to purchasing entities under appropriate circumstances, and therefore would support an OMB circular noting authority for these waivers.

BACKGROUND

The proposed rule is regarding the implementation of section 4203 of the Clinger-Cohen Act of 1996, 41 U.S.C. 431 (the Act) with respect to Commercially Available Off-the-Shelf Item acquisitions. The Act requires the Federal Acquisition Regulation (FAR) to list certain provisions of law that are inapplicable to contracts for acquisitions of Commercially Available Off-the-Shelf items.

The proposed rule would add, among other statutes, the Trade Agreements Act of 1979 (TAA) and Buy American Act (BAA), to those provisions of law that are waived for acquisitions of COTS items. As noted, such waivers are currently permitted on a case-by-case basis. A standing waiver of the TAA and BAA would permit federal contract officers to procure COTS items from both foreign and domestic sources without regard to existing and future trade agreements.

The TAA requires that all products being delivered to federal agencies be made or "substantially transformed" in the United States, Caribbean Basin countries, NAFTA countries, countries that have signed the WTO Agreement on Government Procurement (GPA), or countries with whom the United States has reciprocal commitments in government procurement. The TAA mandates that federal agencies may purchase products from countries that are not party to one of the agreements listed above only under the following circumstances: if no domestic products are available; if the domestic offers are too expensive; or if the domestic offers are determined to not be in the public interest. For countries that are party to one of those agreements, the TAA waives the BAA purchasing restrictions that provide a price advantage for domestic bids when competing against foreign bids.

Industry representatives, including those from the Information Technology Industry Council (ITIC), have provided input to federal agencies, including Office of Federal Procurement Policy, Office of the United States Trade Representative, the State Department and the Department of Commerce, for several years regarding their views on removal of the TAA and BAA restrictions from federal acquisitions. ITIC believes that TAA and BAA restrictions force companies seeking to do business with the federal government to source from more costly sources rather than globally, as is the practice for the manufacture of many IT products. According to ITIC, TAA has created serious, unintended consequences that impede U.S. IT vendors from bidding on U.S. government procurement contracts and prevents federal agencies from getting the IT products they need to perform their missions most efficiently. ITIC estimates that the value of government contracts for which companies would have been competitive but were excluded from bidding due to TAA market access restrictions to be $250-300 million.

COMMENTS

The Department of Commerce does not support the proposed rule. The Department believes that agencies with an interest in negotiating and enforcing international trade commitments that liberalize procurement markets globally, and which ensure U.S. supplier's access to such foreign

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markets, require these provisions to remain in effect for purposes of COTS acquisitions. This will ensure that the waiver under the Trade Agreements Act will provide effective incentives to encourage other countries to provide reciprocal access and liberalization of their procurement markets and enhances the United States' ability to effectively negotiate meaningful commitments in government procurement.

The Department also notes that purchasing agencies have sufficient flexibility to waive the purchasing restrictions of the Trade Agreements Act and Buy American Act when it is deemed to be in the public interest to do so. The Department would support an OMB circular noting authority for these waivers and providing guidelines for using them to provide flexibility in sourcing when fulfilling government contracts.

Questions regarding these comments may be directed to Nbarrere@doc.gov.

Nancy J. Barrere, Procurement Analyst
U.S. Department of Commerce
Office of Acquisition Management

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March 15, 2004

2000-305-52

General Services Administration
FAR Secretariat (MVA)
1800 F Street, N.W.
Room 4035
Washington, DC 20405

Attention: Laurie Duarte

RE: FAR Case 2000-305 -- Federal Acquisition Regulation; Commercially Available Off-the-Shelf Items

Dear Madam:

The Transportation Institute represents U.S.-flag vessel operators engaged in the Nation's domestic and international waterborne commerce, including: a number of companies regularly transporting Department of Defense cargoes; companies under contract to the Military Sealift Command; companies under contract to operate government vessels in the Ready Reserve Force; companies participating in the Maritime Security Program; and, companies which are pledging their resources as part of the U.S. Maritime Administration's Voluntary Intermodal Sealift Agreement. These U.S.-flag vessel operators are committed to providing a viable U.S.-flag fleet to serve the Nation's economic and sealift requirements. As such, adherence to U.S. cargo reservation statutes is of the utmost importance to U.S.-flag vessel operators in their efforts to meet the many challenges facing them in an unevenly competitive international shipping market. Therefore, the Institute is expressing its strong opposition to the proposed listing of the Cargo Preference Act of 1904 (10 U.S.C. §2631) and the Cargo Preference Act of 1954 (46 App. U.S.C. §1241(b)) to those laws that would be inapplicable to acquisition of Commercially Available Off-the-Shelf (COTS) Items under section 4203 of the Clinger-Cohen Act of 1996 (41 U.S.C. §431).

The inapplicability of the Nation's long-established maritime cargo preference policies to COTS would have a deleterious effect on the Institute's member companies and upon the availability of sealift for this Nation's commercial and defense needs. An active and healthy U.S.-flag commercial fleet must have a strong cargo base, including those cargoes funded by U.S. government resources. The two major laws reserving government-impelled cargoes for U.S.-flag vessels are the Cargo Preference Act of 1954, as to civilian cargoes, and the Cargo Preference Act of 1904, as to military cargoes. U.S.-flag carriers are highly efficient and competitive but without question they face uneven competition in the international arena. To exempt these cargo preference statutes from COTS will in effect deny these cargoes to American-flag commercial vessel operators as it will be nearly impossible for American operators to compete against the highly subsidized, government supported, and less taxed fleets of its foreign counterparts. As a result, the U.S.-flag carrier base and complementary mariner pool will be eroded to the detriment of the military and the Nation, an outcome that detracts from the U.S.-flag fleet's and American citizen crew's current and ongoing efforts in transporting essential cargo to the American fighting men and women in Afghanistan, Iraq and elsewhere around the world.

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A highly effective partnership has been achieved between the military and the maritime industry to assure the sealift essential to wage Operation Iraqi Freedom, the continued prosecution of Operation Enduring Freedom, and the ongoing War on Terror. Under the Maritime Security Program (MSP) and the Voluntary Intermodal Sealift Agreement (VISA), the Department of Defense (DOD) is guaranteed access to private-sector vessels, intermodal assets (i.e., vessel management, cargo handling, rail, truck and tracking capabilities), and trained crews for DOD' s contingency sealift requirements. DOD now has immediate access to reliable U.S. commercial maritime assets at a fraction of the cost it would incur if it had to replicate those assets. Further, personnel to crew U.S. Navy support vessels and those in the U.S. government's Ready Reserve Force are drawn from the vessels and the intermodal assets made available to DOD through VISA. An essential component of the VISA arrangement to the U.S. carriers is priority availability of preference cargo. By effectively removing the cargo preference laws, the proposed rule would torpedo the VISA agreements as well as the achieved teamwork between the military and the maritime industry, the reliability of commercial sealift for the military, and the very continued existence of the U.S.-flag merchant marine in foreign commerce. Clearly, it would be in the best interest of the United States to maintain the present arrangements.

International events continue to prove the necessity of a modern, militarily useful fleet to sustain our fighting men and women overseas. During the first phase of Operation Iraqi Freedom, the U.S. Maritime Administration has reported that more than 5,000 U.S. merchant mariners served aboard U.S.-flag ships and more than 1,200 merchant mariners crewed the government's Ready Reserve Force ships. U.S.-flag commercial ships have carried 84 percent of the cargo destined for Iraq. U.S.-flag ships transported a myriad of critical cargo including Apache attack helicopters, multiple launch rocket systems, HUMVEES, fuel tankers, bulldozers and ammunition for our forces. Such successful sealift operations in future scenarios will be jeopardized if we fail to fully enforce long-established maritime programs, such as the Nation's cargo preference policies.

The U.S.-flag fleet operating in foreign commerce competes against foreign-flag carriers by carrying international cargoes and cargo preference. Some of these foreign-flag fleets are state-run, some are heavily subsidized, and some are under so-called foreign flags of convenience with special tax and other promotional treatments. The U.S.-flag fleet bears greater costs than its foreign competitors due to the higher standard of living in this country, disparity in tax treatment, and disparity in cost of compliance with safety, health, environmental and certain other laws of the United States. The U.S. maritime sector is open to world competition. To survive in this highly competitive market, U.S -flag operators must have preference for carriage of government-impelled cargoes. Aggregate revenue from such carriage amounted to about $1.24 billion in 2002 (2002 Annual Report of the Maritime Administration, Appendix 7) of which between an estimated 80 and 90 percent would be adversely impacted by the proposed rules. Preference cargoes, and revenue therefrom, in normal times is the base cargo upon which U.S.-flag carriers rely and in economic downturns is critically important to survival in an ever-ending world shipping cycle of boom and bust. Simply stated, the loss of that base revenue and cargo cannot be replaced in the highly competitive world market.

There are approximately 145 vessels under U.S.-flag operating in the foreign commerce that in varying degrees participate from time to time in the U.S. cargo preference programs. We estimate that eventually more than 100 U.S.-flag vessels in the international trades would be idled, would leave the U.S.-flag or would be sold to foreign purchasers. These include virtually all of the most valuable military useful, U.S.-flag commercial vessels. Further, present plans to enlarge the U.S.-flag

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fleet through an extension of the MSP program would be undercut by finalizing this proposed rulemaking. The resulting decimation of our fleet would cripple the Nation's maritime defense industrial base, hobble reliable power projection capability, cost American jobs, and quite simply be extremely counterproductive to the War on Terror.

The importance of the U.S.-flag commercial fleet to sealift was underscored in testimony last week before the Senate Armed Services Seapower Subcommittee by Gen. John W. Handy, USAF, Commander of the United States Transportation Command (USTRANSCOM). General Handy pointed out that "USTRANSCOM relies on its commercial transportation industry partners and associated labor organizations to provide significant transportation capability during contingencies," adding that this relationship "allows DOD to leverage significant capacity in wartime without the added peacetime cost of sustaining comparable levels or organic capability." General Handy observed that USTRANSCOM, the Military Sealift Command and the Surface Deployment and Distribution Command "support the maintenance of a viable U.S. mariner pool through enforcement of cargo preference requirements, support for the Maritime Security Program (MSP), and vigorous maritime training and education." On March 4th, Secretary of Transportation Norman Mineta underscored the Bush Administration's support for enforcement of viable maritime policies to sustain the U.S.-flag merchant fleet when he stated, "the Maritime Security Program, the Jones Act, and cargo preference laws are essential elements of America's national maritime policy. This Administration supports these laws and programs." The U.S. Congress has also reaffirmed its support for cargo preference policies to sustain the commercial fleet when it included in the FY 2003 Supplemental Appropriations Act language affirming U.S.-flag cargo preference policies to programs funded by U.S. taxpayers for Iraqi humanitarian and reconstruction aid.

It is imperative that the United States maintains and enforces U.S. government programs that encourage a healthy U.S.-flag fleet capable of meeting U.S. economic and national security interests at home and abroad. An active and healthy U.S.-flag commercial fleet depends on a strong U.S. cargo base, particularly those cargoes funded by U.S. government resources. The Councils must encourage a viable U.S.-flag merchant marine to complement the efforts of defense and other agencies in their mission to supply and sustain U.S. troops as they protect U.S. interests at home and abroad. Therefore, the Transportation Institute urges the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council not to include the Cargo Preference Act of 1904 and the Cargo Preference Act of 1954 in those laws that would be inapplicable to acquisition of COTS Items under section 4203 of the Clinger-Cohen Act of 1996.

Sincerely,

James L. Henry
President

JLH:tlh

2000-305-53

EXECUTIVE OFFICE OF THE PRESIDENT
THE UNITED STATES TRADE REPRESENTATIVE
WASHINGTON, D.C. 20508

March 23, 2004

Ralph De Stefano
Deputy Director, Acquisition Policy Division
General Services Administration
Washington, D.C.

Dear Mr. De Stefano:

I am pleased to submit comments on behalf of the Office of the U.S. Trade Representative (USTR), in response to the solicitation of comments by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council on a Proposed Rule (FAR Case 2000-305) relating to Commercially Available Off-the-Shelf (COTS) items, published in the January 15, 2004 edition of the Federal Register (69 FR 2448). Specifically, the notice seeks comments on, *inter alia*, the proposed addition of the Trade Agreements Act of 1979, as amended, to the list of laws, contained in Section 12.505 of the Federal Acquisition Regulations (FAR), that would be inapplicable to acquisitions of COTS items.

USTR opposes the inclusion of the Trade Agreements Act (19 U.S.C. 2512 *et seq.*) in Section 12.505 of the FAR for the reasons set out below. USTR understands that the only TAA provision that was intended to be implicated by the proposed rule is the purchasing prohibition in Section 2512, and that the second listing of the Trade Agreements Act, 19 U.S.C. 2501 *et seq.*, in the proposed rule is an error. As a result, the following comments relate specifically to Section 2512 of the TAA. However, if it is determined that the proposed rule would apply to other provisions of the TAA (such as Section 2511, which provides the authority for the President, delegated to USTR, to waive discriminatory purchasing requirements), USTR requests the opportunity to submit additional comments.

The TAA requires that all products purchased by federal agencies be made or "substantially transformed" in the United States, in countries covered by the WTO Government Procurement Agreement (GPA), the North American Free Trade Agreement (NAFTA) or a bilateral Free Trade Agreement (FTA) or in Caribbean Basin Initiative countries. Federal agencies may purchase products that do not comply with this requirement only where no competing supplier offers products from one of those countries. Section 2512(b) of the TAA authorizes the President, who delegated the authority to the USTR in Executive Order 12260, to waive the TAA "purchasing prohibition" for countries when they become a Party to the GPA or other agreements that include government procurement obligations comparable to the GPA. The purpose of this Section is to encourage other countries to provide appropriate reciprocal competitive opportunities for U.S. suppliers through the GPA and other government procurement agreements.

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If the proposed rule were adopted, the acquisition of COTS items would be subject to a permanent waiver of the TAA purchasing prohibition. That would mean federal agencies would be able to purchase COTS items from suppliers of any foreign country, whether or not that country provides reciprocal market access for government procurement. Potential suppliers include China, Malaysia and the Philippines, all of whom have declined to join the GPA or provide benefits in a bilateral agreement. A permanent waiver would significantly reduce the incentives for the United States to obtain reciprocal benefits via either the GPA or other agreements.

USTR's ability to waive the TAA purchasing prohibition on a case-by-case basis has been a key element in its ability to negotiate reciprocal market access for U.S. suppliers in the government procurement markets of foreign countries, through bilateral FTAs, as well as accession to the GPA. The TAA waiver authority has provided a long record of success for the United States in gaining access to foreign procurement markets, beginning with NAFTA, and continuing in bilateral agreements with Chile, Australia, Morocco, the Central American countries (Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua) and the Dominican Republic. The strong interest of foreign suppliers in gaining access to the U.S. procurement market has repeatedly provided the necessary incentive for foreign governments to agree to provide reciprocal market access for U.S. suppliers and to implement NAFTA or GPA-like procurement procedures that provide the safeguards necessary to ensure that procurements are fair, transparent and predictable. As the Administration negotiates additional bilateral agreements, the incentive will continue to be important.

To give a permanent waiver for COTS items would significantly disadvantage U.S. suppliers without providing reciprocal market access for them. Countries benefiting from a permanent waiver would have little incentive to provide non-discriminatory access for U.S. suppliers and the procedural safeguards that are the foundation of the U.S. system. This could have particularly adverse consequences for U.S. small businesses that traditionally have been important suppliers of commercial items to the federal government.

USTR also questions whether a permanent waiver of the TAA purchasing prohibition is the type of statute that Congress was considering when it authorized, in the Clinger-Cohen Act of 1996, the waiver of laws that impose government-unique polices, procedures and requirements on suppliers that have been awarded contracts for COTS items.

Congress' concerns for the public interest will be best served if the TAA waiver authority continues without dilution. The TAA already provides that the President may authorize agencies to waive prohibitions on a case-by-case [specific procurement] basis when in the national interest. Thus, there is no need to provide a permanent waiver of TAA

For these reasons, USTR opposes the inclusion of the TAA in the list of laws for which a permanent waiver would be granted for purchases of COTS items. While a permanent

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waiver of the TAA prohibition for purchases of COTS items would not eliminate all of USTR's waiver authority, it would severely undermine leverage that is critical to its ability to negotiate reciprocal access for U.S. suppliers to other country's procurement markets. It would allow COTS suppliers from foreign countries to compete in U.S. procurements even if their own governments shut U.S. suppliers out of their procurements. This would significantly disadvantage U.S. suppliers, especially small businesses, and would undermine the purpose of TAA.

Sincerely,

John Veroneau
General Counsel
Office of the United States Trade Representative

2000-305-54

TECO
OCEAN SHIPPING

March 15, 2004

FAR Secretariat (MVR)
Attention: Ms. Laurie Duarte
General Services Administration
Room 4035
1800 F Street, N.W.
Washington, D.C. 20405

RE: Federal Acquisition Regulation: Commercially Available Off-the-Shelf (COTS) Items, FAR Case 2000-305, Federal Register, Vol. 69, No. 10, January 15, 2004, Proposed Rule

Dear Ms. Duarte:

TECO Ocean Shipping is the largest owner and operator of United States flag ocean-going dry bulk vessels. We have been in business since 1959 and operate in the domestic and international trades of the United States. We are strongly opposed to the inclusion of U.S.-flag cargo preference laws on the list of laws inapplicable to contracts and subcontracts for the acquisition of commercially available off-the-shelf (COTS) items.

The Proposed Rule seeks comments on whether the Cargo Preference Act of 1904 (10 U.S.C. 2631), covering Defense Department generated cargoes, and the Cargo Preference Act of 1954 (46 U.S.C. 1241(b)), covering civilian agency generated cargoes, should be placed on the list of laws to be waived pursuant to Section 4203 of the Clinger-Cohen Act of 1996 (41 U.S.C. 431).

While the majority of TECO Ocean Shipping's business is U.S. domestic shipping, we do participate in international cargoes under the above referenced cargo preference statutes. These international cargoes are a very important part of our business. The elimination of the "Cargo Preference" requirements for COTS would be extremely detrimental to our business and, in our view, contrary to the long standing policies of the United States supporting the U.S.-flag merchant fleet.

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AN EQUAL OPPORTUNITY COMPANY

2000-305-54

Please take our comments into consideration in your decision making process, and feel free to contact us with any questions.

Sincerely,

Sal Litrico
Vice President

2000-305-53

U.S. Department of Labor

Assistant Secretary for Policy
Washington, D.C. 20210

March 15, 2004

General Services Administration
FAR Secretariat (MVA)
1800 F Street, N.W.
Room 4035
Attn: Laurie Duarte
Washington, DC 20405

This responds to the request for comments about the proposed rule to implement Section 4203 of the Federal Acquisition Reform Act of 1996 relating to acquisitions of commercially available off-the-shelf items (COTS). 69 Fed. Reg. 2448 (Jan. 15, 2004). The notice of proposed rulemaking invites public comments on both the definition of COTS and a list of laws that would be made inapplicable to COTS acquisitions. The Department of Labor opposes including two laws enforced by the Department on the list of laws inapplicable to COTS: the affirmative action provision of the Vietnam Era Veterans' Readjustment Assistance Act of 1974, as amended (VEVRAA) and Section 503 of the Rehabilitation Act of 1973, as amended.

Taken together, VEVRAA and Section 503 require Federal contractors and subcontractors to provide equal employment opportunities for protected veterans and qualified individuals with disabilities. The proposal would make two sections of VEVRAA inapplicable to COTS: Section 4212(a), which requires Federal contractors and subcontractors to take affirmative action in employment for protected veterans, and Section 4212(d), which requires Federal contractors and subcontractors to annually file a VETS-100 report with the Labor Department.

The Department opposes including the affirmative action provision of VEVRAA (Section 4212(a)) and Section 503 on the "inapplicable" list in light of the extremely broad proposed definition of COTS items contained in the notice of proposed rulemaking. The COTS definition includes not only items that are literally purchased "off-the-shelf" in small quantities and of small value (such as pencils), but also items purchased in the commercial marketplace in large quantities and of large value (such as fleets of aircraft). COTS contracts could therefore be for millions of dollars individually and billions of dollars in the aggregate. Thousands of job opportunities may be created by COTS acquisition contracting dollars.

Making the affirmative action provision of VEVRAA and Section 503 inapplicable to such a broad range of contracts would substantially reduce important job opportunities and protections that could be afforded qualified individuals with disabilities and veterans.

If the definition of COTS were to be significantly narrowed, for example by limiting COTS items to small purchases that are actually completed through "off-the-shelf" buying from retailers, the Department would not object to including Section 503 and the affirmative action provisions of VEVRAA on the list of laws inapplicable to such purchases. Under such a narrow

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definition of COTS, the impact of the change on individuals with disabilities and protected veterans would, in turn, be greatly reduced. If the broad definition of COTS items contained in the current proposal is retained, the Department believes it is in the best interest of the Government to retain the applicability of the affirmative action provision of VEVRAA and Section 503 to the potentially billions of dollars worth of Federal contracts that will be generated through COTS acquisitions.

The relatively minor burdens imposed by the VEVRAA affirmative action provision are justified by the significant and direct benefits for individual protected veterans. Covered contractors are required to take affirmative action to employ and advance protected veterans, and are prohibited from discriminating against them in employment. An important element of the VEVRAA program is the job-listing obligation under Section 4212(a), which requires covered employers to list job openings with state employment agencies; the state employment agencies, in turn, provide job counseling to protected veterans and priority in referrals to job openings. This job-listing obligation is particularly important to the 215,000 to 225,000 veterans discharged from the military each year.

VEVRAA is the only law requiring job listing with the state employment agencies. At a time when we are asking so much of the men and women serving in the Armed Services, it is in the Nation's interest to assist their transition back into civilian society. Reducing job opportunities and protections for veterans could send the wrong message about the value of veterans' service to the Nation.

Similarly, the relatively minor burdens imposed on contractors by Section 503 are justified by the significant benefits the law provides for disabled job applicants and workers. The Census Bureau estimates that approximately 18.6 million American workers have disabilities. Section 503 requires, for example, that contractors recruit qualified applicants with disabilities for job openings, develop anti-disability harassment policies, and refrain from discriminating against qualified individuals with disabilities. Reducing protections for qualified job applicants and workers with disabilities would not be consistent with the President's *New Freedom Initiative*, designed to ensure that Americans with disabilities have the opportunity to learn and develop skills and to engage in productive work.

The Department is mindful of the need to reduce contracting burdens and to streamline the procurement process generally. Accordingly, the Department does not object to including the VETS-100 reporting requirement contained in Section 4212(d) of VEVRAA on the list of laws inapplicable to COTS. The primary purpose of the VETS-100 report is to monitor employment trends of protected veterans as a group. The VETS-100 report has less benefit for individual veterans than the affirmative action provisions of VEVRAA, described above.

Sincerely,

David E. Gray

David E. Gray
Acting Assistant Secretary for Policy

2000-305-56

THE UNDER SECRETARY OF DEFENSE
3010 DEFENSE PENTAGON
WASHINGTON, DC 20301-3010

ACQUISITION,
TECHNOLOGY
AND LOGISTICS

APR 9 2004

General Services Administration
FAR Secretariat (MVA)
1800 F Street NW., Room 4035
ATTN: Laurie Duarte
Washington, DC 20405

Dear Ms. Duarte:

The following comments are provided relative to FAR Case 2000-305 with respect to the implementation of section 4203 of the Clinger-Cohen Act of 1996, public law 104-106, which added section 35 to the official Federal Procurement policy Act, (41 U.S.C. 431), concerning acquisitions of Commercially Available Off-the-Shelf (COTS) Items. The Act requires that the Federal Acquisition Regulation (FAR) list certain provisions of law that are inapplicable to contracts for acquisitions of COTS items. We do not concur with the treatment of 10 U.S.C. 2631, the Cargo Preference Act of 1904 and 49 U.S.C. 40118, the Fly America Act under the proposed subpart 12.505 with regard to contracts for the acquisition of COTS items.

The fundamental Department of Defense (DoD) transportation policy is that DoD transportation requirements shall be met, to the maximum extent possible, by use of commercial entities. The Cargo Preference Act and the Fly America Act help maintain a viable U.S. merchant marine and U.S. air carrier industry which are heavily relied upon by DoD during contingencies or war. In addition to providing U.S. flag ships the U.S. merchant marine also provides a pool of mariners from which DoD crews Defense reserve ships. The inclusion of these acts under the proposed subpart 12.505 may weaken the U.S. maritime and air industries and DoD's ability to moves forces and equipment during contingencies or war.

For this reason, the applicability of these two statutes to acquisition of COTS items should be the same as it is with respect to acquisitions of commercial items.

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Therefore, DoD requests that the proposed rule be revised in a manner that will ensure that the applicability of 10 U.S.C. 2631 and 49 U.S.C. 40118 is the same for acquisition of both COTS and commercial items.

Sincerely,

Michael W. Wynne
Acting

cc:
United States Transportation Command
Maritime Administration