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CIVILIAN AGENCY ACQUISITION COUNCIL LETTER 2004-02

MEMORANDUM FOR CIVILIAN AGENCIES OTHER THAN NASA

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CIVILIAN AGENCY ACQUISITION COUNCIL (CAAC)

SUBJECT: Consultation on Class Deviation – Inapplicability of Buy American Act Restrictions on the Acquisition of Foreign Information Technology that is a Commercial Item, using Fiscal Year 2004 Funds.

This CAAC Letter serves as evidence of your consultation with the CAAC Chair as required by FAR 1.404 for a class deviation. Section 535(a) of Division F of Public Law 108-199 exempts information technology (IT) from the provisions of the Buy American Act, if the IT is a commercial item (see definition in FAR 2.101). Because the Office of Management and Budget (OMB) has determined that this exemption applies only to Fiscal Year 2004 funds, the Federal Acquisition Regulation (FAR) is not being changed. Thus, we are providing this letter identifying the basis for and the class deviations needed from the FAR to comply with the law. If legislation extending the exemption is enacted, the FAR Council will revise the FAR appropriately.

Where is the statute?

Section 535 of Division F of Public Law 108-199 can be found at Page “118 Stat. 345” on the Library of Congress website: <http://thomas.loc.gov/bss/d108/d108laws.html>.

What is in section 535(a)?:

Sec. 535. Exemption From Limitations on Procurement of Foreign Information Technology That Is a Commercial Item. (a) Exemption.--In order to promote Government access to commercial information technology, the restriction on purchasing nondomestic articles, materials, and supplies set forth in the Buy American Act (41 U.S.C. 10a et seq.), shall not apply to the acquisition by the Federal Government of information technology (as defined in section 11101 of title 40, United States Code, that is a commercial item (as defined in section 4(12) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(12))).

What Class Deviations Should My Agency Issue to Comply with the Law?

The following clauses do not apply to acquisitions of information technology that is a commercial item, when using FY 2004 funds:

- FAR 52.225-1, Buy American Act – Supplies
- FAR 52.225-2, Buy American Act Certificate
- FAR 52.225-3, Buy American Act –Free Trade Agreements – Israeli Trade Act
- FAR 52.225-4, Buy American Act –Free Trade Agreements – Israeli Trade Act Certificate

Does this mean there are no restrictions on the purchase of foreign information technology that is a commercial item when using FY 2004 funds?

No. Only the restriction of the Buy American Act on the purchase of nondomestic information technology that is a commercial item is waived. Additionally, the Trade Agreements Act (TAA) still applies at the appropriate TAA threshold.

What about 535(b)?

Paragraph (b) is a permanent change and the FAR will be changed accordingly. Until then, this change to the definition of IT should also be included in your class deviation.

How has the definition of IT changed?

The term "Information Technology" is defined at 40 U.S.C. 11101 and reflected in FAR 2.101; however, Public Law 108-199 amends this definition to add "analysis and evaluation" and to clarify the term "ancillary equipment." Therefore, the definition at FAR 2.101 will need to be changed as indicated in the bold print below:

Information Technology means any equipment, or interconnected system(s) or subsystem(s) of equipment that is used in the automatic acquisition, storage, **analysis, evaluation,** manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information by the agency.

- (1) For purposes of this definition, equipment is used by an agency if the equipment is used by the agency directly or is used by a contractor under a contract with the agency that requires –
 - (i) Its use;
 - (ii) To a significant extent, its use in the performance of a service or the furnishing of a product.
- (2) The term "information technology" includes computers, ancillary equipment **(including imaging peripherals, input, output, and storage devices necessary for security and surveillance), peripheral equipment designed to be controlled by the central processing unit of a computer,** software, firmware and similar procedures, services (including support services, and related resources.
- (3) The term "information technology" does not include any equipment that –
 - (i) Is acquired by a contractor incidental to a contract; or
 - (ii) Contains imbedded information technology that is used as an integral part of the product, but the principal function of which is not the acquisition, storage, **analysis, evaluation,** manipulation, management movement, control, display, switching, interchange, transmission, or reception of data or information. For example, HVAC (heating, ventilation, and air conditioning) equipment, control devices, and medical equipment where information technology is integral to its operation, are not information technology.