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'Buy American' And Solar Devices — DOD Clarification

Law360, New York (February 21, 2012, 1:30 PM ET) -- Last year in January 2011, the president signed the 2011 National Defense Authorization Act (Pub. L. No. 111-383, Section 846), which included a "Buy American" requirement for photovoltaic devices being purchased by the U.S. Department of Defense. Twelve months later, the DOD issued an interim rule to implement this new requirement. See 76 Fed. Reg. 18858 (Dec. 20, 2011).

The interim rule appears to be straightforward, implementing exceptions and manufacturing requirements with which most companies are already familiar under the Buy American Act or the Trade Agreements Act, but there is some fine print of which all companies selling photovoltaic devices to the DOD should be aware.

Key Definitions

The interim rule includes a new subsection at Defense Federal Acquisition Regulation Supplement 225.7017, as well as a new contract clause at DFARS 252.225-7017, Photovoltaic Devices, and a corresponding certification requirement at DFARS 252.225-7018. Defining its key concepts, the interim rule largely restates the statutory language from Section 846 by defining "covered contracts" and "photovoltaic device."

- "Covered contracts" means "an energy savings performance contract, a utility service contract, or a private housing contract awarded by DoD, if such contract results in DoD ownership of photovoltaic devices, by means other than DoD purchase as end products. DoD is deemed to own a photovoltaic device if the device is — (1) Installed on DoD property or in a facility owned by DoD; and (2) Reserved for the exclusive use of DoD for the full economic life of the device." Note that a "covered contract" will not include government contracts valued at less than \$150,000 (the simplified acquisition threshold).

- “Photovoltaic device” means “a device that converts light directly into electricity through a solid-state, semiconductor process.” Under this definition, a solar panel containing many individual solar cells would constitute a “photovoltaic device.” If such a panel were manufactured or assembled in the United States in a manner that constituted a substantial transformation (thus qualifying as a “domestic product”), the photovoltaic device would appear to qualify under this regulation, just as it would have under prior rules.

Applicable Dollar Thresholds and Products from U.S. Allies

The interim rule also breaks out the applicable dollar thresholds/categories at which the various free trade agreements apply. Click here to see table.

There are at least four issues worth noting about the applicable dollar thresholds and lists of approved countries:

1) Dollar Thresholds Apply to the Value of Photovoltaic Devices

The dollar thresholds apply to the value of the photovoltaic devices being purchased as part of the overall contract. As such, if you have a \$3 million contract with the DOD but estimate only \$100,000 in photovoltaic devices as a part of that overall contract, then it is the \$100,000 figure that would determine whether specific trade agreement exceptions apply for the photovoltaic devices.

2) Updated Dollar Thresholds

These dollar thresholds have been updated effective Jan. 1, 2012, which unfortunately means that the new interim rule is already out of date. While these thresholds will no doubt be reconciled when a final rule is eventually issued, the different thresholds will be confusing in the interim.

3) Qualifying Countries

The DOD has entered into memoranda of understanding with 21 U.S. allies whose ministries of defense have agreed that neither the U.S. nor the ally will discriminate against the other in defense procurements. Accordingly, the interim rule acknowledges that purchases at any dollar threshold will satisfy the “Buy American” requirement where the photovoltaic devices are from a “qualifying country,” which includes Australia, Austria, Belgium, Canada, Denmark, Egypt, Finland, France, Germany, Greece, Israel, Italy, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey and the United Kingdom.

Note that even though the U.S. and South Korea have entered into a newly expanded free trade agreement that should be fully implemented in 2012, the free trade agreement does not include an MOU between the DOD and the South Korean Ministry of National Defense such that South Korea would be included on this list as a “qualifying country.” However, South Korea remains a signatory to the World Trade Organization Agreement on Government Procurement, and photovoltaic devices from South Korea would satisfy the interim rule when purchases are at or above the \$203,000 threshold.

4) U.S.-Oman Free Trade Agreement

The rule does not include the U.S.-Oman free trade agreement entered into in 2009, which does not cover the DOD. Oman, therefore, is not listed as an “approved” country under the new DOD photovoltaic rules, even though a product from Oman would otherwise qualify under the Trade Agreements Act when purchased by most civilian agencies.

Other Key Features of the Interim Rule

Components

The interim rule reinforces the fact that it is concerned only with the country of origin for the manufactured end-product — not the components. Where the Buy American Act commonly requires that an end product be both: (1) manufactured in the U.S.; and (2) consist of more than 50 percent in domestic component parts, the new photovoltaic “Buy American” requirement requires only that the manufactured photovoltaic device end product be manufactured in the U.S. or a qualifying country (or a free trade agreement partner, if applicable).

This means that a domestically manufactured photovoltaic device could consist of entirely foreign content, so long as the final end product was manufactured or substantially transformed in an approved country.

Commercial Products

The interim rule expressly states that this rule applies to commercial purchases.

Unreasonable Cost Exception Remain Available

An existing exception under the Buy American Act permits the DOD to purchase products from nonapproved countries when the cost of a product from an approved country is 50-percent more than the product from a nonapproved country. In this respect, the interim rule does not absolutely require the purchase of domestic photovoltaic devices, but merely establishes a sizeable preference for the purchase of domestic products or other qualifying goods.

Conclusion

It is doubtful whether Section 846 was even necessary in the first place — after all, the statute merely directed the DOD to ensure that the purchases of photovoltaic devices comply with the Buy American Act and the Trade Agreements Act, two statutes that would have applied to the DOD purchases even if Section 846 were never passed.

Nevertheless, now that the DFARS has been amended with this interim rule, there should be greater clarity for contractors regarding the types of products that will satisfy the new requirement, as well as the specific procedures on how this new “Buy American” requirement will be implemented (particularly with regard to the valuation of photovoltaic devices being procured as part of a larger government contract).

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