



Federal Aviation Administration

Finding and Waiver 49 USC 50101

Public Interest Exception – Commercial Information Technology

Finding

Under 49 U.S.C. §50101 (“FAA Buy American”), the Federal Aviation Administration (FAA) may obligate appropriated funds for a project only if steel and manufactured goods used in the project are produced in the United States. The “FAA Buy American” permits waiving the requirement for United States-made manufactured goods when finding that requiring domestically produced steel and manufactured products is inconsistent with the public interest. The FAA Administrator delegated to the FAA Acquisition Executive authority to make findings waiving the provisions of the FAA Buy American.

(1) The Acquisition Management System emphasizes using commercial off-the-shelf products to satisfy FAA’s needs. Acquisition laws, such as the Federal Acquisition Streamlining Act, applicable to other Federal agencies also establish a preference for commercial items. Office of Management Budget Circular A-130, Management of Federal Information Resources, requires all Federal agencies to make maximum use of commercial off-the-shelf technology when selecting investments for information technology.

(2) In accordance with Consolidated Appropriations Act of 2004, P.L. No. 108-199, Section 535, Congress exempted purchase of information technology that is a “commercial item” from the requirements of 41 U.S.C. §10a, Buy American Act¹. Specifically, the appropriation states “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 that is a commercial item.”

(3) The Civilian Agency Acquisition Council (CAAC), via letter 2004-02, issued a class deviation to the Federal Acquisition Regulations enabling civilian agencies to purchase foreign made information technology that is a commercial item. Subsequent to CAAC letter 2004-02, the Federal Acquisition Regulations were amended to expressly exempt purchases of commercial information technology from the requirements of the Buy American Act.

(4) The FAA Acquisition Management System allows an exception to 41 U.S.C. §10a for purchasing commercial information technology for non-manufactured goods.

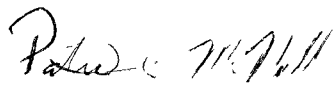
(5) Commercial information technology products contain hundreds of parts, materials, subcomponents, components, and subassemblies for processors, circuits, storage, displays, power, cables, racks, and other assemblies. Competitive pressures, short product lifecycles, and the modular and standardized nature of components have resulted in a decentralized manufacturing capability for United States-based companies providing commercial information technology end products. The information technology industry relies on a global, multi-source supply chainⁱⁱ, with non-domestic sources dominating manufacturing and supply for componentsⁱⁱⁱ. United States-based companies must obtain components either exclusively or mainly from foreign sources^{iv}. Additionally, a variety of non-domestic sources provide raw materials, such as petroleum and aluminum, that are transformed into plastic or metal components used in commercial end products. In some cases, only a foreign end product is available for a particular information technology need^v.

(6) Acquisition Management System Policy, Appendix C, defines "commercial item;" Attachment 1 of this waiver includes the definition. The term "information technology" for purposes of this waiver is defined in Attachment 2.

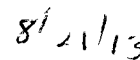
Waiver

Based on the above findings, and consistent with the public interest, I hereby waive the requirements of 49 U.S.C. §50101 to purchase United States-made manufactured goods when those manufactured goods are information technology products that are a commercial item. I do so with the authority granted to the Secretary by 49 U.S.C. §50101(b) and delegated to me by the FAA Administrator through memorandum dated April 3, 2012.

This waiver is valid until expressly rescinded.



Patricia A. McNall
Deputy Assistant Administrator for Acquisition & Business and
FAA Acquisition Executive



Date

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Attachment 1

Commercial item can mean 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 has been sold, leased, licensed to the general public; or has been offered for sale, lease, or license to the general public.
- (b) Any item that evolved from an item described in paragraph (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 government solicitation.
- (c) Any item that would satisfy a criterion expressed in paragraphs (a) or (b) of this definition, but for: (1) modifications of a type customarily available in the commercial marketplace; or (2) modifications of a type not customarily available in the commercial marketplace made to meet Federal government requirements.
- (d) Any combination of items meeting the requirements of paragraphs (a), (b), (c), or (e) of this definition 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 such services are procured for support of an item referred to in paragraph (a), (b), (c), or (d) of this definition, and if the source of such services: (1) offers such services to the general public and the Federal government contemporaneously and under similar terms and conditions; and (2) offers to use the same work force for providing the Federal government with such services as the source uses for providing such services to the general public.
- (f) 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 standards commercial terms and conditions. This does not include services that are sold based on hourly rates without an established catalog or market price for specific service performed.
- (g) Any item, combination of items, or service referred to in paragraphs (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 contract; or
- (h) An item, determined by the procuring agency to have been developed exclusively at private expense and sold in substantial quantities, on a competitive basis, to multiple state and local governments.

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Attachment 2

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.

(a) 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:

(1) Its use; or

(2) To a significant extent, its use in the performance of a service or the furnishing of a product.

(b) The term “information technology” includes computers, ancillary equipment (including 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.

(c) The term “information technology” does not include any equipment that:

(1) Is acquired by a contractor incidental to a contract; or

(2) Contains embedded 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.

¹ The Buy American Act was recodified July 2013 at 41 U.S.C. 83

¹¹ There is a breadth of information about outsourcing, multinational corporations, and global supply chains; two representative references related to information technology include: Linden, Kraemer, and Dedrick, "Who Captures Value in a Global Innovation System? The case of Apple's iPod," Personal Computing Industry Center, University of California, Irvine, 2007; Pulskamp and Rau, "Modeling the Desktop PC, Mobile PC, and X86 Server Supply Chain," IDC, 2005

¹² As an example, the largest electronics manufacturing services company is based in Taiwan, with manufacturing / assembly facilities in more than 10 countries (Sturgeon and Kawakami, "Global Value Chains in the Electronics Industry, Who Captures Value," World Bank, 2010)

¹³ As examples, based on number of units produced, Malaysia and Germany were top producers of printed circuit boards and Croatia and United Kingdom were top producers of electrical capacitors (United Nations Statistics Division; Industrial Statistics, 2008)

¹⁴ Using the value of global exports for high technology products, countries other than the United States export 91% of communications equipment, 89% of semiconductors, and 90% of computers (Chapter 6, Table 6-5, Science and Engineering Indicators, National Science Foundation, 2012)