

Climate Change and Clean Technology Blog

Posted at 4:53 AM on January 13, 2011 by Sheppard Mullin

[New Defense Authorization Act Imposes Buy American Act Mandate for Photovoltaics](#)

By [Curtis M. Dombek](#)

The 2011 Defense Authorization Act signed by the President this week contains a requirement in Section 846 for the Department of Defense to incorporate a clause in specified solar energy contracts requiring photovoltaic devices provided under the contract to comply with the Buy American Act, 41 U.S.C. 10a et seq., subject to the exceptions recognized under the Trade Agreements Act of 1979, 19 U.S.C. 2501 et seq. or otherwise provided by law. Photovoltaic devices are defined for purposes of the legislation as “devices that convert light directly into electricity through a solid-state, semiconductor process.

The contracts to which this new requirement applies include “energy savings performance contracts, utility service contracts, land leases, and private housing contracts, to the extent that such contracts result in ownership of photovoltaic devices by the Department of Defense.”

Although on the surface one might expect this to limit the impact of the requirement to contracts that actually transfer legal title to the devices to DoD, the new requirement actually extends further because of a special definition of “ownership.” “Ownership” of a device by DoD is deemed to exist under the legislation if the device is “(1) installed on Department of Defense property or in a facility owned by the Department of Defense; and (2) reserved for the exclusive use of the Department of Defense for the full economic life of the device.”

The Buy American requirement applies, therefore, not only when photovoltaic devices or equipment containing them is sold to DoD, but also when such devices are installed on DoD property or in a DoD owned facility for the exclusive use of DoD for their “full economic life,” even if legal title to the equipment remains in a third party.

In addition to the Trade Agreement Act exception, the Buy American Act contains special exceptions for certain procurements based upon reasonable availability, relative cost and the public interest. See, e.g., Defense Federal Acquisition Regulation Supplement, Subpart 225.1 (revised Oct. 1, 2010). These other exceptions, however, are unlikely to play a role given the current market conditions in the solar equipment industry. The Buy American Act and Trade Agreements Act also have specific procurement dollar thresholds, and these vary for different countries qualifying under the Trade Agreements Act.

The exception under the Trade Agreements Act will permit the use of photovoltaic devices manufactured in a country that is a party to the WTO Government Procurement Agreement or that has a Free Trade Agreement with the United States. This will have an obvious impact on procurement from China, which is a large exporter of photovoltaic devices but is not yet a party to the WTO Government Procurement Agreement.

Under prior law, it was generally permissible to deliver to DoD photovoltaic cells of foreign origin that were incorporated into equipment that was the subject of a substantial transformation in the United States prior to delivery. If this new provision is applied by looking through any end item substantially transformed in the

United States to require individual photovoltaic components to qualify, this will mean that DoD contractors who manufacture equipment in the United States incorporating photovoltaic components can no longer rely upon substantial transformation in the United States and will need to begin procuring the photovoltaic components in the United States or from countries that qualify under the Trade Agreements Act. It will be very interesting to see how the implementing regulations deal with this and the other issues raised by the new legislation.

Authored by:

[Curtis Dombek](#)

(213) 617-5595

cdombek@sheppardmullin.com