

Buy American Requirements for Military Base Solar Projects

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The Department of Defense ("DoD") is serious about renewable energy and hosting solar photovoltaic projects.

During President Obama's recent State of the Union address, he said, "I'm proud to announce that the Department of Defense, the world's largest consumer of energy, will make one of the largest commitments to clean energy in history – with the Navy purchasing enough capacity to power a quarter of a million homes a year." The President's statement is consistent with recent DoD policy and project announcements related to the use of renewable energy and reports related thereto:

- In January 2012, the DoD issued a report titled "Solar Energy Development on DoD Installations in the Mojave & Colorado Deserts," which found that more than 7,000 megawatts (MWAC) of solar energy development is technically feasible and financially viable at several DoD installations in the Mojave and Colorado Deserts of California. The complete report is more than 500 pages, and provides detail on the full range of issues for any solar project development, as well as the special considerations for projects located on active military bases. The January 2012 DoD report acknowledges that private companies will develop these projects since that will avoid the need for the DoD to make any capital investments, and only private developers can take advantage of tax incentives.
- On February 2, 2012, Siemens Government Technologies, Inc. announced that the U.S. Army Engineering and Support Center has awarded a \$16.8 million task order to implement energy-conserving upgrades, including a 4.465 MW solar photovoltaic (PV) power generating system—the largest to date for the U.S. Army—at the White Sands Missile Range, N.M.
- In August 2011, the United States Army Secretary John McHugh announced the creation of a new entity to manage the development of large-scale renewable energy projects. The Energy Initiatives Office Task Force will help the service meet its goal of using 25 percent renewable energy by 2025—a target that will require at least \$7.1 billion in investments over the next 10

years. The task force will be responsible for finding private sector investors. "We have to attract private investors to utilize Army land to build cost-effective, large-scale renewable projects," said Jonathan Powers, special adviser on energy in the Office of the Assistant Secretary of the Army.

The directive for the DoD's push toward clean energy comes from the Energy Policy Act of 2005 (EPACT), which requires federal agencies to purchase 7.5 percent of their energy from renewable sources by 2013; Presidential Executive Order 13423, which requires that half of this renewable energy comes from new sources; and the National Defense Authorization Act of 2007, which requires that 25 percent of DoD's total electricity comes from renewable sources by 2025.

The recently issued DoD interim rule expands existing Buy American requirements and allows for certain exceptions to those requirements under the Trade Agreements Act.

On December 20, 2011, the DoD issued an interim rule¹ to implement a Buy American requirement contained in the National Defense Authorization Act for Fiscal Year 2011.² The interim rule expands the Buy American coverage since the prior rule only applied if the DoD would have title to the solar facility. The DoD will consider public comments on the interim rule until February 21, 2012.³

The rule provides that photovoltaic devices used in the performance of any covered contract need to comply with the Buy American Act, subject to the exceptions of the Trade Agreements Act. A "covered contract" is defined in this interim rule as an energy savings performance contract, a utility service contract, or a private housing contract, if such contract will result 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:

- Installed on DoD property or in a facility owned by DoD
- Reserved for the exclusive use of DoD for the full economic life of the device

There are exceptions to the application of this interim rule for qualifying country photovoltaic devices, Free Trade Agreement or designated country photovoltaic devices (depending on the estimated value of the photovoltaic devices), and other foreign photovoltaic devices if covered by the Buy American Act, and if the cost of a domestic photovoltaic device would be unreasonable. It is noteworthy that purchases of photovoltaic devices from Taiwan and South Korea would qualify under the World Trade Organization Government Procurement Agreement exception, but devices from the People's Republic of China do not have any exceptions.

In order to determine if the expanded Buy American requirements under the interim rule apply, the key question to ask is whether a solar facility is reserved for the exclusive use of the DoD for the full economic life of the device.

Solar installations have structures and characteristics that may avoid being deemed to be "reserved for the exclusive use of the DoD for the full economic life of the device" as follows:

- Photovoltaic panel warranties are often for terms as long as 25 years and solar photovoltaic systems are often deemed to have a "useful life" of the same period. If the contract with the DoD is for a period of less than 25 years and the DoD is not entitled to take title to the system at the end of the contract term, then it could be argued that the DoD's use is not for the full economic life of the device.
- Depending on the size of the solar installation and the energy demand of the DoD installation, the project may be set up on a "net metered" basis, which means that during periods when energy production exceeds the DoD demand, excess production is sold to the local utility.
- To avoid this requirement, the owner of the solar project could reserve a portion of the output to sell directly to the local utility.

Congress has recently attempted to add Buy American requirements to solar power contracts beyond the expanded coverage of the interim rule.

Another recent effort to expand the application of the Buy American Act occurred in December 2011, when the Buy American Solar Amendment passed the Senate as part of the 2012 DoD appropriations bill. The Buy American Solar Amendment would have expanded the requirements to contracts related to the installation of solar PV systems on DoD property by a third party, in which the output is consumed predominately by the DoD and counted toward federal renewable energy purchase requirements. The Buy American Solar Amendment would also have included land leases.

The "consumed predominately" standard is more inclusive than the "reserved for the exclusive use of the DoD for the full economic life of the device" standard in the DoD's interim rule.

Democratic Senator Tom Udall (D-N.M.), one of the sponsors of the Amendment, stated the following on his website: "The Department of Defense is required to comply with the Buy American Act and purchase

American-made goods, including solar panels. In practice, however, the Buy American requirements often do not apply to solar projects at military facilities because third-party producers procure, install and maintain solar panels, financed by innovative long-term energy contracts with the department. Since the Department of Defense buys the power, and not necessarily the solar panels, a loophole in Buy American requirements has emerged where the military can purchase power from producers who do not use Buy American compliant panels."

The House of Representatives 2012 DoD appropriations bill also included Buy American restrictions on the use of solar PV panels, but the final bill that was signed into law did not include these provisions.

Buy American Act Rules and Proposed Laws Have Not Addressed the Most Likely Type of Solar Project.

One type of solar project structure not covered by the DoD interim rule or the Buy American Solar Amendment is the situation in which a third party leases property from the DoD but sells the output at wholesale to a non-DoD entity. Although Senator Udall correctly identified this loophole in his remarks on the Senate legislation,⁴ the legislation did not address the use of foreign PV panels for this purpose.

The use of DoD lands for solar PV installations that sell output at wholesale is likely to be the predominant use of DoD lands. The January 2012 DoD report found that "Edwards AFB alone has a maximum technical solar development potential of 5,346 MWAC and study-wide there is almost 12,000 MWAC of potential capacity if crystalline-silicon fixed-axis systems are installed. On an annual output basis, this potential can translate into over 23,000,000 MWh (or over \$2.3 billion in annual electricity revenue at current rates). This potential solar electricity output is equivalent to over 75% of DoD's annual, total electricity consumption of 29,861,334 MWh (DoD, 2010d) and more than 40 times as large as the combined annual electricity consumption (approximately 560,000 MWh) of the seven California military installations in this study."

Even though the proposed Buy American amendments did not become law, the level of bipartisan support—in a Congress that is gridlocked on almost every other matter—is noteworthy and indicates that this will likely not be the last we see of such restrictions. The prospect of a change of law that could materially impact a project may have some effect on solar developers as they work on projects to take advantage of the DoD's interest in renewable energy and the solar resource potential at DoD sites.

The current petition to impose tariffs on crystalline silicon PV cells.

This is an evolving political and business issue, and the effect of the Buy American rules may in fact be superseded by the current ongoing investigation of the United States Department of Commerce of a countervailing duty petition concerning imports of crystalline silicon photovoltaic cells from the Peoples Republic of China.⁵ On January 30, 2012, the Department of Commerce issued a finding that it had "reasonable cause to believe or suspect" that the alleged subsidies were "inconsistent" with World Trade Organization rules, and that stating that United States manufacturers were facing "critical circumstances," which means that if the Department of Commerce does impose import duties, they could be retroactive to 90 days before its decision. That could have a significant impact on the many projects that ordered and/or installed panels at the end of 2011 in order to satisfy the start of construction requirement for the 1603 cash grant in lieu of tax credit program. Critics, including the Coalition for Affordable Solar Energy, have argued that tariffs imposed on Chinese manufactured panels would slow domestic growth for solar photovoltaic systems and result in substantial job losses.

Solar power developers, and others in the solar manufacturing chain, may have an opportunity to influence future legislation and subsequent rulemaking implementation, regarding Buy American requirements.

The demand to "close existing loopholes" related to Buy American requirements is clearly bi-partisan and may likely be addressed in upcoming legislation. In addition, recent controversies with the implementation of Buy American requirements in statutes other than those discussed above, including the American Recovery and Reinvestment Act, may provide stakeholders with the chance to suggest certain technical amendments to these other statutes. These legislative changes, to be successful, would need to be consistent with basic Buy American principles, while also adding something tailored to the solar energy industry.

Careful coordination of the basic needs of the industry and of the Department of Defense, and other Federal agencies, could assure the chance for developing a better Buy American program for Solar. Please contact the authors of this Client Alert for more information on how to impact future legislation and rulemaking related to the Buy American requirements affecting the solar power industry.

1. Defense Federal Acquisition Regulation Supplement; Utilization of Domestic Photovoltaic Devices, 76 Fed. Reg. 78858 (Dec. 20, 2011).
2. National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 846 (2011).
3. Two ways to submit comments are through www.regulations.gov or by emailing dfars@osd.mil and including "DFARS Case 2011–D04" in the subject line.
4. 157 Cong. Rec. S7791 (2011).
5. See 76 Fed. Reg. 70996 (Nov. 16, 2011).

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