October 20, 2021

Mathew C. Blum, Acting Administrator
Office of Federal Procurement Policy Office of Management and Budget
Washington, DC 20503

Re: FAR Case 2021-008; Federal Acquisition Regulation: Amendments to the FAR Buy American Act Requirements, Proposed Rule, 86 Fed. Reg. 40980 (July 30, 2021)

Dear Acting Administrator Blum:

Hitachi Vantara Federal Corporation (HVF) is pleased to submit comments in response to *FAR Case 2021-008, Amendments to the FAR Buy American Act Requirements*.

HVF, headquartered in Reston, Virginia, is a wholly-owned subsidiary of Hitachi Vantara, a U.S. technology company, with Hitachi Ltd., a Japanese publicly traded company, being the ultimate parent. HVF is organized as a U.S. company, employing approximately 100 Americans. HVF implements data and analytics solutions that meet the Federal Government's needs today and tomorrow. HVF provides pathways to the cloud and converged information technology (IT) systems through virtualization, storage and hardware tools to reduce IT complexity and increase the efficiency of the U.S. government. HVF offers the best information and operation technology from across the Hitachi family to provide exceptional value to government agencies.

As directed by President Biden's Executive Order Number 14005 on "Ensuring the Future is Made in America by All of America's Workers," the proposed rule seeks to implement widespread changes to the current FAR Part 25 rules implementing the Buy American Act (BAA), 41 U.S.C. §§ 8301-8305. HVF supports the policies to maximize the Federal Government's use of supplies manufactured and produced in the United States. However, HVF is concerned changes would have an adverse impact on industry and the Federal Government – harming, rather than strengthening, the U.S. industrial base and the Federal agencies that companies like HVF are committed to supporting. Those changes include:

1) eliminating, or even narrowing, the exception for commercial information technology; 2) eliminating or narrowing the current partial waiver for commercially available off-the-shelf (COTS) items; 3) inadequate protections for adhering to U.S. trade agreement provisions, and 4) possible

violation of contract provisions and/or positions that could disincentivize companies entering into purchase agreements with the federal government. Not addressing these issues appropriately could lead to U.S. Federal agencies being deprived of access to the most advanced IT commercial items that the global marketplace offers here in the U.S.

As part of the wave of commercial item acquisition reforms in the 1990s, Congress recognized the pressing need to utilize the commercial marketplace to acquire information technology – not only to drive down acquisition costs, but also to provide the Federal Government the opportunity to efficiently acquire products and services with the latest technological advances. In 1994, Congress directed executive branch agencies to acquire commercial items to the maximum extent practicable.[1] Two years later, in 1996, Congress passed the Clinger-Cohen Act, Pub. L. No. 104-106, 110 Stat. 186 (1996), establishing a simplified acquisition landscape for commercial items, and introducing a new subset of commercial items into the Government procurement landscape – "COTS." The Clinger-Cohen Act focused heavily on addressing IT acquisition reforms – providing Federal agencies with the flexibility to acquire IT products quickly and tailor acquisitions to meet specific requirements and needs. The Clinger-Cohen Act requires that "[t]he Federal Acquisition Regulatory Council [] ensure that, to the maximum extent practicable, the process for acquisition of information technology is a simplified, clear, and understandable process that specifically addresses the management of risk, incremental acquisitions, and the need to incorporate commercial information technology in a timely manner."[2]

The BAA commercial IT exception (FAR 25.103(e)) and the COTS partial waiver (FAR 25.101(a)(2)(i)) are necessary to meet Congress' demands – empowering Federal agencies to procure commercial IT items, to the maximum extent practicable, to meet the agency's needs. As explained below, removing, or even narrowing, either exception would drastically increase procurement costs to the Government, increase the time it would take for the Government to acquire critical items, and undermine the Government's ability to purchase items needed to accomplish an agency's mission – items that would otherwise be generally available in the commercial marketplace for anyone other than the Federal Government to use and effectively removing a significant portion of technology products and services from the federal marketplace.

---

[1] *See* Federal Acquisition Streamlining Act (FASA), Pub. L. No. 103-355, 108 Stat. 3243 (1994)

[2] *Id.*, § 5201, 110 Stat. 186.

1. Commercial Information Technology Exception

The proposed rule explains that the FAR Council, in consultation withthe Made in America Office, plans to review "the longstanding statutory exemption from the Buy American Act for commercial information technology (IT) to determine if the original purpose or other goals of the exemption remain relevant in the current economic and national security environment." HVF strongly believes that the original purpose and goals of this exception are very much relevant today and that the commercial IT exception at FAR 25.103(e) should remain untouched.

The Consolidated Appropriations Act of 2004 originally introduced the exception to the BAA for "information technology that is a commercial item."[3] Congress has reiterated this exception in every appropriations act since that time[4] – even as recently as nine months ago.[5] In fact, the current version of the Financial Services and General Government appropriations bill for Fiscal Year 2022 again includes the commercial IT exception to the BAA.[6] Clearly, Congress recognizes the continuing need for the Federal Government to have expeditious access to ever evolving information technology in the commercial IT marketplace, and neither the Made in America Office nor the FAR Council have the authority to countermand the statutory mandate.

2. Partial Waiver for Commercially Available Off-The-Shelf (COTS) Items

Generally speaking, the BAA has a two-part test to determine whether an item qualifies as a "domestic end product": first, the end product must be manufactured in the United States;

---

[3] Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, §535, 188 Stat. 3 (2004)

[4] *See, e.g.,* Pub. L. No. 108-447, § 517, 118 Stat. 2809 (2004) (H.R. 4818); Pub. L. No. 109-115, §717, 119 Stat. 2396 (2005); Pub. L. No. 110-161, §618, 121 Stat. 1844 (2007) (H.R. 2766); Pub. L. No. 111-8, § 615, 123 Stat. 524 (2009) (H.R. 1105); Pub. L. No. 111-117, § 615, 123 Stat. 3034 (2009) (H.R. 3288); Pub. L. No. 112-74, § 615, 125 Stat. 786 (2011) (H.R. 2055); Pub. L. No. 113-76, § 615, 128 Stat. 5 (2014) (H.R. 3547); Pub. L. No. 113-235, § 615, 128 Stat. 2130 (2014) (H.R. 83); Pub. L. No. 114-113, § 615, 129 Stat. 2242 (2015) (H.R. 2029); Pub. L. No. 115-31, § 615, 131 Stat. 135 (2017) (H.R. 244); Pub. L. No. 115-141, § 615, 132 Stat. 348 (2018) (H.R. 1625); Pub. L. No. 116-6, § 615, 133 Stat. 3 (2019) (H.J. Res. 31); Pub. L. No. 116-93, § 615, 133 Stat. 2317 (2019) (H.R. 1158).

[5] *See* Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, § 615 (2020) (H.R. 133)

[6] *See* H.R. 4502, 117th Cong.§ 613 (2021)

second, the majority of the end product's components must also be of U.S. origin.[7]

In 2009, the Office of Federal Procurement Policy (OFPP) waived the second prong of this test for the acquisition of COTS items in an effort to reduce the administrative burdens imposed by Government-unique requirements.[8] OFPP specifically recognized that COTS manufacturers typically make purchasing decisions for materials and parts based on factors such as cost, quality, availability, and maintaining the state-of-the-art – not country of origin. Thus, COTS manufacturers have difficulty in both tracking and guaranteeing the source of their components, serving as a barrier to entry for many manufacturers desiring to sell COTS items to the Federal Government. The proposed rule seeks comments to understand "the extent to which the original purpose of the [COTS] partial waiver remains relevant," including whether the COTS waiver has benefited domestic firms and their employees, and whether and to what extent marketplace conditions support narrowing or lifting the partial waiver. HVF believes the above stated purpose and concerns remain very relevant today. Eliminating or narrowing the COTS exception undoubtedly will disrupt supply chains, increase costs to the Government (and ultimately taxpayers) by denying Federal Government purchasers economical and state-of-the-art technologies available in the commercial marketplace, and also will negatively impact the U.S. industrial base, potentially placing U.S. jobs at risk.

As OFPP recognized in 2009, many U.S. manufacturers of COTS items do not currently track the country of origin for the various components that make up their finished end products. These manufacturers buy from international supply chains, focusing on factors other than country of origin.In implementing the OFPP's determination in 2009, the FAR Council recognized "[i]n today's globally integrated market, it is expensive for manufacturers to distinguish between foreign and domestic components. Requiring them to do so results in increased costs of procurements and impedes the ability to obtain the latest advances in commercial technology." These supply chain risks and concerns are still very relevant today with global market growth creating even more interconnected, complicated, and global supply chains. If it was a sound rationale in 2009, then it remains equally so today.

---

[7] *See* FAR 25.001(c)(1); 25.101(a).

[8] *See* 74 Fed. Reg. 2713 (Jan. 15, 2009).

Removing the COTS partial waiver would place a massive administrative and cost burden on COTS manufacturers that would inevitably flow to the Federal Government and, ultimately, back to the taxpayer. For over a decade, companies selling to the Federal Government have established their supply chains, manufacturing infrastructure, and U.S. workforce to meet the longstanding BAA requirements, including the knowledge that COTS items would be exempt from the domestic content requirement.[9] Removing the partial waiver would cause significant disruptions to supply chain operations, and these companies will be forced to restructure their manufacturing processes – establishing and maintaining costly and labor intensive supply chain management systems to track the domestic content for all their components and materials. These increased administrative costs not only necessarily will be passed along to the Federal Government customer (without an appreciable improvement in the product being purchased at an increased cost), but also will have the practical effect of expelling many COTS manufacturers like HVF from the federal marketplace.

Additionally, OFPP sought to waive the domestic content test for COTS items because OFPP recognized the ever-growing cost of agencies building and maintaining government-unique systems, when the systems with similar capabilities were available in the commercial marketplace at far lower costs. Market competition allows manufacturers to spread costs associated with the development and manufacturing of products over a larger customer base. Further, use of commercially available items utilizes significantly shorter development schedules than items developed to Government-unique specifications, significantly reducing lead time. The Government is able to take advantage of upgrades available in the commercial marketplace, just like commercial customers. With the removal of the COTS partial waiver, the Federal Government ultimately will lose all of these benefits and will face increased costs for U.S. manufacturers to provide BAA-compliant products or Government-unique items.

[9] Allowing COTS vendors to focus their compliance efforts on the country of origin of the manufactured end product allows COTS vendors to synchronize their BAA compliance efforts with their Trade Agreements Act (TAA) compliance efforts. The TAA considers where the end product was manufactured or substantially transformed (*see*, *e.g.*, FAR 25.001(c)(2)), not where the manufacturer sourced the various materials and component. In this respect, COTS vendors who are less familiar with the complex procurement regulations are better able to manage compliance with a single federal country of origin requirements – whether BAA or TAA, requiring only the final country of origin – and more likely to sell to the Federal Government, notwithstanding the complicated regulatory requirements.

Further, by eliminating this partial waiver, entire categories of products, made by the U.S. industrial workforce, would immediately be considered "foreign" under the regulations. This is due mainly to the immediate reality that most manufacturers and vendors simply would not have the information necessary to certify a product as a "domestic end product" under the BAA. The vacuum created would not only disrupt the Government's ongoing procurement priorities – as agencies would find themselves unable to procure the items they need – but also raises significant concerns with quality. Manufacturers with ongoing commitments to the Federal Government will likely scramble, being forced to alter their designs to utilize BAA compliant components, potentially relying on items of higher cost, lesser quality, and/or unknown effect on a legacy, approved manufacturing line. Those risks, and the unpredictable consequences, will be borne wholly by the Federal Government end user that would be suddenly cut off from access to COTS products that it may have been buying for years.

Finally, it is not only the Federal Government that will suffer from the removal of this partial waiver. Many U.S. companies, with U.S. workforces, will find the cost of competing in the Federal marketplace too expensive, too unpredictable, or too burdensome, and simply bow out or shrink their workforces. This effect will especially be borne by small and disadvantaged manufacturers who do not have the infrastructure to track the origin of every component in the items they sell to the Federal Government.

3. Adherence to International Trade Agreements

The United States benefits from the broader procurement marketplace created by our international trade agreements. This flexibility allows the federal government to have additional sourcing options and ensures an enormous marketplace outside of the United States for items made here in America.

As the Biden administration considers changes to the Buy American rules, it is vital we maintain our trade obligations which facilitate procurement opportunities within the scope of allied nations. The Trade Agreements Act ("***TAA***") and Government Procurement Agreement ("***GPA***") are critical elements of those international commitments between the United States and our key, long-time economic, and security partners. The linkage formed by these agreements allows us to consider the concept of "Allied-Made" products for procurement.

According to a 2016 report from the Government Accountability Office, the Government Procurement Agreement gives American-made products non-discriminatory access to those same countries' government procurement markets. These procurement markets have an estimated value of more than $4 trillion – collectively more than eight times the value of the U.S. government procurement market.

Although no change has been proposed in the NPRM, if the United States were to unilaterally suspend TAA benefits for products and services sourced from GPA countries, or from other procurement agreements such as our free trade agreements, American-made goods would almost certainly face retaliation. Specifically, U.S. products could be shut out of most, if not all international government procurement markets, losing valuable export opportunities. Our trading partners would also likely bring World Trade Organization cases against the United States, further complicating the Biden Administration's efforts to work with our allies and partners through multilateral institutions.

4. Treatment of Contracts

The NPRM proposes to raise the domestic thresholds for the Buy American Act from 55% to 75% within five years. The proposed changes raise some concerning questions about impacts across a variety of important areas.

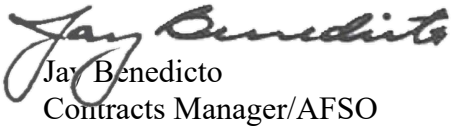
The significant shift to 75% in a short amount of time may be very difficult for many manufacturers to meet. The reality of global supply chains may make it difficult to source parts domestically in order to meet the higher content thresholds. This challenge will be particularly difficult for international companies that utilize global supply chains to run their business. When combined with the significant, new reporting requirements called for in other parts of the NPRM, businesses may decide that the cumulative cost and compliance burdens are too much to justify staying in the federal procurement market.

The proposed requirement that a company that enters a long-term contract must meet the higher requirements when they go into effect places an unreasonable burden on contractors bidding on fixed priced contracts. These impacted companies will need to identify a supply chain that meets the highest requirement and price that out for its proposal although the highest requirement may be several years away. Companies bidding today are utilizing supply chains and the associated cost of products based on a 55% threshold. The new rules, however, would actually require a contract that would apply to five years from now to have a 75% content threshold now.

Companies would need to bid and account for the cost of that 75% threshold today if they are submitting a bid so the price quote to the federal government recognizes the cost to produce the product in 5 years. This also must be calculated by a company with uncertainty of who a potential domestic supplier for content might be and guessing what the possible price point for content might be from this unknown supplier. This creates significant uncertainty and could result in companies bidding at higher prices than required to ensure they do not lose money on this contract.

In sum, both the BAA exception for commercial IT and the partial waiver for COTS items are necessary for the Federal Government to fulfill Congress' mandates to simplify the acquisition of, and to procure to the maximum extent possible, commercial items and commercial IT. Removing or narrowing either would contravene Congressional intent and have the three-fold impact of: (1) increasing the Federal Government's acquisition costs, (2) disrupting agencies' ability to perform their mission, and (3) harm the U.S. industrial base. Accordingly, HVF respectfully requests that both the commercial IT exception and the COTS partial waiver remain untouched in the final rule.

Respectfully submitted,



Jay Benedicto
Contracts Manager/AFSO