



Kissell Amendment Compliance and Domestic Sourcing

October 6, 2022

Fiscal Year 2022 Report to Congress



**Homeland
Security**

Under Secretary for Management

Message from the Office of the Under Secretary for Management

October 6, 2022

I am pleased to present the following report, “Kissell Amendment Compliance and Domestic Sourcing,” which was prepared by the Office of the Chief Procurement Officer (OCPO).

This report responds to direction in the Joint Explanatory Statement and House Report 117-87, which accompany the Fiscal Year 2022 Department of Homeland Security (DHS) Appropriations Act (P.L. 117-103). DHS is committed to maximizing the use of domestic sources and to ensuring that DHS’s procurements comply with all Made in America laws, including the Kissell Amendment. DHS also is committed to ensuring that personal protective equipment (PPE), body armor, and environmental and flame-resistant clothing procured by DHS or its Components are manufactured domestically from domestic materials to the maximum extent possible.



Pursuant to congressional requirements, this report is being provided to the following Members of Congress:

The Honorable Lucille Roybal-Allard
Chairwoman, House Appropriations Subcommittee on Homeland Security

The Honorable Chuck Fleischmann
Ranking Member, House Appropriations Subcommittee on Homeland Security

The Honorable Chris Murphy
Chair, Senate Appropriations Subcommittee on Homeland Security

The Honorable Shelley Moore Capito
Ranking Member, Senate Appropriations Subcommittee on Homeland Security

Inquiries relating to this report may be directed to me at (202) 447-3400.

Sincerely,

**RANDOLPH
D ALLES** Digitally signed by
RANDOLPH D ALLES
Date: 2022.10.06
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R. D. Alles
Acting Under Secretary for Management

Executive Summary

DHS is committed to acquiring domestically manufactured items to the maximum extent possible. To this end, DHS OCPO has been a key partner to the Made in America Office (MIAO) within the Office of Management and Budget (OMB) to identify and establish U.S. Government-wide policies and procedures to maximize domestic content and to ensure that exceptions to domestic content requirements are reviewed and approved at appropriate levels. DHS OCPO also has taken the lead in interagency implementation of the Make PPE in America Act, Subtitle C of the Infrastructure Investment and Jobs Act (P.L. 117-58), and is working closely with the OMB Office of Federal Procurement Policy and MIAO to finalize implementing regulations and policies.

Regarding Made in America laws and regulations, DHS adheres to Federal Acquisition Regulation (FAR) Part 25, *Foreign Acquisition*, which implements the Buy American Act (BAA), the World Trade Organization Government Procurement Agreement approved by Congress, the various free trade agreements, and other related initiatives and agreements. The Homeland Security Acquisition Regulation (HSAR) implements statutes and other matters unique to DHS such as the Kissell Amendment, which addresses textiles. The Homeland Security Acquisition Manual (HSAM)—DHS’s internal acquisition policies and procedures—implements or supplements requirements of the FAR and the HSAR.

For the past several years, and as previously reported to Congress, DHS has had robust internal policies and procedures in place to ensure proper oversight of Made in America laws and to ensure that exceptions to such laws are used only when necessary. Nonetheless, additional actions have been taken over the past 2 years to strengthen further DHS acquisition practices and oversight in response to Executive Order 14005, “Ensuring the Future Is Made in All of America by All of America’s Workers,” and the joint memorandum, dated October 26, 2021, issued by the MIAO and Office of Federal Procurement Policy (OFPP) titled, “Improving the Transparency of Made in America Waivers.” Specifically, DHS OCPO has taken the following actions:

- Issued Acquisition Alert 22-04 *New Requirements for Nonavailability Exceptions Under the BAA and Kissell* (dated November 2, 2021) to advise contracting activities that effective November 16, 2021:
 - Nonavailability waiver determinations require review and approval by the MIAO before award is made and the process by which waivers will be submitted to the MIAO for review;
 - Nonavailability waiver determinations that arise under exigent, or other situations where an agency must act in an expedited manner, must be submitted to the DHS Chief Procurement Officer (CPO) for review and approval within 15 days of contract award;
 - The appropriate Buy American FAR clause/provision shall be included in all applicable solicitations and contracts even when market research suggests that there are no apparent domestic end products that are likely to be offered;

- Written nonavailability waiver determinations shall be developed for procurement actions meeting the criteria at FAR 25.103(b)(3); and
- Use of updated templates for nonavailability exceptions to the BAA and Kissell Amendment are required.
 - **Note:** Template updates require contracting officers to identify mission impacts from a failure to approve a nonavailability exception and to document the issuance of Sources Sought Notices and Requests for Information in the market research section of the nonavailability waiver determination.
- Issued Revision 1 to Acquisition Alert 22-04 *New Requirements for Nonavailability Exceptions Under the BAA and Kissell* (dated November 17, 2021) to announce:
 - Updates to the DHS Buy American Reporting Tool (BART)¹ to facilitate accurate and timely submission of nonavailability waiver determinations to the MIAO for review;
 - Additional updates to the nonavailability waiver determination templates in HSAM Appendix AA and HSAM Appendix AD to ensure that all requisite information is included in determinations; and
 - Federal Procurement Data System workflow notifications for exceptions to the BAA on the basis of resale, public interest, domestic nonavailability, or unreasonable cost.
 - **Note:** Contracting officers now receive an email notification advising that use of the exception requires advance review and approval by the DHS CPO and that he or she must ensure that the requisite determination has been uploaded to the BART and approved by the DHS CPO before proceeding with award.
- Issued FAR Class Deviation 22-04 *Requirements for Nonavailability Determinations Under the Buy American Statute* to implement the requisite changes to FAR Part 3025 *Foreign Acquisition* as a result of the joint memorandum, dated October 26, 2021, issued by the MIAO and OFPP titled, “Improving the Transparency of Made in America Waivers”; and
- Promulgated updates to HSAM Chapter 3025 *Foreign Acquisition*, Appendix AA, and Appendix AE to implement the requirements from the aforementioned Acquisition Alerts and FAR Class Deviation. The updates were published in the January HSAM Notice with an effective date of January 31, 2022.

¹ The DHS BART is the repository for all BAA exceptions requiring approval or concurrence by the DHS CPO or the DHS Secretary.



Kissell Amendment Compliance and Domestic Sourcing

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I. Legislative Language

This report was prepared pursuant to direction in the Joint Explanatory Statement and House Report 117-87 accompanying the Fiscal Year (FY) 2022 Department of Homeland Security (DHS) Appropriations Act (P.L. 117-103).

The Joint Explanatory Statement includes the following:

Domestic Supply Chain.—Not later than 180 days after the date of enactment of this Act, the Secretary of Homeland Security shall provide a report to the Committees with recommendations on how the Department may procure additional items from domestic sources and bolster the domestic supply chain for items related to national security. The report shall include a status of the compliance of the Department with the requirements under section 604 of title VI of division A of the American Recovery and Reinvestment Act of 2009 (6 U.S.C. 453b). Additionally, the report shall include an assessment of the capacity of the Department to procure the following items from domestic sources: personal protective equipment and other items necessary to respond to a pandemic such as that caused by COVID-19; body armor components intended to provide ballistic protection for an individual; helmets that provide ballistic protection and other head protection and components; and rain gear, cold weather gear, and other environmental and flame resistant clothing.

House Report 117-87 states:

Strengthening Domestic Manufacturing and Supply Chains.—The Committee is concerned about the nation’s limited manufacturing base for essential products such as medical devices, medical equipment, pharmaceuticals, and personal protective equipment (PPE), which the early period of the coronavirus pandemic amply demonstrated. The Committee encourages the Secretary to work with other departments and agencies to ensure a long-term sustainable domestic supply chain for PPE and other items that may be in short supply in a future health pandemic or catastrophic natural disaster.

II. Kissell Amendment Compliance

DHS procurements comply with section 604 of title VI of division A of the American Recovery and Reinvestment Act of 2009 (6 U.S.C. 453b), also known as the Kissell Amendment. In August 2009, DHS updated the Homeland Security Acquisition Regulation (HSAR) to incorporate the requirements of the Kissell Amendment. The HSAR details the restriction on procurements of foreign textiles, provides a list of the types of textile items included in the restriction (e.g., yarn, wool, and cotton), identifies the exceptions noted in the Kissell Amendment, and provides details on the specific application of trade agreements. Additionally, HSAR clause 3052.225-70, Requirement of Use of Certain Domestic Commodities, was added to require the use of domestic goods for any procurement of a Kissell-covered item. The clause must be included in solicitations, the exercise of an option, contract modifications that add new items (or that make a significant change), and contracts with a value exceeding the simplified acquisition threshold unless an exception applies.

In addition to updating the HSAR, DHS issued two HSAR Class Deviations on the applicability of the Kissell Amendment. HSAR Class Deviation, “Applicability of the “Kissell Amendment” to Department of Homeland Security Acquisitions”, dated March 5, 2013, communicates that DHS interprets the Kissell Amendment to be permanent and not just applicable to American Recovery and Reinvestment Act awards. HSAR Class Deviation 13-01, Amendment 1 – HSAR 3052.225-70, Requirement for Use of Certain Domestic Commodities, dated March 14, 2013, provides additional clarifications on the implementation of the Kissell Amendment.

In FY 2017, the U.S. Government Accountability Office (GAO) assessed DHS’s implementation of and compliance with the Kissell Amendment and did not make any recommendations to improve DHS’s implementation of the Kissell Amendment. In its final report titled, “Government Procurement: Effect of Restriction on DHS’s Purchasing of Foreign Textiles Is Limited” (GAO-18-116, dated November 21, 2017), GAO found that DHS had updated its policies and procedures appropriately to incorporate the Kissell Amendment and that the Kissell Amendment restrictions were included in the files that it reviewed. Furthermore, compliance was reinforced through DHS’s acquisition review process (a requirement for all DHS Components to use Department-wide contracts), verification procedures, and training for contracting personnel.

III. Personal Protective Equipment

Regarding PPE, DHS is subject to compliance with the Make PPE in America Act (Act), Subtitle C of title IX of Division G of the Infrastructure Investment and Jobs Act (P.L. 117-58), dated November 15, 2021. The Act requires DHS, the Department of Veterans Affairs, and the U.S. Department of Health and Human Services to ensure that any contract for the procurement of PPE, defined as surgical masks, respirator masks and powered air purifying respirators and required filters, face shields and protective eyewear, gloves, disposable and reusable surgical and isolation gowns, head and foot coverings, and other gear or clothing used to protect an individual from the transmission of disease, to be:

- Issued for a duration of at least 2 years, plus all option periods necessary, to incentivize investment in the production of PPE and the materials and components thereof in the United States; and
- For PPE, including the materials and components thereof, that is grown, reprocessed, reused, or produced in the United States.

The DHS Office of the Chief Procurement Officer (OCPO) has taken a leadership role in interagency implementation and has made significant progress in implementing the requirements of the Act. This progress includes development² of:

- An HSAR Class Deviation to implement in the HSAR the requirements of the Act; to delegate the DHS Chief Procurement Officer as the approving official for all determinations and certifications required under the Act; to require procurement of Buy American Act (BAA)-compliant or Trade Agreements Act-compliant PPE when wholly domestically manufactured PPE is not available; and to establish a new clause and provision for inclusion in solicitations and contracts for PPE;
- A Federal Acquisition Regulation (FAR) Class Deviation to remove the domestic content exception at FAR 25.101(a)(2)(i) for commercially available off-the-shelf items to ensure the maximum domestic content when a BAA-compliant item is acquired; and
- Internal policies and procedures to require use of Department-wide vehicles to acquire PPE, contract type and period of performance requirements for Department-wide vehicles, and documentation requirements, including mandatory templates for the determinations required under the Act.

The HSAR and FAR Class Deviations currently are being reviewed by representatives from the Office of Management and Budget's (OMB) Office of Federal Procurement Policy (OFPP) and the Made in America Office (MIAO). The Deviations and supplemental internal policies and procedures will be issued once that coordination is complete.

² Deviations and internal policies and procedures are currently in draft and will be issued when coordination with the OMB OFPP and the Made in America Office is completed.

In addition to the development of the Deviations and internal policies and procedures, DHS OCPO awarded the DHS PPE Safety Stock contract on March 28, 2022. The DHS PPE Safety Stock is a mandatory-for-use, Department-wide contract vehicle that supports the operational and pandemic safety needs of DHS. The contract combines physically stored PPE inventory with a built-in rotation model – pulling from physically stored PPE to fulfill operational PPE requirements and backfilling with new PPE inventory. As part of the contract, the vendor will store and manage/rotate PPE inventory (i.e., face shields, garments/coveralls, goggles, nitrile gloves, N95 respirators, and surgical masks). The contract also provides DHS with the capability to track operational PPE data, including the ability to analyze trends and historic spending. The contract will be modified for compliance with the Act when the implementing Deviations are issued by the OCPO. Upon the Act’s effective date, DHS took action to socialize the Act with the vendor in advance of implementation, and the vendor has identified domestic sources of supply that will comply with its requirements.

IV. Body Armor and Ballistic Helmets

DHS acquires body armor from domestic sources. DHS issued a strategically sourced, multiple-award indefinite-delivery/indefinite-quantity (IDIQ) contract for National Institute of Justice (NIJ) Level IIIA body armor, where all items available for purchase are manufactured in the United States. These contracts were awarded under a small business set-aside to three U.S. small businesses and provide DHS Components with soft, torso-protecting, concealable body armor; carry bags; concealable and outer carriers; modular pouches; and moisture-wicking undergarments. Other federal agencies approved by U.S. Customs and Border Protection may purchase items from these contracts as well. DHS also issued a strategically sourced, single-award IDIQ contract for NIJ Level III ballistic plates. Although this contract was not awarded under a small business set-aside, all the items available under the contract are manufactured domestically using mostly domestic materials. As such, currently 100 percent of the body armor and ballistic plates that DHS procures through its strategically sourced vehicles is sourced domestically.

Helmets that provide ballistic protection and other head protection and components are not available for purchase under DHS's strategically sourced body armor contracts. Such items are procured at the local level on an as-needed basis. Given the manner in which these items are purchased, DHS is unable to determine the country of origin for these items to confirm or refute that they are domestically sourced.

V. Rain Gear, Cold Weather Gear, and Other Environmental and Flame-Resistant Clothing

DHS acquires rain gear, cold weather gear, and flame-resistant clothing from domestic sources. DHS issued a strategically sourced, single-award IDIQ contract for uniform items that includes rain gear, cold weather gear, and flame-resistant clothing. All of the items are manufactured in the United States. As such, currently 100 percent of the rain gear, cold weather gear, and flame-resistant uniform items that DHS procures through its strategically sourced contract is sourced domestically.

VI. Recommendations

As documented in the preceding report sections, DHS procurements utilize domestic sources to the maximum extent possible consistent with governmentwide and Department-specific requirements. These requirements include the FAR that implements the BAA and Trade Agreements Act, HSAR that implements the Kissell Amendment, and DHS's internal acquisition policies and procedures known as the Homeland Security Acquisition Manual. These authorities have enabled DHS to maximize the use of domestic sources. As such, DHS does not have recommendations at this time for procuring additional items from domestic sources.

Appendix: Abbreviations

Abbreviation	Definition
Act	Make PPE in America Act
BAA	Buy American Act
BART	Buy American Reporting Tool
COVID-19	Coronavirus Disease 2019
CPO	Chief Procurement Officer
DHS	Department of Homeland Security
FAR	Federal Acquisition Regulation
FY	Fiscal Year
GAO	U.S. Government Accountability Office
HSAM	Homeland Security Acquisition Manual
HSAR	Homeland Security Acquisition Regulation
IDIQ	Indefinite-Delivery/Indefinite-Quantity
MIAO	Made in America Office
NIJ	National Institute of Justice
OCPO	Office of the Chief Procurement Officer
OFPP	Office of Federal Procurement Policy
OMB	Office of Management and Budget
PPE	Personal Protective Equipment