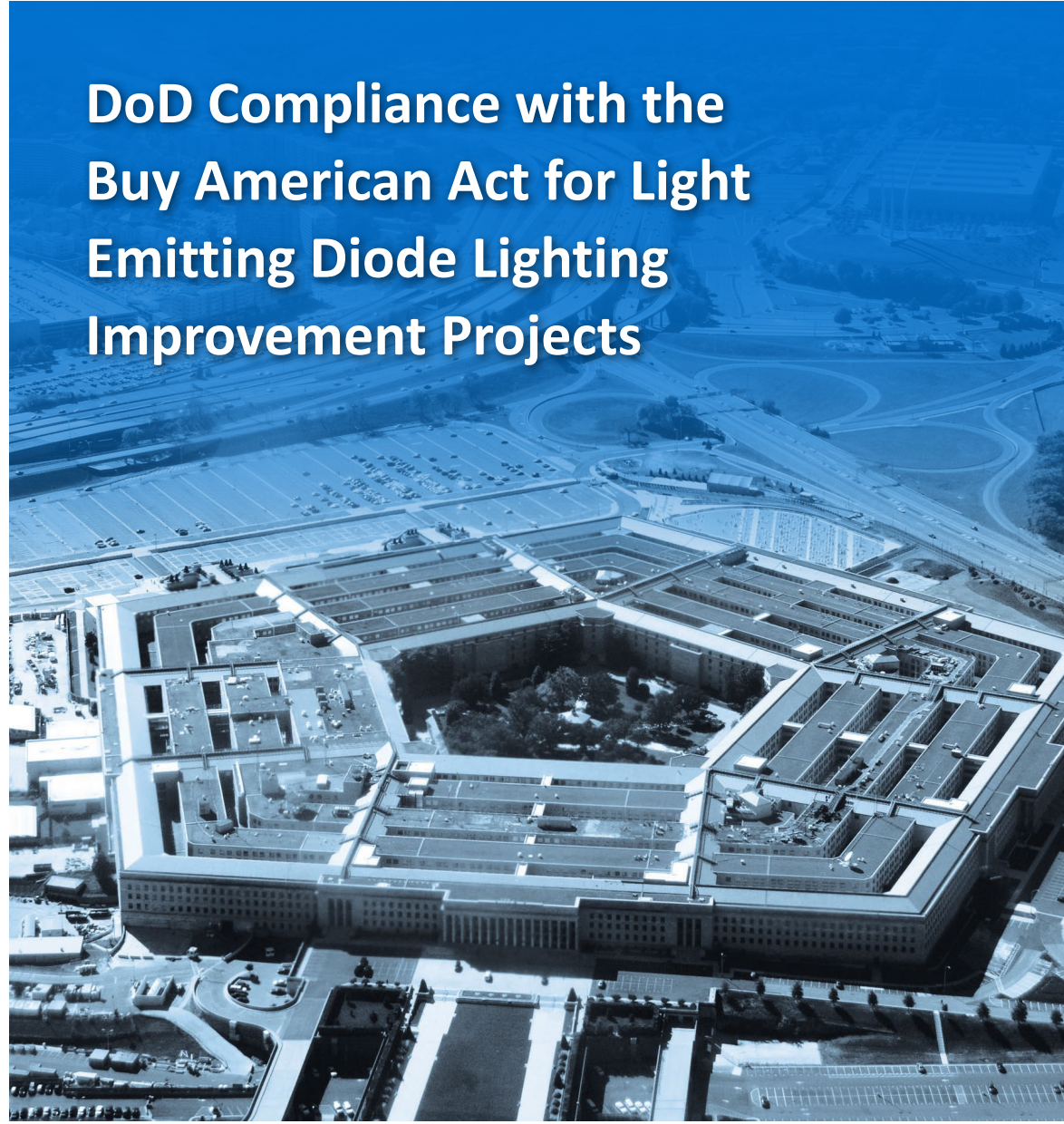




# INSPECTOR GENERAL

*U.S. Department of Defense*

JULY 2, 2024



## DoD Compliance with the Buy American Act for Light Emitting Diode Lighting Improvement Projects

INDEPENDENCE ★ INTEGRITY ★ EXCELLENCE ★ TRANSPARENCY





# Results in Brief

## *DoD Compliance with the Buy American Act for Light Emitting Diode Lighting Improvement Projects*

July 2, 2024

### Objective

The objective of this audit was to determine whether DoD officials complied with the Buy American Act (BAA) and provided the best value to the DoD when procuring light emitting diode (LED) lighting improvement projects using energy savings contracts.

### Background

We conducted this audit in response to a congressional request following a complaint to the DoD Hotline and Congress that contractors were installing foreign-made LED lighting products that were not compliant with the BAA or with executive orders that emphasize the Government must maximize the use of domestically produced materials.

### Finding

DoD contracting personnel obtained best value when they awarded four energy savings contracts that included \$34.9 million for LED lighting improvement projects. However, DoD contracting personnel did not comply with the BAA. Specifically, contracting personnel did not support that the contractors installed LED product models that were manufactured in the United States, and that the cost of the component parts manufactured in the United States exceeded the required percentage of the cost of all component parts. This occurred because contracting personnel:

- relied on prime contractor assurances that subcontractors installed BAA compliant items;

### Finding (cont'd)

- viewed the contracts for energy savings projects as contracts for services rather than procurement of LED products; and
- viewed the LED products installed by the contractors as commercial-off-the-shelf items, for which the acquisition regulations waive the domestic content requirement.

As a result, DoD contracting personnel had limited assurance that contractors installed BAA compliant LED products. For the 46 LED product models in our nonstatistical sample, we observed a number of products with markings that could indicate that they did not comply with the BAA. Specifically, we observed: 2 LED product models marked "Made in China"; 14 LED product models with component parts marked "Made in China"; 16 LED product models that had component parts or the product marked "Mexico," "Laos," or "Taiwan"; 2 LED product models that were marked "Assembled in the U.S.A.;" and 12 LED products that were not marked with a country of origin.

### Recommendations

We made 11 recommendations to address the finding in this report, including recommending the Principal Director, Defense Pricing and Contracting (DPC) issue guidance for procuring activities specifying that when an agency issues an energy savings service contract to ensure the Federal Acquisition Regulation construction materials clauses implementing the BAA requirements are included and enforced. Furthermore, we recommend that Army, Air Force and Defense Logistics Agency contracting officials document their reviews of contractors' BAA compliance and that the cost of the component parts manufactured in the United States exceeded the cost of all domestic component parts by the required percentage. Please see the report for full recommendations.



# Results in Brief

## *DoD Compliance with the Buy American Act for Light Emitting Diode Lighting Improvement Projects*

### **Management Comments and Our Response**

The Commander, U.S. Army Engineering and Support Center agreed with one recommendation and provided sufficient support that they had taken corrective action to address the finding. Therefore, the recommendation is resolved and closed.

The Deputy Director, Defense Logistics Agency Acquisition, responding for the Commander, Defense Logistics Agency Energy; Commander, U.S. Army Corps of Engineers Engineering and Support Center; and Principal Deputy, Assistant Secretary of the Air Force (Acquisition, Technology & Logistics), responding for the 17th Contracting Squadron Commander, agreed with and described actions planned to address 9 recommendations; therefore, the recommendations are resolved but will remain open. We will close the recommendations once we verify that management has implemented corrective actions that fully address the recommendations.

The DPC Principal Director agreed with one recommendation but did not state whether the DPC intended to issue the recommended guidance and if so, when that would occur, therefore we consider this recommendation unresolved. We request that the Principal Director provide comments to the final report within 30 days that discuss the corrective actions that the DPC plans to take. Please see the Recommendations Table on the next page for the status of recommendations.

## Recommendations Table

Management	Recommendations Unresolved	Recommendations Resolved	Recommendations Closed
Principal Director, Defense Pricing and Contracting	3	None	None
Commander, Defense Logistics Agency Energy	None	2.c, 4.c, 5.b	None
Commander, U.S. Army Engineering and Support Center	None	1, 4.a, 5.c	2.a
Commander, 17th Contracting Squadron	None	2.b, 4.b, 5.a	None

Please provide Management Comments by August 2, 2024.

**Note:** The following categories are used to describe agency management’s comments to individual recommendations.

- **Unresolved** – Management has not agreed to implement the recommendation or has not proposed actions that will address the recommendation.
- **Resolved** – Management agreed to implement the recommendation or has proposed actions that will address the underlying finding that generated the recommendation.
- **Closed** – The DoD OIG verified that the agreed upon corrective actions were implemented.





**OFFICE OF INSPECTOR GENERAL**  
**DEPARTMENT OF DEFENSE**  
4800 MARK CENTER DRIVE  
ALEXANDRIA, VIRGINIA 22350-1500

July 2, 2024

MEMORANDUM FOR UNDER SECRETARY OF DEFENSE FOR ACQUISITION AND SUSTAINMENT  
DIRECTOR, DEFENSE LOGISTICS AGENCY  
AUDITOR GENERAL, DEPARTMENT OF THE ARMY  
AUDITOR GENERAL, DEPARTMENT OF THE NAVY  
AUDITOR GENERAL, DEPARTMENT OF THE AIR FORCE

SUBJECT: DoD Compliance with the Buy American Act for Light Emitting Diode Lighting Improvement Projects (Report No. DODIG-2024-102)

This final report provides the results of the DoD Office of Inspector General's audit. We previously provided copies of the draft report and requested written comments on the recommendations. We considered management's comments on the draft report when preparing the final report. These comments are included in the report.

The Commander, Defense Logistics Agency Energy; Commander, U.S. Army Engineering and Support Center; and Commander, 17th Contracting Squadron agreed to address their recommendations presented in the report; therefore, we consider the recommendations resolved and open. We will close the recommendations when you provide us documentation showing that all agreed-upon actions to implement the recommendations are completed. Therefore, within 90 days please provide us your response concerning specific actions in process or completed on the resolved recommendations. Send your response to either [followup@dodig.mil](mailto:followup@dodig.mil) if unclassified or [rfunet@dodig.smil.mil](mailto:rfunet@dodig.smil.mil) if classified SECRET.

This report contains one recommendation that is considered unresolved because the Principal Director, Defense Pricing and Contracting did not fully address the recommendation. Therefore, the recommendation will remain open. We will track this recommendation until management has agreed to take actions that we determine to be sufficient to meet the intent of the recommendation and the Principal Director submits adequate documentation showing that all agreed-upon actions are completed.

DoD Instruction 7650.03 requires that recommendations be resolved promptly. Therefore, within 30 days please provide us your response concerning specific actions in process or alternative corrective actions proposed on the unresolved recommendation. Send your response to either [audacs@dodig.mil](mailto:audacs@dodig.mil) or [rfunet@dodig.smil.mil](mailto:rfunet@dodig.smil.mil) if classified SECRET.

If you have any questions, please contact me at [REDACTED].

FOR THE INSPECTOR GENERAL:

A handwritten signature in black ink, appearing to read "Carmen Malone", is positioned below the text "FOR THE INSPECTOR GENERAL:". The signature is fluid and cursive.

Carmen Malone  
Assistant Inspector General for Audit  
Acquisition, Contracting, and Sustainment

# Contents

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## Introduction

Objective	1
Background	1
LED Lighting Improvement Projects	5
Best Value	8
Installations Selected and Contracts Reviewed	9

## Finding. Contracting Personnel Obtained Best Value But Did Not Comply with the BAA

LED Lighting Improvement Projects Were Obtained for Best Value	11
Contracting Personnel Did Not Support That Installed LED Product Models Were BAA Compliant	12
Sampled Installed LED Product Models Had Foreign Markings	20
Conclusion	28
Management Comments on the Finding and Our Response	29
Recommendations, Management Comments, and Our Response	30

## Appendixes

Appendix A. Scope and Methodology	40
Congressional Request	40
Internal Control Assessment and Compliance	40
Universe and Sample Size Selection	41
Review of Documentation and Interviews	41
Use of Computer-Processed Data	43
Prior Coverage	43
Appendix B. Best Value Competitive Procedures	44

## Management Comments

Defense Pricing and Contracting	47
Department of the Air Force	48
Defense Logistics Agency	51
U.S. Army Corps of Engineers	54

Acronyms and Abbreviations	62
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# Introduction

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## Objective

The objective of this audit was to determine whether DoD officials complied with the Buy American Act (BAA) and provided the best value to the DoD when procuring light emitting diode (LED) lighting improvement projects using energy savings contracts.<sup>1</sup> See Appendix A for discussion of our scope and methodology, and prior coverage related to the objective.

We conducted this audit in response to a May 13, 2021, congressional request. A Member of Congress requested that the DoD OIG perform an audit of the LED lighting improvement projects performed under Energy Savings Performance Contracts (ESPCs) at the Pentagon, Arlington, Virginia, and at Goodfellow Air Force Base (AFB), Texas, to ensure that the lighting products were BAA compliant and provided the best total cost of ownership to the DoD. The Member of Congress shared a constituent's complaint that contractors were installing foreign-made LED lighting products that were not compliant with the BAA or with executive orders (EOs) that emphasized the Government must maximize the use of domestically produced materials. The complainant had also submitted a similar complaint to the DoD OIG Hotline on April 14, 2021.

## Background

The Buy American Act of 1933 was enacted to create and preserve jobs for American workers, and it established a preference for the Government to buy domestic end products. The BAA requires, with certain exceptions, that only articles, materials, and supplies that have been mined, produced, or manufactured in the United States be acquired for public use. The BAA also requires that contracts for the construction, alteration, or repair of any public building in the United States contain a provision that the contractor, subcontractors, or suppliers only use manufactured articles, materials, and supplies that have been manufactured in the United States and substantially from articles, materials, or supplies mined, produced, or manufactured in the United States.<sup>2</sup> Construction materials, including pre-assembled items, are defined as an article, material, or

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<sup>1</sup> Federal Acquisition Regulation Part 2, "Definitions of Words and Terms," Subpart 2.1, "Definitions," defines "best value" as an expected outcome of an acquisition that, in the Government's estimation, provides the greatest overall benefit in response to the requirement.

We use the phrase "energy savings contracts" to include the three types of contracts reviewed: Two Utility Energy Service Contracts, one Energy Savings Performance Contract, and one purchase order for a commodity with install.

<sup>2</sup> 41 United States Code §§ 8301-8305, "Buy American," codifies the principles of the Buy American Act.

supply brought to the construction site by the contractor or a subcontractor for incorporation into the building or work. However, items purchased directly by the Government are treated as supplies.<sup>3</sup>

Additionally, four EOs were issued from April 2017 to August 2023, stating that Federal procurements of supplies and materials for Federal projects should be domestically produced.

- EO 13788, “Buy American and Hire American,” April 18, 2017
- EO 13858, “Strengthening Buy-American Preferences for Infrastructure Projects,” January 31, 2019
- EO 13881, “Maximizing Use of American-Made Goods, Products, and Materials,” July 15, 2019
- EO 14005, “Ensuring the Future is Made in All of America by All of America’s Workers,” January 25, 2021<sup>4</sup>

EO 14005 established a policy that the Government should, consistent with applicable law, use the terms and conditions of Federal procurements to maximize the use of goods, products, and materials produced in, and services offered in, the United States. It states that the Government should, whenever possible, procure goods, products, materials, and services from sources that will help American businesses compete in strategic industries and help America’s workers thrive.

### ***Implementation of the BAA***

The BAA is implemented through the Federal Acquisition Regulation (FAR), which is the primary regulation for use by all executive agencies in their acquisition of supplies and services with appropriated funds.<sup>5</sup> FAR Part 25, “Foreign Acquisition,” provides policies and procedures for acquisition of foreign supplies, services, and construction materials. FAR Subpart 25.1, “Buy American-Supplies,” applies to supplies acquired for use in the United States. FAR Part 25, “Foreign Acquisition,” Subpart 25.1, “Buy American-Supplies,” FAR Section 25.101, “General,” states that the BAA restricts the purchase of supplies that are not domestic end products.<sup>6</sup> FAR Section 25.101, “General,” further requires that for manufactured end products

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<sup>3</sup> FAR Part 52, “Solicitation Provisions and Contract Clauses,” Subpart 52.2, “Text of Provisions and Clauses,” Subsection 52.225-9, “Buy American-Construction Materials.”

<sup>4</sup> EO 14005 revoked EO 13788 and section 5 of EO 13858 on January 25, 2021.

<sup>5</sup> FAR Part 25, “Foreign Acquisition,” provides policies and procedures for the acquisition of foreign supplies, services, and construction materials. It implements 41 U.S.C. chapter 83, “BUY AMERICAN”

Appropriated funds are monies paid out of the United States Treasury pursuant to statutory authority granted by Congress to the executive agencies to incur obligations and make payments.

An “executive agency” is an executive department or independent establishment in the Executive Branch of the Government, including a wholly owned Government corporation.

<sup>6</sup> FAR Section 25.003 defines “foreign end product” as an end product other than a domestic end product.

to be domestic end products, the article must be manufactured in the United States and the cost of domestic components must exceed 60 percent of the cost of all components.<sup>7</sup>

FAR Subpart 25.2, “Buy American-Construction Materials,” applies to contracts for the construction, alteration, or repair of any building or public work in the United States.” FAR Subpart 25.2 “Buy American-Construction Materials,” FAR Section 25.201, “Policy,” states that the BAA restricts the purchase of construction materials that are not domestic construction materials.<sup>8</sup> FAR Section 25.201, “Policy,” restricts the purchase of construction materials that are not domestic construction materials and includes the following two-part test to define domestic construction materials: (1) The item is manufactured in the United States, and (2) except for construction material that consists wholly or predominantly of iron or steel, or a combination of both, the cost of the domestic components must exceed the cost of all of the components by a percentage specified in the FAR. The second part of the test has been waived for acquisitions of commercially available off-the-shelf (COTS) items.

The Defense Federal Acquisition Regulation Supplement (DFARS) provides additional guidance for use by the DoD in its acquisition of supplies.<sup>9</sup> The DFARS includes provisions requiring that contractors meet the two-part BAA test. DFARS Part 225, “Foreign Acquisition,” Subpart 225.11, “Solicitation Provisions and Contract Clause,” Section 225.1101, “Acquisition of Supplies,” requires contracting officers to include DFARS 252.225-7002, “Qualifying Country Sources as Subcontractors,” in contracts that include the basic or one of the alternates of DFARS 252.225-7001, “Buy American and Balance Payments Program,” DFARS 252.225-7021, “Trade Agreements,” or DFARS 252.225-7036, “Buy American Act – Free Trade Agreements – Balance and Payments Program” in the contract.<sup>10</sup>

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<sup>7</sup> FAR Part 25, “Foreign Acquisition,” Subpart 25.1, “Buy American-Supplies,” Section 25.101, “General,” specifies the percentage of domestic content based on the type of contract and items or services procured.

On January 19, 2021, the component percentage increased from 50 percent to 55 percent. On March 7, 2022, the FAR Section 25.101 component percentage increased to 60 percent. FAR Section 25.101 states that the component percentage for 2024 through 2028 is 65 percent and for 2029, the component percentage is 75 percent. The same percentages are included in FAR 25, “Foreign-Acquisition,” Subpart 25.2, “Buy American-Construction Materials,” Section 25.201, “Policy.”

<sup>8</sup> Construction material includes any article, material, or supply brought to the construction site by the contractor or subcontractor for incorporation into a building or work, including items brought to the site preassembled from articles, materials, or supplies. Construction materials are considered domestic construction materials using the two-part test that is also applicable when determining the domestic end product requirement under FAR Section 25.101 for supplies contracts.

<sup>9</sup> DFARS Part 225, “Foreign Acquisition,” Subpart 225.1, “Buy American—Supplies,” Section 225.101, “General.”

<sup>10</sup> DFARS Part 225, “Foreign Acquisition,” Subpart 225.11, “Solicitation Provisions and Contract Clauses.”

The LED products that a contractor brings to the worksite and installs in a building as part of a lighting improvement project under an energy savings contract are items that must be manufactured in the United States and the cost of the LED domestic components must exceed a percentage of the cost of all the LED components, as required by the DFARS clauses contained in the contracts.

In addition, the FAR and DFARS established provisions, clauses, and the applicability of certain laws to contracts and subcontracts, at any tier, for the acquisition of commercial products, commercial services, and COTS items.<sup>11</sup> The FAR and DFARS implementing clauses provide for less restrictive domestic-sourcing requirements for certain end items or components. The clauses also provide notice to contracting personnel and contractors that BAA compliant construction materials are required for the respective contract. The BAA implementing clauses applicable to the contracts we reviewed are:

- FAR 52.225-9, “Buy American-Construction Materials”;
- FAR 52.225-11, “Buy American-Construction Materials under Trade Agreements”;
- FAR 52.225-10, “Notice of Buy American Requirement-Construction Materials”;
- FAR 52.225-12, “Notice of Buy American Requirement-Construction Materials Under Trade Agreements”;
- DFARS 252.225-7001, “Buy American and Balance of Payments Program—Basic”;
- DFARS 252.225-7021, “Trade Agreements—Basic”; and
- DFARS 252.225-7036, “Buy American—Free Trade Agreements—Balance of Payments—Basic.”

### ***Waivers and Exceptions to the BAA***

Although the BAA establishes a preference for domestic end products, agencies can, in certain situations, procure foreign-made products through established waivers and exceptions to BAA requirements. For example, under the Trade Agreement Act (TAA) of 1979, the United States waived domestic purchasing requirements—including the BAA—for certain acquisitions of foreign-end items from countries that are party to international trade agreements or are considered designated countries by the U.S. Trade Representative.<sup>12</sup> In addition, the TAA permits the

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<sup>11</sup> FAR Part 12, “Acquisition of Commercial Products and Commercial Services,” Subpart 12.3, “Solicitation Provisions and Contract Clauses for the Acquisition of Commercial Products and Commercial Products”; FAR Subpart 12.5, “Applicability of Certain Laws to the Acquisition of Commercial Products, Services, and COTS Items,” Section 12.504, “Applicability of Certain Laws to Subcontracts for the Acquisition of Commercial Products and Commercial Services”; FAR Subpart 12.6, “Streamlined Procedures for Evaluation and Solicitation for Commercial Products and Commercial Services.”

<sup>12</sup> 19 U.S.C. Ch. 13, “Trade Agreement Act of 1979.”

President to waive domestic content restrictions that would discriminate against eligible products or suppliers from countries that have trade agreements with the United States. This distinction means that end items or construction materials imported from a designated country are treated as domestic end items or materials for purposes of the BAA when they have been wholly grown, produced, or manufactured in a designated country or have been “substantially transformed” into new and different end items within a designated country using materials from foreign non-designated countries. For COTS items, agencies may waive the FAR required percentage for the cost portion of the two-part test, but the item must be manufactured in the United States.

FAR Section 25.103, “Exceptions,” states that the contracting officer may acquire a foreign end product without regard to the restrictions of the Buy American statute on nonavailability with respect to articles, materials, or supplies if articles, materials, or supplies of the class or kind to be acquired, either as end items or components, are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality. In addition to the waivers, FAR Section 25.202, “Exceptions,” contains four exceptions that allow agencies to acquire foreign end items or construction materials without regard to the BAA: (1) impracticable or inconsistent with public interest, (2) non-availability, (3) unreasonable cost, and (4) information technology that is a commercial product.<sup>13</sup> DFARS Section 225.103, “Exceptions,” also states it is inconsistent with public interest to apply the Buy American statute to end products that are substantially transformed in the United States. In addition, DFARS Section 225.202, “Exceptions,” states that a nonavailability determination is not required for construction materials.

## LED Lighting Improvement Projects

LED lighting improvement projects may be procured as part of a larger energy savings contract that includes several energy conservation measures (ECMs), and may be one of multiple improvement projects, such as water and sewer conservation; heating, ventilation, and air conditioning; or boiler plant improvements. Lighting projects may include replacing older, less energy efficient interior and exterior lighting with more energy efficient LED products. LED lights will generally provide as much brightness while consuming less power.

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<sup>13</sup> FAR Part 25, “Foreign Acquisition,” Subpart 25.2, “Buy American-Construction Materials,” Section 25.202, “Exceptions.”

Types of lighting replaced may include linear fluorescent, compact fluorescent lamp, high-intensity discharge, high sodium pressure, and metal halide fixtures. These lighting products could be LED end products or LED products consisting of several different component parts, such as LED drivers. See Figure 1 for examples of LED end products observed at the Pentagon, Fort Meade, or Goodfellow AFB.



### ***Energy Savings Projects***

According to the Department of Energy, the Government is the largest energy consumer in the United States. Legislation and presidential EOs require and enable Federal agencies to implement energy efficiency, water conservation, and renewable energy projects. The DoD acquires energy savings projects through ESPCs and Utility Energy Services Contracts (UESCs).

### ***Energy Savings Performance Contracts***

ESPCs provide a way for the private sector to finance Government energy savings projects. Through ESPCs, an energy services contractor designs, finances, acquires, installs, and maintains energy saving equipment and systems for a Federal agency. According to the Department of Energy, energy service companies (ESCOs) develop,

design, build, and arrange financing for projects that save energy, reduce energy costs, and decrease operations and maintenance costs at their customers' facilities. When an ESCO implements a project, the company's compensation is directly linked to the actual energy cost savings. Debt payments are tied to the energy cost savings guaranteed for the project, so the agency pays for the capital improvements of the project with the money saved by the project. Section 8287, title 42, United States Code (42 U.S.C. § 8287) allows Federal agencies to take on debt to acquire ECMs if the overall utility costs to the agency do not increase because of the contract and any Government-incurred debt is secured by a contractor guarantee of energy savings.<sup>14</sup>

An ESPC is a service contract that consists of five phases that progress from acquisition planning through post acceptance performance. During Phase 4, "Project Implementation and Construction," the ESCO constructs ECMs such as new windows; lighting; or heating, ventilation, and air conditioning systems. At the end of Phase 4, the ESCO submits a post-installation report to summarize the construction actions and outcomes and identifies any energy savings achieved. The ESCO delivers the results of the post-installation report before final project acceptance. Phase 5 begins once the agency provides written notification to the ESCO to confirm the installation complies with the terms of the contract and is accepted.

### *Utility Energy Service Contracts*

As indicated by the Office of Energy Efficiency and Renewable Energy, UESCs provide a streamlined approach for Federal agencies to contract for the broad spectrum of energy management services offered by local utilities. The utility partner assesses the opportunities, designs, and implements the desired ECMs, and may provide financing for the project. UESCs do not require the utility contractor to guarantee energy savings.

A UESC is a service contract that consists of five phases that progress from acquisition planning through post acceptance performance. During Phases 3 and 4, the agency and utility develop and award a task order. The design must be finished, and all submittals reviewed and approved by the agency before the utility can proceed with construction. During Phase 5, the utility delivers the savings and equipment performance, as contracted, and conducts commissioning activities described in the performance assurance plan.

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<sup>14</sup> 42 U.S.C. § 8287(a)(2)(B) states, "the contract shall provide for a guarantee of savings to the agency."

42 U.S.C. § 8287(a)(2)(D), ESPC terms may not exceed 25 years.

## **Energy Management Program**

According to the Energy.gov website, the Federal Energy Management Program (FEMP) works with its stakeholders to enable Federal agencies to meet energy-related goals, identify affordable solutions, facilitate public-private partnerships, and provide energy leadership to the United States by identifying and leveraging Government best practices.<sup>15</sup>

Mandated by law, the FEMP focuses on key services that help agencies meet energy and water reduction requirements and goals.<sup>16</sup> Since the inception of the Department of Energy's indefinite-delivery, indefinite-quantity ESPCs in 1998, agencies have used the ESPC contracting vehicle to significantly reduce energy and operating costs and make progress toward meeting Federal sustainability goals. Since the beginning of the FEMP's Utility Program, federal agencies have awarded billions of dollars in total UESC project investment value to improve their facilities.

## **Best Value**

FAR Part 15, "Contracting by Negotiation," Subpart 15.3, "Source Selection," Section 15.302, "Source Selection Objective," requires that contracting officials obtain best value when selecting a prime contractor for energy savings contracts. The FAR requires the source selection authority to select the proposal that represents the best value.<sup>17</sup> The FAR defines best value as an expected outcome of an acquisition that, in the Government's estimation, provides the greatest overall benefit in response to the requirement.<sup>18</sup> FAR Section 15.304, "Evaluation Factors and Significant Subfactors," states that the evaluation factors and significant subfactors to determine best value must: (1) represent the key areas of importance and emphasis to be considered in the source selection decision; and (2) support meaningful comparison and discrimination between and among competing proposals.<sup>19</sup> In addition, the FAR requires prime contractors to select subcontractors and suppliers on a competitive basis.<sup>20</sup> The DoD acquires energy savings projects through ESPCs and UESCs. The DoD acquiring activity selects the ESCO. The ESCOs select the subcontractors to perform the individual ECMs on the contract.

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<sup>15</sup> Information was accurate as of December 19, 2023.

<sup>16</sup> 42 U.S.C. §§ 8252-8258, 8259b, 17143, and 15852.

<sup>17</sup> FAR Part 15, "Contracting by Negotiation," Subpart 15.3, "Source Selection," Section 15.302, "Source Selection Objective."

<sup>18</sup> FAR Subpart 2.1, "Definitions."

<sup>19</sup> FAR Part 15, "Contracting by Negotiations," Subpart 15.3, "Source Selection," Section 15.304, "Evaluation Factors and Significant Subfactors."

<sup>20</sup> FAR Part 52, "Solicitations Provisions and Contract Clauses," Subpart 52.2, "Text of Provisions and Clauses," Subsection 52.244-5, "Competition in Subcontracting."



## Installations Selected and Contracts Reviewed

The DoD Hotline complainant alleged that contractors installed foreign-made LED products that did not comply with the BAA at 37 installations. We selected a nonstatistical sample of 4 of those 37 installations to include in our review: the Pentagon; Naval Surface Warfare Center (NSWC) Dahlgren, Virginia; Fort George G. Meade (Fort Meade), Maryland; and Goodfellow AFB, Texas. Personnel at the U.S. Army Engineering and Support Center (CEHNC), Huntsville, Alabama; Defense Logistics Agency (DLA) Energy, Fort Belvoir, Virginia; and 17th Contracting Squadron (17 CONS), Goodfellow AFB, Texas, awarded energy savings contracts for the four installations in our review. We identified the energy savings contracts that included ECMs for the LED lighting projects on the installations.

We then selected a nonstatistical sample of 46 LED product models from nine manufacturers that contractors installed at the four installations to determine whether DoD officials complied with the BAA when procuring LED lighting improvement projects under the energy savings contracts reviewed. See Table 1 for the energy savings contracts reviewed at the four installations.

*Table 1. Energy Savings Contracts Reviewed by Installation*

Contract Number	Contracting Activity	Installation	Type of Contract	Total Contract Value	LED Lighting Improvement Value
W912DY-19-F-1201	CEHNC	NSWC Dahlgren	UESC	\$5,150,342	\$4,490,396
W91DY-19-F-1202	CEHNC	Pentagon	UESC	64,956,567	27,509,802
SP0604-19-F-8003	DLA Energy	Fort Meade	ESPC	9,661,143	2,609,176
FA3030-20-P-0042	17 CONS	Goodfellow AFB	Local Award	302,833	302,833
<b>Total</b>				<b>\$80,070,885</b>	<b>\$34,912,207</b>

Source: The DoD OIG.

### **CEHNC**

The CEHNC UESC program is responsible for negotiating contracts with local utility companies to enable the utility companies to provide Federal agency customers with energy and water efficiency improvements and demand reduction services.<sup>21</sup>

<sup>21</sup> Section 152 of the Energy Policy Act of 1992, Public Law 102-486. Section 152(f) of the Energy Policy Act amended the National Energy Conservation Policy Act, Section 546, subsection (c), "Utility Incentive Programs," which is 42 U.S.C. § 8256(c), "Utility incentive programs."

### ***DLA Energy***

The DLA is the DoD's combat logistics support agency responsible for sourcing and providing nearly every consumable item used by the DoD worldwide. DLA Energy is the DLA major subordinate command responsible for enabling mission readiness by providing globally resilient energy solutions to the Military Services and the whole of Government. The DLA is headquartered at Fort Belvoir, Virginia, with regional support locations worldwide.

### ***17 CONS***

The 17 CONS is responsible for creating agile, innovative, mission-focused business solutions essential to train, develop, and inspire the future force. The unit is located at Goodfellow AFB, Texas, and averages over 300 contract actions annually.

## Finding

### Contracting Personnel Obtained Best Value But Did Not Comply with the BAA

DoD contracting personnel from the CEHNC, DLA Energy, and 17 CONS obtained best value when they awarded four energy savings contracts that included \$34.9 million for LED lighting improvement projects. However, DoD contracting personnel did not comply with the BAA.<sup>22</sup> Specifically, contracting personnel did not support that contractors installed LED product models that were manufactured in the United States and that the cost of the component parts manufactured in the United States exceeded the required percentage of the cost of all component parts.<sup>23</sup> This occurred because DoD contracting personnel:

- relied on prime contractor assurances that subcontractors installed BAA compliant items;
- viewed the contracts for energy savings projects as contracts for services rather than procurement of LED products; and
- viewed the LED products installed by the contractors as COTS. The FAR and DFARS waive the domestic content requirement for COTS items.

As a result, DoD contracting personnel had limited assurance that contractors installed BAA compliant LED products. For the 46 LED product models in our nonstatistical sample, we observed a number of product models with markings that could indicate they did not comply with the BAA. Specifically, we observed that 2 LED product models were marked “Made in China”; 15 LED product models had component parts marked “Made in China”; 15 LED product models or component parts were marked “Mexico,” “Laos,” or “Taiwan”; 2 LED product models were marked “Assembled in the U.S.A.”; and 12 LED product models were not marked with a country of origin.

### LED Lighting Improvement Projects Were Obtained for Best Value

DoD contracting personnel complied with FAR requirements for obtaining best value when selecting a prime contractor for energy savings contracts. Contracting personnel for Fort Meade, Goodfellow AFB, and the Pentagon used competitive

<sup>22</sup> The BAA requires that only articles, materials, and supplies that have been mined, produced, or manufactured in the United States be acquired for public use.

<sup>23</sup> FAR Section 25.101.

On January 19, 2021, the component percentage increased from 50 percent to 55 percent. On March 7, 2022, the FAR Section 25.201 component percentage increased to 60 percent. FAR Section 25.201 states the component percentage for 2024 through 2028 is 65 percent and for 2029, the component percentage is 75 percent.

procedures to select a prime contractor. Contracting personnel for Dahlgren awarded the contract as a sole source contract that required the prime contractor to use competitive procedures when selecting subcontractors. In addition, for Fort Meade and the Pentagon, the prime contractors used competitive procedures when selecting subcontractors. The prime contractor for Goodfellow AFB did not use subcontractors for its contract.

The FAR defines best value as an expected outcome of an acquisition that, in the Government's estimation, provides the greatest overall benefit in response to the requirement.<sup>24</sup> FAR Section 15.302, "Source Selection Objective," states the objective of source selection is to select the proposal that represents the best value.<sup>25</sup> FAR Section 15.304, "Evaluation Factors and Significant Subfactors," states that the evaluation factors and significant subfactors to determine best value must: (1) represent the key areas of importance and emphasis to be considered in the source selection decision, and (2) support meaningful comparison and discrimination between and among competing proposals.<sup>26</sup> Contracting personnel analyzed the contractor proposals for the contract as a whole, which included all contract ECMs, not only the lighting ECM.

Contracting personnel at the CEHNC, DLA Energy, and 17 CONS supported their selection of the three prime contractors that would provide good or best value to the Government for all four contracts. Prime contractors solicited and analyzed bids from subcontractors for individual ECMs including the LED ECMs for three of four contracts reviewed (the fourth contract did not use subcontractors). In addition, contracting personnel included FAR Part 52, "Solicitation Provisions and Contract Clauses," Subpart 52.2, "Text of Provisions and Clauses," Section "Reserved," Subsection 52.244-5, "Competition in Subcontracting," which requires prime contractors to select subcontractors and suppliers on a competitive basis. See Appendix B for the documents and the FAR clauses the contracting personnel used for obtaining best value when selecting a prime contractor for energy savings contracts.

## **Contracting Personnel Did Not Support That Installed LED Product Models Were BAA Compliant**

CEHNC, DLA Energy, and 17 CONS contracting personnel did not support that the LED product models contractors installed complied with the BAA. Specifically, contracting personnel did not support that the LED products were manufactured in

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<sup>24</sup> FAR Part 2, "Definitions of Words and Terms," Subpart 2.1, "Definitions," Section 2.101 "Definitions."

<sup>25</sup> FAR Subpart 15.3, "Source Selection," Section 15.302, "Source Selection Objective."

<sup>26</sup> FAR Section 15.304.

the United States or a qualifying country, that the value of the domestic component parts of the products exceeded the percentage of the cost of all the components, or that the products were COTS.<sup>27</sup>

We reviewed a nonstatistical sample of 46 LED product models, from nine manufacturers, that contractors installed at four installations. We requested that contracting personnel provide support that the LED product models complied with the BAA. However, the provided documentation did not support that all products had a certified place of manufacture or included a component test demonstrating that the cost of domestic components exceeded the percentage of the cost of all the components for a product as specified by the FAR and DFARS clauses in the contracts.<sup>28</sup> Table 2 shows LED product models reviewed by location.

*Table 2. LED Product Models Reviewed by Location*

Contract Number	Contracting Activity	Installation	Number of Manufacturers*	LED Product Models Reviewed
W912DY-19-F-1201	CEHNC	NSWC Dahlgren	5	18
W912DY-19-F-1202	CEHNC	Pentagon	2	12
SP0604-19-F-8003	DLA Energy	Fort Meade	1	12
FA3030-20-P-0042	17 CONS	Goodfellow AFB	2	4
<b>Total</b>			<b>10</b>	<b>46</b>

\* One manufacturer provided LED products at two installations. Therefore, we reviewed 46 LED product models from nine manufacturers.

Source: The DoD OIG.

CEHNC, DLA Energy, and 17 CONS contracting personnel did not support their determination for whether individual LED product models were manufactured in the United States or a qualifying country. Specifically, contracting personnel:

- relied on prime contractor assurances that subcontractors installed BAA compliant items;
- viewed the contracts for energy savings projects as contracts for services and not for the procurement of LED products; and
- viewed the LED products installed by the contractors as COTS. The FAR and DFARS waives the domestic requirement for COTS items.

<sup>27</sup> Defense Federal Acquisition Regulation Supplement (DFARS) Part 252, "Solicitation Provisions and Contract Clauses," Subpart 252.2, "Text of Provisions and Clauses," Subsection 252.225-7001, "Buy American and Balance of Payments Program," defines a qualifying country as a country with a reciprocal defense procurement memorandum of understanding or international agreement with the United States in which both countries agree to remove barriers to purchases of supplies produced in the other country or services performed by sources of the other country, and the memorandum of agreement complies, where applicable, with the requirements of section 36 of the Arms Export Control Act (22 U.S.C. 2776) and 10 U.S.C. 2457.

<sup>28</sup> FAR Section 25.201 and DFARS Section 225.101.

## ***Contracting Personnel Relied on Prime Contractor Assurances of BAA Compliance***

Contracting personnel at the CEHNC, DLA Energy, and 17 CONS relied on the contractors' signature on the contract as their agreement to comply with the BAA contract clauses. In addition, contracting personnel relied on contractor proposals, product specification sheets, and other submittals to ensure the prime contractor would provide BAA compliant products. The FAR and DFARS provide various methods for the contractors and manufacturers to provide assurance that they will provide BAA compliant products.

### ***BAA Implementing Clauses***

Contracting personnel at the CEHNC, DLA Energy, and 17 CONS included BAA implementing clauses in the four contracts reviewed. The FAR and DFARS requires contracting officers to include the applicable clause in the contract.<sup>29</sup> The DFARS requires contracting officers to include DFARS 252.225-7001, "Buy American and Balance of Payments Program," DFARS 252.225-7021, "Trade Agreements," or DFARS 252.225-7036, "Buy American Act – Free Trade Agreements – Balance and Payments Program" in the contract terms. The DFARS requires contracting officers to use DFARS 252.225-7002, "Qualifying Country Sources as Subcontractors," if the contract contains either DFARS 252.225-7001, 252.225-7021, or 252.225-7036.<sup>30</sup> In addition, DLA Energy contracting personnel properly included FAR Subsections 52.225-9, 52.225-11, and 52.225-12 in their solicitation and contract for the acquisition of Buy American construction materials, as required by the FAR.<sup>31</sup> Contracting officers should include the required clause because doing so explicitly notifies the contractor to provide goods that meet the domestic content requirements specified in the Buy American Act. See Table 3 for select BAA clauses included in each contract.

<sup>29</sup> FAR Part 25, "Foreign Acquisition," Subpart 25.11, "Solicitation Provisions and Contract Clauses," and DFARS Subpart 225.11

<sup>30</sup> DFARS 225.11.

<sup>31</sup> The following FAR clauses apply to construction materials. Contract SP0604-19-F-8003 included the following construction materials clauses.

FAR Part 52, "Solicitation Provisions and Contract Clauses," Subpart 52.2, "Text of Provisions and Clauses," Subsection 52.225-9, "Buy American-Construction Materials."

FAR Part 52, "Solicitation Provisions and Contract Clauses," Subpart 52.2, "Text of Provisions and Clauses," Subsection 52.225-11, "Buy American-Construction Materials under Trade Agreements."

FAR Part 52, "Solicitation Provisions and Contract Clauses," Subpart 52.2, "Text of Provisions and Clauses," Subsection 52.225-12, "Notice of Buy American Requirements-Construction Materials Under Trade Agreements."

Table 3. BAA Clauses Included by Contracting Site

BAA Clauses	Contracting Activity			
	CEHNC		DLA Energy	17 CONS
	Pentagon	NSWC Dahlgren	Fort Meade	Goodfellow AFB
FAR 52.225-1 Buy American Act - Supplies			X	X
FAR 52.225-9 Buy American Act - Construction Materials	*	*	X	
FAR 52.225-10 Notice of Buy American Requirement - Construction Materials	*	*		
FAR 52.225-11 Construction Materials Under Trade Agreements	*	*	X	
FAR 52.225-12 Notice of Buy American Act Requirement - Construction Materials	*	*	X	
DFARS 252.225-7000 - Buy American Act - Balance of Payments Program Certificate	X	X	X	
DFARS 252.225-7001 - Buy American and Balance of Payments Program – Basic	X	X	X	X
DFARS 252.225-7002 - Qualifying Country Sources as Subcontractors	X	X		X
DFARS 252.225-7021 - Trade Agreements – Basic	X	X	X	
DFARS 252.225-7036 - Buy American - Free Trade Agreements - Balance of Payments Program - Basic	X	X		

\* The clause was included by the prime contractor in the solicitation to subcontractors.

Source: The DoD OIG.

CEHNC contracting personnel did not include the FAR clauses for construction materials in their solicitations and contracts because the CEHNC did not view the LED products as construction materials. In addition, the CEHNC stated the energy savings projects were contracts for services. The UESC contracts were primarily for services; however, the contracts had construction aspects. The FAR states that construction materials are defined as an article, material, or supply brought to the construction site by the contractor or a subcontractor for incorporation into

the building or work.<sup>32</sup> Therefore, LED lights would be considered construction materials for the UESC contracts reviewed since the contractor or subcontractors brought the materials to the sites and installed the LED products. Inclusion of the proper clauses is important because it explicitly notifies the contractor to provide goods that meet the domestic content requirements specified in the BAA. The Commander, U.S. Army Engineering and Support Center, Huntsville, Alabama, should provide training for the contracting workforce emphasizing the need to ensure that Utility Energy Service Contracts that include energy conservation measures and require construction include appropriate Federal Acquisition Regulation Part 52 “Contract Clauses.” These contracts should include Federal Acquisition Regulation Subsection 52.225-9, “Buy American-Construction Materials,” Subsection 52.225-10, “Notice of Buy American Requirement-Construction Materials,” Subsection 52.225-11, “Buy American-Construction Materials Under Trade Agreements,” and Subsection 52.225-12, “Notice of Buy American Requirement-Construction Materials Under Trade Agreements” clauses.

### *Manufacturer Specification Sheets*

Contracting personnel at CEHNC, DLA Energy, and 17 CONS relied on manufacturer specification sheets to ensure that contractors were providing BAA compliant products. However, nine manufacturers on the four contracts did not always certify their products as BAA or Trade Agreement Act (TAA) compliant on their respective manufacturer specification sheets for 23 of the 46 product models we reviewed. Contracting personnel at the CEHNC, DLA Energy, and 17 CONS requested manufacturer specification sheets from the prime contractors for contracting personnel to review before initiating work.<sup>33</sup> Prime contractors provided contracting personnel copies of manufacturer specification sheets for 36 of the 46 product models reviewed at NSWC Dahlgren, Fort Meade, Goodfellow AFB, and the Pentagon. For the 46 product models reviewed, three of nine manufacturers provided specification sheets that showed 8 products were BAA compliant. However, DLA contracting personnel did not provide specification sheets for 10 LED product models. See Table 4 for the manufacturers’ and specification sheets’ indication of BAA compliance.

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<sup>32</sup> FAR Subsection 52.225-9(a).

<sup>33</sup> Manufacturer specification sheets are also known as cut sheets.



Table 4. Manufacturer Indication of BAA Compliance on Specification Sheets

Location and Contract	Manufacturers Indicated BAA Compliance on Specification Sheets		Manufacturers Did Not Indicate BAA Compliance on Specification Sheets		Total Number of Manufacturer Specification Sheets
	Manufacturers	Specification Sheets	Manufacturers	Specification Sheets	
NSWC Dahlgren W912DY-19-F-1201	2	6	3	12	18
Pentagon W912DY-19-F-1202	0	0	2*	12	12
Fort Meade SP0604-19-F-8003	1	2	0	0	2
Goodfellow AFB FA3030-20-P-0042	0	0	2	4	4
<b>Total</b>	<b>3</b>	<b>8</b>	<b>7</b>	<b>28</b>	<b>36</b>

\* Two manufacturers provided 12 specification sheets that did not indicate BAA or TAA compliance. However, those two manufacturers provided statements in the contract file that their products would be either BAA or TAA compliant.

Source: The DoD OIG.

During our audit, CEHNC contracting personnel stated that not all specification sheets received were reviewed due to the sheer volume of documents submitted. The proposal evaluators reviewed the specification sheets received using a random sampling approach. CEHNC contracting personnel stated that if they identified any products as noncompliant with the BAA during their reviews, they notified the prime contractor that it was required to submit BAA compliant products or request a waiver for those items. Contractors did not submit waivers for any of the LED product models that we reviewed. The CEHNC Commander, the 17 CONS Commander, and the DLA Energy Commander should require contracting personnel to ensure that contract files for energy savings projects include an affirmation from the prime contractor that except for items for which the prime contractor was granted a waiver, all contractor installed products, materials, and supplies are Buy American Act compliant (that is, that materials and products were manufactured in the United States, and the items are commercially available off-the-shelf or that the cost of the domestic components exceed the cost of all the components by the percentage specified by the Federal Acquisition Regulation or the Defense Federal Acquisition Regulation Supplement.

## ***Contracting Officials Viewed Contracts for Energy Savings Projects as Contracts for Services Rather Than Procurement of Installed Materials***

Contracting officials at the CEHNC and DLA Energy viewed the contracts for energy savings projects as contracts for services rather than procurement of LED products. CEHNC contracting personnel stated that the NSWC Dahlgren and Pentagon contracts have construction aspects, but that the CEHNC was contracting to achieve energy savings from the ECMs proposed, not specifically to acquire the LED products installed at Dahlgren and the Pentagon. In addition, DLA Energy contracting personnel stated that the Fort Meade contract had construction aspects, but that DLA Energy personnel considered the ESPC to be a service contract. However, for the CEHNC and DLA Energy to achieve energy savings from the ECMs, contracting personnel relied on the construction materials procured and installed by the ESCOs.

The FEMP describes an implementation or construction phase for both ESPCs and UESCs during which the ESCO handles the construction of the ECMs and confirms the installed products comply with the contract terms. The ESCO procures and installs construction materials, including LED products. Specifically, during the construction or implementation phase, contractors purchased the materials (LED products), brought the LED products to the worksite, and installed them. Therefore, contracting officials at the CEHNC and DLA Energy should have considered the LED products in the construction portion of the ECMs.

Contracting officials were required to ensure that the LEDs installed as part of the lighting ECMs complied with the BAA. The BAA requires that contracts for the construction, alteration, or repair of any public building in the United States contain a provision that the contractor, subcontractor, or suppliers only use manufactured articles, materials, and supplies that have been manufactured in the United States and substantially from articles, materials, or supplies mined, produced, or manufactured in the United States.<sup>34</sup> The FAR defines construction materials as articles, materials, or supplies brought to the construction site by a contractor or subcontractor for incorporation into the building or work.<sup>35</sup> Contracting officers should include the required clause because it explicitly notifies the contractor to provide goods that meet the Buy American Act and the domestic content requirements. The Principal Director, Defense Pricing and Contracting should issue guidance for procuring activities specifying that when an agency issues an energy savings service contract that may include construction and use

<sup>34</sup> 41 U.S.C. §§ 8303, "Contracts for public works."

<sup>35</sup> FAR Part 25, "Foreign Acquisition," Section 25.003, "Definitions."

construction materials during the performance of the contract, the agency must ensure the FAR construction materials clauses implementing the Buy American Act requirements are included and enforced based on the contract terms.

### ***Contracting Personnel Viewed the LED Product Models Installed by Contractors as COTS***

CEHNC, DLA Energy, and 17 CONS contracting personnel viewed the LED product models installed by contractors as commercially available off-the-shelf (COTS) items.<sup>36</sup> For COTS items, agencies may waive the percentage of component cost portion of the two-part test, but the item must be manufactured in the United States, as required by the FAR and DFARS provisions in the contracts. FAR Part 2, “Definitions of Words and Terms,” Subpart 2.1, “Definitions,” Section 2.101 defines a COTS item as a commercial product, sold in substantial quantities in the commercial marketplace, and offered to the Government in the same form in which it is sold to the commercial marketplace.<sup>37</sup> Contracting personnel documented that the LED product models were commercial items, but did not make a determination that the LED product models were COTS. The BAA exception for the consideration of the domestic content is specific to COTS items, and not all commercial items.<sup>38</sup> CEHNC, DLA Energy, and 17 CONS contracting personnel did not support that the LED product models contained more than the required domestic content percentage or that the LED products were COTS, as shown in the following examples.

- **NSWC Dahlgren and Pentagon Contracts.** CEHNC contracting personnel stated the LED products were COTS but provided no support for how the LED products met the FAR definition for COTS. Contracting personnel stated that the manufacturers can self-certify whether an item is sold in substantial quantity. Furthermore, personnel from the CEHNC stated that contracting personnel should be allowed to rely on the manufacturer’s self-certification that items are COTS and that there is no specific test for items sold in substantial quantities. Moreover, personnel stated that the CEHNC depends on the prime contractor to inform the CEHNC that the subcontractors and manufacturers would install BAA compliant products. However, contracting personnel did not provide documentation supporting that all of the LED products we reviewed were COTS.
- **Fort Meade Contract.** Contracting personnel stated that the contract was commercial, and the LED products were COTS. In addition, contracting personnel stated that because the contract was commercial, no specific

<sup>36</sup> One of the primary subcontractors provided a confirmation statement from one LED manufacturer that the manufacturer’s products would comply with the BAA as their products were manufactured in North America and are COTS items.

<sup>37</sup> FAR Section 2.101.

<sup>38</sup> FAR Sections 12.505, and 25.201, 41 U.S.C. §1907, and DFARS Sections 212.505 and 225.101.

COTS determination was made for the products, but contracting personnel agreed the LED products were still required to be BAA compliant. However, contracting personnel did not provide any documentation supporting that the LED products we reviewed were COTS.

- **Goodfellow AFB Contract.** Contracting personnel stated they informed vendors that products would either need to be BAA compliant or COTS. However, contracting personnel stated they did not perform a thorough check for BAA compliance when reviewing the specification sheet. In addition, contracting personnel did not provide any documentation from the contract file that supported that the LED products we reviewed were COTS.

The CEHNC Commander for contract W912DY-19-F-1201 and W912DY-19-F-1202, the 17th Contracting Squadron Commander for contract FA3030-20-P-0042, and the DLA Energy Commander for contract SP0604-19-F-8003 should provide support that the LED product models on the contracts are COTS. If support is not available, perform and document a component test for the LED product models to verify domestic content percentage requirements for LED product models that were not determined to be COTS. Additionally, provide support that products are sold in substantial quantities in the commercial marketplace if a product is determined to be COTS.

## Sampled Installed LED Product Models Had Foreign Markings

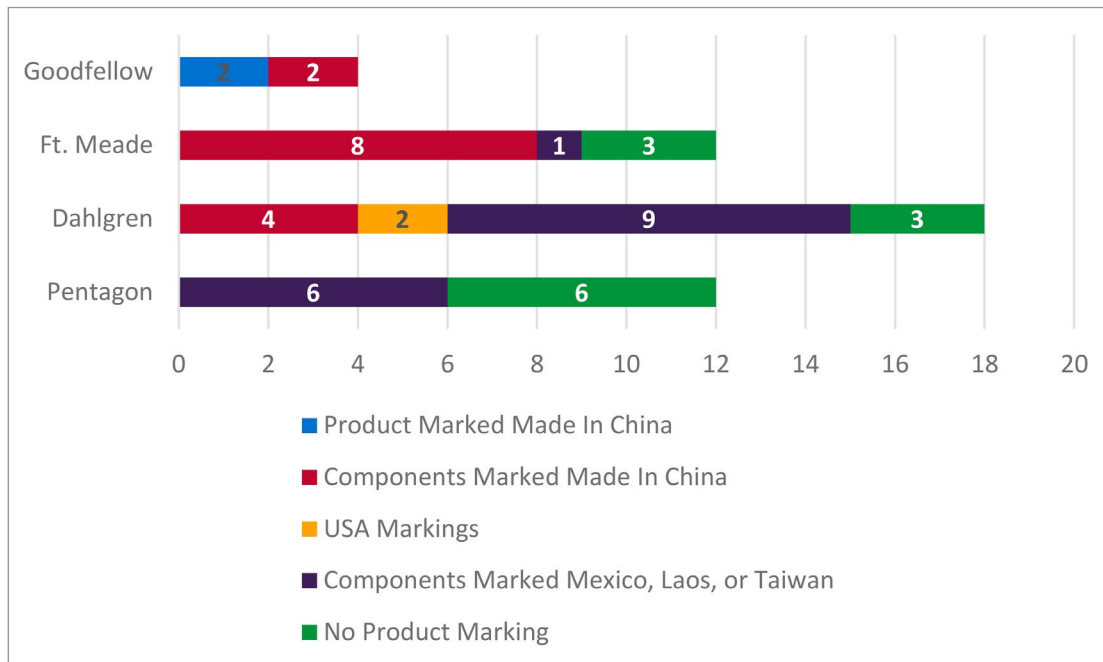
We selected a nonstatistical sample of 46 LED product models from nine manufacturers that contractors installed at the four installations to determine whether DoD officials complied with the BAA when procuring LED lighting improvement projects. For the 46 LED product models reviewed, we observed:

- 16 LED product models or product models with components marked “Made in China”;
- 16 LED product models or product models with component parts marked “Mexico,” “Laos,” or “Taiwan”;
- 2 LED product models marked “assembled in the U.S.A.”; and
- 12 LED product models not marked with a country of origin.<sup>39</sup>

<sup>39</sup> DFARS Part 252, “Solicitation Provisions and Contract Clauses,” Subpart 252.225, “Reserved,” Subsection 252.225-7021, “Trade Agreements,” for designated countries, lists Taiwan, which is a World Trade Organization Government Procurement Agreement Country; Mexico, a Free Trade Agreement country; and Laos, a least developed country. Countries listed in these categories are treated the same as both U.S.-made and qualifying country products.

For all 46 LED end product models or end product models with components, we did not verify BAA compliance. See Figure 2 for a list of LED product models that we observed at each installation.

Figure 2. LED Lighting Product Models That We Observed



Note: Visual analysis performed by audit team on site visits.

Source: The DoD OIG.

FAR Section 25.206, “Noncompliance,” requires the contracting officer to review allegations of violations of the Buy American statute.<sup>40</sup> The FAR also requires that the contracting officer, unless fraud is suspected, notify the contractor of the apparent unauthorized use of foreign construction material, and request a reply, including proposed corrective action. The FAR further requires the contracting officer to take appropriate action if the review reveals that a contractor or subcontractor has used foreign material without authorization. In addition, DFARS Section 225.206, “Noncompliance,” requires contracting officials to prepare any report of noncompliance.<sup>41</sup>

### LED Lighting Installed at Goodfellow Air Force Base

Contractor personnel installed LED product models at Goodfellow AFB that were marked “Made in China.” Contracting personnel from the 17 CONS awarded the Goodfellow AFB contract on September 30, 2020, for \$302,833 to replace interior

<sup>40</sup> FAR Part 25, “Foreign Acquisition,” Subpart 25.2, “Buy American-Construction Materials,” Section 25.206, “Noncompliance.”

<sup>41</sup> DFARS Part 225, “Foreign Acquisition,” Subpart 225.2, “Buy American-Construction Materials,” Section 225.206, “Noncompliance.”

and exterior lighting at Goodfellow AFB that included four models from two manufacturers totaling 2,523 LED products (end-item luminaires).<sup>42</sup> We observed that two of four LED product models at Goodfellow AFB were marked “Made in China” and two of four product models had components marked “Made in China.”<sup>43</sup> The contract documentation did not include any support that the cost of the domestic components exceed the percentage of the cost of all of the components, as required by the FAR or DFARS provisions in the contract, or that the items were COTS products. See Table 5 for the four LED product models observed at Goodfellow AFB marked “Made in China” or containing components marked “Made in China.”

*Table 5. Four LED Lighting Product Models Observed at Goodfellow AFB Marked “Made in China” or Containing Components Marked “Made in China”*

Manufacturer	Product Models
GE Current	12ET8/G/4/840
GE Current	ABV3018T481DQV23KQW
SLG Lighting	ALCS96 T5 G1 5K PC-3 ALC-SPAR
SLG Lighting	ALCS60 T5 G1 5K PC-3 ALC-SPAR

Source: The DoD OIG.

<sup>42</sup> The Air Force Civil Engineer Center notified DLA Energy of its decision not to pursue the execution of an ESPC after a contractor completed and submitted an Investment Grade Audit. Contracting officials from the 17 CONS issued purchase order FA3030-20-P-0042 on September 30, 2020, to install LED lighting. Officials from the 17 CONS stated the contract was awarded as a commodity with install.

<sup>43</sup> We physically observed a nonstatistical sample of 4 LED product models that contractors installed at Goodfellow AFB.

Figure 3 shows an LED light bulb marked “Made in China” that we observed at Goodfellow AFB.

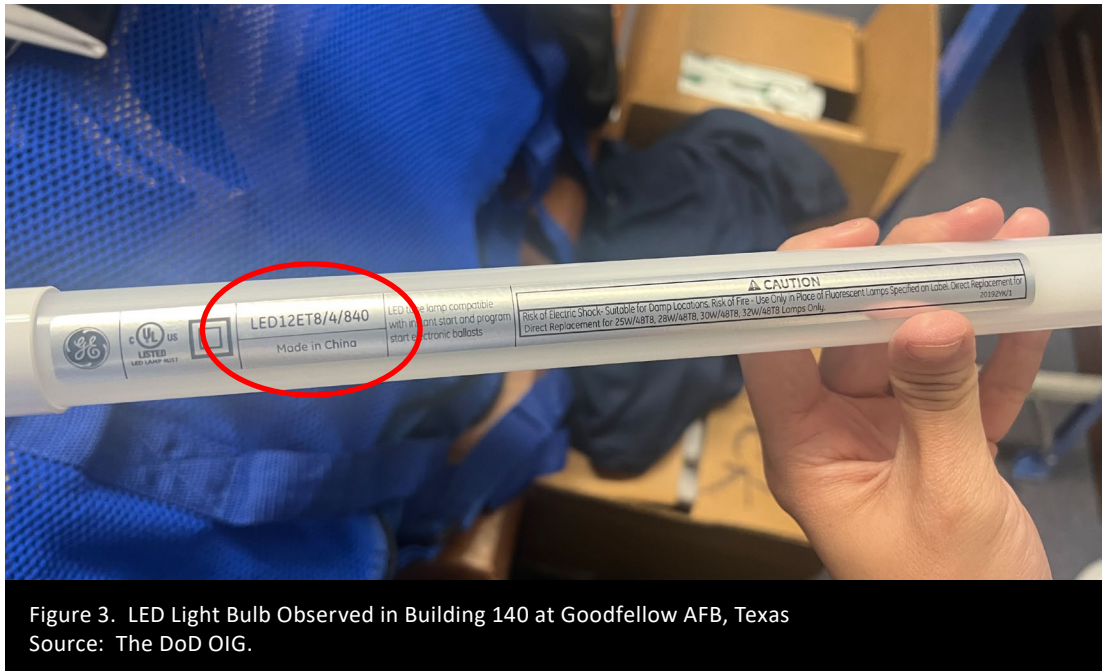


Figure 3. LED Light Bulb Observed in Building 140 at Goodfellow AFB, Texas  
Source: The DoD OIG.

The 17th Contracting Squadron Commander should initiate a review in accordance with FAR Section 25.206 to determine whether noncompliant Buy American Act items were installed on contract FA3030-20-P-0042 for product models 12ET8/G/4/840, ABV3018T481DQV23KQW, ALCS96 T5 G1 5K PC-3 ALC-SPAR, and ALCS60 T5 G1 5K PC-3 ALC-SPAR, and, when appropriate, remove noncompliant items and obtain replacements that comply with the BAA or take alternative actions to make the government whole.

### ***LED Lighting Installed at Fort Meade***

Contractor personnel installed LED product models at Fort Meade that included components marked “Made in China.” DLA Energy contracting personnel awarded the Fort Meade contract on February 15, 2019, for \$9,661,143 to implement seven ECMs at Fort Meade. The seven ECMs included measures such as LED fixture replacement, variable volume air handling units, low flow plumbing units, and control upgrades. The two proposed ECMs for lighting improvements were “ECM 14, LED Fixtures Replacements,” to upgrade interior and exterior lighting with 5,764 LED fixtures and controls in 13 buildings; and “ECM 15, Specialty LED

lighting Upgrades,” to upgrade interior and exterior lighting with 719 non-LED solutions in 11 buildings. Contract documentation identified 25 LED product models from three manufacturers that were to be installed in 24 buildings.<sup>44</sup>

We physically examined a nonstatistical sample of 12 product models of LED products from one manufacturer that contractors installed at Fort Meade. Eight of the twelve product models contained internal components (drivers) that were marked “Made in China.” For the remaining 4 LED product models, we observed that one LED product model was marked “Made in Taiwan,” and three LED products were not marked with a country of origin. The contract files included manufacturer specification sheets for two of the twelve models that stated the products were BAA compliant. Although FAR Section 25.201 waived the component test for COTS items, the contract file contained no support that a component test had been performed, or that the parts were identified as COTS products. See Table 6 for a list of the eight product models observed at Fort Meade that contained components marked “Made in China.”

*Table 6. LED Product Models Observed at Fort Meade with Components Marked “Made in China”*

Manufacturer	Product Models
Invictus Lighting LLC	IAT24-V40U0-058 with sensor
Invictus Lighting LLC	IAB4N-F4000-050
Invictus Lighting LLC	IAT24-040M0-058
Invictus Lighting LLC	IAWF1-U40LM-017
Invictus Lighting LLC	IAC11-P4000-060
Invictus Lighting LLC	IAL4M-F40U0-036
Invictus Lighting LLC	IABCM-C40LM-240
Invictus Lighting LLC	IAT22-040M0-036

Source: The DoD OIG.

<sup>44</sup> As-built drawings are sets of drawings by the contractor building a facility or fabricating a piece of equipment that show how the facility or equipment was actually built at the completion of the project, versus the way it was originally designed.



In addition, Figure 4 shows an LED component marked “Made in China” that we observed at Fort Meade.

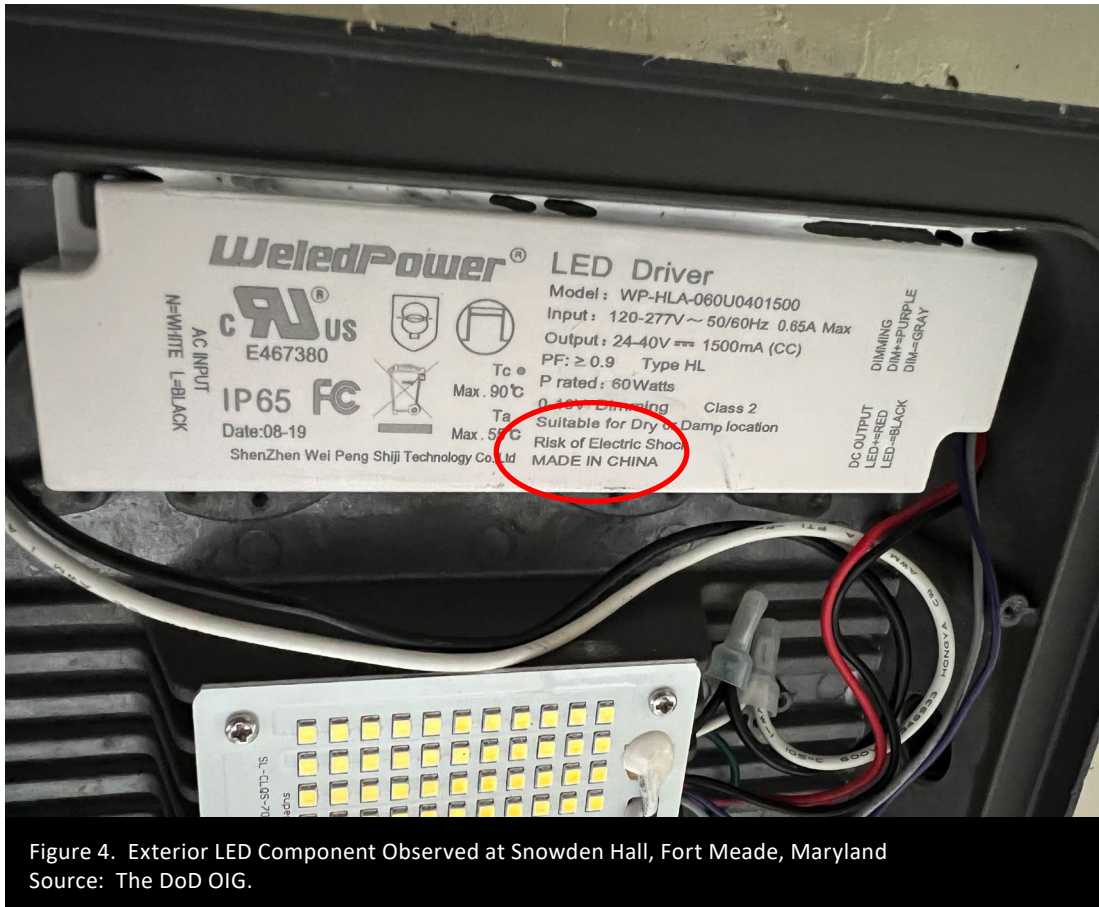


Figure 4. Exterior LED Component Observed at Snowden Hall, Fort Meade, Maryland  
Source: The DoD OIG.

The DLA Energy Commander should initiate a review in accordance with Federal Acquisition Regulation Section 25.206 to determine whether noncompliant Buy American Act items were installed on contract SP0604-19-F-8003 for product models IAT24-V40U0-058 with sensor, IAB4N-F4000-050, IAT24-040M0-058, IAWF1-U40LM-017, IAC11-P4000-060, IAL4M-F40U0-036, IABCM-C40LM-240, and IAT22-040MO-036, and, when appropriate, remove noncompliant items and obtain replacements that comply with the Buy American Act or take alternative actions to make the Government whole.

### ***LED Lighting Installed at NSWC Dahlgren***

Contractor personnel installed four LED product models at NSWC Dahlgren that included components marked “Made in China.” CEHNC contracting personnel issued a modification for the NSWC Dahlgren contract on October 20, 2020, to implement six ECMs for NSWC Dahlgren with a total value of \$12.3 million. The six ECMs included measures such as lighting upgrades, boiler upgrades, control upgrades, and pump and retro commissioning. The lighting upgrade

ECM proposed installing 15,499 products consisting of 77 product models from five manufacturers. We physically examined a nonstatistical sample of 18 LED product models from five manufacturers that contractors installed at NSWC Dahlgren. We observed that 4 of the 18 LED product models contained components that were marked “Made in China.” For the remaining 14 LED product models, we observed that four LED product models were marked “Assembled in Mexico,” two LED product models were marked “Assembled in U.S.A.,” four LED product models contained components marked “Made in Laos,” one LED product model was in a box marked “Made in Taiwan,” and three LED product models were not marked with a country of origin.<sup>45</sup> For all four LED product models with component parts that were marked “Made in China,” the contract file included manufacturer specification sheets that stated the product models were BAA compliant.

Although the FAR waives the component test for COTS items, the contract file contained no documentation that a component test had been performed or that the product models were identified as COTS products. See Table 7 for a listing of the four product models observed at NSWC Dahlgren that contained components marked “Made in China.”

*Table 7. LED Product Models Observed at NSWC Dahlgren with Components Marked “Made in China”*

Manufacturer	Product Models
Patriot	PT-CDL10-40W-40E
Patriot	PT-CDL6-18W-40E
Patriot	PT-CDL8-40W-40E
Patriot	PT-CDL8-18W-40E

Source: The DoD OIG.

<sup>45</sup> DFARS Section 252.225-7021, “Trade Agreements,” for designated countries, lists Taiwan, which is a World Trade Organization Government Procurement Agreement Country; Mexico, a Free Trade Agreement country; and Laos, a least developed country. Countries listed in these categories are treated the same as both U.S.-made and qualifying country products.

In addition, Figure 5 shows an LED component marked “Made in China” that we observed at NSWC Dahlgren.



Figure 5. Exterior Lighting Component Observed at NSWC Dahlgren  
Source: The DoD OIG.

CEHNC contracting officials stated in a January 2024 email to the audit team that corrective action was taken on contract W912DY-19-F-1201 for those parts that were identified by DoD officials as being BAA noncompliant LEDs before and during the auditors’ visit. Since that time, the prime contractor took corrective action, removed all noncompliant LEDs, and replaced the items with compliant BAA LED units. The email further stated that the four specific part numbers identified by the auditors were determined to be compliant parts by the CEHNC Engineering Department. The email included the manufacturer specification sheets previously reviewed by the audit team stating that products were BAA compliant. However, CEHNC contracting officials’ email did not address the component parts marked “Made in China.”

The CEHNC Commander should initiate a review in accordance with FAR Section 25.206 to determine whether noncompliant Buy American Act items were installed on contract W912DY-19-F-1201 for product models PT-CDL10-40W-40E, PT-CDL6-18W-40E, PT-CDL8-40W-40E, and PT-CDL8-18W-40E, and, when appropriate, remove noncompliant items and obtain replacements that comply with the Buy American Act or take alternative actions to make the Government whole.

### ***LED Lighting Installed at the Pentagon***

Contractor personnel installed 6 of 12 LED product models at the Pentagon that did not contain any markings indicating a country of origin. On September 20, 2021, the CEHNC issued a modification for the Pentagon contract to implement six ECMs for the Pentagon, with a total value of \$58.7 million. In addition to the LED lighting improvement ECM, the contract also included five ECM measures such as water conservation, chiller replacement, and refrigeration optimization. The lighting improvement ECM proposed the installation of 88,597 lighting product models that included 84 LED product models from 13 manufacturers.

We physically examined a nonstatistical sample of 12 LED product models from two manufacturers that contractors had installed at the Pentagon.<sup>46</sup> Of the 12 LED product models observed, 6 of 12 LED product models contained components marked “Mexico” or “Made in Taiwan.”<sup>47</sup> The remaining 6 of 12 LED product models contained no country of origin markings. In addition, manufacturer documentation for the 12 LED product models from the contract file stated the products were BAA or TAA compliant. Furthermore, one manufacturer for 5 of 12 product models provided a statement that its LED product models were COTS. For the remaining 7 of 12 LED product models, the contract file did not contain documentation that a component test had been performed or that the LED product models were COTS.

## **Conclusion**

Contracting personnel at the CEHNC, DLA Energy, and 17 CONS complied with the FAR requirements for obtaining best value when contracting for energy savings contracts. They supported their selection of the prime contractor that would provide good or best value to the Government for all four contracts reviewed. However, contracting personnel did not support that the LED products contractors installed on energy saving lighting projects complied with the BAA. Contracting personnel relied on the prime contractor to ensure that subcontractors installed

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<sup>46</sup> We planned to physically examine a nonstatistical sample of the installed 20 LED models from two manufacturers based on contract documentation provided by the CEHNC. However, the team actually viewed 12 LED products because of inconsistencies between the product numbers in the contract documentation versus the products installed.

<sup>47</sup> DFARS Section 252.225-7021.

BAA compliant products. However, contracting officers are ultimately responsible for ensuring that the contract file contains sufficient evidence that products installed are compliant with the BAA.

Contracting personnel did not support that the 46 LED product models were manufactured in the United States, that the value of the domestic component parts of the product exceed the percentage of the cost of all of the components, as required by the FAR and DFARS, or that the products were COTS. As a result, DoD contracting personnel had limited assurance that contractors installed BAA compliant LED products under the four energy savings contracts.

## Management Comments on the Finding and Our Response

### *Commander, U.S. Army Corps of Engineers Engineering and Support Center, Huntsville Comments*

The Commander, U.S. Army Corps of Engineers Engineering and Support Center, Huntsville (CEHNC), stated that steps were taken by CEHNC contracting and engineer personnel to ensure that contractors provided LED products that were BAA compliant. He stated that CEHNC personnel relied upon the vendor's certification fact sheets that the products were BAA compliant and if noncompliant products were identified during quality assurance inspections, the contractors were notified and immediately took corrective actions.

The Commander further stated that the lighting projects are large and include other energy savings measures. The level of effort required to perform tests on each product to determine whether the LED product components met the domestic content percentage required by the FAR and DFARS or to determine whether a product was COTS would be cost and time prohibitive. He stated that CEHNC personnel used a random sampling approach to review manufacturer's specification sheets to evaluate BAA compliance before contract award. The Commander further stated that the Government must be able to rely on manufacturer's specification sheets to be accurate and true.

### *Our Response*

We appreciate the Commander, U.S. Army Corps of Engineers Engineering and Support Center, Huntsville (CEHNC), describing the procedures contracting and engineering personnel used to ensure contractors installed BAA compliant products on the lighting projects. We acknowledge the size and complexity of the energy contracts in our report. We agree that contracting officers and the engineering team should be able to rely on the contractor's certification and quality control

to oversee and enforce compliance with the terms of the contract. However, the contract files we reviewed did not contain evidence of a quality assurance review for BAA compliance. In addition, the manufacturers' specification sheets for 24 of the 30 product models in our nonstatistical sample for products installed at the Pentagon and at NWSC Dahlgren did not state that the LED products were BAA compliant.

## **Recommendations, Management Comments, and Our Response**

### ***Recommendation 1***

**We recommend that the Commander, U.S. Army Engineering and Support Center, Huntsville, Alabama, provide training for the contracting workforce emphasizing the need to ensure that Utility Energy Services Contracts which include energy conservation measures that require construction include appropriate Federal Acquisition Regulation Part 52 "Contract Clauses." These contracts should include Federal Acquisition Regulation Subsection 52.225-9, "Buy American-Construction Materials," Subsection 52.225-10, "Notice of Buy American Requirement-Construction Materials," Subsection 52.225-11, "Buy American-Construction Materials Under Trade Agreements," and Subsection 52.225-12, "Notice of Buy American Requirement-Construction Materials Under Trade Agreements" clauses.**

### ***Commander, U.S. Army Engineering and Support Center, Huntsville Comments***

The Commander, U.S. Army Corps of Engineers Engineering and Support Center Huntsville (CEHNC), agreed with the recommendation, stating that contracting employees will complete the Defense Acquisition University's Training Event Series on the BAA for Construction to ensure that required clauses are included in each solicitation and resultant Utility Energy Services Contract (UESC). The Commander stated that the training will be completed by April 30, 2024. In addition, contracting employees will take any training, when available, provided by the Principal Director, Defense Pricing and Contracting as recommended under Recommendation 3. Furthermore, the CEHNC Chief of Contracting will ensure the CEHNC Desk Guide is updated to properly address the BAA for service contracts with incidental construction requirements by May 31, 2024.

### ***Our Response***

Comments from the Commander addressed the specifics of the recommendation; therefore, the recommendation is resolved but will remain open. We will close the recommendation once CEHNC personnel provide documentation of completion of the Defense Acquisition University's Training Event Series on the BAA for Construction and the updated Desk Guide properly addresses the BAA for service contracts with incidental construction requirements.

### ***Recommendation 2***

**We recommend that the following officials require contracting personnel to ensure that contract files for energy savings projects executed under service contracts include an affirmation from the prime contractor that, except for items for which the prime contractor was granted a waiver, all contractor installed products, materials, and supplies are Buy American Act compliant (materials and products were manufactured in the United States, and the items are commercially available off-the-shelf or the cost of domestic components exceeds the cost of all of the components by the percentage specified by the Federal Acquisition Regulation or the Defense Federal Acquisition Regulation Supplement):**

- a. **Commander, U.S. Army Engineering and Support Center,  
Huntsville, Alabama**

### ***Commander, U.S. Army Engineering and Support Center, Huntsville Comments***

The Commander, U.S. Army Corps of Engineers Engineering and Support Center Huntsville (CEHNC), agreed with the recommendation, stating that as of January 2024, the contracting officers started including a certification requirement in the solicitations for energy savings contracts that require construction. The certification requires contractors to affirm that all proposed and installed products, materials, and supplies are compliant with the BAA statute or are COTS items and for items identified as COTS items provide sufficient evidence to establish that sufficient quantities are sold in the commercial marketplace and offered to the Government in the same form in which they are sold to the commercial marketplace.

### ***Our Response***

Comments from the Commander addressed the specifics of the recommendation. The CEHNC included with their comments a Certificate of Compliance With the Buy American Act that contractors will be required to complete on energy

savings contracts that require construction. The certificate supports that CEHNC met the intent of the recommendation. Therefore, the recommendation is resolved and closed.

**b. Commander, 17th Contracting Squadron, Goodfellow Air Force Base, Texas**

***Commander, 17th Contracting Squadron, Goodfellow Air Force Base Comments***

The Principal Deputy, Assistant Secretary of the Air Force, (Acquisition, Technology & Logistics), responding for the Commander, 17th Contracting Squadron, agreed with the recommendation, stating that the Commander, 17th Contracting Squadron will prepare a Memorandum for the Record to document the file to expressly state that purchased items were commercially available off-the-shelf (COTS) items. The Principal Deputy further commented that the procurement was for installation of exterior and interior LED lighting using Simplified Acquisition Procedures as an open market commodity purchase including ancillary installation services. The Air Force did not use an Energy Savings Performance Contract as described in the report.

The Principal Deputy stated that the contract was subject to DFARs Clause 252.225-7001, which requires the contractor to deliver only domestic end products unless, in its offer, it specifies delivery of other end products. The Principal Deputy also stated there is no FAR requirement for an offeror's affirmation that it will meet BAA requirements of the contract. However, compliance with the Request for Proposal Terms and Conditions is compulsory.

The Principal Deputy stated that the Commander, 17th Contracting Squadron will also implement annual BAA refresher training for the requirements of FAR Part 25 into its customer education program. The proposed date for completion is not later than December 1, 2024.

***Our Response***

Comments from Principal Deputy were responsive. However, our report does not state that the contract was an Energy Savings Performance Contract; the report states the contract was for a commodity with install. The contract file contained no support indicating the items were BAA compliant. Specifically, the manufacturer specification sheets did not indicate the items were BAA compliant or that the products were COTS. However, the Air Force's proposed actions are sufficient to meet the intent of the recommendation. Therefore, the recommendation is resolved but will remain open. We will close the recommendation when the 17th Contracting Squadron provides documentation demonstrating that the



items procured for this contract were a commercial product, sold in substantial quantities in the commercial marketplace, and offered to the Government in the same form in which they were sold to the commercial marketplace. If the products were not determined to be commercially available off-the-shelf, we request that the 17th Contracting Squadron provide supporting documentation that the products were BAA compliant.

**c. Commander, Defense Logistics Agency Energy, Fort Belvoir, Virginia**

***Commander Defense Logistics Agency Energy, Fort Belvoir, Virginia Comments***

The Deputy Director, DLA Acquisition, responding for the Commander, DLA Energy, Fort Belvoir, Virginia, agreed with the recommendation, stating that DLA Energy will include an affirmation from the prime contractor that its installed products, materials, and supply are BAA compliant. DLA Energy will include FAR 52.225-2, “Buy American Certificate,” in future task orders to document a prime contractor’s affirmation that all contractor-installed products, materials, and supplies are BAA compliant. Further, the Deputy Director stated that DLA Energy will add the affirmations into its Task Order template. The Deputy Director estimated completion by October 31, 2024.

***Our Response***

Comments from the Deputy Director addressed the specifics of the recommendation; therefore, the recommendation is resolved but will remain open. We will close the recommendation when the DLA Energy provides documentation that supports that prime contractors will be required to affirm for energy savings performance contracts that installed products, materials, and supplies are BAA compliant and that FAR 52.225-2, “Buy American Certificate,” will be included in future task orders and added into the task order template.

***Recommendation 3***

**We recommend that the Principal Director, Defense Pricing and Contracting, issue guidance for procuring activities specifying that when an agency issues an energy savings service contract that may include construction and use construction materials during the performance of the contract, the agency must ensure the Federal Acquisition Regulation construction materials clauses implementing the Buy American Act requirements are included and enforced based on the contract terms.**

### ***Principal Director, Defense Pricing and Contracting Comments***

The Principal Director, Defense Pricing and Contracting (DPC), agreed with the recommendation, stating that they support the inclusion of the FAR Buy American Statute construction materials provisions and clauses that are applicable to all materials brought to the work site by the contractor for the construction, alteration, or repair of any public building or public work in the United States in contract awards for energy savings service contracts.

### ***Our Response***

Comments from the Principal Director partially addressed the recommendation; therefore, the recommendation is unresolved. The Principal Director agreed with the recommendation; however, the Director did not state whether the DPC intended to issue guidance and if so, when that would occur. For the UESC and ESPC contracts we reviewed, we identified inconsistencies regarding the appropriate construction material clauses to use. We request that the Principal Director provide comments to the final report within 30 days that discuss the corrective actions that the DPC plans to take in order to include and enforce the specifications of implementing the BAA requirements based on the contract terms.

### ***Recommendation 4***

**We recommend that the following officials provide support that the Light Emitting Diode product models are commercially available off-the-shelf items. If support is not available, perform and document a component test to verify domestic content percentage requirements for Light Emitting Diode products that were not determined to be commercially available off-the-shelf. Provide support that product models are sold in substantial quantities in the commercial marketplace if a product is determined to be commercially available off-the-shelf:**

- a. **Commander, U.S. Army Engineering and Support Center, Huntsville, Alabama, on contracts W912DY-19-F-1201 and W912DY-19-F-1202**

### ***U.S. Army Engineering and Support Center, Huntsville Comments***

The Commander, U.S. Army Corps of Engineers Engineering and Support Center Huntsville (CEHNC), agreed with the recommendation and stated that the CEHNC does not have the resources or capacity to perform a component test to verify domestic content for the numerous construction materials that were not fully documented to be COTS. Instead, the CEHNC contracting officer issued a notice of potential non-compliance with the BAA statute to the contractor. The Commander

stated that contractors will be required to certify in writing that they have reviewed and validated that all lighting installed is compliant with the BAA statute or COTS.

The Commander commented in their response to Recommendation 2.a. that the contracting officer issued a notice of a potential BAA statute violation to the contractor on March 22, 2024, with a response date of April 11, 2024, for contract W912DY-19-F-1201 (Dahlgren) for the four Patriot LED units with a driver component marked “Made in China.” The product specification sheets stated the products are BAA compliant, but if found to be noncompliant, the CEHNC will take corrective action in accordance with FAR 25.206(c), as appropriate.

The Commander further commented in their response to Recommendation 2.a. that the contracting officer issued a notice of a potential BAA statute violation to the contractor on March 22, 2024, with a response date of May 3, 2024, for contract W912DY-19-F-1202 (Pentagon) for LED products with no markings. The notice required the contractor to certify that all products are compliant with the BAA.

### ***Our Response***

Comments from the Commander addressed the specifics of the recommendation; therefore, the recommendation is resolved but will remain open. We will close the recommendation when the CEHNC provides documentation that the contractors reviewed and validated that all installed lighting products met the domestic content requirement specified in the FAR or that the items were COTS (product models are sold in substantial quantities in the commercial marketplace). For those items not compliant, we request that the CEHNC provide support for the actions taken by the contracting officer to address the noncompliant items. The CEHNC provided additional documentation on May 16, 2024, which was too late to consider for closure of this recommendation in the final report.

#### **b. Commander, 17th Contracting Squadron, Goodfellow Air Force Base, Texas, for contract FA3030-20-P-0042**

### ***Commander, 17th Contracting Squadron, Goodfellow Air Force Base Comments***

The Principal Deputy, Assistant Secretary of the Air Force (Acquisition, Technology & Logistics), responding for the Commander, 17th Contracting Squadron, agreed with the recommendation, stating that the Commander, 17th Contracting Squadron will prepare a Memorandum for Record to document the file with the conclusion that items purchased for this contract were COTS items, negating the need to perform the component testing. The proposed date for completion is not later than July 1, 2024.

### ***Our Response***

Comments from the Principal Deputy addressed the specifics of the recommendation; therefore, the recommendation is resolved but will remain open. We will close the recommendation when the 17th Contracting Squadron provides documentation that items procured for this contract were COTS items. The Memorandum for Record must support that items were a commercial product, sold in substantial quantities in the commercial marketplace, and offered to the Government in the same form in which they were sold to the commercial marketplace. If the products were not determined to be commercially available off-the-shelf, we request that the 17th Contracting Squadron provide supporting documentation that the products were BAA compliant.

**c. Commander, Defense Logistics Agency Energy, Fort Belvoir, Virginia, for contract SP0604-19-F-8003**

### ***Commander, Defense Logistics Agency Energy Comments***

The Deputy Director, DLA Acquisition, responding for the Commander, DLA Energy, agreed with the recommendation, stating that DLA Energy will determine whether the LED product models in the subject contract are commercially available and sold in substantial quantities as off-the-shelf items. Additionally, the Deputy Director stated that DLA Energy will perform and finalize a commercial item determination on the LED product models. If product models are not determined to be COTS items, DLA Energy will perform and document a component test to verify domestic content percentage requirements. The Deputy Director estimated completion by February 28, 2025.

### ***Our Response***

Comments from the Deputy Director addressed the specifics of the recommendation; therefore, the recommendation is resolved but will remain open. We will close the recommendation when DLA Energy provides documentation that the installed LED product models for contract SPO604-19-F-8003 were COTS items. Specifically, DLA Energy should provide supporting documentation that the installed LED product models were commercial products, sold in substantial quantities in the commercial marketplace, and offered to the Government in the same form in which they are sold to the commercial marketplace. For LED product models that are not COTS, provide support that the LED product models meet the domestic content requirement that the value of the domestic component parts of the product exceed the percentage of the cost of all the components, as required by the FAR and DFARS.

## ***Recommendation 5***

**We recommend that the following officials initiate a review in accordance with Federal Acquisition Regulation Section 25.206 to determine whether noncompliant Buy American Act items were installed and, when appropriate, remove noncompliant items and obtain replacements that comply with the Buy American Act or take alternative actions to make the Government whole:**

- a. Commander, 17th Contracting Squadron, Goodfellow Air Force Base, Texas, on contract FA3030-20-P-0042 for product models 12ET8/G/4/840, ABV3018T481DQV23KQW, ALCS96 T5 G1 5K PC-3 ALC-SPAR, and ALCS60 T5 G1 5K PC-3 ALC-SPAR**

### ***Commander, 17th Contracting Squadron, Goodfellow Air Force Base Comments***

The Principal Deputy, Assistant Secretary of the Air Force (Acquisition, Technology & Logistics), responding for the Commander, 17th Contracting Squadron, agreed with the recommendation, stating that the Commander, 17th Contracting Squadron will refine the commerciality determination memorandum to address all the components of a COTS item. The Principal Deputy stated that the Commander, 17th Contracting Squadron will collaborate with the Commander, 17th Civil Engineering Squadron to execute available contractual remedies or take alternative actions authorized by FAR Section 25.206 to make the Government whole on contract FA3030-20-P-0042 for product models referenced in the audit. The proposed date for completion is December 1, 2024.

### ***Our Response***

Comments from the Principal Deputy addressed the specifics of the recommendation; therefore, the recommendation is resolved but will remain open. We will close the recommendation when the 17th Contracting Squadron provides documentation for the two end products, 12ET8/G/4/840 and ABV3018T481DQV23KQW, that were marked “Made in China,” and the two end products, ALCS96 T5 G1 5K PC-3 ALC-SPAR and ALCS60 T5 G1 5K PC-3 ALC-SPAR, with component parts marked “Made in China,” supporting that the products were manufactured in compliance with the BAA. If the contractors installed noncompliant product models, provide documentation identifying the corrective actions taken by the contracting officer as called for in FAR 25.206.

- b. Commander, Defense Logistics Agency Energy, Fort Belvoir, Virginia, on contract SP0604-19-F-8003 for product models IAT24-V40U0-058 with sensor, IAB4N-F4000-050, IAT24-040M0-058, IAWF1-U40LM-017, IAC11-P4000-060, IAL4M-F40U0-036, IABCM-C40LM-240, and IAT22-040M0-036**

### ***Defense Logistics Agency Energy Comments***

The Deputy Director, DLA Acquisition, responding for the Commander, DLA Energy, agreed with the recommendation, stating that DLA Energy will initiate a review in accordance with FAR 25.206 and take actions as appropriate to determine whether Buy American Act items were installed as part of the prime contract. Additionally, the Deputy Director stated that if items are determined to be noncompliant, DLA Energy will take appropriate action, including removing noncompliant items, obtaining replacement items that comply with the Buy American Act, or taking alternative actions in accordance with FAR 25.206. The estimated completion date for these corrective actions is February 28, 2025.

### ***Our Response***

Comments from the Deputy Director addressed the specifics of the recommendation; therefore, the recommendation is resolved but will remain open. We will close the recommendation when DLA Energy provides documentation showing the results of the Federal Acquisition Regulation Section 25.206 review. Specifically, DLA Energy should determine whether the contractor installed LED product models IAT24-V40U0-058 with sensor, IAB4N-F4000-050, IAT24-040M0-058, IAWF1-U40LM-017, IAC11-P4000-060, IAL4M-F40U0-036, IABCM-C40LM-240, and IAT22-040M0-036 were not BAA compliant. If the review determines that contractors installed noncompliant product models, provide documentation identifying the corrective actions taken by the contracting officer as called for in FAR 25.206.

- c. Commander, U.S. Army Engineering and Support Center, Huntsville, Alabama, on contract W912DY-19-F-1201 for product models PT-CDL10-40W-40E, PT-CDL6-18W-40E, PT-CDL8-40W-40E, and PT-CDL8-18W-40E**

### ***U.S. Army Engineering and Support Center, Huntsville, Alabama Comments***

The Commander, U.S. Army Corps of Engineers Engineering and Support Center (CEHNC) agreed with the recommendation. The Commander commented that the evaluation team for contract W912DY-19-F-1201 determined before contract award that the four LED products (PT-CDL10-40W-40E, PT-CDL6-18W-40E, PT-CDL8-40W-40E, and PT-CDL8-18W-40E) were BAA compliant based on statements in the manufacturer's specification sheets. He further commented that the Government must be able to rely on the manufacture's technical specification sheets. The Government does not have the resources to perform tests on each product, material, or supply item used on a construction project to determine the percentage of domestic material in all construction materials used. Additionally, CEHNC contracting officers issued a notice of potential non-compliance with the BAA statute for the driver components found on the four LED products marked "Made in China." The contractor is required to certify in writing that all products, materials, and supplies used under this energy savings lighting project are and compliant with the BAA statute. An official response from the contractor is expected on April 11, 2024. The contracting officer will follow FAR 25.206 (c) procedures if the contractor identifies noncompliant products.

### ***Our Response***

Comments from the Commander addressed the specifics of the recommendation; therefore, the recommendation is resolved but will remain open. We will close the recommendation when the CEHNC provides the documentation from the contractor's response stating whether the four LED products were compliant with BAA statute. For items that were not compliant, provide documentation for the actions taken by the contracting officer to address the noncompliant items. The CEHNC provided additional documentation on May 16, 2024, which was too late to consider for closure of the recommendation in the final report.

## Appendix A

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### Scope and Methodology

We conducted this performance audit from April 2022 through March 2024 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

### Congressional Request

We conducted this audit in response to a May 13, 2021, congressional request. The Member of Congress requested that the DoD OIG perform an audit of the LED lighting improvement projects performed under Energy Savings Performance Contracts (ESPCs) at the Pentagon and at Goodfellow Air Force Base (AFB), Texas, to ensure that the lighting products were BAA compliant and provided the best total cost of ownership to the DoD. The Member of Congress shared a constituent's complaint that contractors were installing foreign-made LED lighting products that were not compliant with the BAA or with executive orders (EOs) that emphasized the Government must maximize the use of domestically produced materials. The complainant had also submitted a similar complaint to the DoD OIG Hotline on April 14, 2021.

### Internal Control Assessment and Compliance

We assessed internal controls and compliance with laws and regulations necessary to satisfy the audit objective. In particular, we assessed the internal control components and underlying principles related to monitoring, information, and communication. We reviewed the monitoring activities related to the oversight of contracting personnel ensuring BAA compliant products were procured and installed at the installations we reviewed. Additionally, we reviewed information and communication activities, such as contracting personnel statements related to reliance on the prime contractor and the BAA requirements in the contract files. However, because our review was limited to these internal control components and underlying principles, it may not have disclosed all internal control deficiencies that may have existed at the time of this audit.



## Universe and Sample Size Selection

We selected a sample of energy savings contracts to review from the information contained in the DoD Hotline complaint. The complainant to the DoD Hotline identified 37 installations where the complainant alleged that contractors installed foreign-made LED products that were not compliant with the BAA. The information provided by the complainant did not identify contract or project numbers; therefore, the audit team performed additional research to identify the contract numbers.

We selected a nonstatistical sample of 4 of the 37 installations. The four installations selected included NSWC Dahlgren, Fort Meade, Goodfellow AFB, and the Pentagon. We identified the contracts awarded for the LED lighting projects on the installations and selected one contract per installation to review. We then selected a nonstatistical sample of 46 LED product models from nine manufacturers that contractors installed on the four installations to determine whether DoD officials complied with the BAA when procuring LED lighting improvement projects. The audit team did not verify that the individual 46 LED product models in our nonstatistical sample were BAA compliant.

## Review of Documentation and Interviews

We reviewed contracts for NSWC Dahlgren, Fort Meade, Goodfellow AFB, and the Pentagon. We interviewed contracting personnel from the CEHNC, DLA Energy, and 17 CONS to obtain an understanding of how the energy savings contracts were awarded and how contracting personnel ensured BAA compliant products would be used during installation. Specifically, we obtained and reviewed the following documentation.

- contracts
- modifications
- Justification and Approval
- Price Negotiation Memorandums
- contractors' proposals
- Determination and Finding
- Performance Work Statements
- Quality Assurance Surveillance Plan
- source selection information
- Commissioning reports

## ***Criteria and Guidance Reviewed***

To evaluate the contracts, we obtained, reviewed, and analyzed the following relevant criteria and guidance from the United States Code, Unified Facilities Criteria, Executive Orders, and Federal and DoD regulations and policies.

- Section 2511, title 19, U.S.C., “General authority to modify discriminatory purchasing requirements”
- Section 8256, title 42, U.S.C., “Incentives for agencies”
- Section 8287, title 42, U.S.C., “Authority to enter into contracts”
- Section 8301, title 41, U.S.C., “Definitions”
- Section, 8302, title 41, U.S.C., “American materials required for public use”
- Section 8303, title 41, U.S.C., “Contracts for public works”
- Section 8304, title 41, U.S.C., “Waiver rescission”
- Section 8305, title 41, U.S.C., “Annual report”
- FAR Part 12, “Acquisition of Commercial Products and Commercial Services”
- FAR Part 15, “Contracting by Negotiation”
- FAR Part 25, “Foreign Acquisitions”
- FAR Part 52, “Solicitation Provisions and Contract Clauses”
- DFARS Part 212, “Acquisition of Commercial Products and Commercial Services”
- DFARS Part 252, “Solicitation Provisions and Contract Clauses”
- DoD Instruction 4170.11, “Installation Energy Management,” December 11, 2009 (Incorporating Change 2, Effective August 31, 2018)
- DoD Instruction 5010.40, “Managers’ Internal Control Program Procedures,” May 30, 2013 (Incorporating Change 1, June 30, 2020)
- EO 13788 – “Buy American and Hire American,” April 18, 2017
- EO 13858 – “Strengthening Buy-American Preferences for Infrastructure Projects,” January 31, 2019
- EO 13881 – “Maximizing Use of American-Made Goods, Products, and Materials,” July 15, 2019
- EO 14005 – “Ensuring the Future Is Made in All of America by All of America’s Workers,” January 25, 2021

## Use of Computer-Processed Data

We used computer-processed data throughout the audit; however, we did not rely solely on the data and confirmed accuracy of the data through source documentation. Specifically, we used data from the Federal Procurement Data System–Next Generation to attempt to identify contracts awarded for the procurement and installation of LED products using energy savings contracts. Furthermore, we used Procore and the U.S. Army Paperless Contract File System along with DoD Secure Access File Exchange to download information provided by contracting personnel to support our findings and recommendations.

## Prior Coverage

During the last 5 years, the Government Accountability Office (GAO) issued one report discussing the Buy American Act. Unrestricted GAO reports can be accessed at <http://www.gao.gov>.

## GAO

Report No. GAO-19-17, “Buy American Act: Actions Needed to Improve Exception and Waiver Reporting and Selected Agency Guidance,” December 18, 2018

The GAO assessed the extent to which: (1) the Government procures foreign products through BAA exceptions and waivers; and (2) selected agencies provide training and guidance to implement the Act. The GAO reviewed laws, regulations, and policies related to the BAA and analyzed FY 2017 data from Federal Procurement Data System-Next Generation. The GAO also analyzed a non-generalizable sample of 38 contracts from the DoD, Department of Health and Human Services, Department of Homeland Security, and Department of Veterans Affairs—the agencies with the most obligations for products in FY 2017.

## Appendix B

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### Best Value Competitive Procedures

The following discussion details the competitive procedures used by CEHNC, DLA Energy, and 17 CONS contracting personnel to select a prime contractor, and the competitive procedures prime contractors used when selecting subcontractors for obtaining best value. We obtained documents such as the Pre-Negotiation Briefing Memorandum, Pre-Negotiation Objective Memorandum, Price Negotiation Memorandum (PNM), and Evaluation Reports; however, we did not perform further validation processes to verify the information in the documents.

- **Pentagon UESC.** The CEHNC contracting officer determined that the prime contractor's proposal provided the best value to the Government. The Pre-Negotiation Objective Memorandum (PNM) stated that the CEHNC issued a request for proposal to receive and evaluate proposals from utility company offerors to determine which proposal provided the best value to the Government. The PNM stated that the contracting team compared the offeror's proposed price to the Independent Government Estimate and negotiated with the prime contractor to reach a final negotiated price. In addition, the PNM stated that the Government engineering team found the proposed feasibility study approach from the contractor to be acceptable from a technical standpoint and that the technical analysis determined the contractor's approach to be adequate for this contract. Furthermore, the PNM stated that after a competitive proposal evaluation process, CEHNC contracting personnel selected the prime contractor that provided the best value to the Government.
- **Fort Meade ESPC.** The DLA Energy contracting team selected the prime contractor that submitted a proposal that provided the "best overall value" in satisfying the Fort Meade requirement. The Pre-Negotiation Briefing Memorandum stated that officials used a two-step selection process to identify the best offer. The first step of the two-step process provided all 16 ESCOs the opportunity to submit a package acknowledging interest in the Fort Meade requirement. Eight ESCOs responded to Fort Meade's Notice of Opportunity. The proposal assessment team performed an integrated assessment of the evaluation factors such as Technical Capability, Past Performance, and Cost/Price. Based on their evaluation, DLA Energy contracting personnel selected a prime contractor that would satisfy the Fort Meade requirements for 10 ECMs and provide the best value to the Government.

- **Goodfellow AFB Contract.** Contracting personnel from the 17 CONS selected the prime contractor after obtaining adequate price competition.<sup>48</sup> The LED Lighting Retrofit and Upgrade Evaluation Report stated that an evaluation board that included Goodfellow AFB Civil Engineering Squadron personnel reviewed nine proposals for total evaluated price. In addition, the report stated the total evaluated price was calculated using the contract line-item number values for both the base contract line-item numbers and all optional contract line-item numbers. Further, the report stated that contracting personnel awarded the contract to the offeror with the lowest total evaluated price, which was technically acceptable.
- **NSWC Dahlgren UESC.** CEHNC contracting personnel awarded the lighting improvement project as a sole-source acquisition. In the PNM, the CEHNC contracting officer concluded that the prime contractor's offer which included proposals for six ECMs was fair and reasonable; complied with appropriate statutes, regulations, and policies; and provided good value and was in the best interest of the Government. In addition, the PNM stated that the contracting officer compared the Independent Government Estimate to the offeror's subcontractor's data and considered the contracting team's detailed value and risk assessment of the offeror's proposals terms and conditions. Further, the PNM stated that the contracting officer determined the contract modification will provide good value and be in the best interest of the Government.

In addition, contracting personnel included FAR Subsection 52.244-5, "Competition in Subcontracting," in their Price Justification and Economics sheet or contract. Prime contractors solicited and analyzed bids from subcontractors for individual ECMs including the LED ECMs for three of four contracts reviewed (the fourth contract did not use subcontractors), as shown in the following examples.

- **Pentagon and NSWC Dahlgren UESCs.** The contract files for the Pentagon and NSWC Dahlgren contracts included documents that stated the prime contractor used best value as a means of selecting subcontractors for ECMs. In addition, the Pentagon contract file contained a Price Justification and Economics sheet that shows the prime contractor applied FAR clause subsection 52.244-5, "Competition in Subcontracting," to its subcontractor selection to the maximum practical extent, as well as FAR clause subsections 52.225-9, "Buy American –

<sup>48</sup> FAR Subsection 15.403-1, "Prohibition on obtaining certified cost or pricing data," states that adequate price competition is when two or more responsible offerors, competing independently, submit priced offers that satisfy the Government's expressed requirement; award will be made to the offeror whose proposal represents the best value (see FAR 2.101) where price is a substantial factor in source selection; and there is no finding that the price of the otherwise successful offeror is unreasonable. Any finding that the price is unreasonable must be supported by a statement of the facts and approved at a level above the contracting officer.

Construction Materials” and 52.225-11, “Buy American – Construction Materials under Trade Agreements.”<sup>49</sup> Furthermore, the Dahlgren contract file contained a Fee Proposal to Conduct a Feasibility Study that shows the prime contractor applied FAR clause subsection 52.244-5, “Competition in Subcontracting,” to its subcontractor selection to the maximum practical extent and FAR clause subsections 52.225-9 and 52.225-12.<sup>50</sup> Therefore, the prime contractor required products to be BAA compliant by including the FAR Subsection 52.225-12 “Notice of Buy American Act Requirement-Construction Materials” clause when selecting subcontractors.

- **Fort Meade ESPC.** Contracting personnel from DLA Energy included FAR clause subsection 52.244-5, “Competition in Subcontracting,” in the Fort Meade contract to help ensure that prime contractors used competitive methods when selecting the subcontractors that would be responsible for accomplishing the ECMs. The pre-negotiation briefing memorandum stated the prime contractor sought competitive offers from subcontractors from specific trades such as mechanical, electrical, lighting, and direct digital controls. The prime contractor’s solicitations contained a pricing overview and a summary of the selected subcontractor pricing for each ECM and offers included all materials, equipment, labor, and taxes required to meet the contractor energy statement of work for each trade and ECM.

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<sup>49</sup> FAR Subsection 52.225-11 is “Buy American-Construction Materials under Trade Agreements,” and FAR Subsection 52.225-12 is “Notice of Buy American Requirement-Construction Materials Under Trade Agreement.” The contract file contained the FAR clause title for FAR Subsection 52.225-11; however, contractor personnel entered in FAR Subsection 52.225-12 for the number of the FAR clause.

<sup>50</sup> A feasibility study provides a detailed economic analysis as well as technology and project financing recommendations.

# Management Comments

## Defense Pricing and Contracting



OFFICE OF THE UNDER SECRETARY OF DEFENSE  
3000 DEFENSE PENTAGON  
WASHINGTON, DC 20301-3000

MEMORANDUM FOR TECHNICAL DIRECTOR, FOLLOW-UP, AND QUALITY ASSURANCE DIVISION, OFFICE OF THE INSPECTOR GENERAL

SUBJECT: Response to DoDIG Draft Report on Audit of DoD Compliance with the Buy American Act for Light Emitting Diode Lighting Improvement Projects (Project No. D2022-D000AV-0124.000)

As requested, I am providing the response to the recommendation contained in the subject report.

**Recommendation 3:**

We recommend that the Principal Director, Defense Pricing and Contracting, issue guidance for procuring activities specifying that when an agency issues an energy savings service contract that may include construction and use construction materials during the performance of the contract, the agency must ensure the Federal Acquisition Regulation (FAR) construction materials clauses implementing the Buy American Act requirements are included and enforced based on the contract terms.

**Response:**

Concur. I support the inclusion of the FAR Buy American Statute construction materials provisions and clauses that are applicable to all materials brought to the work site by the contractor for the construction, alteration, or repair of any public building or public work in the United States be included in contract awards for energy savings service contracts.

Please contact [REDACTED], if additional information is required.

TENAGLIA,  
JOHN.M [REDACTED]  
[REDACTED]  
John M. Tenaglia  
Principle Director,  
Defense Pricing and Contracting

## Department of the Air Force



**DEPARTMENT OF THE AIR FORCE  
WASHINGTON DC**

OFFICE OF THE ASSISTANT SECRETARY

*30 Apr 24*

MEMORANDUM FOR DEPARTMENT OF DEFENSE INSPECTOR GENERAL

FROM: SAFAQ  
1120 Air Force Pentagon Suite 4E962  
Washington, DC 20330

SUBJECT: Department of the Air Force Response to DoD Office of Inspector General Draft Report, "DoD Compliance with the Buy American Act for Light Emitting Diode Lighting Improvement Projects" (Project No. D2022-D000AV-0124)

1. This is the Department of the Air Force (DAF) response to the DoDIG Draft Report, "DoD Compliance with the Buy American Act for Light Emitting Diode Lighting Improvement Projects" (Project No. D2022-D000AV-0124). The DAF concurs with the report and will complete the recommendations as discussed below.

2. The Commander, 17th Contracting Squadron, Goodfellow Air Force Base, Texas, in coordination with SAF/AQC will correct issues identified in this report, and develop and implement a corrective action plan outlined in the following recommendations:

**RECOMMENDATION 2.b:** The DODIG recommends that the Air Force, Commander, 17th Contracting Squadron, require contracting personnel to ensure that contract files for energy savings projects executed under service contracts include an affirmation from the prime contractor that except for items for which the prime contractor was granted a waiver, all contractor installed products, materials, and supplies are Buy American Act compliant (materials and products were manufactured in the United States, and the items are commercially available off-the-shelf or that the cost of domestic components exceed the cost of all of the components by the percentage specified by the Federal Acquisition Regulation (FAR) or the Defense Federal Acquisition Regulation Supplement (DFARS)).

**DAF RESPONSE:** The DAF concurs with the recommendation. The market research conducted for this procurement confirmed that 1) this was a commodity purchase, vice Energy Savings Performance Contract (ESPC) and 2) that the acquisition would result in a commercially available item. For corrective action, the Commander, 17 Contracting Squadron will accomplish a Memorandum for Record to document the file to expressly state the conclusion that the purchased items were commercially available off-the-shelf (COTS) items.

For context, the DAF awarded the audited procurement for installation of exterior and interior LED lighting using Simplified Acquisition Procedures in accordance with FAR Parts 12 and 13 as an open market commodity purchase to include ancillary installation services. As a result, the DAF did not use an ESPC as described in the audit report. The contract was subject to DFARS



## Department of the Air Force (cont'd)

Clause 252.225-7001, as required by DFARS 225.1101(2)(i), which states “the contractor shall deliver only domestic end products unless, in its offer, it specified delivery of other end products in the Buy American—Balance of Payments Program Certificate provision of the solicitation. If the Contractor certified in its offer that it will deliver a qualifying country end product, the Contractor shall deliver a qualifying country end product or, at the Contractor’s option, a domestic end product.” There is no FAR requirement for an offeror’s affirmation that it has/will meet BAA requirements of the contract. However, compliance with the Request for Proposal (RFP) Terms and Conditions (T&C) is compulsory. For incidents of non-compliance, Federal Acquisition Regulation Section 25.206 authorizes the Contracting Officer to take alternative actions to make the Government whole as outlined below in recommendation 5.a.

For the proposed corrective action the Commander, 17 Contracting Squadron will accomplish a Memorandum for Record to document the file with the conclusion that the purchased items were commercially available off-the-shelf (COTS) items and implement an annual BAA refresher training for the requirements of FAR Part 25 into their customer education program. The proposed date for completion is not later than 1 December 2024.

**RECOMMENDATION 4.b:** The DODIG recommends that the Air Force, Commander, 17th Contracting Squadron, provide support that the Light Emitting Diode product models are commercially available off-the-shelf items. If support is not available, perform and document a component test to verify domestic content percentage requirements for Light Emitting Diode products that were not determined to be commercially available off-the-shelf. Provide support that product models are sold in substantial quantities in the commercial marketplace if a product is determined to be commercially available off-the-shelf.

**DAF RESPONSE:** The DAF concurs with the recommendation. The Commander, 17 Contracting Squadron will accomplish a Memorandum for Record to document the file with the conclusion that the purchased items were commercially available off-the-shelf (COTS) items. Thus, negating the need to perform the component testing. The proposed date for completion is not later than 1 July 2024

**RECOMMENDATION 5.a:** The DODIG recommends that the Air Force, Commander, 17th Contracting Squadron, initiate a review in accordance with Federal Acquisition Regulation Section 25.206 to determine whether noncompliant Buy American Act items were installed and, when appropriate, remove noncompliant items and obtain replacements that comply with the Buy American Act or take alternative actions to make the Government whole on contract FA3030-20-P-0042 for product models 12ET8/G/4/840, ABV3018T481DQV23KQW, ALCS96 T5 G1 5K PC-3 ALC-SPAR, and ALCS60 T5 G1 5K PC-3 ALC-SPAR.

**DAF RESPONSE:** The DAF concurs with the recommendation. The Commander, 17 Contracting Squadron will refine the commerciality determination memo to address all components of a COTS item. Where appropriate, the Commander, 17 Contracting Squadron, in collaboration with Commander, 17 Civil Engineering Squadron will execute available contractual remedies or take alternative actions authorized by FAR Section 25.206 to make the Government whole on contract FA3030-20-P-0042 for product models referenced in the audit. The proposed date for completion is 1 December 2024.

## Department of the Air Force (cont'd)

3. The SAF/AQCC point of contact is [REDACTED] SAF/AQCA, at [REDACTED].



DARLENE J. COSTELLO  
Principal Deputy Assistant Secretary of the Air  
Force (Acquisition, Technology & Logistics)

## Defense Logistics Agency



DEFENSE LOGISTICS AGENCY  
HEADQUARTERS  
8725 JOHN J. KINGMAN ROAD  
FORT BELVOIR, VIRGINIA 22060-6221

April 12, 2024

MEMORANDUM FOR DEPUTY INSPECTOR GENERAL FOR AUDIT (ACQUISITION,  
CONTRACTING, AND SUSTAINMENT)

SUBJECT: Response to Office of Inspector General Draft Report on DoD Compliance with the  
Buy American Act for Light Emitting Diode Lighting Improvement Projects (Project No.  
D2022-D000AV-0124.000)

The Defense Logistics Agency (DLA) appreciates the opportunity to review and  
comment on the entirety of the report. We agree with the report findings and the intent of  
recommendations 2c, 4c, and 5b for the DLA.

The point of contact for this audit is [REDACTED], DLA Office of the Inspector  
General, [REDACTED], or [REDACTED].

ATWOOD.GEORGE [REDACTED]  
.W.III.1229655015 [REDACTED]  
GEORGE W. ATWOOD III  
Deputy Director  
DLA Acquisition

Attachment:  
Individual responses to each of the applicable report recommendations

## Defense Logistics Agency (cont'd)

### DEFENSE LOGISTICS AGENCY'S RESPONSE TO THE DOD OIG RECOMMENDATIONS

**Recommendation 2c:** We recommend that the Commander, DLA Energy, Fort Belvoir, Virginia, require contracting personnel to ensure that contract files for energy savings performance projects executed under service contracts include an affirmation from the prime contractor that except for items for which the prime contractor was granted a waiver, all contractor installed products, materials, and supplies are Buy American Act compliant (materials and products were manufactured in the United States, and the items are commercially available off-the-shelf or that the cost of domestic components exceed the cost of all the components by percentage specified by the Federal Acquisition Regulation or the Defense Federal Acquisition Regulation Supplement).

**DLA Response:** Agree. DLA Energy will implement the improvements stated in the recommendation. DLA Energy will include an affirmation from the prime contractor that its installed products, materials, and supply are Buy American Act compliant. DLA Energy will include Federal Acquisition Regulation (FAR) 52.225-2 Buy American Certificate, in future task orders to document a prime contractor's affirmation that all contractor-installed products, materials, and supplies are Buy American Act (BAA) compliant. DLA Energy will add the affirmations into its Task Order template. The estimated completion date for these corrective actions is October 31, 2024.

**Recommendation 4c:** We recommend that the Commander, DLA Energy, Fort Belvoir, Virginia, provide support that the Light Emitting Diode product models for contract SP0604-19-F-8003 are commercially available off-the-shelf items. If support is not available, perform and document a component test to verify domestic content percentage requirements for Lighting Emitting Diode products that were not determined to be commercially available off-the-shelf. Provide support that the product models are sold in substantial quantities in the commercial marketplace if a product is determined to be commercially available off-the-shelf.

**DLA Response:** Agree. DLA Energy will implement the improvements stated in the recommendation. DLA Energy will determine whether the Lighting Emitting Diode product models in the subject contract are commercially available and sold in substantial quantities off-the-shelf items. DLA Energy will perform and finalize a commercial item determination on the Lighting Emitting Diode product models. If product models are not determined to be commercially available off-the-shelf items, DLA Energy will perform and document a component test to verify domestic content percentage requirements. The estimated completion date for this corrective action is February 28, 2025.

**Recommendation 5b:** We recommend that the Commander, Defense Logistics Agency, Fort Belvoir, Virginia, initiate a review in accordance with Federal Acquisition Regulation Section 25.206 to determine whether noncompliant Buy American Act items were installed and, when appropriate, remove noncompliant items and obtain replacements that comply with the Buy American Act or take alternative actions to make the Government whole. (This recommendation applies to contract SP0604-19-F-8003 for product models IAT24-V40U0-058 with sensor,

## Defense Logistics Agency (cont'd)

IABN-F400-050, IAT42-040M0-058, IAWF1-U40LM-017, IAC11-P4000-060, IAL4M-F40U0-036, IABCM-C40LM-240, and IAT22-040M0-036.)

**DLA Response:** Agree. DLA Energy will implement the improvements stated in the recommendation. DLA Energy will initiate a review with the prime contractor in accordance with FAR 25.206 and take actions as appropriate to determine whether Buy American Act items were installed as part of the prime contract. If items are determined noncompliant, DLA Energy will take appropriate action to include the removal of noncompliant items, obtain replacement items that comply with the Buy American Act or take alternative actions in accordance with FAR 25.206. The estimated completion date for these corrective actions is February 28, 2025.

## U.S. Army Corps of Engineers



DEPARTMENT OF THE ARMY  
U.S. ARMY CORPS OF ENGINEERS  
441 G STREET, NW  
WASHINGTON, DC 20314-1000

CECT

MEMORANDUM FOR [REDACTED], Program Director for Audit, Acquisition, Contracting and Sustainment, Department of Defense Office of Inspector General, 4800 Mark Center Drive, Alexandria, VA 22350-1500

SUBJECT: U.S. Army Corps of Engineers Response for the Department of Defense Office of Inspector General Draft Report, Title: "DoD Compliance with the Buy American Act for Light Emitting Diode Lighting Improvement Projects," (Project Number D2022-D000AV-0124-000) dated 12 March 2024

1. Reference draft Department of Defense Office of Inspector General (DoDIG) Report, 12 March 2024, Title: DoD Compliance with the Buy American Act for Light Emitting Diode Lighting Improvement Projects
2. Enclosed are the U.S. Army Corps of Engineers' response from the Engineering and Support Center for Recommendations 1, 2.a, 4.a, and 5.c. The command concurred with comment. U.S. Army Corps of Engineers Directorate of Contracting has reviewed the report and the response from the Engineering and Support Center and agrees with the response. This represents the Official Army Position for the subject draft report.
3. USACE appreciates the opportunity to review the draft report and agrees with the assessment that USACE should review compliance for the contracts reviewed and conduct training. USACE is committed to improving contracting while engineering solutions for the nation's toughest challenges.
4. The point of contact for this action is [REDACTED], Chief Acquisition Support Division, [REDACTED], or [REDACTED].

Respectfully,

A handwritten signature in black ink that reads "Denver S. Heath".

DENVER S. HEATH, SES  
Director of Contracting

ENCL

## U.S. Army Corps of Engineers (cont'd)



DEPARTMENT OF THE ARMY  
CORPS OF ENGINEERS, ENGINEERING AND SUPPORT CENTER, HUNTSVILLE  
P.O. BOX 1600  
HUNTSVILLE, ALABAMA 35807-4301

CEHNC-Z (36-2b2)

28 March 2024

MEMORANDUM FOR [REDACTED], Program Director for Audit, Acquisition, Contracting, and Sustainment, Department of Defense Office of Inspector General, 4800 Mark Center Drive, Alexandria, VA 22350-1500

SUBJECT: Response for the DoDIG Draft Report "DoD Compliance with the Buy American Act for Light Emitting Diode Lighting Improvement Projects", (Project No. D2022-D000AV-0124.000) dated 12 March 2024.

1. Reference draft Department of Defense Office of Inspector General (DoDIG) Report, 12 March 2024, Subject: DoD Compliance with the Buy American Act for Light Emitting Diode Lighting Improvement Projects.
2. Enclosed is the U.S. Army Corps of Engineers (USACE) Engineering and Support Center (CEHNC) reply for Recommendations 1, 2.a, 4.a, and 5.c. The CEHNC generally concurs with comments to the recommendation(s) in the report.
3. CEHNC appreciates the opportunity to review the draft report and address the DoDIG recommendations 1, 2.a, 4.a, and 5.c. CEHNC generally concurs with comments with the findings for/on contract W912DY-19-F-1201 and W912DY-19-F-1202.
4. My point of contact is [REDACTED], Center Chief of Contracting, [REDACTED], or email at [REDACTED].

JOLY.SEBASTIEN.P  
ERRE [REDACTED]

SEBASTIEN P. JOLY  
Colonel, EN  
Commanding

Encl

## U.S. Army Corps of Engineers (cont'd)

### Enclosure

**Draft Report: D2022-D000AV-0124.000**

**Title:** DOD Compliance with Buy American Act for Light Emitting Diode Lighting Improvement Projects

**Objective of Audit:**

The objective of this audit was to determine whether DoD officials complied with the Buy American Act (BAA) and provided the best value to the DoD when procuring light emitting diode (LED) lighting improvement projects using energy savings contracts.

**Conclusion:**

Contracting personnel at the CEHNC, DLA Energy, and 17 CONS complied with the FAR requirements for obtaining best value when contracting for energy savings contracts. They supported their selection of the prime contractor that would provide good or best value to the Government for all four contracts reviewed. However, contracting personnel did not support that the LED products contractors installed on energy saving lighting projects complied with the BAA. Contracting personnel relied on the prime contractor to ensure that subcontractors installed BAA-compliant products. However, contracting officers are ultimately responsible for ensuring that the contract file contained sufficient evidence that products installed were compliant with the BAA.

Contracting personnel did not support that the 46 LED product models were manufactured in the United States, that the value of the domestic component parts of the product exceed the percentage of the cost of all of the components, as required by the FAR and DFARS, or that the products were COTS. As a result, DoD contracting personnel had limited assurance that contractors installed BAA compliant LED products under the four energy savings contracts.

**Additional Comments:**

The U.S Army Engineering & Support Center (CEHNC) contracting officer and engineering team relied on the vendor's certification fact sheets submitted stating that the LED products were Made in America and compliant with the Buy American Act statute or Commercial off the Shelf (COTS) items. When it was not clearly stated, the contracting officer and engineering team identified the non-compliance during negotiations and the contractor replaced those non-compliant products with compliant products. During construction after award, when Government officials performed quality assurance inspections and identified any non-compliant products, the contractors were notified and immediately took corrective action.

It is extremely important to understand that these lighting projects are large and include other energy savings measures as part of the project. The UESC Washington Headquarters Services - Pentagon project itself required over 88.5K units with 13 different manufactures and 84 different models. The proposal for this effort included multiple energy savings measures and hundreds of fact sheets on the products,



## U.S. Army Corps of Engineers (cont'd)

### Enclosure

materials and supplied that were to be used to execute the project. The level of effort required for the contracting and engineering teams to perform tests on each product to identify if the value of the domestic component parts of the product exceed the percentage of the cost of all the components, as required by the FAR and DFARS, or that the products were COTS (sold in "*sufficient quantities*" in the marketplace (which is undefined in FAR 2.101 – Definitions)) would be cost and time prohibitive for our customers as a reimbursable organization. Due to the significant volume of manufacture specification sheets received during the proposal evaluation phase, a random sampling approach was used to review the manufacture's specification sheets to evaluate compliance with the Buy American Act prior to award. While this random sampling approach was not clearly defined in our evaluation plan, going forward, the CEHNC team will ensure the evaluation plan documents the approach used and is placed in the official contract file.

The CEHNC relies on the contractor's quality control and oversight program and the government quality assurance team to oversee and enforce compliance with the terms and conditions of the contract. The government must be able to rely on the manufactures specification sheets to be accurate and true. When found to be non-complaint or potentially fraudulent, the contracting officer will take immediate action in accordance with FAR 25.206 – Noncompliance.

During proposal evaluation, when the products, materials, or supplies are known to not be compliant with the BAA statute or it is not clearly stated on the manufacture's specification sheets, the contracting officer notifies the contractor of these deficiencies during negotiations and those items are removed and replaced with compliant items prior to award. During construction, if it is identified by the government during quality assurance inspections that the contractor is not installing compliant BAA products, materials or supplies, the contracting officer officially notifies the contractor and directs them to take corrective action – this is exactly what took place on the UESC Naval Special Warfare Center - Dahlgren Project. Furthermore, if it is found that the contractor or its vendors fraudulently and knowingly provided or installed products, materials or supplies that were not BAA compliant, corrective action will be immediately taken by the contracting officer in accordance with FAR 25.206 - Noncompliance.

#### **Recommendation 1:**

We recommend that the Commander, U.S. Army Engineering and Support Center, Huntsville, Alabama, provide training for the contracting workforce emphasizing the need to ensure that Utility Energy Services Contracts that include energy conservation measures that require construction include appropriate Federal Acquisition Regulation Part 52 "Contract Clauses." These contracts should include Federal Acquisition Regulation Subsection 52.225-9, "Buy American-Construction Materials," Subsection 52.225-10, "Notice of Buy American Requirement-Construction Materials," Subsection 52.225-11, "Buy American-Construction Materials Under Trade Agreements," and

## U.S. Army Corps of Engineers (cont'd)

### Enclosure

Subsection 52.225-12, "Notice of Buy American Requirement-Construction Materials Under Trade Agreements" clauses.

#### **Response to Recommendation 1:**

The Commander of the U.S Army Engineering & Support Center (CEHNC) concurs with the following comments to the recommendation. All employees in contracting that award Utility Energy Service Contracts that include energy conservation measures that require construction and those that perform contract oversight of these service contracts, will complete the Defense Acquisition University's Training Event Series on the Buy American Act for Construction, at a minimum to ensure they are educated on which clauses are required and must be included in each solicitation and resultant UESC contract. This will be completed by 30 April 2024. Additionally, these contracting employees will take any training (when available) provided by the Principal Director, Defense Pricing and Contracting as recommended under Recommendation 3.

The CEHNC Chief of Contracting will ensure the CEHNC's Desk Guide properly addresses the BAA for service contracts with incidental construction requirements by 31 May 2024. When available, the CEHNC Desk Guide be updated again to refer the users to any additional training/policy/guidance from the Principal Director, Defense Pricing and Contracting

Furthermore, a general overview of the Buy American Act requirements for service contracts with incidental construction activities will be provided to the workforce by the CEHNC Commander to reinforce the awareness of this requirement for construction materials under service and construction contracts. This will be issued by 31 May 2024 to coincide with the CEHNC Desk Guide update.

#### **Recommendation 2.a:**

We recommend that the following officials require contracting personnel to ensure that contract files for energy savings projects executed under service contracts include an affirmation from the prime contractor that except for items for which the prime contractor was granted a waiver, all contractor installed products, materials, and supplies are Buy American Act compliant (materials and products were manufactured in the United States, and the items are commercially available off-the-shelf or that the cost of domestic components exceed the cost of all of the components by the percentage specified by the Federal Acquisition Regulation or the Defense Federal Acquisition Regulation Supplement):

#### **Response to Recommendation 2.a:**

The Commander of the U.S Army Engineering & Support Center concurs with the following comments to the recommendation. As of January 2024, the contracting

## U.S. Army Corps of Engineers (cont'd)

### Enclosure

officers started including a certification requirement in the solicitations for energy savings contracts that require construction. The contractors will affirm/certify that all proposed and installed products, materials, and supplies are made in America and compliant with the BAA statute or are Commercial Off The Shelf (COTS) items and provide sufficient evidence of sales to non-Government customers to establish that sufficient quantities are sold in the commercial marketplace and offered to the Government in the same form in which it is sold to the commercial marketplace to qualify as a COTS items.

For W912DY-19-F-1201 (Dahlgren), the construction phase is 100% complete. A notice of a potential BAA statute violation notice was issued by the contracting officer on 22 March 2024 with a response date of 11 April 2024 concerning the 4 Patriot LED units with a driver component that was stamped "Made in China". During the construction effort, when it was identified that the wrong product was ordered, the contractor took immediate corrective action by removing and replacing the LED products with the correct BAA compliant product. The product specification sheets stated the products are BAA compliant, but if found otherwise, CEHNC will take corrective action in accordance with FAR 25.206(c), as appropriate.

For W912DY-19-F-1202 (Pentagon), the construction is 87% complete as of 13 March 2024. A notice of potential BAA statute violation notice was issued by the contracting officer on 22 March 2024 concerning LED products with no markings. A response date of 3 May 2024 to affirm/certify that all proposed and installed products, materials, and supplies are made in America and compliant with the BAA statute or are Commercial Off The Shelf (COTS) items and provide sufficient evidence of sales to non-Government customers to establish that sufficient quantities are sold in the commercial marketplace and offered to the Government in the same form in which it is sold to the commercial marketplace to qualify as a COTS items.

#### **Recommendation 4.a:**

We recommend that the following officials provide support that the Light Emitting Diode product models are commercially available off-the-shelf items. If support is not available, perform and document a component test to verify domestic content percentage requirements for Light Emitting Diode products that were not determined to be commercially available off-the-shelf. Provide support that product models are sold in substantial quantities in the commercial marketplace if a product is determined to be commercially available off-the-shelf for contracts W912DY-19-F-1201 and W912DY-19-F-1202.

#### **Response to Recommendation 4.a:**

The Commander of the U.S Army Engineering & Support Center concurs with comment with the recommendation. CEHNC does not have the resources or capacity to perform a

## U.S. Army Corps of Engineers (cont'd)

### Enclosure

component test to verify domestic content for the numerous construction materials that were not fully documented to be Commercially off the Shelf COTS. The construction is completed under W912DY-19-F-1201 (Dahlgren). Construction is 87% complete as of 13 March 2024 under W912DY-19-F-1202 which has 84 different LED models from 13 manufactures.

To address this recommendation, the CEHNC contracting officer issued a notice of potential non-compliance with the BAA statute to the contractor. The contractor will be required to certify in writing that they have reviewed and validated that all lighting installed is Made in America and compliant with the BAA statute, or COTS. This certification will be placed in the official contract file upon receipt from the contractor. Should the contractor not be able to certify and provide evidence that the LEDs are Made in America and COTS or compliant with the BAA, corrective action will be taken by the contracting officer in accordance with FAR 25.206(c), as appropriate. The request for this certification was issued by the contracting officer on 22 March 2024 and the contracting officer is expecting an official response on 11 April 2024 for W912DY-19-F-1201 and 3 May 2024 for W912DY-19-F-1202.

#### **Recommendation 5.c:**

We recommend that the following officials initiate a review in accordance with Federal Acquisition Regulation Section 25.206 to determine whether noncompliant Buy American Act items were installed and, when appropriate, remove noncompliant items and obtain replacements that comply with the Buy American Act or take alternative actions to make the Government whole:

#### **Response to Recommendation 5.c:**

The Commander of the U.S Army Engineering & Support Center concurs with comments with the recommendation. Prior to the award of W912DY-19-F-1201 (Dahlgren), the evaluation team reviewed these four LED product models PT-CDL10-40W-40E, PT-CDL6-18W-40E, PT-CDL8-40W-40E, and PT-CDL8-18W-40E and deemed them compliant with the BAA statute based on the manufacture's statement on each of the individual technical specification sheets for these products. The Government must be able to rely on the manufacture's technical specification sheets as the Government does not have the capacity nor resources to perform tests on each product, material or supply item used on a construction project to determine percent domestic material used for all construction materials used. This would be an enormous task on large projects like the Pentagon or Dahlgren energy savings projects. As demonstrated to the IG Audit Team, when non-compliant items were identified by Government oversight personnel during quality assurance reviews at Dahlgren, the contracting officer ensured immediate corrective action was taken. Had the contractor failed to act, the contracting officer would address non-compliance by following FAR 25.206(c).

## U.S. Army Corps of Engineers (cont'd)

### Enclosure

Because there was a driver component found on 4 LED products that is marked Made in China, the contracting officer as of 22 March 2024 issued a notice of potential non-compliance with the BAA statute to the contractor. The contracting officer is expecting an official response from the contractor on 11 April 2024. The contractor is required to certify in writing that all products, materials, and supplies used under this energy savings lighting project are Made in America and compliant with the BAA statute, or are commercial off-the-shelf (COTS) items, and how they determined that. The certification also will require the contractor to certify that all maintenance or repair/renewal items used over the term of the contract are compliant based on the required domestic material threshold in effect at the time of install. If the contractor identifies any non-compliant products, materials, or supplies used are non-compliant with the BAA statute, the contracting officer will follow FAR 25.206(c).

## Acronyms and Abbreviations

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<b>17 CONS</b>	17th Contracting Squadron
<b>AFB</b>	Air Force Base
<b>BAA</b>	Buy American Act
<b>CEHNC</b>	U.S. Army Engineering and Support Center, Huntsville, Alabama
<b>COTS</b>	Commercially Available Off-The-Shelf
<b>DFARS</b>	Defense Federal Acquisition Regulation Supplement
<b>DLA</b>	Defense Logistics Agency
<b>ECM</b>	Energy Conservation Measure
<b>EO</b>	Executive Order
<b>ESCO</b>	Energy Service Company
<b>ESPC</b>	Energy Savings Performance Contract
<b>FAR</b>	Federal Acquisition Regulation
<b>FEMP</b>	Federal Energy Management Program
<b>LED</b>	Light Emitting Diode
<b>NSWC</b>	Naval Surface Warfare Center
<b>PNM</b>	Price Negotiation Memorandum
<b>TAA</b>	Trade Agreements Act
<b>UESC</b>	Utility Energy Services Contract
<b>U.S.C</b>	United States Code

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