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Federal Domestic Content Requirements: Mitsubishi Electric Paths to Compliance

Mitsubishi Electric US, Inc. (MEUS) is a leading provider of ductless and Variable Refrigerant Flow (VRF) Technology™ heat pumps and air conditioning systems to the U.S. federal government, including the US military. The family of brands supplied by MEUS include Mitsubishi Electric, Trane® / Mitsubishi Electric and American Standard® Heating & Air Conditioning / Mitsubishi Electric. MEUS offers a wide variety of technologically advanced products designed to deliver superior efficiency, comfort, and control.

Federal legislation, such as the "Build America, Buy America Act (BABAA)" contained in the Infrastructure Investment and Jobs Act, and the "Buy American Act of 1933 (BAA)," requires the U.S. government to utilize U.S.-made products in its purchases; however, agencies may seek waivers or accept exemptions under the following circumstances.

First, under the Trade Agreements Act, where the product is sourced from a country that is a signatory to the World Trade Organization Agreement on Government Procurement (WTO GPA) and the relevant monetary threshold is met, products from countries that are party to the WTO GPA are treated equally with domestic goods under the law. For example, many Mitsubishi Electric products are manufactured in Japan, which is a party to the WTO GPA. Conditional on the total value of the project (not just HVAC) meeting the prescribed monetary threshold, Mitsubishi Electric systems manufactured in Japan are exempt from the restrictions of Act and treated equally with domestic goods. Products from Mexico are similarly covered under the United States-Mexico-Canada Agreement (USMCA). The Trade Agreements Act is referenced in the Buy American Act, and OMB guidance for the Build America Buy America Act states that application of the Act must be consistent with the obligations of the United States under international agreements.

Second, under both the Build America, Buy America Act, and the Buy American Act, agencies may waive the domestic content procurement preference requirements if:

(1) applying the domestic content procurement preference would be inconsistent with the public interest (Public Interest Waiver);
(2) types of iron, steel, manufactured products, or construction materials are not produced in the United States in sufficient and reasonably available quantities or of a satisfactory quality (Non-Availability Waiver); or
(3) the inclusion of iron, steel, manufactured products, or construction materials produced in the United States will increase the cost of the overall project by more than 25 percent (Unreasonable Cost Waiver).

Of note, under the Non-Availability waiver, both the available *quantity* and satisfactory *quality* are distinct issues for consideration in making such a determination. Where goods such as Mitsubishi Electric products are not manufactured in the U.S. the agency has express statutory authority to issue a determination of Non-Availability. **Currently there are no similar products manufactured in the United**

States in sufficient quantity and quality. Inverter-driven ductless split and VRF systems comprise a separate and distinct category of non-proprietary HVAC technology. A Non-Availability determination is appropriate because Mitsubishi Electric products are not "manufactured in the United States in sufficient and reasonably available quantities and of a satisfactory quality."

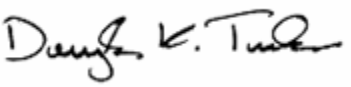
As a practical example, Mitsubishi Electric products have already been waived from similar government procurement restrictions. On May 24, 2010, the Department of Energy's Assistant Secretary of Energy Efficiency and Renewable Energy (EERE) issued a waiver of its requirements based on Non-Availability for both Variable Refrigerant Flow (VRF) multi-split heat pump (with or without heat recovery) and air conditioning systems; and inverter-driven ductless mini-split heat pump and air conditioner systems. Prior to making its Non-Availability determination, the EERE conducted a thorough review to determine whether products like Mitsubishi Electric's were already manufactured in the U.S. EERE collaborated with the National Institute of Standards and Technology's Manufacturing Extension Partnership (MEP) to disseminate the technical specifications of manufactured goods for which Non-Availability waivers were being considered. EERE also conducted independent research and collaborated with labor unions, trade associations, and other manufacturing stakeholders to "scout" for domestic manufacturing capacity of such goods. **This careful research supported EERE's conclusion that these advanced HVAC products like Mitsubishi Electric products were not produced in the U.S. in sufficient and reasonably available commercial quantities of a satisfactory quality**. Though the EERE waiver has expired and is not binding on all federal agencies, it is demonstrative of the uniqueness and distinct quality of our products.

In February of 2015, the Federal Transit Administration carried out its own investigations, also engaging NIST-MEP to scout for Buy America-compliant VRF and ductless systems. NIST-MEP did not locate any such systems manufactured in the United States. In fact, a U.S.-based manufacturer responded to NIST-MEP's scouting efforts, stating "VRF system is a new technology … there are no current domestic manufacturers of VRF systems." This situation has not changed since 2015.

In conclusion, there is express statutory authority for the installation and use of Mitsubishi Electric products in U.S. federal government facilities, namely, via the Trade Agreements Act or due to the Non-Availability of the HVAC technology found in Mitsubishi Electric systems.

If you have any questions, need additional information, or would like our assistance with a waiver request, please contact the Department of Industry and Government Relations.

Sincerely,



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