

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

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DATE: March 14, 1979

MATTER OF: Department of the Treasury--
Request for Advance Decision

DIGEST:

[Applicability of Buy American Act to Bureau of Mint Purchases]

Buy American Act does not apply to Bureau of Mint purchases of metal for use in manufacturing coins for foreign government because such acquisitions are not for public use under terms of Buy American Act.

By letter dated November 29, 1978, the Director of the Mint, Department of the Treasury, has asked for our opinion on the applicability of the Buy American Act, 41 U.S.C. 10a-d (1976), to purchases of metals by the Bureau of the Mint (Mint) for use in manufacturing coins for foreign governments.

In 1874, the Mint was authorized to manufacture coins for foreign governments. Foreign Coinage Act, 31 U.S.C. 367 (1976). The Act provides the Mint may manufacture the coins on a cost reimbursable basis, charging the foreign government an amount equal to the expenses for executing the coins including labor, materials, and use of machinery. The charges are set by the Director of the Mint, with the approval of the Secretary of the Treasury. Manufacturing foreign coins is not to interfere with manufacturing domestic coins.

Usually, orders for foreign coinage are awarded to the Mint following competitive bidding conducted by a foreign central bank or other monetary authority. Thus, the Mint competes for foreign coinage awards with the mints of other countries and private mints.

The Mint Director states that these contracts are generally considered desirable, as foreign coin orders allow the Mint to use effectively excess equipment capacity during slack periods in domestic

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coin demand. The Director also notes these contracts are beneficial for their effect on United States balance of payments.

In June 1978, after a competitive bidding procedure, the Mint was awarded a contract by the Central Bank of the Dominican Republic for its circulating and numismatic coin requirements for 1978 and 1979. The contract, like the Mint's other contracts of this type, provides that the Mint will act as agent for the Central Bank of the Dominican Republic in buying the necessary metal at the best market price and bill the Central Bank at actual cost.

To acquire the metal needed to fabricate the Dominican Republic's coins, approximately 38,000 pounds of nickel, the Mint issued an invitation for bids. During the course of the procurement, AMAX Nickel, Inc. (AMAX) questioned the Mint regarding the application of the Buy American Act preference in the evaluation of bids offered by foreign suppliers. AMAX indicates that it is the only domestic refiner of pure nickel suitable for coinage. As a result of the questions raised, the Mint canceled the invitation, with resolicitation being withheld pending our resolution of the question.

The Buy American Act provides that:

"Notwithstanding any other provision of law and unless the head of the department or independent establishment concerned shall determine it to be inconsistent with the public interest, or the cost to be unreasonable, only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured as the case may be, in the

United States, shall be acquired for public use. This section shall not apply with respect to articles, materials or supplies for use outside the United States * * *."
41 U.S.C. 10a.

In the Director's view, it is doubtful that the provisions of the Buy American Act would apply to the procurement of coinage material where the material is to be used for foreign coins. The Director suggests that the purchase in question is an implementation of its "business transaction" with a foreign government to provide coinage, rather than an acquisition for "public use" within the terms of the Act.

Moreover, the Director also suggests that even if the metal to be purchased is for public use, the Act is inapplicable because it exempts articles which will be used outside the United States. The Director points out that coinage ordered by a foreign government for its own circulating and numismatic purposes is destined essentially for use in the foreign country.

In addition, the Director notes the Act does not apply where the domestic preference is inconsistent with the public interest. See 41 U.S.C. § 10d. As contracts for foreign coinage are awarded after competitive bidding, the Mint Director is concerned that application of a price differential would adversely affect its competitive position with foreign and private mints. In that case, the Director states, not only would the mint lose the benefits to be gained from the order, but also "the very same balance of payments advantage the Buy American Act was designed to achieve would be negated."

On the other hand, AMAX states that the domestic nickel industry is at the low point because of a severe, persistent recession in the industry worldwide, and that nickel is being sold at low prices. It states its refinery is operating below capacity and that the rationale for buy national practices applies in this situation. It alleges that most governmentally-owned mints prefer domestic refined metal when it is

available and largely exclude foreign-source refined metal. Thus, AMAX states that on the whole it has been foreclosed from foreign procurement for coinage.

Also, AMAX points out that the legislative history of the Foreign Coinage Act, which as noted above first authorized the Mint in 1874 to manufacture foreign coinage, indicates the object of the legislation was to benefit domestic silver mining production and interests (2 Cong. Rec. 768 (1874); see also, 14 Op. Atty. Gen. 219 (1873)), rather than to benefit the Mint itself or affect United States balance of payments. AMAX's position is that the Mint was authorized to strike foreign coins as an aid to American suppliers of raw material and that the authority was not granted in order to sustain the Mint. In addition, AMAX argues that to the extent the Mint uses foreign source material, the export benefit to the United States is offset.

The Mint Director indicates that in recent congressional hearings, Congress has been advised of the Mint's view that its foreign coinage program is advantageous, since it provides a means for reimbursement of fixed cost elements which would otherwise have to be borne by the domestic coinage program, and also that it contributes to the favorable side of balance of payments. See Treasury, Postal Service and General Government Appropriations for Fiscal Year 1979, Hearings Before a Subcomm. of the Comm. on Appropriations House of Representatives, 95th Cong., 2d Sess. 364 (1978) (statement of Stella B. Hackel).

The Buy American Act provides a competitive preference favoring domestic materials. However, the language of the Act establishes that the preference is not intended to apply across the board to any purchase made by the United States. As the statute indicates, a number of contracts remain unaffected, as the Act applies only to "articles, materials, or supplies acquired for public use" within the United States, unless the head of the agency concerned determines application of the Act to be inconsistent with the public interest, or the cost unreasonable. See 41 U.S.C. § 10 and B-168434, April 1, 1970.

The public use requirement is mandatory. Public use is defined by the Act as "use by * * * the United States." 41 U.S.C. § 10c; see General Electric Company, 54 Comp. Gen. 792 (1975), 75-1 CPD 176. Thus, if the acquisition of nickel by the Mint does not involve a public use, the Act would not apply to the procurement.

As stated above, the Mint Director suggests that a public use is not involved in the nickel procurement. The Director states the solicitation is an implementation of a "business transaction," drawing a distinction between public and non-public type operations of the Government. In addition, the Director points out that under the Mint's contract with the Central Bank the Mint is acting merely as the purchasing agent for the foreign government in acquiring nickel at the best market price, instead of procuring for public use.

Normally, it can be assumed that most materials which the Government procures for its own use within the United States are subject to the Act. See Watkins, L., Effects of the Buy American Act on Federal Procurement, 31 Fed. Bar J. 191 (1972). On the other hand, we have recognized that purchases of office trailers and relocatable steel buildings made by a prime contractor for its own use while performing a Government construction contract are not subject to the Act because such trailers and temporary building were not items to be delivered to the Government for public use. While we noted that the importation into the United States of the non-domestic trailers and buildings undoubtedly has an adverse impact on the domestic industry, we also found that the purchases were for contractor rather than for Government use, and thereby were not acquired for public use as contemplated by the Act. 51 Comp. Gen. 538 (1972).

In addition, because procurements conducted by state and local authorities under Federal grants do not involve acquisitions either by the United States or for its use, such procurements are not subject to the Act. Thus, in a case concerning a State of California procurement partially funded by a Federal grant, we stated that since the items being procured were for

an agency of the state, the Buy American Act does not apply. B-163390, July 19, 1968; see also B-168434, supra.

In this case, the Mint is buying nickel in the performance of its contract with the Central Bank of the Dominican Republic, although the metal will be used by the United States to fabricate the coins. We do not think the use of the nickel by the Mint under these circumstances is a public use within the provisions of the Act. As the Director points out, in competing for award of a contract and in contracting with a foreign government, the Mint is essentially entering into a competitive business-type transaction, similar in some respects to the arrangement a commercial mint has with its customers. The nickel is to be used to enable the Mint to meet its contractual commitment as agent for the Central Bank. While the Mint Director believes foreign coinage contracts are beneficial to the public, we find this benefit to be incidental to the overall business-type agency arrangements rather than as giving rise to a "public use" within the meaning of the Act. We see nothing in the Act's legislative history which would lead to any other conclusion.

We cannot agree with AMAX that the Mint's procurement of nickel pursuant to arrangements with the Dominican Republic might violate the philosophy of Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936), as an improper "private" operation of the Government. In Ashwander, the Supreme Court held that the Tennessee Valley Authority (TVA) has the right to dispose of surplus electric energy, but that the method of disposal must be in the public interest "as distinguished from private or personal ends," (Id. at 338) and noted that TVA was not seeking to establish a business having no relationship to the Governmental purpose for which it was established (Id. at 339-340).

Similarly, the Mint here is not engaged in a function unrelated to its Governmental purposes simply because its acquisition of nickel is not for "public use" as defined by the Buy American Act. Rather, the Mint is acting pursuant to law by buying the metal, and it is clear that the purchase does further Government objectives.

While the Treasury, Postal Service and General Government Appropriation Act of 1977, Pub. L. No. 94-363, July 14, 1976, as AMAX points out, would generally prohibit the expenditure of public funds for the procurement of foreign stainless steel flatware, since the Mint seeks to buy nickel (not flatware) the Act does not apply to the proposed acquisition.

Lastly, we do not believe, as AMAX has alleged, that our decision bears upon the military export program. While the Department of Defense as a matter of policy applies the Buy American Act to purchases in support of Foreign Military Sales (Defense Acquisition Regulation § 6-1302 (1976 ed.)), the Mint chooses not to apply the Act to its foreign coinage program.

In conclusion, we find that the Buy American Act does not apply to purchases of metals by the Mint for use in manufacturing coins for foreign government for the reasons stated above, and need not consider whether the purchases are also exempt for the other reason suggested by the Director.



Deputy Comptroller General
of the United States