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Dated: October 7, 2009.

Joseph M. Gerhart,

Chief, Records Management Branch, U.S. Immigration and Customs Enforcement, Department of Homeland Security.

[FR Doc. E9-24563 Filed 10-9-09; 8:45 am]

BILLING CODE 9111-28-P

DEPARTMENT OF HOMELAND SECURITY

Transportation Security Administration

Electronic Baggage Screening Program

AGENCY: Transportation Security Administration, DHS.

ACTION: Notice of waiver.

SUMMARY: The Department of Homeland Security (DHS) has granted a limited nationwide waiver of the buy American provision contained in sec. 1605 of the American Recovery and Reinvestment Act of 2009 (Recovery Act) Public Law 111-5, 123 Stat. 115, 303 (2009) under the authority of sec. 1605(b)(1) (public interest exception) provided that at least 95 percent of the costs of each Transportation Security Administration (TSA) Electronic Baggage Screening Program (EBSP) project will comply with sec. 1605(a).

DATES: This notice is effective October 13, 2009.

ADDRESSES: Office of Acquisitions/ Acquisitions Policy Office, TSA-25, Transportation Security Administration, 601 South 12th Street, Arlington, VA 20598-6025.

FOR FURTHER INFORMATION CONTACT: Ronald B. Gallihugh, Office of Acquisitions/ Acquisitions Policy Office, TSA-25, Transportation Security Administration, 601 South 12th Street, Arlington, VA 20598-6025; telephone (571) 227-2402; facsimile (571) 227-1372; e-mail ronald.gallihugh@dhs.gov.

SUPPLEMENTARY INFORMATION:

Background

On February 17, 2009, the Recovery Act was enacted to assist those most impacted by the recession by creating and preserving jobs and promoting economic recovery. The funding was specified for multiple areas of national interest. TSA received \$1 billion to invest in the procurement and installation of checked baggage explosives detection systems and checkpoint explosives detection

equipment to be obligated by September 30, 2010. Approximately \$500 million in Recovery Act funding will be allocated to facility modification projects to be administered through TSA's EBSP. This program directly benefits the traveling public, air carriers, airport authorities, and our Nation as a whole.

TSA's EBSP supports the DHS goals of protecting our Nation from dangerous goods and protecting our Nation's critical transportation infrastructure by strengthening screening of checked baggage to reduce the probability of a successful terrorist or other criminal attack to the air transportation system. Since December 31, 2002, EBSP has been responsible for ensuring 100 percent screening of checked baggage in the United States. The EBSP's objective is to deter, detect, mitigate, and prevent transportation of explosives or other prohibited items in checked baggage on commercial aircraft. One significant way EBSP accomplishes its objectives is through the construction of Checked Baggage Inspection Systems (CBIS). These projects form the backbone of TSA's EBSP and represent the highest level of baggage screening capability in terms of processing efficiency and security. TSA has identified twenty-six airports across the country with "shovel ready" facility modification projects that include CBIS construction. These projects are dependent on Recovery Act funding. Several of these projects, however, are on hold and in jeopardy because of concerns over compliance with sec. 1605(a).

Section 1605(a) of the Recovery Act, the buy American provision, states that none of the funds appropriated by the Act, including the funds that have been dedicated to project awards under EBSP, "may be used for a project for the construction, alteration, maintenance, or repair of a public building or public work unless all of the iron, steel, and manufactured goods used in the project are produced in the United States." Subsections 1605(b) and (c) of the Recovery Act authorize the head of a Federal department or agency to waive the buy American provision by finding that: (1) Applying the provision would be inconsistent with the public interest; (2) the relevant goods are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality; or (3) the inclusion of the goods produced in the United States will increase the cost of the project by more than 25 percent. If the head of the Federal department or agency waives the buy American provision, then the head of the department or agency is required to

publish a detailed justification in the **Federal Register**. Finally, sec. 1605(d) of the Recovery Act states that the buy American provision must be applied in a manner consistent with the United States' obligations under international agreements.

Public Interest Finding

The Secretary of Homeland Security has determined that it would be inconsistent with the public interest—and particularly with the Recovery Act's directives to ensure expeditious spending of construction funds consistent with prudent management, as cited above—to apply the buy American requirement to an entire CBIS project where at least 95 percent of the costs of the project will comply with sec. 1605(a).

A CBIS is a highly sophisticated electromechanical system for screening checked baggage. It consists of hundreds of mechanical and electrical items. It includes a mechanical conveyor system or baggage handling system (BHS) that transports checked baggage through the system. The CBIS also features a security screening matrix area where baggage is fed through one or more Explosion Detection Systems (EDS) or Explosive Trace Detection (ETD) systems to be analyzed. All of the mechanical and electrical items and processes that make up the CBIS are controlled by a central programmable logic controller (PLC) or programmable controller. The PLC is essentially a computer 'brain' used for the automation of electro-mechanical processes, such as the control of machinery on factory assembly lines. The PLC controls all aspects of the CBIS including conveyor belt speeds, baggage tracking and managing the BHS merge points or windows.

CBIS projects are comprised of thousands of manufactured goods, such as conveyor, conveyor motor drives, electrical and communications controls, programmable logic controllers, electronic tracking devices, high speed diverters, vertical sorters, specialty fasteners and switches. Not all of these items are domestically available. Furthermore, in many instances, the geographic origin of the equipment is not readily ascertainable. While arguably the Secretary of Homeland Security could have relied on the authority under sec. 1605(b)(2) (non-availability waiver), the burden placed on TSA and contractors in sourcing and evaluating equipment availability would be unduly burdensome, impracticable and not in keeping with the Recovery Act's overall goal of expeditious spending of recovery funds.

In the construction of such a sophisticated system as a CBIS, complete adherence to the requirements of section 1605(a) is impracticable, if not impossible. In addition, it has become a serious obstacle to ensuring that all identified airports will be able to sign construction contracts by September 30, 2010. Some airport authorities have simply been unable or unwilling to certify that the construction contracts it signs are compliant with the buy American provisions. The alternative would be for the airports and communities to lose their Recovery Act assistance, requiring TSA to reallocate funds, which is inconsistent with the public interest and the intent and purpose of the Recovery Act.

DHS has considered the disproportionate cost and delay that would ensue if a limited waiver is not issued. The exercise of ascertaining whether compliant products exist or can be made to meet these requirements is already becoming a demanding and time-consuming task far out of proportion to the total percentage of project costs. On balance, the public interest in having these projects completed outweighs the Buy American requirement; particularly where the value of noncompliant goods is relatively small when compared to total project cost. CBIS projects significantly benefit aviation security, baggage screening efficiency and the flying public in general. Also, these projects help stimulate job growth for local construction workers, technicians, equipment designers, engineers, and others who will operate and maintain the equipment.

Therefore, the Secretary granted a limited, nationwide public interest waiver, having found that it would be inconsistent with the public interest—and particularly with the Recovery Act's directives—to apply the buy American requirement to an entire CBIS project in which at least 95 percent of the costs of the project will comply with section 1605. The Secretary determined the five percent limit based on research and informed professional judgment as to the maximum total amount of costs used in most CBIS projects.

Waiver

Accordingly, the Secretary granted a limited, nationwide waiver of the requirements of section 1605(a) of the Recovery Act, Public Law 111–5, buy American requirements, based on the public interest authority of section 1605(b)(1), provided that at least 95 percent of the costs of each TSA EBSP project will comply with section 1605.

This waiver applies to all eligible EBSP projects for which the TSA has awarded or will award a project award using Recovery Act funds, and where at least 95 percent of the costs of the project will comply with sec. 1605.

TSA will attempt to obtain 100 percent compliance with the buy American provision on all airport projects. This limited nationwide waiver is available to airports that cannot comply 100 percent with the buy American provision because applying the provision would be inconsistent with the public interest in accordance with sec. 1605(b)(1). TSA will ensure that on all projects at least 95 percent of the costs will comply with section 1605. Recipients who wish to use this waiver should, in consultation with their contractors determine the items to be covered by this waiver, must retain relevant documentation as to those items in their project files, and must summarize in reports to TSA the types and/or categories of items to which this waiver is applied, the total cost of the goods covered by the waiver, and the calculations by which they determined the total cost of materials used in and incorporated into the project.

Issued in Arlington, Virginia, on October 7, 2009.

Gale D. Rossides,

Acting Administrator.

[FR Doc. E9–24608 Filed 10–9–09; 8:45 am]

BILLING CODE 9110–05–P

DEPARTMENT OF THE INTERIOR

Office of the Secretary

Proposed Appointment to the National Indian Gaming Commission

ACTION: Notice.

SUMMARY: The Indian Gaming Regulatory Act provides for a three-person National Indian Gaming Commission. One member, the chairman, is appointed by the President with the advice and consent of the Senate. Two associate members are appointed by the Secretary of the Interior. Before appointing members, the Secretary is required to provide public notice of a proposed appointment and allow a comment period. Notice is hereby given of the proposed appointment of Steffani A. Cochran as an associate member of the National Indian Gaming Commission for a term of 3 years.

DATES: Comments must be received before November 12, 2009.

ADDRESSES: Comments should be submitted to the Director, Office of

Executive Secretariat, United States Department of the Interior, 1849 C Street, NW., Mail Stop 7229, Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: John A. Strylowski, Executive Secretariat, United States Department of the Interior, 1849 C Street, NW., Mail Stop 7229, Washington, DC 20240; telephone 202–208–3071.

SUPPLEMENTARY INFORMATION: The Indian Gaming Regulatory Act, 25 U.S.C. 2701 *et seq.*, established the National Indian Gaming Commission (Commission), composed of three full-time members. 25 U.S.C. 2704(b). Commission members serve for a term of 3 years. 25 U.S.C. 2705(b)(2)(4)(A). The Chairman is appointed by the President with the advice and consent of the Senate. 25 U.S.C. 2704(b)(1)(B). The two associate members are appointed by the Secretary of the Interior. 25 U.S.C. 2704(b)(1)(B). Before appointing an associate member to the Commission, the Secretary is required to “publish in the **Federal Register** the name and other information the Secretary deems pertinent regarding a nominee for membership on the commission and * * * allow a period of not less than thirty days for receipt of public comments.” 25 U.S.C. 2704(b)(2)(B).

The Secretary proposes to appoint Steffani A. Cochran as an associate member of the Commission for a term of 3 years. Ms. Cochran is well qualified to serve as a member of the Commission, by virtue of her broad background in the law and her work for both State and tribal governments on issues affecting Indian tribes. Her extensive legal experience includes service in New Mexico State government as a Special Counsel for Indian Affairs and as an Administrative Law Judge for the State of Oregon. She has also served tribal governments as General Counsel for the Pueblo of Pojoaque and as an Associate Judge for the Isleta Tribal Court and judge pro tem on the Southwest Intertribal Court of Appeals. Working at different times for tribal and State governments, Ms. Cochran has participated in negotiations and addressed issues of critical importance to both constituencies. She is a member of the Chickasaw Nation. Ms. Cochran does not have any financial interests that would make her ineligible to serve on the Commission under 25 U.S.C. 2704(b)(5)(B) or (C).

Any person wishing to submit comments on this proposed appointment of Steffani Cochran may submit written comments to the address