DEPARTMENT OF HOMELAND SECURITY

U.S. Customs and Border Protection

Notice of Issuance of Final Determination Concerning Country of Origin of the KC-390 Military Cargo Airplane Converted to a Fire-Fighting Aircraft

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of final determination.

SUMMARY: This document provides notice that United States Customs and Border Protection ("CBP") has issued a final determination concerning the country of origin of a military cargo airplane manufactured in Brazil, known as the KC-390, that will be converted into a fire-fighting aircraft in the United States. Based upon the facts presented, CBP has concluded in the final determination that for purposes of United States Government procurement the country of origin of the converted KC-390 aircraft will be Brazil, where it was originally manufactured.

DATES: The final determination was issued on March 06, 2017. A copy of the final determination is attached. Any party-at-interest, as defined in 19 C.F.R. § 177.22(d), may seek judicial review of this final determination within [insert 30 days from date of publication in the Federal Register].

FOR FURTHER INFORMATION CONTACT: Robert Dinerstein, Valuation and Special Programs Branch, Regulations and Rulings, Office of Trade (202-325-0132).

SUPPLEMENTARY INFORMATION: Notice is hereby given that on March 06, 2017, pursuant to subpart B of Part 177, Customs and Border Protection (CBP) Regulations (19 C.F.R. Part 177, subpart B), CBP issued a final determination concerning the

country of origin of a converted military cargo airplane which may be offered to the United States Government under an undesignated government procurement contract. This final determination, HQ H280872, was issued at the request of Embraer Aircraft Holding, Inc. under procedures set forth at 19 C.F.R. Part 177, subpart B, which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. § § 2511-18). In the final determination, CBP was presented with a scenario in which a military cargo plane, the KC-390, manufactured in Brazil, will be converted into an aircraft that would be used for combating forest fires in the United States. CBP has determined for purposes of United States Government procurement that the country of origin of the KC-390 aircraft converted from a military cargo aircraft to a fire suppression aircraft in the United States will be Brazil, the country where the airplane was originally manufactured.

Section 177.29, CBP Regulations (19 C.F.R. § 177.29), provides that notice of final determinations shall be published in the *Federal Register* within 60 days of the date the final determination is issued. Section 177.30, CBP Regulations (19 C.F.R. § 177.30), provides that any party-at-interest, as defined in 19 C.F.R. § 177.22(d), may seek judicial review of a final determination within 30 days of publication of such determination in the *Federal Register*.

Dated: March 06, 2017.

Alice A. Kipel, Executive Director,
Regulations and Rulings,
Office of Trade.

HQ H280872

March 06, 2017

OT:RR:CTF:VS H280872 RSD

CATEGORY: Country of Origin

Mr. Bruce L. Bunin
Director Business Development
Embraer Aircraft Holding, Inc.
Ft. Lauderdale, Florida 33315

RE: U.S. Government Procurement; Title III, Trade Agreements Act of 1979 (19 U.S.C. § 2511); subpart B Part 177 CBP Regulations; Converting a Military Cargo Airplane to a Fire Fighting Aircraft

Dear Mr. Bunin:

This is in response to your letter dated October 24, 2016, requesting a final determination on behalf of Embraer Aircraft Holding, Inc., (Embraer) pursuant to subpart B of Part 177, Customs and Border Protection ("CBP") Regulations (19 C.F.R. § 177.21 *et. seq*.). Under the pertinent regulations, which implement Title III of the Trade Agreements Act of 1979 as amended (19 U.S.C. § 2511 *et seq.*), CBP issues country of origin advisory rulings and final determinations as to whether an article is or would be a product of a designated country or instrumentality for purposes of granting waivers of certain "Buy American" restrictions in the U.S. law or practice for products offered for sale to the U.S. Government.

This final determination concerns the country of origin of the Embraer KC-390 aircraft, which will be converted from a military cargo aircraft to an aircraft used for fire suppression. We note that Embraer is a party-at-interest within the meaning of 19 C.F.R. § 177.22(d) and is entitled to request this final determination.

FACTS:

Embraer is large Brazilian aerospace company that manufactures aircrafts. The merchandise at issue is an aircraft known as the Embraer KC-390. It is a medium-sized, twin-engine jet powered military transport aircraft developed by Embraer for the

Brazilian Air Force that is able to perform aerial refueling and for transporting cargo and troops. It is the heaviest aircraft that Embraer had made to date. The aircraft was designed for a variety of military mobility missions, including heavy and outsized cargo transport and air drop, troop transport and parachute drop, air-to-air refueling, search and rescue, and medical evacuation. It has a modern cockpit and an advance cargo handling system designed to enable fast and efficient military operations in normal or austere environments.

Embraer intends to offer the KC-390 aircraft in response to a United States Forest Service (USFS) solicitation for air tankers that can be used in civil fire-fighting operations. Presently, the KC-390 is produced in Brazil. Embraer plans to modify the KC-390 from a medium military cargo aircraft to a fire suppression aircraft to meet the requirements of the USFS solicitation. The work on the aircraft will occur in the United States at a Boeing facility in San Antonio, Texas. You state that the conversion of the KC-390 from a military transport aircraft to a civil fire-fighting aircraft will require modification of multiple systems and structures in order to meet the USFS requirements for aerial fire-fighting.

The following systems in the aircraft need to be removed: the refueling systems, self-protection system, military mission equipment, antennas and systems, cargo handling systems (CHS), electronic controls, and the ballistic protection. In addition, the central panel assemblies of the Container Delivery System (CDS) rails and inboard panels will be removed in order to install a lower component retardant delivery system (RDS) under the cargo compartment floor. This change will also mandate a redesign, manufacture, and integration of a new roller solution on the mid-board floor beams. The aircraft structures, cargo compartment floor, avionics systems, and electrical systems need to be modified. A series of other engineering activities associated with the removal of the cargo handling system and the installation of the fire-fighting systems will be completed as well. Because the USFS does not require an electronically controlled locking system, that system will also be removed.

Because the KC-390 military communications and navigation systems and sensors are not required for the USFS flight operations, they also will be removed. Removing those components includes the partial redesign and manufacture of the control and power harnesses, removal of Line Replaceable Units (LRUs), removal of structural supports for some of the LRUs and the removal of external fuselage surface fairings. KC-390 armor panels will also be removed from the flight deck and loadmaster station and from actuator bays.

Several systems will be installed on the aircraft, such as: a new hydraulic actuator and fluid line, new bell doors, a new harness for power, a new refueling port, a new retardant tank, new pumps, and new fuselage fairings. A major structural modification required for the KC-390 to accommodate the RDS system will be made to

the center fuselage of the KC-390. The avionics system will incorporate some new functionalities that need to be developed and integrated into the current system such as: fire-fighting control panels to allow monitoring and control of RDS information and actuation, new synoptics for tank integration, and integration of Global Positioning System and moving map functionality to allow automatic tracking and disposal of retardant.

It will also be necessary to develop and install new hydraulic systems for actuation of the retardant system doors, which comprises the integration of new actuators, a new hydraulic line and valves, and the relocation of the hydraulic lines passing under the floor due to the presence of the RDS lower component. The insertion of the RDS lower component under the floor will affect the current emergency actuation system of the main landing gear. The system will be re-routed under the floor, and cables and pulleys will be repositioned. In addition, a new internal tank will be added. The internal tank will require an external aircraft refueling port for retardant fluid, which means that there will be a design, manufacture, and installation of new fluid lines and valves.

ISSUE:

What is the country of origin of the Embraer KC-390 aircraft after it has been converted from a military cargo aircraft to an aircraft that can be used by the USFS in combatting forest fires?

LAW AND ANALYSIS:

Pursuant to subpart B of Part 177, 19 C.F.R. § 177.21 *et seq*., which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. § 2511 *et seq*.), CBP issues country of origin advisory rulings and final determinations as to whether an article is or would be a product of a designated country or instrumentality for the purposes of granting waivers of certain "Buy American" restrictions in U.S. law or practice for products offered for sale to the U.S. Government, under the rule of origin set forth under 19 U.S.C. § 2518(4)(B).

An article is a product of a country or instrumentality only if (i) it is wholly the growth, product, or manufacture of that country or instrumentality, or (ii) in the case of an article which consists in whole or in part of materials from another country or instrumentality, it has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed. *See also*, 19 C.F.R. § 177.22(a).

In rendering advisory rulings and final determinations for purposes of U.S. Government procurement, CBP applies the provisions of subpart B of part 177 consistent with the Federal Acquisition Regulations. *See* 19 C.F.R. § 177.21. In this regard, CBP recognizes that the Federal Acquisition Regulations restrict the U.S. Government's purchase of products to U.S.-made or designated country end products for acquisitions subject to the TAA. *See* 48 C.F.R. § 25.403(c)(1). The Federal Acquisition Regulations define "U.S.-made end product" as "an article that is mined produced or manufactured in the United States or that is substantially transformed in the United States into a new and different article of commerce with name, character, or use distinct from that of the article or articles from which it was transformed." *See* 48 C.F.R. 25.003.

In order to determine whether a substantial transformation occurs when components of various origins are put together into completed products, CBP considers the totality of the circumstances and makes such determinations on a case-by-case basis. Substantial transformation occurs when an article emerges from a process with a new name, character or use different from that possessed by the article prior to processing. A substantial transformation will not result from a minor manufacturing or combining process that leaves the identity of the article intact. *See United States v. Gibson-Thomsen Co.*, 27 C.C.P.A. 267 (1940). No one factor is determinative. In *Uniroyal, Inc. v. United States*, the Court of International Trade held that no substantial transformation occurred because the attachment of a footwear upper from Indonesia to its outsole in the United States was a minor manufacturing or combining process which left the identity of the upper intact. *See Uniroyal, Inc. v. United States*, 3 CIT 220, 224, 542 F. Supp. 1026, 1029 (1982), aff'd, 702 F.2d 1022 (Fed. Cir. 1983). The court found that the upper was readily recognizable as a distinct item apart from the outsole to which it was attached, it did not lose its identity in the manufacture of the finished shoe in the United States, and the upper did not undergo a physical change or a change in use. Also, under *Uniroyal*, the change in name from "upper" to "shoe" was not significant. The court concluded that the upper was the essence of the completed shoe, and was not substantially transformed.

CBP has considered changes to airplanes in prior decisions. In Headquarters Ruling Letter (HQ) 546092, dated September 16, 1992, a Yak 52 aircraft built in Romania was disassembled in Russia and certain vital components of the aircraft were replaced, in order to render the aircraft suitable for performing aerobatic acts. In particular, the aircraft was completely disassembled in order to replace the aircraft's spar with a new heavier spar, which is one of the main longitudinal supports of the wings of an aircraft. In addition, a new engine and propeller were fitted as part of the

modification of the aircraft. The newly designed aircraft was capable of use with up to nine positive and seven negative gravitational forces. CBP noted that the purpose of the disassembly and reassembly of the Yak 52 aircraft in Russia was not to restore the aircraft to its original purpose. Rather, the work performed on the Yak 52 aircraft was to transform it from a trainer plane into a plane capable of aerobatic flight. In addition, the reassembly was very substantial involving, most notably, a completely new spar, engine, and propeller. Accordingly, CBP found that the manufacture in Russia resulted in a substantial transformation of the Yak 52 aircraft.

HQ H561322, dated May 11, 1999, involved the assembly of imported component parts of the fuselage plus the installation of other key components of an aircraft in the United States. CBP held that the imported fuselage was substantially transformed in the United States when it was reassembled and combined with significant other parts of the aircraft such as the engines, avionics and the landing gear to make the Hawker 800XP aircraft. CBP noted that when it was entered into the United States, the fuselage was unassembled, unpainted and did not have an interior. Even more significantly, the fuselage was basically an empty shell which lacked the essential components necessary to allow it to function as an aircraft. The most important of the other components that were involved in the making of the Hawker aircraft were the two engines. CBP found that the installation of these components was not a simple minor finishing operation, but a sophisticated procedure which required a high degree of technical skill. Accordingly, CBP held that the aircraft manufacturer substantially transformed the imported fuselage and the other imported component parts when it assembled them together to make the finished Hawker 800XP aircraft. Therefore, CBP held that the country of origin of the Hawker 800XP aircraft was the United States.

In HQ H560245, dated April 4, 1997, certain satellite communications systems were installed in freight vans or trucks operated as motor carriers in the United States. The satellite communication system units consisted of three main components: a communications unit, an outdoor antenna unit, and a display unit. The system was an interactive communications tool that linked vehicles to a dispatch center so that messages and positioning information of the vehicle could be sent and received through a network management center. CBP found that the function of the vans and trucks remained the same before and after the installation of the communication systems, that is, for the transportation of articles. CBP also determined that the installation of the communication systems did not change the identity of the vans or trucks; it merely enabled the vans and trucks to be located while they were on the road. Therefore, CBP held that the vans and trucks could be entered under subheading 9802.00.50, HTSUS.

In this case, we understand that the KC-390 will be overhauled when it is converted from a military cargo plane to an aircraft that has the capability of dispersing fire-fighting retardant. In the process of converting the KC-390, we recognize that some

systems and components will have to be removed, while other new systems and components will be added. However, the work performed to the aircraft in this case is not as significant as the work performed to the aircraft in HQ 546092, where the aircraft's spar was replaced with a new and heavier spar, and a new engine and propeller were fitted as part of the modification of the aircraft. In addition, in HQ 546092, the aircraft was also equipped with two large annunciator panels to be used in aerobatic instruction. In contrast, the information presented indicates that the most important systems of the KC-390 will remain intact even after the work is done to convert it to a fire suppression aircraft. The modification of the KC-390 aircraft largely consists of removing items from the aircraft that are associated with hauling military cargo and personnel and installing some new systems in order that the aircraft can carry and disperse fire retardant materials. Along these lines, while there will be some modifications, the basic structural integrity and the aerodynamics of the aircraft will not be changed. For example, the size and shape including its length and wing-span will not be changed. In addition, no information was presented showing that the engine powering the aircraft will be significantly reworked, meaning there will be no meaningful change to the aircraft's power, speed and range. Similarly, the electronics and instruments, which are involved in flying the airplane, will not be significantly changed.

Although the KC-390 will be modified from a military cargo aircraft to an airplane that has fire suppression capability, we do not find that the fundamental identity of the product will be changed. After the work is completed to give the KC-390 its forest fire-fighting capability, the product will still remain an airplane. Unlike the imported components in H561322, when the aircraft in this case will be imported into the United States, it will already be a fully functioning airplane capable of flight, and ready for transporting personnel and equipment. While the type of materials carried on the aircraft and the method of delivery of those materials will be for a different purpose, we find that the changes made to the aircraft to convert it to a fire suppression airplane are not extensive enough to result in a substantial transformation of the aircraft. Therefore, we find that the country of origin of the KC-390 aircraft after it is converted from a military cargo aircraft to a fire suppression aircraft will be the country where the KC-390 aircraft was originally produced, Brazil.

HOLDING:

Based upon the specific facts of this case, we find that the country of origin of the KC-390 aircraft converted from a military cargo aircraft to a fire suppression aircraft for purposes of U.S. Government procurement will remain Brazil, the country where it was originally manufactured.

Notice of this final determination will be given in the Federal Register, as required by 19 C.F.R. § 177.29. Any party-at–interest other than the party which requested this final determination may request, pursuant to 19 C.F.R. § 177.31, that CBP reexamine

the matter anew and issue a new final determination. Pursuant to 19 C.F.R. § 177.30, any party-at-interest may, within 30 days of publication of the Federal Register Notice referenced above, seek judicial review of this final determination before the Court of International Trade.

Sincerely,

Alice A. Kipel, Executive Director
Regulations and Rulings
Office of Trade

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