



Navigating the Buy American Act, Trade Agreements Act, and other Domestic Preference Regimes

April 5, 2012

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Agenda

- Understanding the basic restrictions and tests of the various regimes
 - What are the different regimes that can apply?
 - What are the differences between the restrictions and analytical frameworks of different regimes?
- Understanding Contractors' Obligations
- Understanding Enforcement and Liability
- Practical Pointers for Compliance

Domestic Source Restrictions Generally

- Long-standing U.S. preference to buy domestic products
 - Buy American Act of 1933, as amended
 - Miscellaneous Buy American Requirements
 - ✓ Rail transit funds
 - ✓ Highway construction
 - ✓ Berry Amendment (DoD)
- Partially waived by treaty obligations
 - WTO Agreement on Government Procurement
 - NAFTA and other Free Trade Agreements

Domestic Source Restrictions Generally

- Federal Procurements
 - Buy American Act
 - Trade Agreements Act
 - Berry Amendment
 - Specialty Metals
 - Recovery Act
- Grants
 - Recovery Act
 - DOT Buy America (FTA, FAA, FHWA)

Domestic Source Restrictions Generally

- Renewed focus on Buy National restrictions
 - Globalized supply chain
 - Increased enforcement efforts

- Different regimes: common questions, different answers
 - What is the product?
 - Are services covered?
 - How is “origin” determined?
 - Statutory requirements and waivers?

Buy American Act (“BAA”)

- 41 U.S.C. § 10a
- Written as a prohibition; implemented as a preference
 - 6% / 12% evaluation factor (civilian contracts)
 - 50% evaluation factor (DoD contracts)
- Exempt:
 - Non-availability
 - Micro-purchase threshold
 - Public interest
 - Commercial IT products

Buy American Act (“BAA”)

- Applies to:
 - “End product” (supply contract); or
 - “Construction material” (construction contract)
 - ✓ “article, material, or supply brought to the construction site. . .”

- Two-part test:
 - “Manufactured” in the U.S.
 - From U.S. “manufactured” components the cost of which exceeds 50% of the total component cost

Buy American Act (“BAA”)

- Component test:
 - Calculating component cost
 - ✓ Purchased components – all costs
 - ✓ Manufactured components – no profit
 - ✓ Special DoD rule
 - Component test waived for COTS items
 - Components are those items *directly* incorporated into the end product

Buy American Act (“BAA”)

- What constitutes “manufacturing”?
 - No statutory or regulatory definition
 - GAO has articulated a standard, applied on a case-by-case basis:
 - ✓ Completion of the article in the form required for use by the government
 - Packaging is not enough
 - Assembly may be enough

Buy American Act (“BAA”)

- “Manufacture” case law
 - Yes
 - ✓ Modified Ricoh Fax Machines; *Gen’l Kinetics*, B-242052, 70 Comp. Gen. 473 (1991)
 - TEMPEST version – yes
 - Non-TEMPEST version – no (reassembly not enough?)
 - No
 - ✓ Reassembly of disassembled airframe component not manufacturing; *Bell Helicopter*, B-195268, 59 Comp. Gen. 158 (1979)

Trade Agreements Act (“TAA”)

- 19 U.S.C. §§ 2511-2518
 - Implements the WTO GPA
- Opens procurement to products from “designated countries”
- Applies to listed agencies (including DoD), but only to specified product categories (FSCs), and above specified thresholds
- **Prohibits** procurement of end products from non-designated countries (e.g., China, India)

Trade Agreements Act (“TAA”)

- Current Thresholds

| Agreement | Supply Contract | Construction Contract |
|--|-----------------|-----------------------|
| WTO GPA | \$202,000 | \$7,777,000 |
| Australia FTA, CAFTA-DR FTA, Chile FTA, Singapore FTA | \$77,494 | \$7,777,000 |
| Mexico (NAFTA) | \$77,494 | \$10,074,262 |
| Bahrain FTA | \$202,000 | \$10,074,262 |
| Peru FTA | \$202,000 | \$7,777,000 |
| Canada (NAFTA) | \$25,000 | \$10,074,262 |
| Israel Trade Act | \$50,000 | |

Trade Agreements Act (“TAA”)

- Application to Federal Supply Schedules
 - GSA takes the position that threshold applies to estimated 5-year value of sales
 - ✓ Virtually all Schedule contracts covered by the TAA
 - ✓ Requires Certification of country of origin
 - ✓ Prohibition against furnishing products from other than U.S. or “designated countries”

Trade Agreements Act (“TAA”)

- TAA procurement ban currently applies, *inter alia*, to:
 - China
 - India
 - Indonesia
 - Malaysia
 - Philippines
 - Thailand
 - Vietnam

Trade Agreements Act (“TAA”)

- Rule of Origin Test
 - Country in which article was “substantially transformed into a new and different article”
 - ✓ Yes: assembly complex & meaningful
 - ✓ No: assembly minimal or simple
 - 19 C.F.R. Part 177, Subpart B
 - ✓ Mechanism for obtaining TAA ruling
 - ✓ Subject to judicial challenge or review

Trade Agreements Act (“TAA”)

- “Substantial Transformation” – key factors:
 - Number of components & subassemblies
 - Key programming or customization that defines the product
 - Value of assembly vs. total cost of components
 - Precision & specialized tools
 - Skill level for assembly
 - Actual physical modification of components

TAA Current Issue: Software and “Substantial Transformation”

Touchstone

- *Data General Corp. v. U.S.*, 4 C.I.T. 182 (Ct. Int’l Trade 1982)

Recent CBP Determinations

- HQ H089762 (June 2, 2010) GTX Mobile Hand Held Computer
- HQ H090115 (August 2, 2010) Avaya Communications Manager system
- HQ H175415 (October 4, 2011) Arista Networks LAN Switches

TAA Current Issue: Software and “Substantial Transformation”

Trends

- We still do not have a determination on country of origin where the software itself is the end product
- In manufacturing cases, CBP looks at both the place of *development* and the place of *loading* of the software
- Not much distinction between software and firmware *per se*
- Determinations are still highly fact-dependent
- Simple assembly process is not enough (“glue and screw” operations, see Pocket Projectors determination)

Things to Watch Out For

- Accessories
- Spares
- Replacement parts

BAA and TAA Overview

| | BAA | TAA |
|------------------|---|--|
| Government Wide? | Yes | Yes, sort of |
| Prohibition? | No, proposal evaluation criterion | Yes |
| Requirements | (1) Manufactured in the U.S. (or qualifying country, for DoD); (2) Cost of domestic (or qualifying) components exceeds 50% of total component cost | End products that are substantially transformed in the U.S. or designated country |
| Scope | <ul style="list-style-type: none"> •All supplies and construction materials •Not applicable to services | <ul style="list-style-type: none"> •Certain FSCs •Dollar threshold |

BAA and TAA Overview

| | BAA | TAA |
|---------------|---|--|
| Exceptions | <ul style="list-style-type: none">•Public interest•Non-availability•Unreasonable cost | <ul style="list-style-type: none">•Small-business set-asides•Items indispensable for national security•Sole-source acquisitions•Exempted services•Waiver by agency head (rarely available) |
| Certification | Yes | Yes |
| Flow Down? | No (content analysis done at end product level) <ul style="list-style-type: none">•Beware of spares and ancillary items | No (content analysis done at end product level) <ul style="list-style-type: none">•Beware of spares and ancillary items |

Federal Procurements and Grants

OTHER DOMESTIC PREFERENCE REGIMES

American Recovery and Reinvestment Act of 2009

- Statutory restriction at ARRA Section 1605
- Implementing regulations
 - Federal procurement: FAR 25.6
 - Projects funded by grants: 2 CFR Part 176
- Key Points
 - No component test
 - Evaluate origin of “manufactured good,” not “construction material”
 - International agreements: Procurements v. Grants
 - Agency specific interpretations (EPA, DOE, etc.)

Department of Transportation

- Special restrictions attach to federal funds to states for mass transit and highway projects
 - Federal Aviation Administration
 - Federal Highway Administration
 - Federal Railroad Administration High Speed Rail Program
 - Amtrak
 - Federal Transit Administration
- Restrictions apply even where project is partially or wholly funded by ARRA

FTA Buy America

- By statute, funds may only be used on projects where the steel, iron, and manufactured goods are produced in the United States
 - 49 U.S.C. § 53223(j), 49 CFR Part 661
- Key Points
 - FTA generally treats the construction project as the “manufactured good” and the main elements to be incorporated as “components”
 - Non-shift test
 - Rolling stock

FAA Buy American Requirements

- For projects funded by Airport Improvement Program or ARRA, FAA applies its own Buy American restriction
 - All products must be “wholly produced in the U.S. of U.S. materials”
 - 49 U.S.C. § 50101
- Key Points
 - Standing waiver where 60% or more of the components and subcomponents in a facility or equipment are of U.S. origin and final assembly in the U.S.

Other DOT Domestic Preference Regimes

- Federal Highway Administration, 23 U.S.C. § 313, 23 CFR § 635.410
- Federal Railroad Administration High Speed Rail Program, 49 U.S.C. Chapters 244, 246, § 24405
- Amtrak, 49 U.S.C. § 24306

Export-Import Bank of the United States

- Eligibility criteria
 - Available on website (www.exim.gov)
 - New legislation would require ExIm to review domestic content guidelines
- Key Points
 - Shipment from U.S.
 - Short-term programs: product must have more than 50% U.S. content based on direct costs; 100% financing
 - Medium and long-term exports: finance the lesser of 85% of value of eligible goods and services or 100% of U.S. content
 - Less restrictive for small businesses

Foreign Military Financing Program

- DoD Policy – no regulations
 - DSCA Guidelines & Certification
 - But 22 U.S.C § 2791(c)
- Key Policies
 - Finance only US content
 - Must disclose all non-US content
 - No non-US services
- Key Exceptions
 - COTS
 - Prior purchase of item by USG

USAID Programs

- General requirement to procure from US, recipient country or developing countries. 22 U.S.C. § 2354
- Key Points
 - Source & origin of commodity
 - Nationality of supplier
 - Local procurement
 - waivers

Contractor Obligations

- Accuracy in all written and oral submissions
- Problem areas
 - Determining which regime may apply
 - Different tests may lead to different results
 - Broad certifications (that do not distinguish between BAA, TAA and other standards)

Compliance and Enforcement

- Navigating the different regimes remains a challenge, given their complexity and differences, and the commercial global-sourcing pressure on contractors and subcontractors



Enforcement Mechanisms

- Audits and investigations
 - GAO, Agency IG, and DOJ at Federal level
 - Auditors and investigators at state/local level
- Civil/Criminal False Claims Act
- Suspension/Debarment
- Termination and Reprocurement
- Replacement
- Reimbursement of Cost
- Negative Past Performance
- Bid Protests

False Claims Act

- Enforcement tool of choice
- Civil
 - Knowingly presents or causes to be presented a false claim for payment
 - Treble damages
 - Penalties from \$5,500 to \$11,000 per claim
 - *Qui Tam* lawsuits
- Criminal
 - False, fictitious or fraudulent claims
 - Maximum fine of \$500k (companies) and \$250k (individuals) and up to 5 years imprisonment

False Claims Act

- Low burden of proof: preponderance of the evidence (“more likely than not that it happened”)
- “knowing” submission of a false claim
 - Intent need not be proved
 - “reckless disregard” or “deliberate ignorance” = lack of internal controls, systems, training, policies, compliance program, etc.

False Claims Act

- Broad definition of a claim
 - Invoices for payment
- Implied certification theory
 - Invoices are contractor's representation that "all" contract terms have been met, including compliance with BAA, TAA, or other domestic preference requirement

Enforcement Mechanisms

- False Claims Act liability for sale of products from non-designated countries
 - *US ex rel Safina Office Products v. Office Depot* (D.D.C. No. 03-CV-0003)
 - \$4.8M settlement (\$27M recovered in total)
- Don't rely on Government representations!
 - *Wyse Technology, Inc.*, B-297454 (Jan. 24, 2006)
 - “Brand Name or Equal” where identified brand manufactured in China

Prospective Compliance

- Internal Certification Processes
 - Certifications directly to public entities
 - Certifications to higher tiers
 - Standardization
 - Understanding legal requirements
- Flow down to suppliers, vendors and subcontractors
 - Standardization
 - Indemnity
 - Process for review/resolution

Retroactive Compliance

- Mandatory disclosure
 - Federal contracts/subcontracts
 - Many federal grant programs (including ARRA)



Questions and Discussion

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