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PRACTICAL TIGHT-KNIT BRIEFINGS INCLUDING ACTION GUIDELINES ON GOVERNMENT CONTRACT TOPICS

Real Steps Towards "Buy American" Compliance

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Buy American laws provide an unending source of consternation for Government contractors. Even in their most straightforward applications, the Buy American Act (BAA),[1] Trade Agreements Act (TAA),[2] and related statutes that make up the U.S. domestic preference regime force contractors to navigate through a maze of exceptions, exclusions, and waivers. This analysis can prove challenging enough before the added complication of conflicting contract provisions, accidentally (or was it purposefully?) absent flowdowns, the effect of change orders, the application of the *Christian* doctrine,[3] and a host of other Buy American-related performance issues.

This complex regime can be overwhelming when contractors first attempt to dive into Federal Acquisition Regulation (FAR) Part 25, "Foreign Acquisition" (and Defense FAR Supplement (DFARS) Part 225). The solution? Small steps first: setting small, reasonable goals.

This three-part Briefing Paper does just that—breaking this complex regime into small, reasonable tutorials. It works from the ground up to provide an overview of the Buy American landscape and practical tools for contractors navigating the domestic preference regime, from application (Part I) to compliance (Part II) and finally to enforcement (Part III). The goal is to turn FAR Part 25 from an impenetrable maze to a helpful resource during a time when Buy American compliance is perhaps more important than ever.[4]

Part I: Unpacking FAR Part 25 & The Application Of "Buy American" Laws

In Part I, this Briefing Paper unpacks the individual policies that make up the U.S. domestic preference regime and provides a series of questions to help contractors determine which acts apply to their contracts. Before a

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contractor can begin assessing Buy American requirements, it must identify the proper statutes and regulations in play.

Overview Of The "Buy American" Laws

Although the phrase "Buy American" is often used to refer to all domestic preference requirements, the BAA is only one of several potentially applicable laws. In general, "Buy American" laws encompass the laws discussed below.

Buy American Act of 1933: The BAA mandates that federal agencies conducting procurements for public use purchase "[o]nly unmanufactured articles, materials, and supplies that have been mined or produced in the United States, and only manufactured articles, materials, and supplies that have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured in the United States."[5] These requirements likewise apply to contractors on Government construction contracts in the United States.[6] The FAR implements this mandate by requiring agencies to apply a price preference for certain supplies and construction materials if the lowest offer in a procurement is not for the domestic articles, materials, and supplies described above.[7] If, after the application of the pricing preference, the lowest offer is for the designated foreign articles, materials, and supplies, then the agency may select the foreign offer for award. The BAA outlines a number of exceptions,[8] which are discussed in greater detail below and throughout the three-part PAPER.

Trade Agreements Act of 1979: The TAA allows the president to waive procurement requirements, including the BAA, if they require treating products or supplies from "designated countries" differently from domestic products or supplies.[9] "Designated countries" are countries with which the United States has trade agreements that, in a procurement context, require foreign goods from that country to be treated the same as U.S. domestic products.[10] The TAA waiver applies when three circumstances are present: (1) the anticipated procurement value is below the threshold established in the relevant trade agreement, (2) the procurement involves goods or construction materials listed in the relevant trade agreement, and (3) none of the other exceptions outlined in the trade agreements apply—e.g., the procurement is set aside for small business concerns or it is being conducted as a sole-source procurement.[11]

Berry and Kissell Amendments: The Berry Amendment, which was originally an amendment to the yearly defense appropriations bills, but has since been codified 10 U.S.C.A. § 2533a, prohibits the Department of Defense (DOD) from using its funds to purchase certain "covered items," including food, clothing, tents, certain textile fabrics and fibers, and hand or measuring tools.[12] Designed to safeguard national security interests and ensure that the U.S. industrial base can provide defense industry products in times of need, the Berry Amendment mandates that the DOD ensure more domestic content in its procured goods than the BAA requires.

More specifically, the DOD can only use its funds to purchase items entirely grown, reprocessed, reused, or produced within the United States. There are a number of statutory exceptions to this requirement, such as procurements for combat operations and contingency operations, as well as procurements below a certain threshold.[13] Notably, if an acquisition meets the criteria for the Berry Amendment to apply, then the BAA does not apply.[14]

The Kissell Amendment, codified at 6 U.S.C.A.

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§ 453b, mirrors the Berry Amendment requirements, but applies to the Department of Homeland Security's (DHS') purchase of textiles, clothing, and footwear for two agencies: the Coast Guard and the Transportation Security Administration.

Specialty Metals Restriction: Originally part of the Berry Amendment, but now separately codified at 10 U.S.C.A. § 2533b, the specialty metal domestic sourcing requirement applies to DOD purchases of certain items and components of items that contain specialty metal, as well as specialty metal itself, that was not melted or produced in the United States. "Specialty metals" consist primarily of certain types of steel, including certain metal alloys made of nickel, iron-nickel, and cobalt; titanium and titanium alloys; and zirconium and zirconium alloys.[15]

The restriction prohibits the DOD from purchasing aircraft, missile and space systems, ships, tank and automotive items, weapon systems, ammunition, or any components thereof, if they consist of a specialty metal not melted or produced in the United States.[16] Finally, there are a number of exceptions to the specialty metals restriction that are reflective of the exceptions to the Berry Amendment, such as if the purchase is "necessary" to U.S. national security interests, as discussed below.[17] Also like the Berry Amendment, the BAA does not apply if the specialty metals restriction does.[18]

Balance of Payments Program: The Balance of Payments Program is a DOD program implemented by DFARS Subpart 225.75 that extends BAA policies (generally limited to products used within the United States) to use *outside* the United States.[19] It also requires the use of domestic products in foreign military sales.[20]

The Balance of Payments Program applies only to DOD procurements above a certain threshold, and procurements for certain items, such as petroleum products, industrial gases, and particular brand drugs, are exempted.[21] The program employs other exemptions similar to the BAA—e.g., if the domestic product is not available or would be for commissary resale—and like the BAA, if the lowest offer contains nonqualifying end products or material, then the agency must apply a price preference.[22] In the case of the DOD, the applicable price preference is an increase of 50%.[23] TAA requirements may also supersede the Balance of Payments Program mandates.[24]

American Recovery and Reinvestment Act of 2009: Section 1605 of the American Recovery and Reinvestment Act of 2009 governs the use of manufactured construction material in procurements conducted pursuant to funds appropriated under this act.[25] Generally, it prohibits the purchase of iron, steel, and manufactured goods used as construction material that are not produced or manufactured in the United States.[26] It also prohibits the purchase of iron and steel components that are not "wholly or predominantly" produced in the United States.[27]

Notably, where the iron and steel is sourced is irrelevant; rather, the restriction focuses on the manufacturing process itself.[28] The Recovery Act has a number of exceptions similar to other domestic sourcing requirements, such as when construction material or components of construction material are not available, only available at an unreasonable cost, or inconsistent with public interest.[29]

The Department of Transportation Buy America Act: The Buy America Act (different from the Buy *American* Act) is a short name for a number of domestic content restrictions that the Department of Transportation (DOT) applies to grants provided to states, localities, and other nonfederal Government entities for certain purposes. These requirements are separate from the BAA because the Federal Government is not conducting the procurement or purchasing the goods.[30] In addition, the TAA explicitly waives any applicability to certain types of Government spending, such as grants and other forms of assistance.[31]

In general, Buy America requires the recipients of federal funds from DOT agencies to purchase U.S.-produced steel, iron, and manufactured products, among other goods and materials.[32] The applicable goods and materials vary depending on which agency, such as the Federal Highway Administration (FHWA) or the Federal Aviation Administration (FAA) funded the grant.

Determining Which Buy American Laws Apply

The FAR and DFARS (primarily FAR Part 25 and DFARS Part 225) set forth the rules for applying each of

these Buy American laws. However, maneuvering through the "application" clauses, which can differ depending on, among other factors, the agency, contract amount, type of contract, and place of performance, can prove easier said than done. Accordingly, the following questions are designed to help guide contractors to the appropriate Buy American laws.

Question 1: What clause is in the contract? The first question is the most obvious. In an ideal procurement, the Contracting Officer (CO) will have analyzed which laws apply and will have checked the appropriate clauses (e.g., FAR 52.225-1, "Buy American—Supplies," or FAR 52.225-5, "Trade Agreements"). In some circumstances, however, COs will have included the wrong clause, or more commonly, conflicting clauses, or even all Buy American clauses, putting the onus back on the contractor to work with the CO to assess how to comply. Or perhaps you have yet to enter into a contract and want to assess the likely restrictions. This leads us to the next seven questions, which can assist in identifying the correct laws (or simply verifying that the included clauses are correct).

Question 2: What is the contract type? The product or service an agency procures can dictate which Buy American laws apply. For Buy American purposes, contracts generally fall into one of three categories: (1) supplies, (2) services, or (3) construction. These categories affect the applicable regime in a variety of ways. Most notably, the type of contract affects whether a procurement will be subject to the BAA or the TAA. Although both acts encourage domestic sources of supplies, the TAA allows products of certain "designated countries" to be treated as domestic pursuant to various trade agreements.[33] Supply contracts, governed by FAR Subpart 25.1, can be subject to either the BAA or the TAA, depending on the contract value (see question 3). The TAA applies to contracts above a certain dollar threshold, while the BAA applies to contracts below the threshold.[34] Construction contracts, governed by FAR Subpart 25.2, are also subject to either the BAA or TAA, but with different dollar thresholds for TAA applicability.[35] Service contracts, in contrast, always apply the TAA rather than the BAA.[36]

Question 3: What is the contract value? Application of the BAA or TAA depends not only on the contract type, as noted in question 2 above, but also on the contract value. In general, the BAA applies to contracts *over* the micropurchase threshold (increased to $10,000 for both the DOD and civilian agencies)[37] and *under* the TAA threshold.[38] The U.S. Trade Representative (USTR) establishes the TAA threshold, which is published at FAR 25.402(b) and updated biennially. The USTR updated the thresholds most recently effective January 1, 2018, to $180,000 for supply contracts and $6,932,000 for construction contracts (recall that service contracts are never subject to the BAA).[39] Although contract value often governs which Buy American laws apply, certain categories of acquisition apply the BAA regardless of price, as discussed in more detail in question 7.

Question 4: Who is the acquiring agency? The contract type and value get you most of the way there, but occasionally the rules will change based on the acquiring agency. For instance, certain laws and regulations, such as the Berry Amendment, specialty metals restriction, and Balance of Payments Program, apply only to DOD procurements. Additionally, DOD agencies apply a stricter BAA price preference than civilian agencies. The BAA encourages the use of domestic sources by applying a price penalty to foreign supplies. The FAR requires civilian agencies to apply a 6% price penalty to foreign end products for price evaluation purposes.[40] Under DOD procurements, however, the penalty jumps to a 50% increase to foreign end products.[41] The DOD also provides an exception to BAA and TAA requirements for certain "qualifying countries" as a result of various memoranda of understanding and international agreements. The "qualifying countries" exception allows DOD agencies to procure end products from 26 countries that would otherwise be prohibited under the BAA.[42] The acquiring agency matters outside of DOD vs. civilian delineation as well. The Kissell Amendment, for example, applies specifically to certain DHS agencies, namely the TSA and the Coast Guard.[43] The "Buy America" or "Little Buy American" requirements for U.S. steel apply specifically to DOT agencies, and the requirements vary among the FAA, FHWA, Federal Railroad Administration, and FTA.[44]

Question 5: What specific items or services is the agency procuring? This question requires contractors to look beyond the simple supply vs. construction vs. services designation addressed under question 2. Although those categories help to identify which law applies,

specific items may be subject to BAA or TAA exceptions. For example, certain items are exempt from the BAA because they have been predetermined as unavailable in sufficient quantities, or they are under a micropurchase threshold of typically $3,500.[45] The BAA exempts other products if an agency head determines that their purchase is inconsistent with public interest.[46] Additionally, trade agreements exclude certain categories of items (arms, ammunition, or war materials and purchases indispensable for national security or for national defense purposes) from TAA coverage, and therefore the BAA will apply even above the TAA applicability dollar thresholds.[47] Finally, the BAA (but not the TAA) permits agencies to purchase foreign end products if procuring information technology that is a commercial item.[48]

Question 6: What are the acquired items made of? As noted above, the BAA and TAA contain different requirements and exceptions based on the contract type (question 2) and the specific items procured (question 5). Additionally, certain items made of specific materials may face differing or additional requirements. Most notably, specialty metals face additional restrictions in DOD procurements. Pursuant to the specialty metals restriction, the DOD cannot buy any aircraft, missile and space system, ship, tank and automotive item, weapon system, ammunition, or any components thereof, containing a specialty metal that was not melted or produced in the United States.[49] Specialty metals include certain types of steel; certain metal alloys made of nickel, iron-nickel, and cobalt; titanium and titanium alloys; and zirconium and zirconium alloys.[50] Steel products (both structural steel and manufactured products with steel components) also face additional domestic content restrictions in DOT-funded transportation products.[51]

Question 7: How is the contract awarded? As discussed above, the TAA generally governs service contracts, supply contracts valued at $180,000 or more, and construction contracts valued at $6,932,000 or more.[52] But this general rule is littered with exceptions. One such exception, as noted in question 5, depends on the specific items acquired (e.g., acquisitions of arms, ammunition, or war materials are always subject to the BAA, regardless of the dollar value). Another exception hinges on how an agency competes or awards the contract. If an agency awards the contract as either a sole-source procurement or a small business set-aside, the contract will be subject to the BAA rather than the TAA. The FAR specifically excludes these award types from TAA coverage, and therefore the BAA applies even above the dollar thresholds.[53]

Question 8: Where will contract performance take place? The BAA only applies to contracts within the United States—i.e., the 50 states, the District of Columbia, and outlying areas such as Puerto Rico.[54] This does not include locations where the United States does not have complete sovereign jurisdiction—i.e., overseas military bases that are leased from foreign governments. Therefore, foreign end products and foreign construction material can be used for contracts outside the United States. But remember, the DOD Balance of Payments Program does apply to supplies for use outside the United States,[55] and the TAA applies to supplies and services both within and outside the United States.[56]

Congratulations! You have completed your first small steps towards Buy American compliance. Simple right? Not really, but armed with these eight questions, you can begin to navigate to the Buy American laws likely to apply to a particular procurement.

Part II: Demystifying BAA & TAA Requirements

Part I of this Briefing Paper focused on the applicability of various domestic sourcing preference laws and regulations, providing a series of questions to help contractors determine which acts might apply to various types of contracts. Here in Part II, the discussion moves past *which* acts apply and focuses instead on *how* the acts apply. In other words, now that you have determined that a particular act applies to a procurement, how do you assess compliance with the requirements of that act? The simple answer is to look to the requirements delineated in the FAR. However, anyone who has delved into FAR Part 25 knows that domestic sourcing requirements are a maze of exceptions and exceptions to the exceptions. Accordingly, here in Part II, the Paper adheres to the promise of small, manageable steps toward "Buy American" compliance by breaking down the basics of compliance with the two largest and most widely applicable regimes: the BAA and the TAA.

Although often conflated, the BAA and the TAA are two separate and distinct domestic content preference

regimes with different requirements and applications. The BAA encourages the use of articles, materials, and supplies that have been mined, produced, or manufactured in the United States in fulfilling Federal Government procurement and construction contracts by imposing a price penalty during proposal evaluation on offerors using foreign materials.[57] The TAA, in contrast, acts as a strict prohibition against the use of foreign end products in Government procurement; however, products from certain designated countries are subject to a waiver and therefore exempt from TAA requirements.[58] Together, these laws constitute the primary domestic sourcing requirements for U.S. federal contractors.

Demystifying Buy American Act Requirements

Recall from Part I of the PAPER that the BAA applies to purchases (excluding service contracts) *over* the micro-purchase threshold (currently $10,000) and *under* the TAA threshold (currently $180,000 for supply contracts and $6,932,000 for construction contracts).[59] The BAA also applies to certain categories of acquisition regardless of whether the contract exceeds the TAA threshold: (1) small business set-asides; (2) acquisitions of arms, ammunition, or war materials or purchases indispensable for national security or for national defense purposes; (3) acquisitions from Federal Prison Industries Inc. or nonprofit agencies employing people who are blind or severely disabled; and (4) sole-source awards.[60]

These are the requirements for BAA applicability, but what are the requirements for BAA compliance? As noted above, the BAA mandates that federal agencies conducting procurements for public use purchase "[o]nly unmanufactured articles, materials, and supplies that have been mined or produced in the United States, and only manufactured articles, materials, and supplies that have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured in the United States."[61]

The FAR implements this mandate by requiring agencies to apply a price preference for certain supplies and construction materials if the lowest offer in a procurement is not for the domestic articles, materials, or supplies described above.[62] Civilian agencies apply a 6% "price penalty" to foreign offers (12% if the next-in-line offeror is a U.S. small business),[63] while DOD agencies provide a more outcome-determinant 50% penalty to foreign offers (regardless of small business competition).[64] If, after the application of the pricing preference, the lowest offer is for the designated foreign articles, materials, or supplies, then the agency may select the foreign offer for award. In short, the BAA requires that prime contractors provide domestic end products or receive a price penalty during proposal evaluation and contract award.

Although FAR Part 25 lays out the basic requirements for BAA compliance, without a careful reading (and re-reading, and re-re-reading) of the applicable provisions, it is easy to misinterpret the requirements. This part of the PAPER therefore breaks down the requirements into a series of common misconceptions—or "myths"—about the BAA.

BAA Myth 1: The BAA requires the use of U.S. content: The BAA does not in fact require agencies to "buy American" exclusively. This myth highlights one of the key contrasts between the BAA and the TAA. As noted above, the BAA acts as a *preference*, not a prohibition. The BAA only "restricts" the use and purchase of foreign supplies and construction material by promoting the purchase of domestic supplies and materials. The policy promotes domestic supplies by requiring agencies to apply a price preference during proposal evaluation. Civilian agencies apply a price penalty of 6% to foreign offers (12% if the lowest domestic offer is a small business);[65] DOD agencies apply a price penalty of 50% to foreign offers.[66]

For example, if one offeror proposes a domestic widget for $80,000 and another offeror proposes a foreign widget for $60,000, a civilian agency would evaluate the foreign widget as if it cost $63,600 (a 6% increase), or $67,200 if the foreign offerors was competing against a U.S. small business (a 12% increase). If price were the deciding factor in the competition, the foreign widget would still prevail, because even with the price penalty, the foreign product is cheaper. A DOD agency would evaluate the foreign widget as if it cost $90,000 (a 50% increase). If price were the deciding factor in the competition, the domestic widget would prevail, because the price preference pushed the foreign widget price higher than the domestic price.

BAA Myth 2: The BAA price preference causes the Government to pay more for foreign products: It is

important to understand that the price preference applies *for evaluation purposes only*. So in the example above, in the first scenario in which the foreign offer prevailed with a price of $63,600 (a 6% price penalty), the agency would ultimately still pay the original proposed price of $60,000.

BAA Myth 3: To be BAA compliant a product must be 100% domestic: It is true that *nonmanufactured* products must be mined or produced in the United States.[67] *Manufactured* products, however, need only consist of 51% domestic content, although manufacturing must occur in the United States. Manufactured products must meet a two-part test to be considered "domestic end products" under the FAR: (1) manufacturing must occur in the United States, and (2) the end product must consist of more than 50% U.S. component parts.[68] The FAR defines "component" as "an article, material, or supply incorporated directly into an end product or construction material."[69] Agencies calculate the percentage of U.S. components by cost.

For example, if an end product consists of 90% domestic material, but it is manufactured in China, it will not be considered a domestic end product under the BAA because the BAA requires manufacturing to take place in the United States. If instead an end product consists of 90% foreign parts, but is manufactured in the United States, it still does not meet the definition of a domestic end product under the BAA. A product must meet *both elements* of the two-part test to constitute a domestic end product.

For DOD procurements, contractors can take advantage of the "qualifying country" exception as well (not to be confused with the "designated country" delineation for TAA procurements, discussed in greater detail below). The DOD has exempted end products and components from a number of countries as a result of various memoranda of understanding. These countries are listed in DFARS 225.872-1, and the DOD will treat end products and components from those countries as "domestic" for purposes of BAA and TAA analysis.

BAA Myth 4: I have to rely on my CO's interpretation of what constitutes "manufacturing": It is true that neither the BAA nor the FAR defines "manufacture" for purposes of BAA's two-part test for domestic end products. However, various tribunals provide guidance and factors to consider. The Government Accountability Office (GAO) interprets whether processes constitute "manufacturing" when a protester challenges an awardee's compliance with BAA requirements. The GAO loosely defines the term "manufacture" as "completion of the article in the form required for use by the government."[70] The GAO considers a number of factors, such as whether there were "substantial changes in physical character."[71] The GAO has also considered whether separate manufacturing stages were involved, or whether there was one continuous process.[72] The GAO generally does not view operations performed after an item has been completed (e.g., packaging, testing) as significant enough to constitute manufacturing.[73] Boards of contract appeals (Armed Services Board of Contract Appeals (ASBCA) and Civilian Board of Contract Appeals (CBCA)) have also weighed in on the definition of "manufacturing" for BAA purposes. The ASBCA has considered, for instance, whether the article is completed in the form required by the Government.[74]

The most useful resource for interpretations of "manufacturing" comes from U.S. Customs and Border Protection's (CBP's) ruling program. A ruling is a written decision in the form of a letter issued by Regulations and Rulings pursuant to 19 C.F.R. Part 177 that tells the requester how the CBP will treat a good or conveyance when it is imported into or arrives in the United States.[75] The CBP is required to publish these rulings.[76] The published rulings provide the international trade community with guidance on how CBP will handle similar transactions.

BAA Myth 5: To calculate total domestic content, I need to know the country of origin of each component part's subcomponents: As stated above, a contractor does need to know the country of origin of each component part of an end product because, to qualify as domestic, an end product must consist of 51% domestic component parts.

So what qualifies as a domestic component part? To understand the analysis, it is helpful to break the elements down into three categories: (1) the end product, (2) components of the end product, and (3) *subcomponents* of each component part. For example, a vehicle (end product) has an engine (component) that includes a spark plug, valves, piston, crankshaft, and pump (subcomponents). Do these subcomponents have to be

51% (or perhaps 100%) domestic as well? The answer is no.

The BAA does not require contractors to take the country of origin analysis to the subcomponent level. To qualify as a "domestic component" for purposes of calculating total domestic content of an end product, a component part need only be *manufactured* in the United States.[77] In short, determination of a manufactured "domestic component" requires a different (and simpler) analysis than does determination of a manufactured domestic end product: A component manufactured in the United States will be considered "domestic" regardless of the foreign content of its subcomponents. To use our engine example, the engine will be considered a domestic component for purposes of determining 51% domestic content of the end product vehicle as long as the engine was manufactured in the United States, even if the spark plug, valves, piston, and crankshaft (subcomponents of the engine) were all manufactured in a nonqualifying foreign country.

Note, however, that the analysis gets trickier if it is not clear from the procurement what constitutes an "end product" and what constitutes a "component." In the example above, the agency procured a vehicle, of which the engine was a component. If instead the engine *itself* is the end product (i.e., procured independently of the vehicle, perhaps as a replacement or a spare), then the analysis changes. In that case, the spark plug, valves, piston, and crankshaft parts can no longer be considered *subcomponents* of the component engine, because the engine is now the end product. Instead, these parts become *components* of the end product engine and therefore require domestic manufacture.

BAA Myth 6: If my products qualify as commercial items, I do not have to comply with the BAA: The BAA does not exclude commercial items or commercial-off-the-shelf (COTS) items, with two (partial) exceptions. The FAR states that the BAA does not apply to "information technology that is a commercial item."[78] Therefore, agencies can procure commercial item information technology regardless of its domestic content and place of manufacture. The FAR also provides a limited exception for COTS items by waiving part two of the BAA test (the 51% domestic content requirement).[79] A COTS item therefore meets the BAA definition of a domestic end product if it is manufactured in the United States, regardless of the foreign content. To use the example above in which an end product consisted of 90% foreign parts and was manufactured in the United States, typically, such a product would not comply with the BAA's definition of a domestic end product because the foreign content is above 50%. If the end product qualified as a COTS item, however, the product would constitute a domestic end product under the BAA, because COTS items need only meet the domestic manufacturing element, not the domestic content requirement.

BAA Myth 7: I do not have to comply with the BAA if the supplies or construction procured by the agency will be used overseas: This one is a half-myth, as it applies only for civilian agency procurements. The BAA typically only restricts purchases of supplies and construction "for use within the United States."[80] For DOD agencies, however, the Balance of Payments Program restricts the purchase of foreign end products for use outside the United States.[81]

Demystifying Trade Agreements Act Compliance

The TAA allows the president to waive domestic sourcing requirements, including the BAA, so that the United States can comply with its obligations under various international trade agreements. It requires that products and services from select countries ("designated countries") receive equal consideration with domestic offers. The TAA waiver applies when three circumstances are present: (1) the anticipated procurement value is below the threshold established in the relevant trade agreement, (2) the procurement involves goods or construction materials listed in the relevant trade agreement, and (3) none of the other exceptions outlined in the trade agreements apply—e.g., the procurement is set aside for small business concerns or it is being conducted as a sole-source procurement.[82]

Thresholds for TAA applicability vary depending on the trade agreement. The most widely applicable trade agreement is the World Trade Organization's (WTO's) Agreement on Government Procurement (GPA), although the United States participates in a number of other free trade agreements (FTAs) as well.[83] The USTR establishes the TAA thresholds for the WTO GPA and other FTAs, which are published at FAR 25.402(b) and

updated biennially. As noted above, the USTR updated the thresholds most recently in January 2018.[84] The thresholds for the WTO GPA are currently $180,000 for supply and service contracts and $6,932,000 for construction contracts; FTA applicability thresholds currently range from $25,000 to $180,000 for supplies and services and $6,932,000 to $10,441,216 for construction.[85] To explain the specific obligations for TAA compliance, this part of the PAPER once again breaks down the requirements into a series of common TAA misconceptions or "myths."

TAA Myth 1: The TAA applies the same restrictions as the BAA but waives the requirements for certain countries: Many contractors appear to believe that the TAA simply allows certain countries to be treated as domestic for purposes of BAA analysis. In fact, the laws require separate and distinct analyses. In each situation, one or the other act applies, not both.

As discussed above, the BAA uses a two-part test to define "domestic end product": (1) the end product must be manufactured in the United States, and (2) domestic components must exceed 50% of component cost.[86] The origin of component parts is therefore a significant factor in the analysis. The TAA, in contrast, uses a "substantial transformation" test. It requires that domestic products be either (1) "wholly the growth, product or manufacture" of the United States or a designated country, or (2) "substantially transformed [in the United States or a designated country] 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 transformed."[87]

Thus, for TAA analysis, the country of origin of the underlying components ultimately incorporated into the end product is largely irrelevant. Unlike the BAA, the TAA allows end products with more than 50% foreign, nondesignated country components (in fact, it allows end products with 100% foreign, nondesignated country components), provided that those components are "substantially transformed" in the United States or a designated country.

TAA Myth 2: The TAA requires the same "price preference" evaluation as the BAA does: Although the BAA requires application of a "price preference," as described above, the TAA does not apply a similar price preference. Instead, in procurements above the relevant threshold, the TAA *prohibits* the purchase of products from nondesignated countries, regardless of the potential cost savings. If the TAA applies to the procurement, the agency must (1) review the products or services being purchased for their country of origin, and (2) only award to offerors utilizing U.S. or designated-country origin end products or services.[88] The only exception is if the DOD enters into a reciprocal agreement for the purchase of supplies with a particular country.[89] The TAA's prohibition is consistent with the U.S. policy to *encourage* trade with certain countries and *discourage* trade with all others.

TAA Myth 3: The TAA's "substantial transformation" requirement is the same as BAA's "manufacturing" requirement: When analyzing a product's or service's country of origin, the TAA's "substantial transformation" requirement is not actually synonymous with the BAA's "manufacturing" requirement.[90] Rather, the TAA's substantial transformation requirement employs a more demanding standard, as the article must have "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."[91]

CBP, the responsible authority for determinations of "substantial transformation," undertakes a fact-intensive analysis and employs considerable judgment in determining whether specific processes rise to the level of "substantial transformation." In its rulings, which CBP publishes in an online database called the Customs Rulings Online Search System,[92] CBP has considered a multitude of factors, including the number of components and subassemblies; whether parts "lose their identities" and become integrated into the new article; the extent of processing (i.e., whether it is minimal or simple as compared to whether it is complex or meaningful); whether worker skill is required during the actual manufacturing process; the overall importance of the imported article to the finished product; and whether the imported article is functionally necessary or simply an accessory with respect to the finished product. As you can see, there is no hard-and-fast rule that applies to a particular type of product or the extent of processing; however, CBP's prior rulings provide an excellent place to start when trying to determine a product's country of origin.

CBP also provides advanced rulings upon request if a

contractor cannot determine country of origin using CBP's existing rulings, or if the contractor requires more definitive guidance. A ruling may be requested under Part 177 of the CBP Regulations (19 C.F.R. Part 177) by any person who, as an importer or exporter of merchandise, or otherwise, has a direct and demonstrable interest in the question or questions presented in the ruling request, or by the authorized agent of such person.

TAA Myth 4: The TAA limits the definition of "designated countries" to those countries that are signatories to the GPA: The GPA is a multilateral agreement that strives to provide open government procurement markets to its cosignatories. Pursuant to the TAA, the United States treats the GPA's 45 signatories as "designated countries." While the GPA constitutes a large percentage of designated countries, it does not provide an exhaustive list of countries that the TAA identifies as designated countries.[93]

The United States also maintains FTAs with 18 countries, which the TAA includes in the definition of designated countries.[94] Designated countries also include the 46 countries to which the USTR applies a "least developed country" designation.[95] The USTR also extends designated countries coverage to the 21 countries that are part of the Caribbean Basin Trade Initiative.[96] Additionally, the "qualifying country" exception still applies to DOD procurements for an (expansive) list of end products.[97]

TAA Myth 5: The TAA applies to all contracts for articles valued over the TAA threshold: Contrary to this "myth," the TAA does not apply to all contracts for supplies and services above the TAA threshold. The FAR explicitly exempts several types of acquisitions from the TAA requirements. These acquisitions include (1) acquisitions set aside for small businesses; (2) acquisitions for arms, ammunition, or war materials or purchases indispensable for national security or for national defense purposes; (3) acquisitions of end products for resale; (4) acquisitions by Federal Prison Industries; and (5) sole-source procurements and other types of competition that do not utilize full-and-open competition.[98] These types of acquisitions instead revert back to BAA compliance, provided that the acquisition involves construction or supplies (because the BAA does not extend to services). The FAR also outlines numerous categories of service contracts that are specifically exempted from the TAA requirements.[99] These include services such as those that support military services overseas, dredging, and research and development.[100]

Congratulations! You have now completed your second real step towards "Buy American" compliance. The TAA and the BAA requirements—and the interplay between the two—arguably constitute the most complex pieces of the "Buy American" regime. But by following the guidelines above, you can avoid the compliance pitfalls that result from relying on myths and common misconceptions of the BAA and TAA.

Part III: Understanding & Avoiding Common Areas Of Noncompliance That Lead To Enforcement Actions

As you have likely surmised from previous Parts of this Briefing Paper, the "Buy American" regime creates a labyrinth of rules in which contractors can get lost. Contractors are not the only ones who run into difficulty in attempting to navigate the labyrinth or with the proper application of these complex rules. A series of Department of Defense Inspector General audits published in 2018 identified 86 deficiencies related to BAA and Berry Amendment compliance on 280 DOD contracts.[101] Courts have described the BAA as "sparse and confusing," "nebulous," and "shadowy."[102] Indeed, some courts have even suggested that Congress purposely drafted the BAA with a significant amount of grey area so that it can be adapted to the particular circumstances at issue.[103] This grey area, however, can spell trouble for contractors when it comes to compliance considerations.

Part III of this Paper focuses on putting the requirements of the BAA and the TAA, discussed in detail above, into practice, including common missteps and implications of noncompliance. First, this part of the Paper identifies various contexts in which contractors must demonstrate compliance with the "Buy American" regime or face potential liability. It then discusses commonly litigated issues, demonstrating the particular issues with which contractors are likely to have difficulty in identifying and complying.

Enforcement Of "Buy American" Compliance

Enforcement of "Buy American" compliance can oc-

cur in many forms. As with many procurement issues, the "private attorneys general" of the federal procurement system (i.e., offerors responding to a particular solicitation) often provide the Government's first line of defense to ensure "Buy American" compliance by either identifying flaws in the "Buy American" provisions of a solicitation or highlighting an awardee's inability to comply. Noncompliance may also be discovered in the course of a contract audit, such as the series of DOD IG audits referenced above. A prime contractor may need to enforce "Buy American" compliance with its subcontractors to ensure the end products it delivers to the Government meet "Buy American" requirements. Finally, enforcement might also take the form of a False Claims Act (FCA) investigation or qui tam suit.

Bid Protests: The GAO and the U.S. Court of Federal Claims (COFC) review "Buy American" compliance in the context of preaward protests (in the case of flaws in the "Buy American" provisions included in a solicitation) or postaward protests (in the case of an awardee's inability to comply with domestic sourcing requirements). If an offeror has a reasonable basis to believe that an awardee cannot comply or is not compliant with the "Buy American" requirements set forth in the solicitation, it may file a bid protest at the GAO or the COFC.[104]

Protesters may also claim that an agency acted unreasonably in its application of the BAA's price preference, for example, by improperly calculating or misapplying the BAA pricing penalty.[105]

In certain situations, however, the GAO will find that a protester's claims of BAA violations are simply a nonstarter. For example, the GAO explicitly recognizes that because the BAA applies a price preference and does not prohibit the purchase of foreign products, it is not a valid basis for challenging sole-source procurements.[106]

GAO and IG Audits: The GAO might also review "Buy American" compliance in the context of an audit requested by Congress. For instance, in 1996, Congress requested that the GAO report on the Library of Congress' compliance with the BAA with respect to two specific contracts, as well as "the adequacy of the Library's contracting procedures relating to the BAA, including [the GAO's] views on whether certain contract offers should be looked at more closely in regard to the act."[107]

IGs will also conduct audits to review "Buy American" compliance for particular agencies. As noted above, the DOD IG conducted a series of four audits of the military services and the Defense Logistics Agency from October 2013 through July 2017 to assess BAA and Berry Amendment compliance for selected items.[108] As another example, in May 2006, the DHS IG audited DHS' compliance with the BAA and its progress in implementing prior audit recommendations.[109] These audits often occur at the direction of Congress.[110]

Prime/Sub Disputes: Prime contractors also play a key role in "Buy American" compliance by monitoring their supply chains to ensure that end products ultimately delivered to the Government meet the "Buy American" requirements of prime contracts. The FAR does not require the mandatory flowdown of "Buy American" requirements, with one potential exception related to construction material.[111] For all other "Buy American" requirements, the regulations leave it to the prime contractor to flow down requirements as necessary. Such leeway makes sense because a subcontractor's domestic sourcing requirements for the specific subcontracted portion of the project may differ from the prime contractor's requirements for "Buy American"-compliant end products. For instance, a subcontractor providing supplies for a prime contract governed by the BAA may not be required to supply BAA-compliant products for one of the following reasons: (1) the subcontractor's foreign component parts constitute less than 50% of the end product, which will be manufactured in the United States; (2) the product is a subcomponent of a component part that will be manufactured in the United States; or (3) the prime contractor obtained a waiver.

A subcontractor performing under a prime contract subject to the TAA will have similar flowdown exceptions; for instance, if the subcontractor supplies components from a nondesignated country, the prime contractor will substantially transform the components into an end product in the United States or in a designated country. However, for other "Buy American" requirements, it may be prudent to always flow down the requirements to subcontractors. The Berry Amendment, for example, requires 100% domestic content and manufacture for certain covered items, and a prime contractor would therefore need to impose the same requirement on any component parts supplied by subcontractors.

In sum, subcontractor flowdowns may not always be necessary for "Buy American" compliance, depending on the requirements of the prime contract. However, even without a mandatory flowdown requirement, prime contractors must still monitor the country of origin of their suppliers' products to ensure their own compliance, and subcontractors may be liable to prime contractors for failure to comply with domestic content requirements.[112]

Qui Tam/FCA Litigation: FCA liability represents perhaps the most well-known enforcement mechanism for "Buy American" compliance. Contractors that fail to comply with "Buy American" requirements may face liability in the form of an FCA case brought by either a relator/whistleblower or the Government.[113]

Common Issues Leading To Noncompliance

Both practical experience and a review of notable "Buy American" case law reveal a number of common issues that lead to "Buy American" noncompliance. These common issues demonstrate the importance of truly understanding the application of the "Buy American" regime rather than blindly trusting the clauses incorporated by reference, a CO's interpretation, or the fact that the prime contractor has flowed the provisions down to its subcontractors.

Application of the Incorrect "Buy American" Requirements or Exceptions: Although it may be somewhat obvious, parties should clearly identify and confirm which "Buy American" standards apply to a particular procurement. When confronted with a potential violation of "Buy American" requirements, an adjudicatory body will confirm which set of rules apply—usually the BAA or the TAA—and whether an exception applies under the circumstances set forth in the dispute. Arguments that posit application of the wrong law or overlook an exception that applies are doomed to fail.

For example, in *U.S. ex rel. Scutellaro v. Capitol Supply, Inc.*, a qui tam case, the defendant attempted to argue that a particular TAA clause was not applicable because most of the products at issue were below the "micropurchasing threshold."[114] However, the micropurchase threshold applies to the BAA, but not to the TAA.[115] While the TAA generally applies only to contracts valued above certain thresholds, the contract at issue in this case was a General Services Administration (GSA) Federal Supply Schedule contract, which mandates TAA compliance. Accordingly, the court found the defendant's argument unpersuasive.[116]

A GAO decision, *Pierce First Medical U.S.—Reconsideration*, provides an example of offerors' failure to apply the appropriate "Buy American" requirements in the context of a bid protest.[117] In that case, the Department of Veterans Affairs issued a sole-source purchase order for items from an AbilityOne vendor. Protesters challenged the award on the basis of TAA and BAA noncompliance, because the awardee intended to supply goods from the People's Republic of China. However, the FAR exempts AbilityOne from TAA requirements.[118] Nor did the BAA provide a basis for challenging the procurement because (as discussed previously) the GAO has explicitly recognized that the BAA does not provide a basis for challenging sole-source procurements.[119] These examples demonstrate the importance of identifying at the outset of a procurement which "Buy American" standards apply in order to assess potential exceptions.

Failure To Identify or Seek Clarification Regarding Inconsistent Contract Clauses: A common misstep—failure to seek clarification—relates to the issue discussed above and, in fact, often results in application of the incorrect "Buy American" requirement or exception. The DOD IG's recent audit report noted that contracting personnel omitted the required BAA clauses in 36 out of 171 contracts reviewed.[120] On the other end of the spectrum are contracts that include *both* BAA *and* TAA clauses without understanding that the two regimes operate separately. In either situation, communication is key. Prime contractors should discuss application of the BAA, TAA, or other "Buy American" requirements with their COs, and subcontractors should do the same with their primes.

Incorrect Certifications: Contractors are often required to submit certifications of compliance with "Buy American" requirements and exceptions. The BAA and TAA, for instance, require contractors to list each end item that does not qualify as a U.S. end product (or designated country end product, in the case of TAA compliance).[121]

In the bid protest context, the GAO has found that an offeror that does not specifically exclude any end products from meeting the solicitation's BAA or TAA requirements, and otherwise does not indicate it is proposing

anything other than domestic end products, has agreed to furnish only domestic end products.[122]

Interestingly, the GAO has also decided that an agency acts reasonably when it rejects an offer that fails to revert a certification in its entirety, provided that the solicitation informs offerors that failure to furnish required representations may result in rejection of a proposal. With respect to DOD agency procurements, the solicitation provision at DFARS 252.225-7000, "Buy American—Balance of Payments Program Certificate," requires offerors to submit a certification regarding whether the offered products are domestic end products, qualifying country end products, or other foreign end products. The GAO determined that agencies may reasonably conclude that a contractor failing to submit the certification fails to meet the requirements of the solicitation.[123] Further, an agency is not allowed to ignore other information in a solicitation indicating an inability to furnish "Buy American"-compliant products.[124]

Navigating these certifications can sometimes leave contractors in a precarious position in the FCA context. Allowing agencies to rely on blank certifications as a certification of only domestic end products can prove helpful to an awardee in a bid protest context, but it can lead to compliance problems if the offeror did not intend to certify such compliance.

Failure To Obtain, Archive, and Update Country-of-Origin Information/Certification From Suppliers: This PAPER previously discussed the necessity of communicating specific "Buy American" requirements with suppliers, but the prudent contractor will also protect itself by collecting country-of-origin information rather than relying on blanket assurances of compliance. Such documentation allows a prime contractor to verify for itself that the countries listed satisfy the requirements of the prime contract (for instance, designated countries under the TAA or qualifying countries for DOD procurements). To be sure, this can add administrative expense and hassle, but it also adds compliance confidence. Moreover, the failure to collect and document such information could prove detrimental should "Buy American" compliance ever be called into question. For instance, in *Scutellaro,* discussed above, the defendant's failure to retain country-of-origin documentation for the products it sold to the Government entitled the relator and the Government to an adverse inference that the defendant did not comply with the TAA.[125]

A related issue is the failure to update this information throughout the life of a contract. Contractors may remember to obtain proper certifications and country-of-origin information at the outset but may fail to update this information if it changes suppliers mid-contract or if the supplier changes manufacturing locations during the contract.

Misapplication of the "Substantial Transformation" or "Domestic Manufacture" Test: Noncompliance can also result from a misunderstanding or misapplication of the TAA's "substantial transformation" test or the BAA's "domestic manufacture" test. Contractors attempting to provide compliant manufactured products can also run into these issues when using foreign components. The BAA applies a preference to unmanufactured items that have been mined or produced in the United States, or manufactured items that have been "manufactured in the United States."[126] The TAA prohibits acquisition of manufactured products from nondesignated countries unless such products are wholly the growth, product or manufacture of the United States or a designated country, or have been "substantially transformed" in the United States or a designated country.[127]

However, as mentioned previously, there is no precise definition of "manufacture" or "substantial transformation," which obscures whether a contractor's products are eligible under the appropriate test. There are several scenarios in which a contractor may believe that it produced an eligible product but did not. For instance, a contractor may believe that its product is eligible for the preference because all of the components for its product are from designated countries. However, the contractor must also consider the implication of any processing that occurs in nondesignated countries. Also, a contractor could think that subjecting certain components to a process in a designated country constitutes substantial transformation, when, in reality, the process does not meet the standard to be considered manufactured.[128]

At the same time, it is not enough for protesters or qui tam relators to claim that a product is not manufactured or substantially transformed in the United States or a designated country. Parties challenging a contractor's conclusion that its product has been manufactured or

substantially transformed must offer more than simple assertions.

In *United States ex rel. Kress v. Masonry Solutions International, Inc.*, a relator brought an FCA claim against his former employer, asserting that the injectable steel spiral wall tie kits and enhancement anchors that Masonry Solutions International Inc. provided were not BAA compliant, as they had not been manufactured in the United States.[129] The court applied the following test to determine whether the items were U.S.-origin per the BAA: "[I]f the operations performed on the foreign item create a basically new material or result in a substantial change in physical character," then the item becomes a component manufactured in the United States.[130] Masonry Solutions provided several statements explaining the manufacturing process that took place in the United States and the fundamental changes down to the molecular level that the product underwent during the manufacturing process. The relator, on the other hand, failed to offer any further explanation of why he believed the process was insufficient to be considered U.S. manufacturing.[131]

Christian Doctrine Issues: *Christian* doctrine issues can prove particularly challenging for "Buy American" requirements, again emphasizing that it is imperative to communicate early and often with COs regarding which "Buy American" requirements apply. The U.S. Court of Appeals for the Federal Circuit has held that the *Christian* doctrine, derived from a 1962 U.S. Court of Claims decision holding that a mandatory contract clause that expresses a significant or deeply ingrained strand of public procurement policy is considered to be included in a contract by operation of law,[132] extends to "Buy American" requirements. In *S.J. Amoroso Construction Co. v. United States*, the Federal Circuit determined that the *Christian* doctrine mandated inclusion of the BAA clause applicable to construction contracts, even though the contract erroneously included the BAA clause applicable to supply contracts.[133] The court noted that the contractor should have realized that the supply contract clause requirements were inconsistent with the construction of a building and had a duty to inquire; the court also found that the agency had explicitly advised the contractor of the correct requirements.[134]

Conclusion

Congratulations! You have successfully completed this BRIEFING PAPER's three-part tutorial on "Real Steps Towards Buy American Compliance." You reviewed the overall U.S. domestic sourcing regime in Part I, sifted through the nuts and bolts of BAA and TAA requirements in Part II, and scared yourself into compliance through a survey of enforcement mechanisms in Part III. These tutorials, along with the *Guidelines* below, will help you avoid common pitfalls in Buy American compliance, and also provide you with a solid foundation in order to react and adapt to the Buy American policy changes that inevitably lie ahead.

Guidelines

These *Guidelines* are intended to assist you in understanding and complying with the maze of Buy American requirements. They are not, however, a substitute for professional representation in any specific situation.

1. *Read the solicitation and contract carefully.* The CO should have assessed which Buy American laws are applicable to a given procurement and only included the applicable clauses. Additionally, solicitations and contracts containing the TAA also include space for offerors to list products supplied from designated countries, and contractors that fail to list these products may impliedly certify that all its supplied products are U.S.-made.

2. *Seek clarification regarding inconsistent or confusing clauses in a solicitation*: If there are inconsistent or confusing clauses in a solicitation regarding whether the BAA, and which of its progeny, applies, in most instances, contractors have the option to submit questions prior to the date that proposals are due. Furthermore, contractors may want to consider filing a protest if any patent ambiguities remain in the solicitation after the agency answers questions. Protests of this nature—i.e., those that challenge the terms of the solicitation—must be filed prior to the date of submission of proposals to be considered timely pursuant to the GAO's bid protest regulations.[135]

3. *Flow down BAA/TAA requirements to subcontractors as necessary*: The FAR does not explicitly require BAA and TAA requirements to be flowed down to subcontractors because in some instances delivery of a

foreign component by a subcontractor to a prime will not result in the delivery of a noncompliant product (e.g., a foreign end product) to the Government. Nevertheless, contractors must be cognizant of the country of origin of the products provided by each supplier to ensure that components provided from countries other than the United States (or a qualifying or designated country as applicable) are manufactured or substantially transformed to meet the applicable "Buy American" requirements. Prime contractors are also well advised to ensure that their subcontractors in turn flow down requirements or country-of-origin certifications as necessary to lower-tier subcontractors.

4. *Bolster supply chain management*: Establish procedures to obtain, archive, and update country-of-origin information from suppliers. Include annual updates (or notification requirements triggered by changes in country-of-origin content or a supplier's place of manufacture) to ensure compliance throughout the life of a contract. Additionally, contractors can further protect themselves by spot-checking commercial items that, although initially determined to be domestic end products, are often produced in foreign locations.

5. *Keep the agency informed*: Keep the agency informed of the contractor's ability to procure the particular components or products. To the extent the contractor has trouble continuing to obtain compliant components and products, keeping the agency abreast of such issues may make it easier to explain why a BAA/TAA waiver is necessary in a particular situation.

6. *Stay up-to-date on regulatory changes affecting the applicability of Buy American laws*. The Buy American landscape is constantly shifting, and contractors must be aware of how changes to trade agreements or dollar thresholds may affect compliance. Additionally, other regulatory changes may affect applicability indirectly, such as changes to the micropurchase or simplified acquisition thresholds.

ENDNOTES:

[1]41 U.S.C.A. §§ 8301–8305.

[2]19 U.S.C.A. §§ 2501–2581.

[3]See G.L. Christian & Assocs. v. United States 312 F.2d 418, aff'd on reh'g, 320 F.2d 345 (Ct. Cl. 1963) (a mandatory contract clause that expresses a significant or deeply ingrained strand of public procurement policy is considered to be included in a contract by operation of law).

[4]See also the authors' Feature Comments at 60 GC ¶ 52; 60 GC ¶ 97; 60 GC ¶ 131; and 60 GC ¶ 181.

[5]41 U.S.C.A. § 8302(a)(1).

[6]41 U.S.C.A. § 8303(a).

[7]See FAR 25.105 (supplies); FAR 25.204 (construction materials).

[8]41 U.S.C.A. §§ 8302(a)(2), 8303(b); FAR 25.103, 25.202.

[9]19 U.S.C.A. § 2511.

[10]19 U.S.C.A. § 2511(b); FAR 25.003.

[11]FAR 25.401, 25.402.

[12]See DFARS 225.7002-1.

[13]10 U.S.C.A. § 2533a; see DFARS 225.7002-2.

[14]See DFARS 225.7000(b).

[15]See 10 U.S.C.A. § 2533b(l).

[16]See 10 U.S.C.A. § 2533b(a)(1); see DFARS 225.7003-2.

[17]10 U.S.C.A. § 2533b; see DFARS 225.7003-3.

[18]See DFARS 225.7000(b).

[19]DFARS 225.7500, 225.7501.

[20]DFARS 225.7501.

[21]DFARS 225.7501(a).

[22]See DFARS 225.502.

[23]See DFARS 225.502.

[24]See DFARS 225.502.

[25]Pub. L. No. 111-5, § 1605, 123 Stat. 115, 303 (2009).

[26]FAR 25.602-1(a)(1).

[27]FAR 25.602-1(a)(1).

[28]FAR 25.602-1(a)(1).

[29]See FAR 25.603.

[30]See 31 U.S.C.A. §§ 6303–6305.

[31]See 19 U.S.C.A. § § 2511–2518.

[32]See, e.g., 23 U.S.C.A. § 313(a).

[33]See FAR 25.003.

[34]See FAR 25.100(b), 25.402(b).

[35]See FAR 25.402(b).

[36]See FAR 25.002.

[37]41 U.S.C.A. § 1902(a)(1); 10 U.S.C.A. § 2338.

[38]See FAR 25.100(b), 25.402(b).

[39]82 Fed. Reg. 58248 (Dec. 11, 2017); see 83 Fed. Reg. 3396 (Jan. 24, 2018) (FAR implementation).

[40]FAR 25.105 (supplies); FAR 25.204 (construction materials).

[41]DFARS 225.101.

[42]DFARS 225.872-1.

[43]6 U.S.C.A. § 453b.

[44]See, e.g., 23 U.S.C.A. § 313(a).

[45]FAR 25.100(b), 25.103(b), 25.202(a)(2); see FAR 25.104 ("Nonavailable articles").

[46]FAR 25.103(a).

[47]FAR 25.401(a)–(b).

[48]FAR 25.103(e).

[49]10 U.S.C.A. § 2533b.

[50]10 U.S.C.A. § 2533b(l)(1)–(4).

[51]23 U.S.C.A. § 313; 49 U.S.C.A. § 24405; 49 U.S.C.A. § 50101; 49 U.S.C.A. § 24305; 49 U.S.C.A. § 5323(j).

[52]FAR 25.402(b).

[53]FAR 25.401(a).

[54]FAR 25.003, 25.100(b), 25.200(b).

[55]DFARS 225.7500, 225.7501.

[56]See FAR 25.002.

[57]41 U.S.C.A. §§ 8301–8305.

[58]19 U.S.C.A. §§ 2501–2581.

[59]See FAR 25.100(b), 25.402(b).

[60]FAR 25.401(a).

[61]41 U.S.C.A. § 8302(a)(1).

[62]See FAR 25.105 (supplies), 25.204 (construction materials).

[63]FAR 25.105 (supplies); FAR 25.204 (construction materials).

[64]DFARS 225.101.

[65]FAR 25.105 (supplies); FAR 25.204 (construction materials).

[66]DFARS 225.101.

[67]FAR 25.003.

[68]FAR 25.003.

[69]FAR 25.003.

[70]Marbex, Inc., Comp. Gen. Dec. B-225799, 87-1 CPD ¶ 468.

[71]See City Chem. LLC, Comp. Gen. Dec. B-296135.2, 2005 CPD ¶ 120 (citing A. Hirsch, Inc., Comp. Gen. Dec. B-237466, 90-1 CPD ¶ 247).

[72]See Cincinnati Elec. Corp., Comp. Gen. Dec. B-185842, 76-2 CPD ¶ 286.

[73]See Marbex, Inc., Comp. Gen. Dec. B-225799, 87-1 CPD ¶ 468.

[74]See Valentec Wells, Inc., ASBCA 41659, 91-3 BCA ¶ 24,168.

[75]See CBP, What Every Member of the Trade Community Should Know About: U.S. Customs & Border Protection Rulings Program (Dec. 2009), https://www.cbp.gov/sites/default/files/documents/cbp_rulings_prog_3.pdf.

[76]See 19 U.S.C.A. § 1625.

[77]See FAR 25.003 (defining a domestic end product as "[a]n end product manufactured in the United States, if . . . [t]he cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components").

[78]FAR 25.103(e).

[79]FAR 12.505(a), 25.001(c)(1).

[80]FAR 25.001(a).

[81]See DFARS 225.7501.

[82]FAR 25.401, 25.402.

[83]See FAR 25.400.

[84]82 Fed. Reg. 58248 (Dec. 11, 2017); see 83 Fed. Reg. 3396 (Jan. 24, 2018) (FAR implementation).

[85]FAR 25.402(b).

[86]FAR 25.003.

[87]FAR 25.003.

[88]See FAR 25.403(c)(1).

[89]See FAR 25.403(c)(2).

[90]See Becton Dickinson Acutecare, Comp. Gen. Dec. B-238942, 90-2 CPD ¶ 5 (rejecting both the agency's and protester's country of origin analyses because "they concern the definition of a 'domestic end product' under the Buy American Act, which has been waived by the President for procurements subject to the TAA").

[91]19 C.F.R. § 177.22 (defining "Country of origin").

[92] https://rulings.cbp.gov/home.

[93]FAR 25.400(a)(1).

[94]See FAR 25.400(a)(2).

[95]See FAR 25.400(a)(3).

[96]See FAR 25.400(a)(4).

[97]See DFARS 225.401-70.

[98]FAR 25.401(a).

[99]FAR 25.401(b).

[100]See FAR 25.401(b).

[101]See DOD IG, DODIG-2018-070, Summary Report of DOD Compliance With the Berry Amendment and the Buy American Act (Feb. 6, 2018), https://media.defense.gov/2018/Feb/21/2001880339/-1/-1/1/DODIG-2018-070.PDF.

[102]United States ex rel. Made in the USA Found. v. Billington, 985 F. Supp. 604, 606–07 (D. Md. 1997).

[103]See United States ex rel. Made in the USA Found. v. Billington, 985 F. Supp. 604, 606–07 (D. Md. 1997).

[104]See, e.g., Sea Box, Inc., Comp. Gen. Dec. B-405711.2, 2012 CPD ¶ 116.

[105]See, e.g., Dynatest Consulting, Inc., Comp. Gen. Dec. B-257822.4, 95-1 CPD ¶ 167 (finding that the agency improperly applied the BAA price penalty to an offeror's total price, including both products and services, even though the BAA requirements exclude services).

[106]See Design Pak, Inc., Comp. Gen. Dec. B-212579, 83-2 CPD ¶ 336.

[107]B-275097, GAO/GGD-97-20R (Dec. 13, 1996).

[108]DOD IG, DODIG-2018-070, Summary Report of DOD Compliance With the Berry Amendment and the Buy American Act 1 (Feb. 6, 2018), https://media.defense.gov/2018/Feb/21/2001880339/-1/-1/1/DODIG-2018-070.PDF.

[109]DHS IG, OIG-06-37, Audit of Buy American Act Compliance (May 2006), https://www.oig.dhs.gov/sites/default/files/assets/Mgmt/OIG-06-37_May06.pdf.

[110]See, e.g., DHS IG, OIG-06-37, Audit of Buy American Act Compliance 1 (May 2006), https://www.oig.dhs.gov/sites/default/files/assets/Mgmt/OIG-06-37_May06.pdf (noting that the DHS IG performed that audit at the direction of the House of Representatives Conference Report H.R. 109-79 for the DHS Appropriations Act, fiscal year 2006).

[111]See FAR 25.003 (defining construction material as "an article, material or supply brought to the construction site by a contractor or subcontractor for incorporation into the building or work").

[112]See, e.g., Air Comfort Sys., Inc. v. Honeywell, Inc., 760 So. 2d 43 (Miss. Ct. App. 2000) (claim for damages by a contractor against a supplier for allegedly providing noncomplying foreign materials).

[113]See, e.g., United States ex rel. Kress v. Masonry Sols. Int'l, Inc., 2015 WL 3604760 (E.D. La. June 8, 2015) ("Compliance with the BAA may serve as a basis for FCA violations."); United States ex rel. Schweizer v. Océ, N.V., 681 F. Supp. 2d 64 (D.D.C. 2010) (qui tam lawsuit alleging FCA violation for knowingly selling noncompliant products to the Federal Government in contravention of the TAA).

[114]United States ex rel. Scutellaro v. Capitol Supply, Inc., 2017 WL 1422364, at *20 n.28 (D.D.C. Apr. 19, 2017).

[115]United States ex rel. Scutellaro v. Capitol Supply, Inc., 2017 WL 1422364, at *20 n.28 (D.D.C. Apr. 19, 2017).

[116]United States ex rel. Scutellaro v. Capitol Supply, Inc., 2017 WL 1422364, at *20 n.28 (D.D.C. Apr. 19, 2017),

[117]Pierce First Med. U.S.—Reconsideration, Comp. Gen. Dec. B-406291.3 et al., 2012 CPD ¶ 182.

[118]FAR 25.401(a)(1)(4) (stating that the TAA does not apply to acquisitions from nonprofit agencies employing people who are blind or severely disabled).

[119]See Design Pak, Inc., Comp. Gen. Dec. B-212579, 83-2 CPD ¶ 336.

[120]See DOD IG, Report No. DODIG-2018-070, Summary Report of DOD Compliance With the Berry Amendment and the Buy American Act 20 (Feb. 6, 2018), https://media.defense.gov/2018/Feb/21/2001880339/-1/-1/1/DODIG-2018-070.PDF.

[121]See FAR 52.225-2; FAR 52.225-6.

[122]See, e.g., Metermod Instr. Corp., Comp. Gen. Dec. B-211907, 84-1 CPD ¶ 448 ("Where, as here, an offeror does not exclude any end products from the Buy American requirements of the solicitation and does not indicate that it is offering anything other than domestic end products, the acceptance of its offer will result in an obligation on the part of the offeror to furnish domestic end products."); Discount Mach. & Equip., Inc., Comp. Gen. Dec. B-242793, 91-1 CPD ¶ 541 (agency reasonably relied on blank certification as self-certification of BAA compliance).

[123]See, e.g., FitNet Purchasing Alliance, Comp. Gen. Dec. B-410797, 2015 CPD ¶ 78.

[124]SeaBeam Instruments, Inc., Comp. Gen. Dec. B-253129, 93-2 CPD ¶ 106; Marquette Med. Sys., Inc., Comp. Gen. Dec. B-277827.5 et al., 99-1 CPD ¶ 90, 41 GC ¶ 284.

[125]United States ex rel. Scutellaro v. Capitol Supply, Inc., 2017 WL 1422364, at *20 n.28 (D.D.C. Apr. 19, 2017).

[126]41 U.S.C.A. § 8302(a)(1).

[127]See FAR 25.003, 25.403(c)(1).

[128]See, e.g., Becton Dickinson AcuteCare, Comp. Gen. Dec. B-238942, 90-2 CPD ¶ 55 (sustaining a protest where the agency unreasonably concluded that the protester's product was a foreign end product because it was packaged in Mexico).

[129]United States ex rel. Kress v. Masonry Sols. Int'l, Inc., 2015 WL 3604760 (E.D. La. June 8, 2015).

[130]United States ex rel. Kress v. Masonry Sols. Int'l, Inc., 2015 WL 3604760, at *5 (E.D. La. June 8, 2015).

[131]United States ex rel. Kress v. Masonry Sols. Int'l, Inc., 2015 WL 3604760, at *8 (E.D. La. June 8, 2015).

[132]G.L. Christian & Assocs. v. United States 312 F.2d 418, aff'd on reh'g, 320 F.2d 345 (Ct. Cl. 1963).

[133]S.J. Amoroso Constr. Co. v. United States, 12 F.3d 1072 (Fed. Cir. 1993), 36 GC ¶ 75.

[134]S.J. Amoroso Constr. Co. v. United States, 12 F.3d 1072, 1076–77 (Fed. Cir. 1993), 36 GC ¶ 75.

[135]4 C.F.R. § 21.2(a)(1).

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BRIEFING PAPERS