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FEATURE COMMENT: Real Steps Towards 'Buy American' Compliance—Part I: Unpacking FAR Pt. 25 And The Application Of 'Buy American' Laws

Domestic sourcing requirements and preferences (often referred to collectively as the “Buy American” laws) have received considerable attention under the Trump administration. Many are already familiar with President Trump’s April 18, 2017 executive order directing federal agencies to “scrupulously” monitor, enforce and comply with Buy American laws. Since publication of the executive order, the shift toward Buy American enforcement and reform has continued to gather force.

In September 2017, Senate Democrats published an article, “A Better Deal: Taxpayer Dollars Should be Used to Support & Create American Jobs, Not Ship Them Overseas,” demonstrating commitment to strengthen Buy American Act (BAA) policies. Congress ultimately declined to include the proposed policy revisions in the National Defense Authorization Act for Fiscal Year 2018, but the article signaled continued bipartisan efforts to strengthen Buy American policies in the coming years. We have already begun to see such efforts in 2018 with the BuyAmerican.gov Act (S. 2284) to “strengthen Buy American requirements,” published on January 9.

Buy American laws provide an unending source of consternation for Government contractors. Even in their most straightforward applications, the BAA, Trade Agreements Act (TAA) 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?) missing flow-downs, the effect of change orders, the application of the *Christian* doctrine, 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 pt. 25 (and Defense FAR Supplement pt. 225). The solution? Small steps first: setting small, reasonable goals.

In this four-part Feature Comment series, we do just that, breaking this complex regime into small, reasonable tutorials. We will work 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 to compliance and enforcement, and finally to potential policy changes on the horizon. Our hope is that by the end of this series, we will have turned FAR pt. 25 from an impenetrable maze to a helpful resource during a time when Buy American compliance is perhaps more important than ever.

Here in Part I, we will unpack the individual policies that make up the U.S. domestic preference regime and provide a series of questions to help contractors determine which acts apply to their contracts. Before a contractor can begin assessing Buy American requirements, it must identify the proper statutes and regulations in play. 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 following:

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.” 41 USCA § 8302(a)(1). 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. See FAR 25.104 (supplies); 25.204 (construction materials). 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 that we will discuss in greater detail below and throughout the four-part series.

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. “Designated countries” are countries with which the U.S. has trade agreements that, in a procurement context, require foreign goods from that country to be treated the same as U.S. domestic products. 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.

Berry and Kissell Amendments—The Berry Amendment, which was originally an amendment to the yearly defense appropriations bills, but has since been codified, prohibits the Department of Defense from using its funds to purchase certain “covered items,” including food, clothing, tents, certain textile fabrics and fibers, and hand or measuring tools. See 10 USCA § 2533a. 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 DOD ensure more domestic content in its procured goods than the BAA requires.

More specifically, DOD can only use its funds to purchase items entirely grown, reprocessed, reused or produced within the U.S. 10 USCA § 2533a(a). 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. Notably, if an acquisition meets the criteria for the Berry Amendment to apply, then the BAA does not apply. See 10 USCA § 225.7000(b). The Kissell Amendment, codified at 6 USCA § 453b, mirrors the Berry Amendment requirements, but applies to the Department of Homeland Security’s 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 USCA § 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 U.S. “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. See 10 USCA § 2533b(1).

The restriction prohibits 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 U.S. See 10 USCA § 2533b(a)(1). 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, which we will discuss in a future part of this series. Also like the Berry Amendment, the BAA does not apply if the specialty metals restriction does.

Balance of Payments Program—The Balance of Payments Program is a DOD program implemented by DFARS subpt. 225.75 that extends BAA policies (generally limited to products used within the U.S.) to use *outside* the U.S. DFARS 225.7500. It also requires the use of domestic products in foreign military sales. *Id.*

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. DFARS 225.7501(a). 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. See DFARS 225.502. In the case of DOD, the applicable price preference is an increase of 50 percent. *Id.* TAA requirements may also supersede the Balance of Payments Program mandates. See *id.*

American Recovery and Reinvestment Act of 2009—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. Generally, it prohibits the purchase of iron, steel and manufactured goods used as construction material that are not produced or manufactured in the U.S. FAR 25.602-1(a) (1). It also prohibits the purchase of iron and steel components that are not “wholly or predominantly” produced in the U.S. *Id.*

Notably, where the iron and steel is sourced is irrelevant; rather, the restriction focuses on the manufacturing process itself. *Id.* 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. See FAR 25.603.

Buy America—Buy America (different from the *Buy American Act*) consists of a number of domestic content restrictions that the Department of Transportation, among other agencies, is required to apply 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. See 31 USCA §§ 6303–305.

In addition, the TAA explicitly waives any applicability to certain types of Government spending, such as grants and other forms of assistance. 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. See, e.g., 23 USCA § 313(a). The applicable goods and materials vary depending on which agency, such as the Federal Highway Administration or the Federal Aviation Administration, the funds originated from.

Determining What Rules Apply—The FAR and DFARS (primarily FAR pt. 25 and DFARS pt. 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, we have drafted a list of questions to help guide contractors to the appropriate Buy American laws.

Question 1: What clause is in the contract? We start with the most obvious question. In an ideal procurement, the contracting officer 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. Supply contracts, governed by FAR subpt. 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. Construction contracts, governed by FAR subpt. 25.2, are also subject to either the BAA or TAA, but with different dollar thresholds for TAA applicability. Service contracts, in contrast, always apply the TAA rather than the BAA. See FAR 25.002.

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 (\$3,500

for civilian agencies, \$5,000 for DOD) and *under* the TAA threshold. The U.S. trade representative establishes the TAA threshold, which is published at FAR 25.402(b) and updated biennially. The U.S. trade representative updated the thresholds most recently in January 2018, to \$180,000 for supply contracts and \$6,932,000 for construction contracts (recall that service contracts are never subject to the BAA). 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 six-percent price penalty to foreign end products for price evaluation purposes. Under DOD procurements, however, the penalty jumps to a 50-percent increase to foreign end products. DFARS 225.101. 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. The acquiring agency matters outside of the DOD vs. civilian delineation as well. The Kissell Amendment, for example, applies specifically to certain DHS agencies, namely the TSA and the Coast Guard. 6 USCA § 453b. 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 Federal Transit Administration.

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. FAR 25.103(a). The BAA exempts other products if an agency head determines that their purchase is inconsistent with public interest. FAR 25.103(a). 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. FAR 25.401(a)–(b). Finally, the BAA (but not the TAA) permits agencies to purchase foreign end products if procuring information technology that is a commercial item. FAR 25.103(e).

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, 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 U.S. 10 USCA § 2533b. 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. 10 USCA § 2533b(1)–(4). Steel products (both structural steel and manufactured products with steel components) also face additional domestic content restrictions in DOT-funded transportation products. 23 USCA § 313; 49 USCA § 24405; 49 USCA § 50101; 49 USCA § 24305; 49 USCA § 5323(j).

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. But as we have already seen, 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 com-

petes 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. FAR 25.401(a).

Question 8: Where will contract performance take place? The BAA only applies to contracts within the U.S.—i.e., the 50 states, the District of Columbia and outlying areas such as Puerto Rico. This does not include locations where the U.S. 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 U.S. But remember, the DOD Balance of Payments Program does apply to supplies for use outside the U.S., and the TAA applies to supplies and services both within and outside the U.S.

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.

Congratulations! You have completed your first small steps towards Buy American compliance. Next month in Part II, we will provide guidance on how to apply the various laws to individual procurements.



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