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¶ 131

FEATURE COMMENT: Real Steps Towards 'Buy American' Compliance—Part III: Understanding And Avoiding Common Areas Of Noncompliance That Lead To Enforcement Actions

Introduction—As you have likely surmised from previous parts in this series, 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 recent series of Department of Defense inspector general audits identified 86 deficiencies related to Buy American Act (BAA) and Berry Amendment compliance on 280 DOD contracts. See DOD IG, *Summary Report of DOD Compliance with the Berry Amendment and the Buy American Act* (DODIG-2018-070). Courts have described the BAA as "sparse and confusing," "nebulous," and "shadowy." *U.S. ex rel. Made in the USA Found. v. Billington*, 985 F. Supp. 604 (D. Md. 1997). 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. See id. This grey area, however, can spell trouble for contractors when it comes to compliance considerations.

In Part II of this series, we took a closer look at the requirements of the BAA and Trade Agreements Act (TAA). In Part III, we focus on putting those requirements into practice, including common missteps and implications of noncompliance. First, we identify various contexts in which contractors must demonstrate compliance with the "Buy American" regime or face potential liability. Next, we discuss commonly litigated issues, demonstrating the particular issues with which contractors are likely to have difficulty in identifying and complying. Finally, we suggest best practices for identifying and avoiding the typical "Buy American" pitfalls.

Enforcement of "Buy American" Compliance—Enforcement of "Buy American" compliance can occur 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 investigation or qui tam suit.

Bid Protests: The Government Accountability Office and the U.S. Court of Federal Claims 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 post-award 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 GAO or the COFC. See, e.g., *Sea Box, Inc.*, Comp. Gen. Dec. B-405711.2, 2012 CPD ¶ 116.

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. 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).

In certain situations, however, GAO will find that a protester's claims of BAA violations are simply a nonstarter. For example, 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. See *Design Pak, Inc.*, Comp. Gen. Dec. B-212579, 83-2 CPD ¶ 336.

GAO and IG Audits: GAO might also review "Buy American" compliance in the context of an audit requested by Congress. For instance, in 1996, Congress requested that 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 [GAO's] views on whether certain contract offers should be looked at more closely in regard to the act." B-275097, GAO/GGD-97-20R (Dec. 13, 1996).

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. DOD IG, *Summary Report of DOD Compliance with the Berry Amendment and the Buy American Act* (DODIG-2018-070) at 1. As another example, in May 2006, the Department of Homeland Security IG audited DHS' compliance with the BAA and its progress in implementing prior audit recommendations. DHS IG, *Audit of Buy American Act Compliance*, OIG-06-37, May 2006. These audits often occur at the direction of Congress. See, e.g., id. (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).

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 Federal Acquisition Regulation does not require the mandatory flow-down of "Buy American" requirements, with one potential exception related to construction material. 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" (emphasis added)).

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 percent of the end product, which will be manufactured in the U.S.; (2) the product is a subcomponent of a component part that will be manufactured in the U.S.; or (3) the prime contractor obtained a waiver.

A subcontractor performing under a prime contract subject to the TAA will have similar flow-down 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 U.S. 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-percent 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 flow-downs may not always be necessary for "Buy American" compliance, depending on the requirements of the prime contract. However, even without a mandatory flow-down 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. 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).

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. See, e.g., *U.S. 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."); *U.S. ex rel. Schweizer v. Oce, 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).

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 contracting officer'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.*, 2017 WL 1422364, at *1 (D.D.C. Apr. 19, 2017), 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 "micro-purchasing threshold." Id. at *20 n.28. However, the micropurchase threshold applies to the BAA, but not to the TAA. Id. While the TAA generally applies only to contracts valued above certain thresholds, the contract at issue in this case was a General Services Administration Federal Supply Schedule contract, which mandates TAA compliance. Accordingly, the court found the defendant's argument unpersuasive. Id.

Pierce First Medical U.S.—Reconsideration, Comp. Gen. Dec. B-406291.3 et al., 2012 CPD ¶ 182, provides an example of offerors' failure to apply the appropriate "Buy American" requirements in the context of a bid protest. 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. FAR 25.401(1)(4) (stating that the TAA does not apply to acquisitions from nonprofit agencies employing people who are blind or severely disabled). Nor did the BAA provide a basis for challenging the procurement because (as discussed previously) GAO has explicitly recognized that the BAA does not provide a basis for challenging sole-source procurements. See *Design Pak, Inc.*, Comp. Gen. Dec. B-212579, 83-2 CPD ¶ 336. 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. See DOD IG, *Summary Report of DOD Compliance with the Berry Amendment and the Buy American Act* (DODIG-2018-070) at 20. 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). See FAR 52.225-2; FAR 52.225-6.

In the bid protest context, 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. 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 Machinery & Equip., Inc.*, Comp. Gen. Dec. B-242793, 91-1 CPD ¶ 541 (agency reasonably relied on blank certification as self-certification of BAA compliance).

Interestingly, 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, Defense FAR Supplement 252.225-7000 requires offerors to submit a certification regarding whether the offered products are domestic end products, qualifying country end products or other foreign end products. GAO determined that agencies may reasonably conclude that a contractor failing to submit the certification fails to meet the requirements of the solicitation. See, e.g., *FitNet Purchasing Alliance*, Comp. Gen. Dec. B-410797, 2015 CPD ¶ 78. Further, an agency is not allowed to ignore other information in a solicitation indicating an inability to furnish "Buy American"-compliant products. *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.

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: We 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,* 2017 WL 1422364, 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.

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 U.S., or manufactured items that have been "manufactured in the United States." 41 USCA § 8302(a)(1). The TAA prohibits acquisition of manufactured products from nondesignated countries unless such products are wholly the growth, product or manufacture of the U.S. or a designated country, or have been "substantially transformed" in the U.S. or a designated country.

However, as we have 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. 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).

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 U.S. 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 *Masonry Solutions*, 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 U.S. *Masonry Solutions,* 2015 WL 3604760. 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 U.S.

Masonry Solutions provided several statements explaining the manufacturing process that took place in the U.S. 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. For additional discussion on the manufacturing and substantial transformation tests, see Part II of our series, Nibley, Conant and Bakies, Feature Comment, "Real Steps Towards 'Buy American' Compliance—Part II: Demystifying BAA And TAA Requirements," 60 GC ¶ 97.

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 *G. L. Christian and Assocs. v. U.S.*, 160 Ct. Cl. 1, 312 F.2d 418 (1963)) extends to "Buy American" requirements. In *S.J. Amoroso Constr. Co., Inc. v. U.S.*, 12 F.3d 1072 (Fed. Cir. 1993); 36 GC ¶ 75, 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. 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; and the court also found that the agency had explicitly advised the contractor of the correct requirements.

Best Practices—Many of the issues and common pitfalls discussed above can be avoided by implementing a number of "Buy American" best practices:

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 GAO's bid protest regulations.

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 U.S. (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.

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.

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.

Congratulations! You are in the home stretch of real steps toward "Buy American" compliance. Armed with the basics for application of the various "Buy American" policies, the nuts and bolts of the TAA and BAA, and finally now with common pitfalls and best practices, you are prepared to address the potential changes to the "Buy American" regime on the horizon. In our last part of this series, we will address the changes currently underway and predict others that may be in the pipeline.

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