

Buying American: Country of Origin Requirements in US Government Contracts

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Applying country of origin (COO) rules to federal government contracts can be confusing even to experienced government contracting professionals. This confusion is due in significant part to the contradictory goals of domestic preference laws, on the one hand, and international free trade agreements (FTAs), on the other hand.

As in other countries, the US federal government has a long-standing preference for awarding procurement contract dollars to domestic companies. The most important domestic preference laws are embodied in the depression-era Buy American Act of 1933 (BAA) (41 U.S.C. §§ 8301-8305). However, the US has also entered into a number of FTAs that generally provide for reciprocal non-discrimination in government procurement among the signatories to these agreements.

The most extensive of the FTAs is the Agreement on Government Procurement (GPA), a multi-party agreement under the World Trade Organization, as well as the US's bilateral agreements with Israel, Chile, Singapore, and Australia, among others. These bilateral agreements and the GPA guarantee signatory countries non-discriminatory treatment in government procurement activities conducted in other signatory countries and are implemented by the Trade Agreements Act of 1979 (TAA) (19 U.S.C. § 2501).

The overlapping implementing regulations for the domestic preference laws and international FTAs have resulted in a complex regulatory web with many exceptions (and exceptions to the exceptions) to general coverage rules, based on factors including:

- The contract's anticipated value.
- The nature of the contract requirements.
- The contract vehicle being used for the purchase.
- Whether the procurement is being conducted on a small business "set-aside" or "sole source" basis.
- The country in which the contractor is established.

This Note provides a comprehensive overview of the most significant COO requirements applicable to federal government contracts, particularly the BAA and the TAA, and also discusses:

- BAA and TAA certificates.
- Penalties for non-compliance.

For information on making legal US origin claims in advertisements and product labels, including when and how these claims must be qualified and how they are affected by foreign origin labeling regulations, see Practice Note, Made in USA Claims ([8-549-3880](#)).

BUY AMERICAN ACT

The most significant domestic preference statute is the BAA, which restricts the delivery of foreign end products under federal government contracts by granting a price preference advantage to contractors proposing competing offers of domestic end products. Domestic source preferences that arise in other statutory and regulatory regimes but are beyond the scope of this Note include:

- **The Berry Amendment.** The Berry Amendment applies to Department of Defense (DoD) contracts for domestic food, clothing, fabric, and specialty metals.
- **The Balance of Payments Program.** This program encompasses foreign contracts for supplies and construction.
- **Transportation and Infrastructure Project "Buy America" Laws.** Iron, steel, and manufactured goods used in transportation and infrastructure projects funded by the Department of Transportation, the Federal Aviation Administration, and other government agencies are generally subject to various statutory "Buy America" requirements which differ from the BAA.

PRICE EVALUATION PENALTY

The BAA restricts the purchase of items that are not domestic end products through a price evaluation penalty applied to competing offers of foreign end products. It is not an absolute prohibition on foreign end products. If foreign end products are cheaper even after application of the penalty, the contracting agency may properly purchase the foreign end products.

For civilian agency procurements, the price evaluation penalty depends on whether the lowest domestic offer is made by:

- **A large business concern.** If the low domestic offeror is a large business concern, the contracting officer adds a price evaluation penalty to the low foreign offer equal to 6% of the foreign offer's price. For purposes of the BAA's price evaluation penalty, a large

business concern means any contracting entity that is not a “small business concern.”

- **A small business concern.** If the low domestic offeror is a small business concern, the contracting officer adds a price evaluation penalty to the low foreign offer equal to 12% of the foreign offer’s price. A “small business concern” means a business entity organized for profit with a place of business located in the US and which qualifies as a small business under the criteria and size standards in 13 C.F.R. Part 121. (48 C.F.R. § 2.101; 48 C.F.R. § 19.001.)

(48 C.F.R. § 25.105.)

For DoD procurements, the price evaluation penalty is 50%, regardless of whether the low domestic offeror is a large business concern or a small business concern (48 C.F.R. § 225.105(b)). This is generally outcome-determinative.

The BAA price evaluation penalty is an evaluation tool only. If an offer containing foreign end products is selected for award after application of the evaluation penalty, the contracting agency pays the proposed price and not the (increased) evaluated price.

APPLICATION OF THE BAA

The BAA applies to supply and construction contracts between \$3,000 and the dollar threshold for TAA applicability (TAA Threshold). Supply and construction contracts with an estimated value of more than \$3,000 and less than the TAA Threshold are subject to the BAA. The TAA Threshold, established bi-annually by the US Trade Representative (USTR), is currently:

- \$180,000 for supply contracts.
- \$6,932,000 for construction contracts.

The estimated value of a procurement includes the value of the base award period and the value of all option periods (48 C.F.R. § 25.403(b)(2)).

However, the BAA is generally waived for contracts above the TAA Threshold. The TAA authorizes the President of the United States to waive the BAA and other discriminatory provisions for eligible products from countries that have signed an FTA with the US, or that meet certain other criteria, such as qualifying as a “least developed country.” The President has delegated this waiver authority to the USTR. In general, contracts with an estimated value in excess of the TAA Threshold are exempt from the BAA and are, instead, subject to the COO requirements of the TAA.

The BAA also applies to certain procurements regardless of value. Certain categories of contracts remain subject to the BAA even where the estimated value of the contract exceeds the TAA Threshold (48 C.F.R. § 25.401). The most common categories of procurements which remain subject to the BAA at any value are:

- Arms, ammunition, or war materials.
- Purchases indispensable for national security.
- Sole-source acquisitions.
- Small business set-aside contracts.

In addition to the BAA’s COO requirements, absent waiver of the “non-manufacturer rule” by the Small Business Administration, a

small business reseller must supply the product of a small business manufacturer on a set-aside contract.

Notably, the BAA does not apply to contracts for services.

INSTANCES WHERE THE BAA DOES NOT RESTRICT FOREIGN OFFERS

Unreasonable Cost

The BAA does not restrict contractors from supplying foreign end products in other specified circumstances (48 C.F.R. § 25.103). The most common of these scenarios is where an offer containing domestic end products has an “unreasonable cost” as compared to an offer containing foreign end products. The unreasonable cost exception is implemented through the price evaluation preference of the BAA.

For example, if the low domestic offer is priced at \$10,000 and the low foreign offer is priced at \$4,500, the low foreign offer has a lower evaluated price even after the application of any of the possible BAA price evaluation penalty percentages (6%, 12%, or 50%). In these circumstances, the domestic offer presents an unreasonable cost and the foreign offer is therefore eligible for award notwithstanding the BAA’s applicability to the procurement.

Commercial Item Information Technology

The BAA has been waived for information technology (IT) that is a commercial item (48 C.F.R. § 25.103(e)). The terms “commercial item” and “information technology” are both defined in Section 2.101 of the Federal Acquisition Regulation (FAR) (48 C.F.R. § 2.101).

For more information on commercial item contracting, see Practice Note, Government Contracts: Reduced Risk Through Commercial Item Contracting ([5-532-3257](#)).

Commercial item IT is often sold through:

- The Multiple Award Schedule (MAS) contract program administered by the General Services Administration (GSA) and Department of Veterans Affairs.
- Other large, indefinite-delivery/indefinite-quantity (ID/IQ) contracts.

MAS contracts are presumed to exceed the TAA Threshold, as are most ID/IQ contracts for commercial item IT, and are therefore subject to the TAA but not the BAA. Federal government contractors should be aware that the TAA applies and the BAA is not applicable to commercial item IT purchases under these contracts, even for individual orders that do not exceed the TAA Threshold.

There are some limited exceptions where the TAA does not apply to commercial item IT purchases, making the waiver of the BAA’s COO requirement for commercial item IT helpful to contractors. These exceptions include:

- A one-time open market purchase added to an MAS contract delivery order on a non-competitive basis.
- Small contracts individually awarded on a competitive basis.

However, most commercial item IT is not purchased in these one-off contexts and is subject to the TAA’s COO requirements. This renders the waiver of the BAA’s COO requirements for commercial item IT of limited utility to contractors.

Qualifying Country End Products in DoD Procurements

Qualifying countries are those countries that have a reciprocal defense procurement agreement with the US where both countries agree to remove barriers to purchases of supplies produced in the other country. The DoD treats “qualifying country end products” as domestic end products for purposes of the BAA (48 C.F.R. § 252.225-7000(b)(2)).

The countries that are currently designated as qualifying countries are Australia, Austria, Belgium, Canada, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Greece, Israel, Italy, Japan, Luxembourg, Netherlands, Norway, Poland, Portugal, Slovenia, Spain, Sweden, Switzerland, Turkey, and the United Kingdom.

There is no preferential treatment for qualifying country end products in acquisitions by civilian agencies.

Other, less common exceptions to BAA applicability include:

- **Public interest.** This exception applies if the head of a contracting agency determines that domestic preference is inconsistent with the public interest (48 C.F.R. § 25.103(a)).
- **Nonavailability.** This exception applies to items that are not mined, produced, or manufactured in the US:
 - in sufficient and reasonably available commercial quantities; and
 - of a satisfactory quality.
 (48 C.F.R. § 25.103(b).)
- Section 25.104 of the FAR lists articles currently designated as nonavailable (48 C.F.R. § 25.104(a)). The list is published for public comment in the Federal Register at least once every five years (48 C.F.R. § 25.104(b)).
- **Commissary resale.** This exception applies to items purchased by the contracting agency for resale at military bases (48 C.F.R. § 25.103(d)).

BAA COMPLIANCE TESTS

The BAA prescribes two different tests for determining whether items qualify as domestic end products, depending on whether they are:

- **Non-manufactured products.** To qualify as a domestic end product, a non-manufactured product must be mined or produced in the US (48 C.F.R. § 25.003).
- **Manufactured products.** A manufactured product qualifies as a domestic end product if:
 - it is manufactured in the US; and
 - the cost of its components mined, produced, or manufactured in the US exceeds 50% of the cost of all of its components.

(48 C.F.R. § 25.101(a).)

While the BAA test for manufactured goods may seem straightforward, “real world” application of the test to manufactured goods is often complex. Courts and administrative tribunals have observed that the absence of formal guidance about how the term “manufactured” should be applied in specific contexts has led to subjective and inconsistent application by government contracting

agencies (see *Davis Walker Corporation*, B-184672, 76-2 CPD ¶ 182 (August 23, 1976), at 2).

Domestically Manufactured Products

The difficulty in applying the first part of the test lies in the fact that there is no statutory or regulatory definition for “manufactured” under the BAA. The term has been interpreted broadly and often in a confusing manner by the courts and administrative tribunals. According to the Government Accountability Office (GAO), the term means completion of an article in the form required for use by the government.

Manufacturing establishes the identity and character of the end product regarding its current and future use, and may consist of:

- Mechanical operation performed on a foreign product.
- Assembly of separate items.

The key is to determine whether the process makes the item suitable for its intended use and establishes its identity (*DynAmerica, Inc.*, B-248237, 92-2 CPD ¶ 210 (September 28, 1992), at 3).

The level of activity required to meet this test is generally understood to:

- Require greater complexity than packaging operations.
- Be less stringent than the substantial transformation test used to determine product COO under the TAA.

(*CompuAdd Corp. v. Dep’t of Air Force*, 1992 WL 442353 (G.S.B.C.A. December 23, 1992).)

Components

The second part of the BAA applicability test for manufactured products requires that the cost of domestic components exceeds 50% of the total component cost. The practical application of this test can be both complex and administratively burdensome. The term “component” is defined as “an article, material, or supply incorporated directly into an end product” (48 C.F.R. § 25.003).

For purposes of the BAA’s domestic content test:

- Cost is measured at the component level only.
- Subcomponent cost is not considered.

Component Versus Subcomponent

Whether an item is a component or subcomponent often determines if its domestic content is sufficient (50%) to qualify as a domestic end product under the BAA.

The proper definition of component can be ambiguous in some contexts. It can be difficult to determine if a particular item is either a component of the end product or a subcomponent of a component that is incorporated directly into the end product.

For example, a contractor supplies commercial grade ovens to an Army base. The oven door is comprised of a glass and metal face manufactured in the US. However, it also includes a large metal handle manufactured in China, which is added to the glass and metal face during an assembly process performed by the contractor in the US.

If the handle is treated as a component by itself (because the domestic assembly process was too simple to qualify as manufacturing), its value would count as foreign (Chinese) for purposes of the BAA domestic content test. If, however, the entire, finished oven door is treated as the component (because the domestic assembly process qualified as manufacturing, causing the handle to become a subcomponent to the component-level oven door), its entire value, including the handle, would be domestic.

Accordingly, the BAA definition of component affords contractors in some contexts a degree of flexibility to define component in a manner to maximize the likelihood of qualifying as a domestic end product. A contractor should disclose any “close calls” in its component determinations in the BAA certificate (see BAA and TAA Certificates) or proposal to the contracting agency.

Component Cost

The administrative burden of compiling and analyzing all of the elements necessary to build up to a component’s defined cost can be significant. The methodology for calculating component cost varies depending on whether the components are:

- **Purchased.** For components purchased by the contractor, the component cost is comprised of:
 - the acquisition cost;
 - any transportation costs to the place of incorporation into the end product or construction material; and
 - any applicable duty.
- **Manufactured.** For components manufactured by the contractor, the component cost is comprised of:
 - all costs associated with the manufacture of the component;
 - any transportation costs to the place of incorporation into the end product or construction material; and
 - allocable overhead costs.

Excluded from the component cost definition are:

- The contractor’s profit margin on manufactured components.
- Any costs associated with the manufacture of the end product.

(48 C.F.R. § 25.003.)

Components with Unknown COO

Frequently, a contractor lacks reliable information about the COO of certain components used in the end products it delivers. If a component is of unknown origin, it is presumed to be foreign, increasing the challenge of meeting the component cost prong of the BAA test (48 C.F.R. § 52.225-2).

BAA TEST FOR COMMERCIALY AVAILABLE OFF-THE-SHELF ITEMS

In general, commercially available off-the-shelf (COTS) items are common, commodity-type products that are widely available in the commercial market. The FAR defines a COTS item as any item of supply, including construction material, that is:

- A commercial item as defined in Section 2.101(1) of the FAR.
- Sold in substantial quantities in the commercial marketplace.

- Offered to the federal government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace.

(48 C.F.R. § 2.101.)

COTS items are exempt from the BAA’s component cost test. Consequently, COTS items need only be manufactured in the US to comply with the BAA. Contractors do not need to demonstrate that domestic components represent 50% of the item’s cost (48 C.F.R. § 25.001(c)(1)).

“MADE IN AMERICA” DISTINGUISHED FROM THE BAA

Even if an end product qualifies as a domestic end product under the BAA, this does not mean that it is properly labeled as “Made in America.” The Federal Trade Commission (FTC) regulates the use of Made in America claims and labels. The FTC has published guidance indicating that an item must be “all or virtually all” domestic to be properly labeled as Made in America.

For example, an end product that is manufactured in the US and passes the 50% domestic component cost test but is not comprised of all or virtually all domestic components is a BAA “domestic end product,” but is not properly labeled as Made in America. The FTC’s FAQs, *Complying with the Made in USA Standard*, provide more information on complying with Made in America standards.

TRADE AGREEMENTS ACT

The TAA implements several international trade agreements that guarantee signatory countries non-discriminatory treatment in government procurement activities conducted in other signatory countries.

Unlike the BAA, which creates only a preference for domestic end products, the TAA prohibits supplying products and services from countries not approved as TAA-eligible (for example, China). If a product or service has a COO that is not TAA-eligible, it may not be supplied in connection with TAA-covered procurements without a government waiver, which is available only in limited circumstances, most often when TAA-eligible products are insufficient to fulfill the government’s requirements. (48 C.F.R. § 25.403(c).) TAA compliance has become especially problematic for federal government contractors in recent years as production of many common commercial item products has moved to countries which are not TAA-eligible, including China, India, Malaysia, Thailand, and Vietnam.

TAA ELIGIBLE COUNTRIES

In addition to domestic products and services, the TAA allows contractors to supply products and services from countries with which the US has signed multilateral or bilateral FTAs, or has otherwise determined to be TAA-eligible (Designated Countries). The Designated Country list is comprised of:

- **GPA countries.** The countries that have signed the GPA are Armenia, Aruba, Austria, Belgium, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France,

Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Montenegro, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Taiwan, Ukraine, and the United Kingdom.

- **FTA countries.** The countries that have signed a multilateral or bilateral FTA with the US are Australia, Bahrain, Canada, Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Korea, Mexico, Morocco, Nicaragua, Oman, Panama, Peru, and Singapore.
- **Caribbean Basin countries.** The Caribbean Basin countries are Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, Bonaire, British Virgin Islands, Curacao, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saba, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Sint Eustatius, Sint Maarten, and Trinidad and Tobago.
- **Least Developed Countries.** The Least Developed Countries are Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, Laos, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Nepal, Niger, Rwanda, Samoa, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, Somalia, South Sudan, Tanzania, Timor-Leste, Togo, Tuvalu, Uganda, Vanuatu, Yemen, and Zambia.

(48 C.F.R. § 25.003.)

TAA TEST FOR COMPLIANCE: PRODUCTS

To meet the TAA's COO requirement for products, contractors must supply items which are either:

- Wholly grown, produced, or manufactured in the US or a Designated Country.
- Substantially transformed into new and different articles of commerce in the US or a Designated Country.

(19 U.S.C. § 2518(4).) In addition, on July 10, 2018, in a departure from how the FAR TAA clause had traditionally been interpreted, the United States Court of Federal Claims ruled that the FAR TAA clause allows for the purchase of all COTS domestic end products (i.e., COTS products “manufactured” in the US), even if such products do not meet the more rigorous “substantial transformation” test and would not qualify as US or Designated Country End Products under the TAA. (*Acetris Health, LLC v. United States*, 2018 WL 3425071 (Fed. Cl. July 16, 2018).) The Department of Justice has appealed the court's ruling. Pending the outcome of this appeal, US government agencies appear mostly to be following the ruling and allowing contractors to offer domestic end products on TAA-covered procurements even if such products would not qualify as a US or Designated Country End Product under traditional TAA substantial transformation analysis.

The substantial transformation test, applied on a totality of the circumstances basis, most often assesses whether a ‘final stage’ manufacturing or assembly process involving components originating from multiple countries transforms these components into a new and different product that differs from the underlying components in:

- Name.
- Character.
- Use.

(HQ No. 735315 (April 10, 1995).)

“Complex and meaningful” manufacturing processes tend to meet the substantial transformation test, while “mere assembly” of components does not effect a substantial transformation and the underlying components retain their original COO. For example, a partially assembled but non-functional laptop computer is substantially transformed through addition of memory, hard-drive, keyboard, and software downloads. Conversely, assembly of components of cut fabric for a laptop carrying case, entailing simple combining operations, trimming, and joining together by sewing, does not involve sufficient skill or complexity to effect a substantial transformation.

It is important to understand that the COO of an end product's components is considered but is not dispositive for the substantial transformation test. For example, electronic equipment built entirely of Chinese components in the US could qualify as a US-made end product if the manufacturing process performed in the US effected a substantial transformation of the underlying Chinese components.

US Customs and Border Protection (CBP) has the legal authority to interpret and apply the TAA's COO test and rules by issuing final determinations and advisory rulings requested by interested parties (19 C.F.R. Part 177, Subpart B). CBP issues administrative rulings applying the TAA's substantial transformation test to specific items of commerce. CBP applies different variations of the substantial transformation test depending upon the applicable industry (i.e., pharmaceutical products vs. information technology products). A searchable database of these rulings is available at the CBP website. CBP's rulings interpret the TAA in specific factual scenarios, sometimes in the context of US government procurements.

For example, CBP determined that multi-line Avaya telephone sets to be offered to the US government under a government procurement contract were substantially transformed in Mexico and were, therefore, TAA-compliant Mexican end products (HQ 563236 (July 6, 2005)). When applying the TAA rules to a specific procurement, administrative tribunals have accorded exceptional weight to CBP rulings interpreting the TAA (see *CompuAdd Corp. v. Dep't of Air Force*, GSBCA Nos. 12021-P, 93-3 B.C.A. (CCH) ¶ 26123 (May 10, 1993)). but have also held that contracting agencies are responsible for determining COO requirements with respect to the contracts that they award and may not defer such responsibility to CBP (see *Acetris Health, LLC v. United States*, 2018 WL 3425071 (Fed. Cl. July 16, 2018)).

TAA TEST FOR COMPLIANCE: SERVICES

While government enforcement activity and bid protests involving the TAA have focused almost exclusively on contracts to supply products, the TAA (unlike the BAA) is expressly applicable to government contracts for services. The TAA test for COO under services contracts is where the contractor is established (48 C.F.R. § 25.402(a)(2)). The term “established” is not defined in the FAR, but has been recognized by the GAO to mean the country where the contractor is either:

- Incorporated.
- Headquartered.

(*Technosource Information Systems, LLC; True Tandem, LLC, B-405296, et al., 2011 CPD ¶ 220.*)

APPLICATION TO EVOLVING TECHNOLOGIES

As commercial products and services evolve over time, the available guidance for determining the TAA COO of certain items can lag, resulting in substantial ambiguity about the proper COO. Over the past several years, guidance on the proper test for TAA COO has become available for software and cloud computing, two evolving and important areas of technology.

Software

Beginning in the early 1990s, CBP issued rulings stating that the COO for software was established by the country where the “diskette” containing the software was produced (HRL 732087 (February 7, 1990)). However, as commercial practices for delivering software evolved over time away from diskettes to internet download and software as a service (SaaS) models, there was resulting ambiguity about the correct test to determine TAA COO for software. In 2012, CBP issued an advisory ruling applying for the first time traditional “substantial transformation” analysis to software applications not delivered on a diskette (HQ H192146 (June 8, 2012)). In particular, the programming of some source code in non-Designated Countries (such as India or China) is permissible as long as certain (further) key steps occur in the US or in a Designated Country. In 2016, CBP issued a final determination holding that a software product comprised of Malaysian source code that was subsequently compiled into object code in the United States in connection with the production of a final, executable software program qualified as a US-made end product. (HQ HH268858 (Feb. 12, 2016).)

These rulings emphasize the importance of the “software build” process, which CBP defines as the process of methodically converting source code files into standalone lines, converting routines and subroutines of software object code files into standalone lines, and converting routines and subroutines of software object code that can be run by a computer. CBP found that the software build is what gives the software a new name, character, and use, making the location of the software build paramount over other steps in the software production process.

Cloud Computing

In 2011, the GSA issued a request for quotation subject to the TAA, seeking proposals to provide cloud computing services. In response to a pre-award bid protest by a potential bidder, the GAO clarified that the TAA COO for the solicited cloud computing services is determined by the country where the bidder was “established” regardless of where the contractor’s data center was located (*Technosource Information Systems, LLC; True Tandem, LLC, B-405296, et al., 2011 CPD ¶ 220.*)

For example, a US-based company providing the solicited services using servers located in a data center in China would comply with the TAA COO requirement. However, a US or Designated Country-based contractor performance plan based on the use of a Chinese data center could cause security concerns for the procuring agency, even while meeting TAA COO requirements.

BAA AND TAA CERTIFICATES

For procurements covered by the BAA and TAA, contractors must file certificates of compliance with the procuring agency. Subsection (b) of the FAR BAA certificate requires the contractor to identify, by proposed contract line item, all foreign end products included in its offer. Subsection (b) of the FAR TAA certificate requires the contractor to list all non-US and all non-Designated Country end products.

Many contractors misunderstand the mechanics of completing the BAA and TAA certificates. They do not realize that by leaving subsection (b) of the certificate blank, they are representing that they will supply exclusively domestic end products under the BAA or Designated Country or US-made end products under the TAA.

Government auditors and investigators have not considered confusion about the mechanics of completing the BAA and TAA certificates to excuse a contractor’s failure to comply with BAA and TAA requirements in the resulting contract.

The US Court of Appeals for the Eighth Circuit’s decision in *United States v. Rule Industries*, 878 F.2d, 535 (8th Cir. 1989) illustrates the contractual requirements created when the contractor leaves subsection (b) of a BAA certificate blank:

“In each of these contracts, Rule certified that the hacksaw blades were ‘domestic end products’; the space for exceptions to the Buy American Act was left blank. Thus, taking into account the language of the ‘Buy American Act’ clause in the contract, Rule certified that the hacksaw blades were manufactured in the United States and that the cost of the hacksaw blades’ components (i.e., those articles, materials and supplies ‘directly incorporated’ into the hacksaw blades) mined, produced or manufactured in the United States exceeded 50 percent of the cost of all of the hacksaw blades’ components.”

(878 F.2d at 536-37.)

PENALTIES FOR NON-COMPLIANCE WITH COO REQUIREMENTS

In the 1980s and 1990s, contractor non-compliance with COO requirements mostly played out in bid protests, with competing contractors accusing one another of failing to meet a particular solicitation’s BAA or TAA requirements. For example, the General Services Board of Contract Appeals sustained a protest where the awardee of a contract to supply desktop computers to the Air Force proposed computer monitors that were not “substantially transformed” in a Designated Country (*CompuAdd Corp. v. Dep’t of Air Force*, 1992 WL 442353 (G.S.B.C.A. December 23, 1992)).

COO issues are still raised in the bid protest process, although seemingly with less frequency. For instance, the GAO determined that the contracting agency had reasonably determined that the protester’s foreign-sourced components would not be substantially transformed in the US and that the protester’s proposed items did not, therefore, comply with the TAA, as required by the solicitation (*Sea Box, Inc., B-409963.3, 2015 CPD ¶ 72* (February 4, 2015)).

However, over the past decade, contractor post-award non-compliance with the COO requirements in their government contracts has become the subject of regular government audits and investigations, often implicating the False Claims Act (31 U.S.C. §§ 3729-3733) and the potential for extraordinary damages. These cases are commonly referred to as “product substitution” claims, where a contractor promised to deliver products that comply with applicable COO requirements but instead delivered non-compliant products.

An important component to a compliance program mitigating False Claims Act liability is maintenance of good records. Contractors are required to retain documents supporting the BAA and TAA certifications. A recent False Claims Act case reinforces the importance of this. In *United States ex rel. Louis Scutellaro v. Capitol Supply, Inc.*, 2017 WL 1422364 (D.D.C. Apr. 19, 2017), the court held that the defendant’s failure to retain COO documents 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. This decision highlights that contractors:

- Need documentation to support COO determinations.
- Must retain this documentation in accordance with the contract’s audit provisions and the contractors’ records management policies.

For an overview of the False Claims Act and the issues counsel should consider when defending a False Claims Act action, see Practice Note, [Understanding the False Claims Act \(7-561-1346\)](#).

The following is a selected list of contractor forfeitures and payments made by contractors to resolve allegations of post-award non-compliance with the COO requirements in their contracts with the US government, published by the Department of Justice:

- In 2017, a federal judge ordered the owner of a Huntsville-based company to forfeit \$4.4 million and sentenced him to serve four years in prison for fraudulently supplying hundreds of thousands of Chinese-produced baseball caps and backpacks to the Army Recruiting Command, in contravention of the BAA and Berry Amendment requirements in the applicable government contracts. A federal jury had previously convicted the owner on three counts of wire fraud relating to this conduct.

- In 2017, Seiler Instrument & Manufacturing Company, Inc. agreed to forfeit \$1.5 million based upon the company’s use of Chinese optical materials in the weapons sights which the company admitted it had improperly certified as BAA-compliant under a series of DoD contracts.
- In 2016, Novum Structures, LLC, a Wisconsin-based architectural firm, agreed to enter a guilty plea and pay \$3 million to settle criminal and civil allegations that it had intentionally used foreign materials on federal construction projects subject to the BAA.
- In 2015, Medtronic agreed to pay \$4.4 million to settle allegations in a *qui tam* relator’s False Claims Act lawsuit that Medtronic had violated the TAA by supplying spine surgery devices made in China under a false “Manufactured in Memphis, TN” label.
- In 2014, Ossur Americas, Inc. agreed to pay \$500,000 to settle allegations that it supplied the Army with hundreds of foreign-made prosthetic, bracing, and support products under contracts for which the company had certified that it would supply only domestic end products under the BAA.
- In 2014, Samsung Electronics America, Inc. (Samsung) agreed to pay \$2.3 million to resolve allegations that it caused the submission of false claims for products sold on various GSA MAS contracts in violation of TAA COO requirements. It was alleged that Samsung had knowingly provided false information to GSA MAS resellers with respect to the COO of Samsung products, identifying Chinese end products as having a COO of Mexico or Korea.
- In 2013, CDW-Government, LLC agreed to pay \$5.66 million to settle allegations that it improperly supplied IT and office products manufactured in China and other TAA non-Designated Countries under contracts subject to the TAA.
- In 2012, Cable Express Technology agreed to pay \$2 million to settle allegations that it supplied items from TAA non-Designated Countries, including China, Taiwan, Indonesia, Malaysia, and Thailand under contracts subject to the TAA. In August 2009, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council issued an interim rule amending the FAR to add Taiwan to the list of Designated Countries. The alleged MAS contract deliveries involving products from Taiwan presumably pre-dated this amendment to the FAR.

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