Buy American Act: Common Non-Compliance Scenarios and Best Practices for Federal Government Contractors Checklist

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A Checklist of best practices for federal government contractors to help ensure compliance with the Buy American Act of 1933 (BAA). This Checklist also examines common BAA non-compliance scenarios for federal government contractors to avoid.

Federal government contractors must comply with country of origin (COO) requirements. Compliance can be challenging due to the contradictory goals of domestic preference laws, such as the Buy American Act of 1933 (BAA) (41 U.S.C. §§ 8301-8305), and free trade agreements (FTAs) that guarantee signatory countries non-discriminatory treatment in government procurement activities.

Together with the Trade Agreements Act of 1979 (TAA) (19 U.S.C. § 2501) which implements several FTAs, the BAA is one of the most important statutes for COO compliance. For more information on COO requirements and the TAA, see Practice Note, Buying American: Country of Origin Requirements in US Government Contracts (7-573-3545).

This Checklist addresses common non-compliance scenarios under the BAA and recommends best practices to government contractors to help ensure compliance. It may be used to either:

- Avoid common scenarios that result in violations of the BAA.
- Help create internal processes to ensure compliance with the BAA.

COMPLYING WITH THE BAA

The BAA seeks to maximize the use of domestic end products over foreign end products under federal government supply and construction contracts by granting a price preference advantage to contractors proposing domestic end products over competing foreign offers (see Practice Note, Buying American: Country of Origin Requirements in US Government Contracts: Price Evaluation Penalty (7-573-3545)).

For information on the types of contracts that are subject to the BAA, see Practice Note, Buying American: Country of Origin Requirements in US Government Contracts: Application of the BAA (7-573-3545). For information on determining whether items qualify as domestic end products, see Practice Note, Buying American: Country of Origin Requirements in US Government Contracts: BAA Compliance Tests (7-573-3545).

BAA NON-COMPLIANCE FACT PATTERNS

The following fact patterns are common scenarios where the contractor fails to meet its obligations under the BAA:

- The contractor misunderstands the mechanics of completing the BAA certificate (see Practice Note, Buying American: Country of Origin Requirements in US Government Contracts: BAA and TAA Certificates (7-573-3545)).
- The contractor fails to "flow down" BAA domestic end product requirements to its subcontractors and suppliers.
- The contractor is performing a contract above the TAA threshold, but that is still subject to BAA requirements, for example:
  - a national defense contract;
  - a sole source contract; or
  - a small business set-aside contract.
- (See Practice Note, Buying American: Country of Origin Requirements in US Government Contracts: Application of the BAA (7-573-3545)).
- The contractor's bid or sales group enters into a BAA-covered contract, but fails to notify the contractor's fulfillment department of BAA requirements.
- The contractor fails to archive COO and cost information for components and end products delivered under BAA-covered contracts.

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BEST PRACTICES FOR BAA COMPLIANCE

To avoid non-compliance with the BAA, a federal government contractor should:

- Consider including clarifying language with its BAA certificate or proposals, especially where application of the BAA to the particular facts is unclear (for example, "we define component(s) as follows...").
- Create a process to verify that items treated as domestic end products have been manufactured in the US, even if substantially all of the components are domestic.
- Create a process to identify before bid submission each end product's components and their:
  - place of manufacture; and
  - cost.
- Create a process for supply chain staff to:
  - track and archive COO and cost information by component for each end product delivered to the government; and
  - provide advance notice to contract management staff of changes to the production point for end products and construction material supplied to the government or used on a construction project.
- Ensure that COO determinations are supported by documentation, and retain that documentation in accordance with contract requirements and applicable records management policies.
- Remember that Department of Defense procurements treat qualifying country end products as domestic end products under the BAA (see Practice Note, Buying American: Country of Origin Requirements in US Government Contracts: Qualifying Country End Products in DoD Procurements (7-573-3545)).

For more information on complying with the BAA, see Practice Note, Buying American: Country of Origin Requirements in US Government Contracts: BAA Compliance Tests (7-573-3545).

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