

Made In America?

Country of Origin Requirements in Federal Government Contracts

A Webinar by Matt Koehl

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9:00 – 10:00 a.m. MT



Overview

- Sources of Country of Origin (COO) requirements
- Trade Agreements Act (TAA)
- Buy American Act (BAA)
- Completing FAR BAA and TAA certificates
- Practical strategies for COO contract compliance
- COO challenges, enforcement and penalties

Sources of COO Requirements

- Domestic preference laws for government procurement
 - Buy American Act
 - Berry Amendment
 - Recovery Act “Buy America”
- International “free trade” agreements guaranteeing non-discriminatory treatment in government procurement
 - Agreement on Government Procurement (GPA)
- Implementing regulations for domestic preference and international free trade agreements

Sources of COO Requirements

- Interaction between domestic preference laws and international free trade agreements
- Often extremely complex
 - Many “exceptions to exceptions”
- Significant penalties for non-compliance
- Increased visibility and compliance enforcement



TAA Overview

- Implements international trade agreements guaranteeing non-discriminatory treatment in government procurement
- TAA applies to most procurements of supplies with estimated value in excess of \$202,000 (“TAA Threshold”; FAR 25.402)
- The TAA Threshold for construction contracts is much higher > \$7.77 million
- BAA waived for TAA-covered procurements
 - Subject to exceptions

TAA Overview

- Absolute prohibition vs. “pricing preference”
- TAA restricts contractors from supplying any “end products” from TAA-ineligible (“non-designated”) countries
- Unavailability determination (TAA waiver) is theoretically possible but extremely rare in real world
 - Contractor requests are routinely denied by GSA Multiple Award Schedule (MAS) contracting officers
- Applies to services but enforcement uncertain
 - Different test – where contractor is “established”

TAA Exceptions

- Even above the TAA Threshold, TAA does not apply to:
 - Small business set-asides
 - Including MAS contract set-aside Special Item Numbers (SINs)
 - Not including set-aside RFQs involving MAS contract SINs that are not set-aside SINs
 - Arms, ammunitions or war materials
 - Purchases indispensable for national security
 - E.g., Project BioShield
 - Sole-source acquisitions

Calculating “Estimated Value”

- The “Estimated Value” of a procurement is based upon estimated total value, including options
- Almost all MAS contract special item numbers (SINs) are covered by TAA, regardless of order size
 - Exception for “Set-Aside” SINs
- “Estimated Value” generally calculated using all contract line-items (CLINs)
 - Order-by-Order Basis (previous NASA SEWP rule)
 - GSA considered but rejected proposal to apply TAA on a delivery order value basis under MAS contracts

TAA Eligible Countries

- “Designated Country” List at FAR 25.003
- “US-Made End products” qualify under TAA
- TAA “US-Made End Product” does not = “Made in America”
 - Federal Trade Commission
 - “All or virtually all” domestic parts and processing
 - <http://www.ftc.gov/bcp/edu/pubs/business/adv/bus03.shtm>
 - False “Made In America” labels = suspension (FAR 9.407-2(a)(5)) or debarment (FAR 9.406(a)(4))

Non-Designated TAA Countries

- Developing countries to which manufacturing has moved are most often not TAA eligible
- "Non-Designated" TAA countries include China, India, Malaysia, Thailand, Vietnam, etc., etc.
- Republic of China (Taiwan) is exception
 - July 15, 2009, Taiwan joins WTO Agreement on Government Procurement (GPA)
 - Effective August 11, 2009, Taiwan is added to FAR designated country list at FAR 25.003

Determining TAA COO

- TAA Rule: all “end products” supplied under TAA-covered contracts must be from TAA-eligible countries
- Country of origin for manufactured items under TAA is the country in which the end product was last “substantially transformed”
- July 2008 - Customs and Border Protection issues proposed rule to replace “substantial transformation” test with tariff shift test
 - Greater certainty, less subjectivity
 - Withdrawn

Determining TAA COO

- “Substantial Transformation” Test – Totality of the Circumstances
 - Manufacturing process must change components’ “essential use” through “complex and meaningful” manufacturing process
 - Simple assembly does not = “substantial transformation”
 - Also look to product design/development costs, post-assembly testing and component COO
 - Absent “substantial transformation” each component retains original COO

Determining TAA COO

- Component COO is not determinative
 - Electronic equipment built entirely of Chinese components in the US might comply
 - Component COO is a consideration
- Product “bundling” strategy (w/in a CLIN) to establish TAA end product compliance
 - Example: is the computer system the “end product” or are the desktop unit, keyboard, mouse and monitor all separate end products?

Determining TAA COO

- US Customs and Border Protection has statutory authority to issue advisory opinions and final determinations on product country of origin
- Formal and informal rulings on “substantial transformation” for specific end products and manufacturing processes
 - Searchable database <http://rulings.cbp.gov/>
- Government contracts tribunals give “exceptional weight” to Customs Rulings but make independent determinations

Substantial Transformation Test Example Cases

- Example A: Simple assembly in Mexico of HP LaserJet components manufactured in China does not involve sufficient skill or complexity to effect a substantial transformation. HP LaserJet 500 remains a Chinese End Product notwithstanding final assembly in Mexico. (Attachment 1)
- Example B: Substantial, complex assembly and programming work performed in Taiwan substantially transform non-Taiwanese components into Taiwanese digital projectors. (Attachment 2)
- Fact patterns and results sometimes difficult to reconcile

TAA Applied To Software

- Media
 - *HRL 732087 (February 7, 1990); HQ 735409 (May 27, 1994).*
COO = country in which the diskette is produced
 - Still good law?
 - Still relevant?

- Internet download
 - Traditional “substantial transformation” analysis

- Software as a service (SAAS)
 - Probably a service (different test – where is contractor “established”?)

TAA Applied To Cloud Computing

- *Technosource Information Systems, LLC; TrueTandem, LLC, B-405926, et al., October 17, 2011*
<http://www.gao.gov/decisions/bidpro/405296.htm>
- Pre-Award bid protest filed with the Government Accountability Office (GAO)
- RFP required offerors to propose “data centers” located in TAA-Designated Countries
- Held: TAA’s COO test for services is the country where the contractor is “established”; location of data centers not relevant

Buy American Act - Overview

- Establishes a pricing preference for U.S. goods, not a prohibition vs. foreign goods. FAR Subpart 25.1
- Applies to supply (end products) and construction (construction materials) contracts
 - Not applicable to services
 - Waived for “commercial item” Information Technology. FAR 25.103(e)
 - Not applicable above TAA threshold
 - Unless TAA exception applies (e.g., small business set-aside contract)

Buy American Act - Applicability

- Items are acquired for use in U.S.
- Estimated value > \$3,000 and < \$202,000 for supply contracts
- Estimated value is > \$3,000 and < \$7.77 million for construction contracts
- Small business set-asides of any value

Buy American Act - COO Test

- Manufactured Goods: (1) end product must be manufactured in the U.S.; and, (2) the cost domestic components > 50% of cost of all components
- Manufactured
 - No regulatory definition
 - Broadly defined, often confusing
 - Test: Did the operation performed on the foreign item create a basically new material or result in a fundamental change in the item?

Buy American Act - COO Test

- Calculating Component Cost
 - “Components” = items directly used in end product manufacture
 - Some flexibility to define “component”
 - Disclose “close calls” in certificate or proposal
 - For domestic components, cost is purchase price of component or the contractor’s cost of manufacture
- No component cost test for COTS items

Buy American Act Pricing Preference

- If domestic offer is not the low offer, Contracting Officer increases the price of the low offer:
 - Civilian agency procurements
 - 6% , if low domestic offeror is large
 - 12%, if low domestic offeror is small
 - DoD procurements
 - 50% added to price
- Price penalty for evaluation purposes only

Recovery Act “Buy America” Rules

- Recovery Act Section 1605: “Iron, steel, and manufactured goods” must be produced in the U.S
- FAR subpart addition for the Recovery Act (FAR 25.6)
- Only applies to construction on public buildings or public works
- “Iron” and “steel” - produced in the U.S. if all manufacturing takes place in the U.S. (except metallurgical processes involving refinement of steel additives)
 - Disregard standard BAA component content analysis
- Other “manufactured goods” construction material – produced in U.S. if all manufacturing occurs in the U.S.
 - Disregard standard BAA component content analysis
- Unmanufactured construction materials must be domestic

Completing FAR TAA And BAA Certificates

- TAA Certificate (Attachment 3)
 - FAR 52.225-6
- BAA Certificate (Attachment 4)
 - FAR 52.225-2
- Completing Certificate is the easy part
- Difficult task is supplying only TAA/BAA-compliant end products for the entire contract term

Online Representations and Certifications

- Completed by government contractors at least annually
- www.sam.gov
- Online TAA and BAA certifications
 - Option A - certify compliance for all procurements
 - Option B - defer online and provide TAA and BAA certifications specific to individual procurements

COO Compliance Strategies - General

- Review all government solicitations and contract clauses and certifications contained therein to clearly understand BAA and/or TAA requirements
- Seek clarification re: regulatory inconsistencies:
 - BAA clause in a TAA-covered procurement
- Consider including clarifying language w/ certificates or proposal:
 - BAA – “this is how we defined *component*”
 - TAA – “this is how we defined *end product*”

COO Compliance Strategies - General

- Supply chain staff must maintain a system capable of tracking and archiving COO information by component (BAA) and end product (TAA)
- Supply chain staff must provide advance notice to contract management staff of changes to production point for products supplied to the government
- Resellers should obtain TAA certification and indemnity from their manufacturer suppliers
 - Be especially careful when purchasing through distributors

TAA-Specific Compliance Strategies

- Seek CO clarification if the solicitation does not identify which line items are subject to the TAA
- The substantial transformation test is applied on a line-item basis, such that each end product/line-item must be substantially transformed in a TAA-eligible country
- Remember that the substantial transformation test is based on the processes used to produce the End Product; the value and COO of the End Product's components is not determinative
- Consider obtaining a Customs ruling or advisory opinion with regard to a product's TAA COO

BAA-Specific Compliance Strategies

- You may be required to perform a BAA analysis on some CLINs under a TAA-covered contract depending on the CLIN value and agency interpretation
- End products must also be manufactured in the U.S., even if substantially all of the components are U.S.
- Identify the components of the end product and the place of manufacture of each component
- Identify the cost of each component. The acquisition value of a component purchased by a contractor is a component's "value"
- DOD procurements exempt "qualifying country" articles from application of the BAA

Challenges to COO Certifications

- Pre-award (Bid Protests)
 - *Wyse Technology, Inc.*, B-297454, January 24, 2006
<http://www.gao.gov/decisions/bidpro/297454.htm>
 - Award overturned by GAO where awardee declined to execute TAA certificate
 - No requirement for agency to “look behind” contractor’s COO certification
 - Contractor responsible for compliance
- Post-award (False Certification, Product Substitution Investigations)

Penalties and Government Emphasis on Compliance

- “False” COO certifications may = civil false claims, with treble damages and up to \$11,000 per invoice penalty
- Investigations of MAS “office products” and “IT” contractors for TAA violations led to numerous multi-million dollar fines over past decade
- 2012. Cable Express Technology agreed to pay \$2 million to settle allegations that it supplied items under its MAS contract from non-designated TAA countries, including China, Taiwan, Indonesia, Malaysia
http://www.bizjournals.com/prnewswire/press_releases/2012/04/16/P_H87986
- Numerous additional TAA investigations and TAA False Claims Act litigation currently on-going



Questions?



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