

Trade Agreements 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 Trade Agreements Act of 1979 (TAA). This Checklist also examines common TAA 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) and free trade agreements (FTAs) that guarantee signatory countries non-discriminatory treatment in government procurement activities.

The Trade Agreements Act of 1979 (TAA) (19 U.S.C. § 2501) implements FTAs entered into by the US government. For most government contractors, TAA rules are the most significant COO obligations required for contract compliance. For more information on COO requirements, see *Practice Note, Buying American: Country of Origin Requirements in US Government Contracts* (<http://us.practicallaw.com/7-573-3545>).

This Checklist addresses common non-compliance scenarios under the TAA 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 TAA.
- Help create internal processes to ensure compliance with the TAA.

COMPLYING WITH THE TAA

- The TAA prohibits supplying products and services from countries not approved as TAA-eligible (for example, China and India) under TAA-covered contracts.

- 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 (see *Practice Note, Buying American: Country of Origin Requirements in US Government Contracts: TAA Eligible Countries* (<http://us.practicallaw.com/7-573-3545#a371377>)).
- The test for compliance with the TAA's COO requirements differs depending on whether the federal government contractor supplies:
 - products (see *Practice Note, Buying American: Country of Origin Requirements in US Government Contracts: TAA Test for Compliance: Products* (<http://us.practicallaw.com/7-573-3545#a100299>)); and
 - services (see *Practice Note, Buying American: Country of Origin Requirements in US Government Contracts: TAA Test for Compliance: Services* (<http://us.practicallaw.com/7-573-3545#a179113>)).

TAA NON-COMPLIANCE FACT PATTERNS

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

- The contractor misunderstands the mechanics for completing the TAA certificate.
- US-made or Designated Country end products are simply unavailable in the commercial marketplace for certain products (for example, computer keyboards or certain types of medical supplies). Designated Countries are those with which the US has signed multilateral or bilateral FTAs or has otherwise determined to be TAA-eligible. For the current Designated Country list, see *Practice Note, Buying American: Country of Origin Requirements in US Government Contracts: TAA Eligible Countries* (<http://us.practicallaw.com/7-573-3545#a371377>).
- Government resellers fail to implement a reasonable process for obtaining updated manufacturer product COO data.
- Government resellers purchase a manufacturer's products from a distributor without obtaining a TAA certification or COO information from the manufacturer.



- The contractor's product development or manufacturing group changes the point of production for particular products without notice to its contract management group in time to delete products that are no longer TAA-compliant from its TAA-covered contracts.
- The contractor's bid or sales group enters into a TAA-covered contract, but fails to notify the contractor's fulfillment organization of the requirement.
- There are inventory control issues and stock keeping unit (SKU) management issues.
- There is a failure to archive COO information.

BEST PRACTICES FOR TAA COMPLIANCE

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

- Review all government solicitations and contract clauses and certifications contained therein, to clearly understand TAA requirements.
- Seek clarification regarding regulatory inconsistencies, for example, a BAA Federal Acquisition Regulation (FAR) clause in a TAA-covered procurement.
- Consider including clarifying language with its TAA certificate or proposals, especially where the TAA's application to the particular facts is unclear (for example, "the end product for purposes of our certificate is...").
- Consider obtaining a ruling or advisory opinion from *US Customs and Border Protection* (<http://us.practicallaw.com/9-519-3715>) (CBP) about a product's TAA COO for end products with "close calls" on COO designation (see *Practice Note, Buying American: Country of Origin Requirements in US Government Contracts: TAA Test for Compliance: Products* (<http://us.practicallaw.com/7-573-3545#a100299>)).
- Create a process for supply chain staff to:
 - track and archive COO information for each SKU or end product; and
 - provide advance notice to contract management staff of changes to the production point for products supplied to the federal government.
- If a reseller, obtain TAA certification and indemnification from the manufacturer, even if the reseller is purchasing from a distributor.
- Focus on the manufacturing process of the end product and remember that the value and COO of components are not determinative.
- Be especially careful regarding TAA compliance in industries where commercial item products are often produced in non-Designated Countries, such as:
 - furniture;
 - IT hardware;
 - medical products;
 - paper products; and
 - software.

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