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BUY AMERICAN ACT

INTRODUCTION

The Buy America Act (Act) (41 U.S.C. 10a-d) was enacted into law in 1933. The Act requires that construction materials for use on CONUS construction contracts be manufactured in the United States substantially all from articles, material or supplies mined, produced, or manufactured in the United States.

The purposes of the Act are as follows:

1. To increase American made product purchases;
2. To protect American jobs;
3. To protect American investments;
4. To protect the American manufacturing industry.

The application of the Buy American Act to construction contracts administered by the USACE has been limited by subsequent treaty negotiations and exceptions which are noted in the Federal Acquisition Regulations (FAR). The Trade Agreements Act (19 U.S.C. 2501, et. seq.) provides the President authority to waive the Buy American Act for eligible products from countries that have signed an international trade agreement with the United States. Such waivers have been enacted for signatory countries to the World Trade Organization Procurement Agreement and certain Free Trade Agreements for contracts which exceed a certain threshold. Exceptions to the Buy American Act are noted under FAR 25.202 where use of the domestic construction material is impracticable or inconsistent with public interest, not manufactured or mined in the United States in sufficient commercial quantities, or where the cost domestic construction material is unreasonable.

DEFINITIONS FAR 25.003

Construction Material: An article, material or supply brought to the construction site by a contractor or subcontractor for incorporation into the building or work. The term also includes an item brought to the site preassembled from articles, materials or supplies. Emergency life safety system such as fire alarm and audio evacuation systems that are discrete systems incorporated into a public building or work that are produced as complete systems are evaluated as a single and distinct construction materials regardless of when or how the individual parts or components of those systems are delivered to the construction site. GFE is not defined as a construction material but is considered a supply.

Domestic Construction Material:



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- (1) An unmanufactured construction material mined or produced in the U.S.
- (2) A manufactured construction material is manufactured in the U.S. if the costs of components mined, manufactured or produced in the U.S. exceed 50% of the costs of all components. If a non-availability determination has been made for a construction material, the foreign construction material is treated as domestic.
- (3) The construction material is a commercial off the shelf (COTS) item.

Cost of Components:

- (1) Purchased: The acquisition costs including transportation costs to the place of incorporation into the construction.
- (2) Manufactured: All costs associated with the manufacture of the component including transportation, plus allowable overhead costs but excluding profit. Cost of components does not include any costs associated with the manufacture of the end product.

Domestic End Product:

- (1) An unmanufactured end product mined or produced in the U.S.
- (2) A manufactured end product is manufactured in the U.S. if the costs of components mined, manufactured or produced in the U.S. exceed 50% of the costs of all components. If a non-availability determination has been made for an end product, the foreign end product is treated as domestic.

Note: The term “end product” applies to supply and not to construction contracts. The test for Buy American Act compliance for construction contracts is the “construction material” test, not the “end product” test.

Discussion:

A supply contract end product is the product which is being supplied under the contract. The costs of the individual components do not have to be considered



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as it does for each construction material.

APPLICATION

SUPPLY CONTRACTS

There are numerous exceptions to the Buy American Act which pertain to supply contracts. If you are administering a supply contract, contact your District's Office of Counsel to determine which exceptions are applicable.

CONSTRUCTION CONTRACTS

FAR 25.201 implements the Buy American requirements for contracts for the construction, alteration or repair of any public building or public work in the United States. Under the Buy American Act, only *domestic construction materials* are to be used in Federal government construction within the United States unless an exception or waiver exists. The Buy American Act does not apply to OCONUS construction

FAR 25.001(c) sets forth a two-part test to define a domestic construction material for compliance with the Buy American Act. The two elements of the test are: manufacture and component. The two-part test requires that the construction material be (1) manufactured in the United States (2) from articles, materials or supplies (components) mined, produced or manufactured in the United States. Executive Order No. 10582 modified the component portion of the test by adding the requirement that no less than 50% of the construction material's cost be from articles, materials or supplies mined, produced or manufactured in the United States.

Discussion:

Executive Order No. 10582, as amended by Executive Order Nos. 11051 and 12148, established that 50% of the construction material cost must arise from domestically produced items, i.e. manufactured in the U.S.

The term "manufacture" means completion of the article in the form required for use by the government, see *Marbex, Inc.*, B-225799, May 4, 1987, 87-1 CPD ¶ 468. Also, the assembly of components necessary to transform an imported article into an article which meets the specifications can constitute manufacture, at least where a significant number of assembly operations are performed in the United States. See *Rolm Corp.*, B-200995, Aug. 7, 1981, 81-2 CPD ¶ 106. It is not necessary for the process performed in the United States to result in a substantial or fundamental change to the physical character of an imported machine in order for it to constitute manufacture. *Saginaw Mach. Sys., Inc.*, B-238590, June 13, 1990, 90-1 CPD ¶ 554. *General Kinetics, Inc.*, B-24205291-1 CPD445..2,



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The test for domestic construction material differs substantially under a construction contract than it does for an end product under a supply contract. Each separate construction item must be evaluated if brought to the construction site for incorporation into the building. 41 USC 10b. For example each structural member must be evaluated when brought to the site. The contractor cannot make the determination of domestic percentage for any one structural member based on the aggregate costs for all the structural steel incorporated on the project.

There is no simple answer to the question of what constitutes the construction material to which the two-part test must be applied. In a decision involving pumping equipment supplied under a construction contract for a VA Hospital, the Comptroller General (46 Comp.Gen. 813) stated in part:

From our review of the record it is our opinion that the initial question for determination is whether the motors or the complete pump units are to be considered the 'Construction Material' which the subcontractor 'brought to the construction site for incorporation into the building,'... In this connection, it appears that both the contracting officer and the Board have found that the 'article, material, or supply brought to the construction site for incorporation in the building or work' was a complete circulating water pump unit, with motor mounted on the same base with the pump, and the shafts aligned and coupled as required for operation....

In a different case, the Board reached a different result with switchgear. The circuit breakers and the switchgear were brought separately to the construction site and not as a complete unit ready for operation. The switchgear was incorporated into the building separately. The circuit breakers were judged and rejected as nondomestic construction material brought to the site separately while still in shipping cartons and before incorporation into the switchgear or the public work. *George Hyman Const. Co., 69-2 BCA P 7830*. The difference between these two cases is that the motors and pumps were delivered to the site already put together, while the switch gear was delivered and installed separately.

COTS - 41 USC 431(c)

FAR 2.101 defines a "Commercially available off-the-shelf (COTS)" item as any item of supply (including construction material) that is:

- Sold in substantial quantities in the commercial marketplace; and
- Offered to the Government, under a contract or subcontract at any tier, without modification, in the same form in which it is sold in the commercial marketplace; and



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- Does not include bulk cargo, as defined in section 3 of the Shipping Act of 1984 (46 U.S.C. App. 1702), such as agricultural products and petroleum products.

FAR 12.505 waives the component test for the acquisition of COTS construction materials. However the COTS construction materials must be manufactured in the United States.

EXCEPTIONS TO THE BUY AMERICAN ACT- FAR 25.2002

IMPRACTICABLE OR INCONSISTENT WITH PUBLIC INTEREST

FAR 25.202 (a)(1) Impracticable or inconsistent with public use. The head of an agency may determine that the application of the Buy American Act to a particular construction material would be impracticable or would be inconsistent with the public interest.

UAI 25.202(a)(1) provides delegations of authority to make the determination that the use of a domestic construction material is impracticable or inconsistent with the public interest. The following delegations have been made:

- a. One level above the PCO for acquisitions valued at or below the SAT
- b. At the chief of the contracting office for acquisition greater than the SAT but less than \$1.5 million
- c. At the PARC for acquisitions valued at more than \$1.5 million

NON-AVAILABILITY

FAR 25.202(a)(2) Non-availability. The head of the contracting activity may determine that a construction material is not mined, produced or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality. FAR 25.104(a) lists specific articles, materials or supplies which have been determined to be not mined, produced or manufactured in the United States in sufficient quantities to be reasonably available.

AFAR 5125.202(a)(2) Non-availability. The head of contracting activity may delegate the authority at FAR 25202 (a)(2) to the principal responsible for contracting

UNREASONABLE PRICE

FAR 202(a)(3) Unreasonable price. The determination of unreasonable prices is made in accordance with FAR 25.204.



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FAR 25.204 instructs the contracting officer to apply a 6% cost differential to determine if the price of the domestic construction material is unreasonable. If the domestic construction material exceeds the costs of a foreign construction material, the waiver provisions of the Buy American Act apply. In order to establish the 6% differential, the construction contractor must submit vendor quotes or catalog prices which establish the differential. If the contractor establishes the costs differential, the Contracting Officer must prepare a D&F establishing the basis for the waiver.

Under EFAR 25.202(a)(3) the determination of unreasonable price must be made by the Chief of the Contracting Office.

In order to utilize the unreasonable price exceptions, the contractor should show that it relied on and included in its proposal the price of a domestic construction material. In order to establish that the costs of the domestic construction material is unreasonable, the contractor should provide either vendor's quotes or catalog prices for three construction materials which are not in compliance with the Buy American Act. These construction materials must be in full compliance with the requirements of the drawings and the specifications.

Note: Before seeking a Buy American exception, make sure that the BAA requirements have not been waived by the Trade Agreements Act. See "Trade Agreements Act" discussion below.

POST AWARD DETERMINATIONS

FAR 25.205(a). If a contractor requests a determination regarding the inapplicability of the Buy American Act after contract award, the contractor must explain why it could not request the determination prior to contract award or why the need for the determination was not reasonably foreseeable. If the contracting officer concludes that the contractor should have made the request prior to contract award, the contracting officer may deny the request. Failure to grant a request for waiver may be an abuse of discretion. *John C. Grimberg Co. v. United States*, 869 F.2d 1475 (Fed.Cir. 1989) (contracting officer abused discretion by denying post-award request for waiver of BAA, where price of domestic materials exceeded price of foreign materials plus differential).

FAR 25.205(c). If a determination is made to waive the Buy American Act after contract award, it is processed under the Changes cause and the contracting officer must negotiate adequate consideration and modify the contract to allow use of the foreign material. When the basis for the exception is the unreasonable price of a domestic construction material, adequate consideration is at least the differential established in FAR 25.202(a).



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TRADE AGREEMENTS ACT

19 U.S.C. 2501-2582 provides authority for the President to waive the Buy American Act and other discriminatory provisions for eligible products from countries that have signed an international trade agreement. Essentially, when the U.S. seeks to procure goods or services subject to a trade agreement, it must treat a trade agreement partner equally with a domestic U.S. company.

Per FAR 25.403, the application of the Buy American Act is waived for construction materials and end products from countries signing the World Trade Organization (WTO) Government Procurement Agreement and the Free Trade Agreements (FTA). FAR 25.003 provides a list of both WTO and FTA countries. Note there are several free trade agreements other than the North American Free Trade Agreement which includes primarily Canada and Mexico. Canada is also a WTO country.

FAR 25.402 establishes certain thresholds for application of the treaty waiver. The most important waivers for construction contracts are:

- WTO: Contracts equal to or exceeding \$7.864M
- NAFTA: Contracts equal to or exceeding \$10.335M

The waiver authority has been delegated to the U.S. Trade Representative who meets yearly and negotiates the thresholds. The thresholds may be adjusted on a yearly basis.

Under the TAA, the country of origin is determined by the “substantial transformation” test. Unlike determinations under the BAA, the component test for TAA purposes is not based primarily on the value or percentage of the designated country components, but on whether the construction material in question was given a different character or use as a result of the process it underwent in the designated country; i.e., was it “substantially transformed.” FAR 25.001(c)(2). This means that the construction material must be transformed, in the country of origin, into a new and different article, with a name, character or use distinct from the original article(s). To determine if the material is exempted under the TAA, the proper inquiry for non-domestic materials is where did the material acquire its distinct name, character, or use.

PROHIBITED SOURCES

FAR Subpart 25.7 prohibits the purchase of materials and equipment from certain countries. The countries on the prohibited list include:

- Cuba
- Iran



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- Sudan
- North Korea
- Burma/Myanmar

Other countries or individuals subject to economic sanctions can be found at Office of Foreign Assets Control list of designated nations and blocked persons at:

<http://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx>

OTHER EXCEPTIONS

MICROPURCHASE

The Buy American Act does not apply to purchases under the micro-purchase threshold. 41 U.S.C. § 10a(a).

NONCOMPLIANCE - FAR 25.206

The contracting officer must review allegations of Buy American Act violations. Unless, fraud is suspected, the contractor must be notified of the unauthorized use of foreign construction materials and request a reply to include proposed corrective action. The contracting officer may:

- Process a determination of the inapplicability of the Buy American Act;
- Consider removal and replacement of the unauthorized foreign construction material.
- If removal is impracticable and if in the best interest of the Government, the contracting officer may determine that the foreign construction material need not be replaced. Such a determination does not constitute an exception to the Buy American Act or affect the Government's right to suspend or debar the contract.
- If the noncompliance is sufficiently serious consider taking an appropriate contract remedy such as terminating the contract for default and consider preparation of a report to the agency debarring



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official in accordance with subpart 9.4 of the FAR.

RELIANCE ON CONTRACTOR CERTIFICATION

Determining compliance with the Buy American Act is primarily monitored through certifications which offerors are required to submit with their proposals. Contracting Officers, however, are required to go beyond a firm's self certification where there is pre-award belief that a foreign end product will be furnished. Where there is no pre-award information which would lead to the conclusion that a foreign end product will be furnished Contracting Officers may properly rely on the self certification without further investigation. Situations where an offeror furnishes a foreign end product in violation of its certifications are treated as a matter of contract administration. General Kinetics, Inc., B-24134, 91-1 CPD 111. The Government may invoke its termination rights and in some instances may be entitled to an equitable adjustment. Moreover, firms that submit false certifications may also be subject to suspension and debarment. Further, offerors who knowingly submit false certifications may be subject to criminal penalties. Where the eligibility of an offered product is doubtful, the Contracting Officer must look beyond an offeror's self certification.

Factors which the Contracting Officer should consider include the manufacturing process and comparison of the characteristics of the end product to the component products. These factors, of course, are dependent on the product produced and will vary from product to product. In General Kinetics, Inc., B-242052.2, 91-1 CPD ¶ 445, GAO provides a useful description of the type of analysis necessary to determine whether a product was substantially transformed into a domestic end product and the 50% component requirement. In that procurement, DoD had a requirement for secure and non-secure fax machines. The offeror proposed a single non-domestic fax machine which was "modified" to meet the requirements. The first machine met the specifications by providing a protocol converter and replacing programmable read only memory chips. The second, nonsecure machine, was modified by switching circuit board and memory chips. GAO held that the first machine underwent significant transformation to be considered manufactured in the United States while the second basically retained the characteristics of a foreign end product.

POST AWARD

The contracting officer must review allegations of Buy American Act violations. Unless fraud is suspected, the contractor must be notified of the unauthorized use of foreign construction materials and provide a proposed corrective action. The contracting officer may:



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- Process a determination of the inapplicability of the Buy American Act;
- Consider removal and replacement of the unauthorized foreign construction material.
- If removal is impracticable and if in the best interest of the Government the contracting officer may determine that the foreign construction material need not be replaced. Such a determination does not constitute an exception to the Buy American Act or affect the Government's right to suspend or debar the contract.
- If the noncompliance is sufficiently serious consider taking an appropriate contract remedy such as terminating the contract for default and consider preparation of a report to the agency debaring official in accordance with subpart 9.4 of the FAR.

PENALTIES FOR WILLFUL VIOLATION OF THE BUY AMERICAN ACT

- Debarment or suspension
- Termination for Default

FAR 9.406-2 lists as a cause for debarment "intentionally affixing a label bearing a 'Made in America inscription' to a product sold in or shipped to the United States where the product was not made in the United States." A debarment was sustained for three years in *Glazer Const. Co. v. United States* 50 F. Supp. 2d 85 (D. Mass. 1999) where the violation was only 0.01% of the value of all materials used in the project.

FAR 9.407-2(a)(5) lists as a cause for suspension intentionally affixing a label bearing a "Made in America" inscription to a product sold in or shipped to the United States when the product was not made in the United States.

