Domestic Sourcing and Content Requirements Under Federal Government Contracts

Virtual Class
March 22, 2017

Sandy Hoe
shoe@cov.com
202-662-5394

Justin Ganderson
jganderson@cov.com
202-662-5422

COVINGTON
BEIJING  BRUSSELS  LONDON  LOS ANGELES  NEW YORK  SAN FRANCISCO
SEOUL  SHANGHAI  SILICON VALLEY  WASHINGTON

www.cov.com
Domestic sourcing and content requirements under federal government contracts

- Complex rules
- Ramifications for non-compliance

Significant likelihood of increased focus under Trump Administration

- Increase focus on compliance and contract administration
Trump Administration: Domestic Focus
Trump Administration: Domestic Focus

The White House
Office of the Press Secretary

For Immediate Release

January 24, 2017

Presidential Memorandum Regarding Construction of American Pipelines

The Secretary of Commerce, in consultation with all relevant executive departments and agencies, shall develop a plan under which all new pipelines, as well as retrofitted, repaired, or expanded pipelines, inside the borders of the United States, including portions of pipelines, use materials and equipment produced in the United States, to the maximum extent possible and to the extent permitted by law. The Secretary shall submit the plan to the President within 180 days of the date of this memorandum.
Presidential Memorandum
Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing

Section 1. Purpose. This memorandum directs executive departments and agencies (agencies) to support the expansion of manufacturing in the United States through expedited reviews of and approvals for proposals to construct or expand manufacturing facilities and through reductions in regulatory burdens affecting domestic manufacturing.
Buy American Act (BAA)
“BAA is a complex law”
BAA Background/Purpose

- Passed in 1933 during the Great Depression to support US labor and manufacturers
- Codified at 41 USC §§ 8301-8305
  - Implemented through FAR part 25 and DFARS part 225
- Provides a preference for contractors offering (a) “domestic end products” or (b) construction services using “domestic construction materials”
  - Not a prohibition, but restriction with exceptions
BAA General Restrictions

- “Domestic End Products”
  - “[T]hose articles, materials, and supplies” purchased by USG for public use in the United States must be “domestic,” unless subject to exception or waiver

- “Domestic Construction Materials”
  - “[A]n article, material, or supply brought to the construction site by a contractor or subcontractor for incorporation into . . . any public building or public work in the United States” must be “domestic,” unless subject to exception or waiver
BAA Domestic Determination

- Determining if an end product or a construction material is domestic
  - **Unmanufactured**
    - Must be mined or produced in the United States
  - **Manufactured (2-part test)**
    1. End product or material must be manufactured in US, *and*
    2. Cost of components mined, produced or manufactured in US must exceed 50 percent of the cost of all components
BAA Domestic Determination

- What does “manufactured” mean?
  - No statutory/regulatory definition of “manufactured,” but GAO has interpreted manufacturing to mean when the item is made suitable for its intended use and its identity established
  - Fact specific
What are Components?

- A “component” is an article, material, or supply “incorporated directly” into an end product or a construction material
  - Component vs. subcomponent – a subcomponent is a component of a component
  - A part could be a component, subcomponent or end product depending upon what the USG purchases
First Steps in BAA Analysis

- What is the end product?
- Where is end product manufactured?
- What are the components of the end product?
- Where were the components manufactured?
Applying the BAA

Domestic end product or not?
(1) Place of manufacture?
(2) Cost of components?
Applying the BAA: Subcomponents

Door
(US, $10)

- Wood
  (Japan, $3)
- Glass
  (US, $3)
- Door Knob
  (China, $3)
- Lock
  (US, $1)

- Steel
  (US, $2)
- Materials
  (China, $1)
Applying the BAA: Spare Part

Glass
(US, $3)

Steel
(China $2)

Materials
(US, $1)
Applying the BAA: Nuances

- **DoD variation**
  - Qualifying country end products and components treated as domestic
  - "Qualifying country" means a “country with a reciprocal defense procurement memorandum of understanding or international agreement with the United States in which both countries agree to remove barriers to purchases of supplies produced in the other country or services performed by sources of the other country, and the memorandum or agreement complies, where applicable, with the requirements of section 36 of the Arms Export Control Act (22 U.S.C. 2776) and with 10 U.S.C. 2457”

- **COTS variation**
  - Component cost test not applicable to COTS end products or construction materials
Applying the BAA: DoD Variation

- Japan is a qualifying country
  - Wood component treated as domestic
- Treated as domestic end product?
Applying the BAA: DoD Variation

- Japan is a qualifying country
  - Wood component treated as domestic
- Treated as domestic end product?
Applying the BAA: COTS Variation

- Doors is COTS
- 50% component test not applicable
- Manufactured in US
Certifications/Representations

- Prime contractors to certify that each end product is a “domestic end product” or “domestic construction material” except those that are identified in the certificate as “foreign end products” or from a “qualifying country”
52.225-2 -- Buy American Certificate.

As prescribed in 25.1101(a)(2), insert the following provision:

Buy American Certificate (May 2014)

(a) The offeror certifies that each end product, except those listed in paragraph (b) of this provision, is a domestic end product and that for other than COTS items, the offeror has considered components of unknown origin to have been mined, produced, or manufactured outside the United States. The offeror shall list as foreign end products those end products manufactured in the United States that do not qualify as domestic end products, i.e., an end product that is not a COTS item and does not meet the component test in paragraph (2) of the definition of “domestic end product.” The terms “commercially available off-the-shelf (COTS) item,” “component,” “domestic end product,” “end product,” “foreign end product,” and “United States” are defined in the clause of this solicitation entitled “Buy American—Supplies.”

(b) Foreign End Products:

<table>
<thead>
<tr>
<th>Line Item No.:</th>
<th>Country of Origin:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>

[List as necessary]

(c) The Government will evaluate offers in accordance with the policies and procedures of Part 25 of the Federal Acquisition Regulation.

(End of Provision)
52.225-9 Buy American—Construction Materials.
As prescribed in 25.1102(a), insert the following clause:

**BUY AMERICAN—CONSTRUCTION MATERIALS (MAY 2014)**

(d) Data. To permit evaluation of requests under paragraph (c) of this clause based on unreasonable cost, the Contractor shall include the following information and any applicable supporting data based on the survey of suppliers:

<table>
<thead>
<tr>
<th>Construction Material Description</th>
<th>Unit of Measure</th>
<th>Quantity</th>
<th>Price (Dollars)*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Item 1:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Foreign construction material</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Domestic construction material</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Item 2:</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Foreign construction material</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Domestic construction material</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

[List name, address, telephone number, and contact for suppliers surveyed. Attach copy of response; if oral, attach summary.]
[Include other applicable supporting information.]
[* Include all delivery costs to the construction site and any applicable duty (whether or not a duty-free entry certificate is issued).]
Certifications/Representations


Basic. As prescribed in 225.1101(1) and (1)(i), use the following provision:

BUY AMERICAN—BALANCE OF PAYMENTS PROGRAM CERTIFICATE—
BASIC (NOV 2014)

(c) Certifications and identification of country of origin.

(1) For all line items subject to the Buy American and Balance of Payments Program—Basic clause of this solicitation, the offeror certifies that—

(i) Each end product, except those listed in paragraphs (c)(2) or (3) of this provision, is a domestic end product; and

(ii) For end products other than COTS items, components of unknown origin are considered to have been mined, produced, or manufactured outside the United States or a qualifying country.

(2) The offeror certifies that the following end products are qualifying country end products:

<table>
<thead>
<tr>
<th>Line Item Number</th>
<th>Country of Origin</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>

(3) The following end products are other foreign end products, including end products manufactured in the United States that do not qualify as domestic end products, i.e., an end product that is not a COTS item and does not meet the component test in paragraph (ii) of the definition of “domestic end product”:

<table>
<thead>
<tr>
<th>Line Item Number</th>
<th>Country of Origin (If known)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>

COVINGTON
Exceptions / Waiver to BAA

- USG may accept foreign end product / construction material in the certain circumstances, including but not limited:
  - Public Interest
    - “The head of the agency may make a determination that domestic preference would be inconsistent with the public interest” (FAR 25.103(a))
  - Nonavailability
    - BAA “does not apply with respect to articles, materials, or supplies if articles, materials, or supplies of the class or kind to be acquired, either as end items or components, are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality” (FAR 25.103(b))
  - Unreasonable Cost
    - “The contracting officer may determine that the cost of a domestic end product would be unreasonable, in accordance with 25.105 and Subpart 25.5” (FAR 25.103(b))
  - Trade Agreements Act
    - The TAA “provides the authority for the President to waive the Buy American statue and other discriminatory provisions for eligible products from countries that have signed an international trade agreement with the United States, or that meet certain other criteria, such as being a least developed country” (FAR 25.402(a))
## Application of Unreasonable Cost Exception

<table>
<thead>
<tr>
<th>Acquisition of Supplies</th>
<th>Acquisition of Construction Materials</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Civilian agency procurements</strong></td>
<td><strong>Civilian agency and DoD procurements</strong></td>
</tr>
<tr>
<td>▪ Add an evaluation factor to foreign end product if there is a domestic offeror that is not the lowest offeror</td>
<td></td>
</tr>
<tr>
<td></td>
<td>▪ Add an evaluation factor of 6 percent to foreign construction materials</td>
</tr>
<tr>
<td></td>
<td>▪ 6 percent (if low domestic offeror is large business)</td>
</tr>
<tr>
<td></td>
<td>▪ 12 percent (if low domestic offeror is small business)</td>
</tr>
<tr>
<td></td>
<td>▪ Tie goes to offeror that did not include foreign construction materials</td>
</tr>
<tr>
<td></td>
<td>▪ May submit alternative offers</td>
</tr>
<tr>
<td><strong>DoD procurements</strong></td>
<td></td>
</tr>
<tr>
<td>▪ Add an evaluation factor of 50 percent to foreign end products</td>
<td></td>
</tr>
</tbody>
</table>
## Application of Unreasonable Cost Exception

- Unit price of $10 x 100 doors = $1,000
- Evaluated cost

<table>
<thead>
<tr>
<th>Offer</th>
<th>Civilian Agency Procurement</th>
<th>DoD Procurement</th>
</tr>
</thead>
<tbody>
<tr>
<td>If Domestic End Product</td>
<td>$1,000</td>
<td>$1,000</td>
</tr>
<tr>
<td>If Foreign End Product</td>
<td>$1,060 (6% factor)</td>
<td>$1,500 (50% factor)</td>
</tr>
<tr>
<td></td>
<td>$1,120 (12% factor)</td>
<td></td>
</tr>
</tbody>
</table>
Trade Agreements Act

(TAA)
Implement international trade agreements and promotes free trade

Codified at 9 USC § 2501, et seq.
- Implemented in FAR subpart 25.4 and DFARS subpart 225.4

TAA waives application of BAA
- BAA waived in acquisitions covered by the World Trade Organization Government Procurement Agreement (WTO GPA), Free Trade Agreements, and the Israeli Trade Act
- Treats “designated countries” as domestic
  - Designated countries are parties to trade agreements with the U.S.
- Procurement must be valued in excess of a specified dollar threshold (see FAR 25.402)
- TAA, like BAA, applies to end products
Substantial Transformation

- To be TAA-compliant, end products must be “substantially transformed” in TAA designated countries or US before delivery
  - Substantial transformation means “[t]ransforming an article into a new and different article of commerce, with a name, character, or use distinct from the original article”
    - Guided by Customs determinations
  - No components test
TAA Thresholds

- Thresholds for end products based on value of acquisition (revised periodically); examples:
  - WTO GPA = $191,100
  - NAFTA, Canada = $25,000
  - NAFTA, Mexico = $77,533
  - FTA, Korea = $100,000
Buying 3,000 doors at $10 per door = $30,000 acquisition
Exceeds $25,000 NAFTA (Canada) threshold
No components test
Exceptions

- TAA not applicable to certain types / categories of acquisitions

- *DoD variation* – TAA only applicable to end products identified in specific Product Services Groups (PSGs) under DFARS 225.401-70), including, but not limited to:
  - Railway equipment
  - Construction, mining, excavating, and highway maintenance equipment
  - Lumber, millwork, plywood, and veneer
Balance of Payments Program
Balance of Payments Program

- **Policy**
  - In early 1960s, SecDef McNamara ordered DoD to hold expenditures of appropriated funds outside of US; due to unfavorable balance of payments
  - “Acquire only domestic end products for use outside the United States, and use only domestic construction material for construction to be performed outside the United States, including end products and construction material for foreign military sales”

- **Applies to DoD contracts for:**
  - acquisition of supplies for use outside U.S., and
  - construction to be performed outside U.S.
Exceptions/Waiver

- Pertinent exceptions or waivers:
  - Acquisition of foreign end production/construction materials is required
  - “[R]equirement can best be filled by a foreign end product or construction material”
  - Public interest
### Applying Balance of Payments Evaluation Factor

<table>
<thead>
<tr>
<th>Acquisition of Supplies Outside the U.S.</th>
<th>Acquisition of Construction Materials for Construction Outside U.S.</th>
</tr>
</thead>
</table>
| • If low offer includes foreign end product, then must apply the “Balance of Payments Program evaluation factor”  
  • 50 percent factor | • No special evaluation requirements |
Other Sourcing & Content Restrictions
DoD may not procure certain items, as end products or components, if they are not “grown, reprocessed, reused, or produced in the United States”

- Including, but not limited to: food; clothing and the materials and components thereof; tents, tarpaulins, or covers; cotton and certain other types of fabric/fibers/materials

Exceptions include, but not limited to:

- Nonavailability
- Emergency acquisitions by activities located outside U.S. for personnel of those activities
- Acquisitions outside the United States in support of combat operations
- Acquisitions of incidental amounts of cotton, etc., incorporated into an end product
DoD may not procure certain items, or their components, unless the specialty metals contained therein are “melted or produced in the United States”

- Applies to aircraft, missile or space systems, ships, tanks or automotive items, weapons systems, or ammunition
- Specialty metals include certain steel, certain metal alloys, titanium and titanium alloys, and zirconium and zirconium alloys

Exceptions include, but not limited to:

- End items that contain “a minimal amount of otherwise noncompliant specialty metals”
- Nonavailability
- National security interests
- COTS items, except certain categories like specialty metal mill products (such as billets, wires, plates)
Other DoD Sourcing Restrictions

- Restrictions on acquiring:
  - foreign buses
  - certain chemical weapons antidote
  - air circuit breakers for naval vessels
  - anchor and mooring chain
  - ball and roller bearings
  - supercomputers
  - construction or repair of vessels in foreign shipyards
  - utilization of domestic photovoltaic devices
“Buy American” Under ARRA

- FAR subpart 25.6 implements Section 1605 of American Recovery & Reinvestment Act (ARRA)
  - Applies to contractors performing construction work under ARRA funding
- Provides for restrictions related to domestic manufactured and unmanufactured construction materials
“Buy American” Under ARRA

- Restrictions:
  - All “iron, steel, and other manufactured goods used as construction material” must be “produced or manufactured in the United States”
    - Unlike the BAA, no origin restrictions for components, except certain iron and steel components must be produced in the U.S.
    - May also use manufactured construction material that is “wholly the product of” or that is “substantially transformed in a Recovery Act designated country”
  - “[U]se only unmanufactured construction material mined or produced in the United States, as required by the Buy American statute or, if trade agreements apply, unmanufactured construction material mined or produced in a designated country may also be used”

- Exceptions include:
  - Nonavailability
  - Unreasonable cost
  - Public interest
  - Impracticability
“Buy America” Provisions

- Federal Highway Administration, Federal Railroad Administration High Speed Rail Program and Federal Transit Administration funds may not be obligated unless steel, iron, and manufactured goods used in a construction project are produced in the United States.

- Exceptions include:
  - Public interest
  - Nonavailability
Compliance, Administration & Risks
Compliance & Administration

- Implement compliance program
  - Regular training
  - Written procedures and policies
  - Mandatory disclosure

- Administration
  - Identify which domestic restrictions apply to which contracts
  - Implement process and due diligence for making any determinations, and document such determinations
  - Keep good records; obtain records from suppliers
  - Track changes in supply chain; update or revise certifications where necessary
Compliance & Administration

- Accuracy is key
  - Do not overstate certifications
  - Do not make careless or reckless assumptions
Risks of Non-Compliance

- Bid protest
- Costs related to removing and replacing non-compliant construction materials
- Breach of contract or termination
- Government investigation or audit
- False Claims Act violations
- Suspension or debarment
Risks of Non-Compliance

Department of Justice

U.S. Attorney’s Office

Central District of California

FOR IMMEDIATE RELEASE

Wednesday, March 26, 2014

O.C. Firm Pays $500,000 To Resolve Allegations It Violated The Buy American Act By Selling Foreign-Made Medical Devices To Army

LOS ANGELES – Prosthetics supplier Ossur Americas, Inc. today paid the United States $500,000 to resolve allegations that the Orange County company supplied the Army with hundreds of foreign-made prosthetic, bracing and support products – while falsely certifying that all of its products were manufactured in the United States as required by federal law and its contracts with the military.
Risks of Non-Compliance

Department of Justice
Office of Public Affairs

FOR IMMEDIATE RELEASE

Tuesday, January 5, 2016

**Wisconsin Architectural Firm to Plead Guilty and Pay $3 Million to Resolve Criminal and Civil Claims**

The Department of Justice announced today that Wisconsin-based Novum Structures LLC (Novum) has agreed to enter a guilty plea and pay $3 million to resolve its criminal and civil liability arising from its improper use of foreign materials on construction projects involving federal funds. This use was in violation of contractual provisions implementing various domestic preference statutes, often referred to colloquially as the “Buy America” requirements. Novum specializes in the design and construction of glass space frames often used in roofs and atrium enclosures.
Risks of Non-Compliance

Buy American

(See also our Customs Fraud page)

Do You Know a Company Selling Foreign Products or Materials as American Made in a Government Contract?

This Violates the Buy America – Buy American and False Claims Acts
Contact Us With Any Questions

Sandy Hoe
shoe@cov.com
202-662-5394

Justin Ganderson
jganderson@cov.com
202-662-5422