



The Buy American Act and Trade Agreements Act: Understanding Federal Domestic Preference Requirements

A PilieroMazza Webinar

March 15, 2018

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About PilieroMazza

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Overview

- What are domestic preference laws and why should you care about them?
- When do these laws apply and what do they require?
- Small business and FSS contract issues
- Practical tips for ensuring compliance
- Q&A

Federal Domestic Preference Laws

- The federal government has a long-standing preference for the purchase of domestic products over foreign products
- **Buy American Act of 1933:** provides preferential treatment for purchase of domestic products and construction materials under federal government contracts
- **Trade Agreements Act of 1979:** implements trade agreements guaranteeing non-discrimination of eligible foreign products, while prohibiting the purchase of ineligible products and services
- **The Berry Amendment:** requires that certain DoD purchases (e.g, food, clothing, certain textiles and tools, and “specialty metals”) be entirely grown or produced in U.S.
- **Buy America:** various restrictions on purchases by state and local governments using certain federal grant funds requiring that certain products be produced or manufactured in U.S.

Why Should You Care About These Laws?

- Renewed focus by President Trump
 - Buy American and Hire American Executive Order (April 18, 2017)
 - Addressing Trade Agreement Violations and Abuses (April 29, 2017)
- Renewed focus in Congress
 - Proposed bipartisan legislation strengthening domestic preference laws
- Potential Impacts:
 - Changes to trade agreements
 - Changes to Country of Origin tests
 - Fewer exceptions and waivers
 - Increased compliance monitoring and enforcement actions

Compliance is Critical

- Non-compliance could have serious repercussions
 - Audits and investigations
 - False Claims Act exposure
 - Suspension and/or debarment
 - Termination for default and reprocurement costs
 - Negative past performance reviews
 - Vulnerability in post-award protests

Buy American Act of 1933 – Overview

- 41 U.S.C. §§ 8301-8305, implemented at FAR Part 25 & DFARS Part 225
- Favors the purchase of “domestic end products” and use of “domestic construction materials” on certain federal contracts performed in the U.S.
- In effect, works as a domestic preference (through price evaluation adjustment), not a prohibition
 - Does not prohibit federal agency from purchasing foreign end product if that product is cheaper even after price adjustment
 - Civilian agencies: low foreign offer increased by 6% or 12% depending on whether low domestic offeror is large or small business (FAR 25.105)
 - DoD acquisitions: 50% adjustment (DFARS 225.105)

BAA – Applicability

- Applies to all federal prime supply and construction (not purely service) contracts with estimated value above the micropurchase threshold, unless TAA applies
- Applies to certain types of contracts not covered by TAA (FAR 25.401). E.g.:
 - Arms, ammunition, war materials, or purchases indispensable for national security or national defense
 - Sole-source acquisitions
 - Small business set-asides
- Generally applies only to contracts for products to be used or construction to be performed in U.S.

BAA – Country of Origin Test

- Non-manufactured products (FAR 25.003)
 - To qualify as a “domestic end product,” must be mined or produced in U.S.
- Manufactured products – two part test to determine whether they qualify as “domestic end products” (FAR 25.003, 25.101)
 - 1) the item must be manufactured in the U.S.; **and**
 - 2) the cost of its components mined, produced, or manufactured in the U.S. must exceed 50% of the cost of all its components
- Commercially available off-the-shelf (“COTS”) items need only be manufactured in the U.S.; component test does not apply

BAA – Country of Origin Test

- Part 1 of COO test: defining “manufacture”
 - No statutory or regulatory definition
 - GAO standard:
 - Completion of the article in the form required for use by the Government
 - Operation whereby identity and character is established and fixed as to its current and future use
 - Need not involve substantial or fundamental change to physical character of the item (less stringent than TAA COO test)
 - Assembly of components may be sufficient to constitute “manufacturing” under BAA, but packaging is not
 - Standard applied on case-by-case basis

BAA – Country of Origin Test

- Part 2 of COO test: Component test – cost of domestic components must exceed 50% of total component cost
- “Component” defined as “an article, material, or supply directly incorporated into an end product or construction material” (FAR 25.003)
- Calculating component cost (FAR 25.003):
 - Purchased components = acquisition cost, including transportation costs and applicable duties
 - Manufactured components = all costs associated with manufacture of components (but not end product), including transportation and allocable overhead, but not profit
- Components with an unknown origin presumed to be foreign (FAR 52.225-2)

BAA – Exceptions

- An agency may acquire foreign end products if a specified exception applies (FAR 25.103)
- **Commercial IT** acquisitions
- **Unreasonable cost** of domestic end product
 - If domestic offer is not low offer, reasonableness is based on whether domestic offer exceeds low offer even after adjustment to low offer of + 6%/12% (depending on offeror's size)
- **Nonavailability** of domestic end products or components
 - Items not mined, produced, or manufactured in U.S. (1) in sufficient and reasonably available quantities, and (2) of satisfactory quality
 - Class determinations of nonavailability provided in FAR 25.105
 - Individual determinations made by agency

BAA – Exceptions

- **Public interest**

- Head of the agency may determine that domestic preference is inconsistent with public interest
- This exception applies when agency has an agreement with a foreign government that provides a blanket exception to BAA
- DoD procurements: “Qualifying country end products” are treated as domestic end products (DFARS 225.872-1, 252.225-7000(b)(2))

- **Products for commissary resale**

Trade Agreements Act of 1979 – Overview

- 19 U.S.C. 2511-2518, implemented in FAR Part 25
- Free trade agreements guarantee non-discrimination in government procurement among signatories
- Implements U.S. trade agreements such that “designated country end products or . . . services” are treated as though made in U.S. for TAA-covered procurements
- Designated countries (FAR 25.003)
 - WTO Government Procurement Agreement countries
 - Countries that have a FTA with the U.S.
 - “Least developed” countries
 - Caribbean Basic countries
- Notable non-designated countries: China, India, Turkey

TAA – Overview

- TAA establishes a prohibition, not a preference
 - Unlike BAA, TAA prohibits end products or services from non-designated countries
 - An offeror may still offer non-designated country products, but it must be disclosed and doing so likely will render those products ineligible (unless a basis for waiver exists)
- TAA effectively acts as a waiver of BAA

TAA – Applicability

- Applies to federal acquisitions whose estimated value meets or exceeds listed thresholds (FAR 25.402)
- Applicable threshold varies by agreement and type of procurement
 - WTO GPA threshold for supplies or services is \$180,000
 - WTO GPA threshold for construction is \$6,932,000
- Estimated value is based upon total value, including options

TAA – Rule of Origin

- Services (FAR 25.402(a)(2)):
 - Country in which the firm providing the services is established
 - GAO has held that “established” means incorporated or headquartered
- Products (19 U.S.C. 2518(4)(B)):
 - (1) country where the article or product is wholly grown, produced, or manufactured, or
 - (2) if an article consists of materials from multiple countries, country where the article “has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed”

TAA – Rule of Origin

- “Substantial transformation” test is fact-specific analysis based on totality of circumstances
- Determinative issue is the extent of operations performed and whether the parts lose their identity and become an integral part of the new article
- Key factors:
 - Extent of processing within a given country
 - Whether processing results in new name, character, and use
 - Resources expended on product design and development
 - Skill level required in manufacturing process
 - Key programming or customization that defines the product

TAA – Exceptions

- Exceptions (FAR 25.401):
 - Small business set-asides
 - Acquisitions of arms, ammunition, war materials, purchases indispensable for national security or national defense
 - Certain sole-source acquisitions
 - Acquisitions of end products for resale
 - Acquisitions from Federal Prison Industries and AbilityOne
 - Certain services, varying by trade agreement (transportation, utility, r&d, services supporting military services overseas)
- Waivers – agency has discretion to grant based on:
 - Nonavailability – FAR 25.502
 - DoD national interest – DFARS 225.403(ii)

BAA VS. TAA

	BAA	TAA
Effect	Preference (price adjustment for evaluation purposes)	Prohibition
Applicability: Contract Type	Federal prime contracts for supplies or construction	Federal prime contracts for supplies, construction, or services
Applicability: Contract Value	> Micropurchase threshold, unless TAA applies	≥ Applicable threshold in FAR 25.402
Country of Origin Test	1. Manufactured in US, AND 2. > 50% cost of all components from domestic components	Substantial transformation in U.S.
Exceptions/Waivers	<ul style="list-style-type: none"> • Commercial IT • Commissary resale • Nonavailability • Public interest • Unreasonable cost • Procurements under TAA 	<ul style="list-style-type: none"> • SB set-asides • Nat'l security purchases • Sole source • End products for resale • Certain services • FPI & AbilityOne • Nonavailability • DoD nat'l interest

BAA & TAA – Small Business Issues

- For small business set-asides, BAA applies – TAA does not
- SBA rules on small business manufacturing
 - A small business manufacturer must make the product in the U.S.
 - There can be only one manufacturer of a product: the concern which, with its own facilities, performs the primary activities in transforming inorganic or organic substances, including the assembly of parts and components, into the end item being acquired
- SBA rules on small business “nonmanufacturer”
 - Must resell a product made by a small business in the U.S.
 - SBA may issue a waiver that allows a nonmanufacturer to sell a product made by “any size business without regard to the place of manufacture”
 - Waiver does not affect BAA or TAA requirements that may apply

BAA & TAA – FSS Contract Issues

- All FSS contracts are covered by TAA, unless a SIN under a given schedule is a set-aside
- TAA and BAA applicability flow from the FSS contract down to the order level
 - TAA applies to orders placed under non-set-aside SINs
 - BAA applies to orders placed under set-aside SINs
- If a TAA exception applies, the CO must determine whether BAA applies and identify specific SINs to which it applies

Compliance Tips – Get Clarity on Applicability of BAA & TAA

- Review your solicitations and contracts, and make sure you understand which domestic sourcing requirements apply
 - BUT do not assume BAA/TAA do not apply if contract clause omitted
 - Agencies can make mistakes and include both BAA and TAA clauses
- Raise any questions regarding applicability with the procuring agency or prime contractor
- Consider a pre-award protest at GAO if BAA/TAA clauses are improperly included or omitted
- Need to be confident in the requirements before you submit your proposal and certifications

Compliance Tips – Get Clarity on Country of Origin

- CBP issues advisory rulings and final determinations on COO (19 C.F.R. Part 177, Subpart B)
- Advisory ruling: non-binding, non-reviewable, identifies COO legal principles without applying them to particular facts
- Final determination: binding, reviewable statement that applies law to particular facts
- Request must contain sufficient information “as will enable Customs to” render its ruling or determination
 - Request for final determination requires more detail, including description of the article, claimed COO, and specific procurement
- Ruling or determination is made “promptly”
- May seek judicial review within 30 days of a final determination by the Court of International Trade

Compliance Tips – Make Sure the Certification Is Accurate

- Be aware of the relevant FAR provisions and certifications
 - FAR 52.225-2, Buy American Certificate
 - DFARS 252.225-7000, Buy American Statute-Balance of Payments Program Certificate
 - FAR 52.225-6, Trade Agreements Certificate
 - DFARS 252.225-7020, Trade Agreements Certificate
- Unless contractor specifically lists a product as being non-compliant with BAA or TAA, it certifies that all products are compliant by default
- Consider whether an item can be classified as a component instead of a subcomponent (or vice versa)

Compliance Tips for Prime/Sub Relationships

- BAA/TAA is not a mandatory flow down
 - Primes need to determine if flow down is necessary and, if so, include the BAA or TAA in the subcontract
 - Prime contractor is ultimately responsible for compliance
- Best practices for primes when flow down is necessary
 - Prime should obtain certificate of compliance from its subcontractor
 - Subcontract should include appropriate risk-shifting provisions
 - How far does a prime need to go in investigating a subcontractor's compliance?
 - Be wary of making the determination of compliance for your subcontractor
 - Any reason to doubt your sub's certification?

Compliance Tips – Establish & Follow Internal Processes

- Develop internal policies and procedures
 - Who is responsible for ensuring BAA/TAA requirements are met?
 - What certification protocols must be followed?
 - What certifications are expected from subcontractors/suppliers?
 - How will subcontractor/supplier compliance be monitored?
- Train employees to identify which laws apply & relevant exceptions, waivers, and tests
 - Consider procuring agency, where products or services will be used, value of procurement
 - Identify end product and components, where they were manufactured or substantially transformed, and cost
- Maintain accurate records of origin of components and end products

Questions?

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