



# CONTRACT LAW DIVISION

Office of the Assistant General Counsel for Finance & Litigation  
A Lawyer's View of The Buy American Act

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## A Lawyer's View of the Buy American Act by Steven Carrara

### The Requirement To Buy American

As initially enacted the Buy American Act, 41 U.S.C. § 10(a), ("BAA") required that supplies for public use be manufactured in the United States substantially all from articles, material or supplies mined, produced, or manufactured in the United States. Although the BAA did not define the term "substantially all", Executive Order No. 10582, as amended by Executive Order Nos. 11051 and 12148, established that 50% of the component cost must consist of domestically produced items. The General Accounting Office ("GAO") has defined "manufacture" to mean the completion of the article in the form required by the Government, and assembly of the components necessary to transform an imported machine into a machine which meets the specifications where at least a significant number of assembly operations are performed in the United States. General Kinetics, Inc., B-242052.2, 91-1 CPD ¶ 445. There are, however, exemptions for supplies which are used outside the United States, unreasonably priced, not mined, produced, or manufactured in the United States in commercial quantities or supplies for which the agency head determines it is inconsistent with public interest to apply a domestic preference. FAR § 25.102. In considering whether prices are reasonable differentials of 6 to 12% are factored into evaluations. FAR § 25.105.



### Waiver of the BAA—TAA Restrictions

Pursuant to the Trade Agreement Act of 1979, 19 U.S.C. § 2501-2582, ("TAA") BAA restrictions were waived for signatory countries of the Agreement on Government Procurement negotiated within the General Agreement on Tariffs and Trade ("GATT"). Executive Order 12260 requires the U.S. Trade Representative to set the dollar threshold for application of the TAA. The waiver threshold is currently \$176,000. The waiver thresholds for Canada and Israel, however, are \$25,000 and \$50,000 respectively. FAR § 25.402(a) (2) and (3).

Waiver of the BAA restrictions created a free market economy in government procurements between GATT signatory countries. Supplies from signatory countries became eligible for US procure-

ments, without prejudice, so long as they were manufactured or substantially transformed in a signatory country. Price differentials, however, continue to apply to end products from non-signatory countries or for procurements below the dollar thresholds.

### Resurrection of The Buy American Act

Confronted with a rising trade deficit, in 1988, Congress amended the Buy American Act to prohibit the procurement of supplies from (1) GATT signatory countries that are not in good standing, or (2) countries which maintain, in government procurement, a significant and persistent pattern of discrimination against the United States. The President is required to identify non-compliant countries to Congress and additional duties may be imposed should the non-compliance failed to be addressed. Although no duties have yet been imposed pursuant to this provision, its potency has been influential in conducting trade negotiations.

### FAR Prejudiced American Firms

In implementing the latest revisions to the BAA and TAA, the FAR actually created a bias against American companies offering supplies substantially transformed in the US from foreign produced components. While signatory countries were able to offer supplies substantially transformed in a signatory country, FAR clause 52.225-9 required American companies to offer supplies consisting of 50% domestically produced component parts before the product could be considered a domestic end product. Signatory countries, however, were only required to offer supplies which were substantially transformed in a signatory country, a lower standard. This conflict was addressed in the protest of International Business Machines Corp., GSBCA No.10532-P, 90-2 BCA ¶ 22,824, where the Board invalidated the FAR clause 52.225-9 and held that American companies

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could offer supplies composed of less than 50% domestic component providing that the end product was substantially transformed in either the United States or other signatory country. In response to the FAR's failure to rectify this discriminatory practice, the Department's Office of Procurement issued a FAR deviation in HCO MEMO 92-28 which is consistent with the Board's holding. Consequently, from a trade prospective, Contracting Officers may consider products manufactured or substantially transformed in either the United States or designated TAA country.

### Determining BAA and TAA Compliance

Compliance with the BAA and TAA 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. We are, however, unaware of any such criminal cases at this time.

As compliance with the BAA and TAA is a matter which affects the evaluation process and resulting award, the GSBCA, (in Brooks Act procurements) will consider challenges to an offerors' certifications as part of the Board's bid protest jurisdiction. The Board will review a Contracting Officer's decision de novo to determine whether it is consistent with statute, regulation and terms of the solicitation. Rocky Mountain Trading Co.-System Div., GSBCA No. 10894-P, 91-1 ¶ 23,619. Although GAO has generally treated such protests as a matter of contract administration, it has been moving in the Board's direction by accepting protest jurisdiction based on the impact on evaluations and contract award. Unlike the Board's de

novo review, GAO will only review a Contracting Officer's determinations addressing BAA and TAA compliance to determine if they are reasonable. Autospin, Inc., B-233778, 89-1 CPD ¶ 197.

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. 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 meet the specifications by adding a protocol converter and replacing programmable read only memory chips. The second, non-secure 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.

### Products Eligible for Award

Thus, for procurements in excess of the threshold, currently \$176,000, products manufactured or substantially transformed in either the United States or other eligible country are eligible for US procurements without prejudice. If there is any doubt with respect to an offeror's BAA and TAA certification, the Contracting Officer should look beyond the self certification to determine whether the products are compliant. Products from another origin may only be eligible for award, where after the price differentials are applied, the costs are less than the lowest priced eligible offeror or one of the other exemptions discussed is applicable. Finally, it is important to note that these acts apply to the characteristics of the supplies rather than an offeror's origin. Thus, where foreign offerors provide supplies consistent with the BAA and TAA they are eligible for contract award. *finis*

