

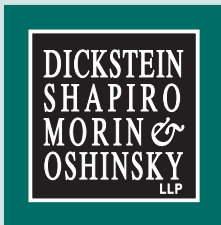


THE ADVISOR

Timely legal and business information for government contractors.

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Our attorneys guide clients through the maze of regulations to maximize a company's ability to secure government contracts. If you would like more information on this issue or any other government contracts issue, please contact us.

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What You Should Know About the Buy American Act

The Buy American Act is in the news. In February 2005, Senator Russell Feingold introduced a bill to strengthen the Buy American Act (BAA), and others have done so in the House. In May 2005, the House passed measures in the 2006 appropriations bills for the Departments of Defense (DoD) and Homeland Security that would apply the BAA to all Homeland Security procurements and limit DoD's authority to grant BAA exemptions to certain countries. The Senate may not agree to these provisions, having disfavored such amendments in the past.

The influence of the BAA, enacted during the Great Depression, has been greatly diminished by successive free trade agreements. However, the BAA still applies to many procurements and solicitations, including some major programs such as the Joint Strike Fighter and the Marine One presidential helicopter. When Lockheed Martin won the award to build the new helicopter fleet in January 2005, special attention was paid to its compliance with BAA provisions, given its widely reported partnership with foreign companies. Bills were introduced in Congress seeking to reverse the award, adding to the legislative interest in the BAA.

I. The Buy American Act

The Buy American Act, 41 U.S.C. §§ 10a-10d, and its implementing regulations restrict Government purchases of supplies to "domestic end products." FAR § 25.001. A "domestic end product" is defined as (1) an unmanufactured end product mined or produced in the United States, or (2) an end product manufactured in the United States, if the cost of its components mined, produced, or manufac-

ured in the United States exceeds 50 percent of the cost of all its components. FAR § 25.003.

"End product" is defined in FAR § 52.225-1 as "those articles, materials, and supplies to be acquired under the contract for public use," and a solicitation may specify evaluation on a line-item or group basis. FAR § 25.501. The BAA requirements apply to products for public use inside the United States. FAR §§ 25.001, 25.102. There are numerous exceptions to the BAA. FAR § 25.103. A contracting officer (CO) may acquire a foreign end product without regard to the BAA if: the agency head grants a waiver; the end product is not mined, produced, or manufactured in the United States in sufficient quantity and quality (nonavailability); or the cost of the domestic end product is unreasonable.

For evaluation purposes, a domestic end product is compared to a foreign end product for price reasonableness by the addition of six percent to the price of the foreign end product (12 percent if the domestic offer is from a small business). FAR § 25.105. In DoD procurements, 50 percent is added to the foreign offer. DFARS § 225.105.

A separate set of BAA requirements specifies domestic construction materials for use in contracts for construction in the United States. Slightly different BAA rules apply to DoD through the Defense FAR Supplement (DFARS). Other agencies may have additional agency-specific rules that are based on the FAR.

The Buy American Act does not apply to purchases below the micro-thresh-

old of \$2,500 or less. 41 U.S.C. § 428. As discussed below, the BAA also does not apply above certain dollar thresholds.

II. The Trade Agreements Act

The BAA does not apply in acquisitions subject to certain trade agreements. The Trade Agreements Act (TAA), 19 U.S.C. § 2501 *et seq.*, adopted the General Agreement on Tariffs and Trade (GATT) in 1979. As amended, this law implements the World Trade Organization Government Procurement Agreement (WTO GPA) and various Free Trade Agreements such as NAFTA and others.

The TAA allows the President to waive the BAA for certain goods from certain designated countries. While the BAA imposes an evaluation penalty on foreign offers but allows their selection, the TAA bars offers from countries not designated (unless compliant offers are not received or are insufficient for procurement needs). FAR § 25.403(c). Under the TAA, only U.S.-made end products or eligible products from designated countries may be acquired.

A U.S.-made end product is “an article that is mined, produced, or manufactured in the United States or that is substantially transformed in the United States.” FAR § 25.003. Eligible products include products from designated WTO GPA countries, Free Trade Agreement countries, least-developed countries, and Caribbean Basin countries. FAR § 25.003. The U.S. Defense Department maintains additional international agreements exempting “qualifying countries,” which are implemented through the DFARS. If a U.S.-made end product is not also a domestic end product, agency-specific rules may apply the BAA evaluation differential. FAR § 25.502(b)(2).

The TAA FAR provisions apply to contracts for supplies, construction, and services for use inside and outside the United States. COs must apply the evaluation procedures to each line item of an offer unless the

solicitation or the offer specifies evaluation on a group basis. FAR § 25.501(a).

TAA Application; Dollar Threshold

The TAA applies to procurements above a certain dollar threshold. These thresholds may be revised every two years by the U.S. Trade Representative. Countries covered by the WTO GPA (and Morocco) are exempted from the BAA in supply contracts equal to or exceeding \$175,000, and the TAA also applies to service contracts at that level. The TAA applies to Canada, Mexico, Chile, Singapore, and Australia for supplies and services (and to Israel for supplies) at levels between \$25,000 and \$58,000. The TAA applies to construction contracts equal to or exceeding \$6,725,000 for WTO GPA and other countries, and at a higher level for NAFTA countries. FAR § 25.402.

If, in any 12-month period, recurring or multiple awards for the same type of product are anticipated, the total estimated value of these projected awards is used to determine whether the WTO GPA or an FTA applies. FAR § 25.403(b)(3).

The TAA has its own set of exceptions, which include, among others, certain services, acquisitions set aside for small businesses, acquisitions “indispensable for national security or for national defense purposes,” and acquisitions of end products for resale. FAR § 25.401. If the TAA does not apply, the BAA may apply, unless the procurement is subject to another BAA exception.

Substantial Transformation

Under the TAA, the rule of origin provides that an article is the product of a particular country if (1) the article is “wholly the growth, product, or manufacture of that country,” or (2) where an article consists “in whole or in part of materials from another country,” 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 so transformed.” 19 U.S.C. § 2518(4)(B); FAR § 25.003.

Thus, a product is a designated country end product if substantially transformed in that country. Unlike the BAA manufacturing test, the TAA “substantial transformation” test does not depend on the relative value of the components. A product that is substantially transformed may not necessarily meet BAA requirements if the BAA applies. The Bureau of Customs and Border Protection in the Department of Homeland Security, which includes the former U.S. Customs Service, may issue advisory opinions on whether a product has been substantially transformed, pursuant to 19 C.F.R. § 177.21 *et seq.* Rulings on substantial transformation are made by the Bureau of Customs and Border Protection, and by GAO and the courts on a case-by-case basis.

Proposed Rule Exempting COTS

On January 15, 2004, a Notice of Proposed Rulemaking sought comments regarding a Proposed Rule that would render the BAA and TAA inapplicable to Commercially Available Off-the-Shelf (COTS) items. The rule remains pending in rulemaking proceedings.

III. Contractor Certification

The BAA and TAA require contractors to certify compliance. The CO should indicate in each solicitation whether or not the BAA or TAA applies, by indicating which contract clauses in FAR Part 52 apply. These clauses include certifications of compliance that allow a contractor to identify those end products that are not domestic end products under the BAA, and those products that do not originate within a designated country under the TAA. A false certification may expose a contractor to suspension, debarment or other administrative sanctions, or criminal penalties. The BAA can apply by operation of law in some purchases even if the CO fails to incorporate it. This heightens the need for vigilance over compliance by bidders.

New Rights for Federal Workers

The Federal Aviation Administration's (FAA) Office of Dispute Resolution for Acquisition (ODRA) recently issued an important opinion that gives standing to federal employees to challenge outsourcing decisions in public-private competitions under Office of Management and Budget Circular A-76.

ODRA held that the President of the National Association of Air Traffic Specialists (NAATS) has standing to challenge the FAA's award of a \$1.9 billion contract to a private company to outsource 2,500 jobs. [Contests of Agency Tender Official James H. Washington and Kate Breen, Agent for a Majority of Directly Affected FAA Employees, ODRA Docket Nos. 05-ODRA-00342C and 343C.]

The FAA is exempt from the Competition in Contracting Act. Therefore, the Government Accountability Office (GAO) does not have jurisdiction to hear protest and contract disputes relating to FAA procurements. The FAA established ODRA, an independent office within the agency, as the adjudicative forum for protests and disputes arising out of contracts entered into under the FAA's Acquisition Management System. ODRA is the FAA's corollary to GAO for adjudication of protests or "contests" of A-76 procurements. ODRA's decisions may be appealed directly to the U.S. Court of Appeals for the District of Columbia Circuit.

In addition to a private sector offeror, ODRA's Procedural Rules

for Contests of A-76 Competitions allow a contest to be filed by the Agency Tender Official (ATO), who submits an offer on behalf of the government bidding unit, as well as by a single individual appointed by a majority of directly affected FAA employees as their agent.

ODRA's decision on standing is broader than the recent GAO rule implementing a provision of the fiscal 2005 Defense Authorization Act. That rule allows GAO to hear protests by an ATO in connection with an A-76 procurement involving commercial activities performed by more than 65 full-time equivalent employees. It also allows a person representing the majority of agency employees to be an "intervenor" in an ATO protest at GAO.

By contrast, ODRA's rule is applicable regardless of the number of affected employees. Moreover, unlike the GAO rule, which allows the employees to "intervene" only in an ATO contest, ODRA's rule allows the affected employees to file a separate and independent contest on their behalf.

This is a significant distinction. Under the GAO rule, the employees may request that the ATO file a contest, but there is no requirement that the ATO do so. Indeed, the ATO often has little incentive to file a contest because the ATO typically is a manager whose job

is not subject to being contracted out. Even if the ATO does file a contest, the grounds that are raised may not include matters that are of particular interest to a union or the employees.

The importance of ODRA's rule is that it recognizes the complementary and distinct interests of the employees and the ATO, and gives a separate voice to the employees whose lives are directly affected by the outsourcing decision.

Congress should follow ODRA's example and give full participatory rights to federal employees in public-private competitions.

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If you would like to receive future issues of *The Advisor* via e-mail, please contact MaryBeth Mora at MoraM@dsmo.com.

Ervin & Associates, Inc. v. United States:

A Reminder to Contractors That the Rights in Data Clause Will Be Strictly Enforced

Earlier this year, the Federal Circuit affirmed without opinion *Ervin & Associates, Inc. v. United States*, 59 Fed. Cl. 267 (2004), the first case in the U.S. Court of Federal Claims interpreting the Federal Acquisition Regulation (FAR) Rights in Data clause. The *Ervin* decision puts government contractors on notice to follow the guidelines of the data rights clause, 48 C.F.R. § 52.227-14, when they enter into contracts that contemplate providing data to the Government. The clause provides broad intellectual property rights to the Government, but also allows a contractor to preserve certain rights.

Ervin was a small contractor for the Department of Housing and Urban Development (HUD). HUD issued a Request For Proposals (RFP) for collection, review, and analysis of financial statements relating to HUD projects. The Statement of Work defined requirements for the contractor's performance. *Ervin* submitted a proposal that detailed its technical capabilities and its plans for performance, and that proposal was incorporated into the contract upon award, a standard practice during government contract formation.

Ervin created a database that contained and analyzed all information from HUD's hard copy financial statements. HUD asked for the data at issue, received it subject to certain objections, and ultimately shared it with third parties. As discussed in the trial court's decision, the Government argued that *Ervin's* proposals promised the

creation of data beyond that called for by the RFP. For its part, *Ervin* argued that the data at issue was not required by the contract, was created at private expense, and was provided on the condition it would not be disclosed outside HUD. The court held that the provision of data was required by the contract, that the data was "first produced" under the contract, that the data rights clause provided the Government with unlimited rights, and that no copyright infringement occurred. See 59 Fed. Cl. at 290-303.

FAR Subpart 27.4 governs "Rights in Data and Copyrights," and § 27.409 requires the use of the "Rights in Data-General" clause at § 52.227-14 "in solicitations and contracts if it is contemplated that data will be produced, furnished, or acquired under the contract[.]" Other related clauses also may be used. The Rights in Data clause provides the Government with unlimited rights in "data first produced in the performance of [the] contract," certain other categories, and "all other data delivered under [the] contract unless provided otherwise for limited rights data or restricted computer software in accordance with paragraph (g) of this clause."

Under paragraph (g), if the contract requires the delivery of "limited rights" data or "restricted rights" software, the contractor must identify that data with certain restrictive legends set forth in the data rights clause. To qualify for this protection, the contractor must be able to demonstrate that the data was

developed at private expense. Under paragraph (b)(2) and (c), where the Government gains unlimited rights, the contractor also retains title and certain rights, including the ability to use, distribute, and copyright the data, although the CO's permission may be required to copyright, and a license may be required for the Government. Under paragraph (e), when the contractor informs the Government of limited or restricted rights, the CO may challenge this designation. Under paragraph (f), data provided without the authorized notices is deemed unlimited rights data.

Contractors who wish to preserve all rights in proprietary data should strictly follow the guidelines in the Rights in Data clause, attaching the proper notice whenever proprietary data is provided to the Government. While *Ervin* was decided upon its particular facts, future cases could hold that data is subject to unlimited rights based upon provisions in the RFP and/or representations in the proposal that forms the basis for the contract award. Therefore, if any data discussed, presented, or proposed for creation within the proposal is considered to be proprietary, contractors should clearly identify it as such. Once performance begins, contractors should continue to invoke the Rights in Data clause whenever the proprietary data is provided. Please contact Dickstein Shapiro if you have any questions regarding the Rights in Data clause.

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