

GAO report shows that agencies buy only a small percentage of non-American goods, but Buy American Act implementation remains a challenge

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In December 2018, GAO released a report¹ analyzing federal agency implementation of the Buy American Act (“BAA”), 41 U.S.C. §§ 8301-8305. As we have previously reported,² BAA enforcement is an area of focus for the Trump Administration, which has repeatedly emphasized the need to “Buy American and Hire American,” including in an April 2017 executive order.³

And for government contractors, compliance with the BAA and other domestic sourcing regimes also has been an increasingly common subject of litigation, particularly under the civil False Claims Act, as we have detailed⁴ in this space.⁵

In keeping with this Buy American focus, GAO was commissioned to report on (A) the extent to which federal agencies procure non-domestic end products through the use of BAA exceptions and waivers, and (B) the ways in which the government’s largest buyers provide training and guidance to implement BAA requirements.

Although GAO found that only a relatively small percentage of goods purchased were foreign end products, GAO also found that this number could have been misstated due to reporting errors and system limitations.

Moreover, GAO found that the level of BAA training varied significantly among the agencies it canvassed.

GAO’s findings, which are discussed in greater detail below, offer a window into the government’s view of its own compliance with the BAA’s complex and often confusing regulatory scheme.

LESS THAN 5% OF THE POTENTIALLY BAA-COVERED END PRODUCTS PURCHASED WERE OF FOREIGN ORIGIN

Although BAA establishes a preference for domestic end products, there are circumstances where agencies are not required to afford preferential treatment to domestic end products.

First, the BAA does not apply to products purchased for use outside of the United States (although for DoD contracts, the Balance of Payments Program may impose BAA-type restrictions overseas).

Second, the Trade Agreements Act (“TAA”), 19 U.S.C. § 2501, permits agencies to waive the BAA and procure end products that

are manufactured in foreign countries with which the United States has negotiated a trade agreement (provided that procurement is above a certain dollar threshold).

Third, the FAR and DFARS include certain exceptions to the BAA — for example, the FAR allows a contracting officer to bypass the BAA if he or she determines that the item is not “reasonably available” in the U.S. or the cost of an end product is “unreasonable.” FAR § 25.103(b), (c).

Similarly, the DFARS permits the purchase of products from certain “qualifying countries” where, due to memoranda of understanding or other international agreements, it would not be in the public interest to enforce the BAA. See DFARS § 225.872-1(a).⁶

When GAO reviewed the \$196 billion of potentially BAA-covered end products purchased by the government in fiscal year 2017, it found that only \$7.8 billion — or less than 5% — of the reported amount was spent to purchase foreign end products that fit into one of the BAA exceptions or waivers.

More than 80% of that \$7.8 billion figure — roughly \$6.4 billion — was for products purchased by the DoD. Almost all of those DoD purchases were for use outside of the United States or otherwise came from a qualifying country.

The civilian agencies, by contrast, made use of a wide variety of means to purchase foreign goods — including, for example, TAA waivers and the FAR unreasonable cost exception.

THE GOVERNMENT’S REPORTING SYSTEM HAS LIMITATIONS

GAO’s report notes, however, that the data reviewed was less-than perfect, due to potential coding errors. When agencies purchase products, they are required to enter information regarding the place of manufacture into the Federal Procurement Data System-Next Generation (“FPDS-NG”). If the purchase is for a foreign end product, the agency also reports the applicable waiver or exception.

GAO used this FPDS-NG data to determine the total amount spent on foreign end products. However, GAO also found that agencies made mistakes when entering information into FPDS-NG.

More specifically, GAO reviewed 38 contracts from the government's four largest buyers of end products covered by the BAA — DoD, the Department of Health and Human Services ("HHS"), the Department of Homeland Security ("DHS"), and the Department of Veteran's Affairs ("VA") — and found that mistakes were made with regards to six of these contracts.

These mistakes included recording the wrong exception or waiver, as well as misidentifying the country from which an end product was sourced. For example, DHS mistakenly stated that it purchased aircraft parts manufactured in the United States, even though the file documentation showed that the parts were manufactured in Italy.

TRAINING VARIES BY AGENCY

GAO also found that DHS, DoD, HHS, and the VA varied in their approach to BAA training and guidance. DoD and DHS contracting officers reported that they had received helpful training, while HHS and VA contracting officials described confusion due to a lack of resources. This may have been based on the different training curricula promulgated within the agencies.

In 2017, DoD elected to "re-emphasize" BAA training and guidance, such that 18,000 employees were expected to have completed a BAA training course by the end of September 2018. DHS similarly required BAA-specific training in 2017, and reported that 1400 employees (or 94% of the contracting staff) had completed the BAA training course by April 2018.

On the other hand, the VA and HHS were not so proactive. The VA issued guidance in 2017 requiring reviews of awarded contracts to ensure BAA compliance, but lacked any BAA-specific training for its personnel. HHS also lacked any agency-level BAA training or guidance.

Based on these findings, GAO recommended that both the VA and HHS develop and implement BAA training for their employees.

KEY TAKEAWAYS FOR CONTRACTORS

GAO's report is further evidence that the government remains focused on ensuring BAA compliance. The report paints a picture of largely consistent BAA enforcement and compliance, but there are real questions about the consistency of the underlying data and the ability of certain agencies to adequately train their staff on BAA requirements.

And while agencies are required to report data regarding country of origin, it is contractors who are required to certify the country of origin of the end-products they supply to the government — and it is contractors who bear the consequences of any inaccurate certifications, which can be severe.

As such, contractors would be well-served by continuing to take steps to understand and satisfy the BAA and other domestic sourcing requirements imposed by contract.

NOTES

¹ <https://bit.ly/2Rv4Qlf>

² <https://bit.ly/2N4FaOh>

³ <https://bit.ly/2SP3Qzl>

⁴ <https://bit.ly/2GHGvsZ>

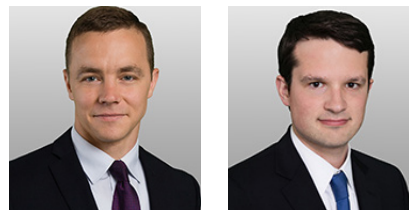
⁵ <https://bit.ly/2TKU7HO>

⁶ It should be noted, however, that the "qualifying countries" identified in the DFARS are largely covered already by the Trade Agreements Act waiver, provided that the procurement in question exceeds the specified TAA threshold.

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