

DECODING THE BUY AMERICAN REGIME

This article was originally published in *Contract Management* on February 2010.

by Todd J. Canni



Todd J. Canni

Public Practices
+1.202.663.8088
todd.canni@pillsburylaw.com

Todd J. Canni is a partner in Pillsbury's Government Contracts & Disputes practice and is located in the Washington, DC office.

The phrase “Buy American” resonates with most of us, especially in light of congress’s recent enactment of the American Recovery and Reinvestment Act (ARRA), which was hailed as the elixir needed to cure the ailing economy by preserving and creating American jobs.¹

As if it was not difficult enough for contractors to navigate the pre-existing legal landmines associated with the Buy American Act (BAA) and Trade Agreements Act (TAA)-violations of which may result in contract price adjustments, contract termination, and the dreaded False Claims Act liability, among other negative consequences—the ARRA’s “Buy American” requirements have only made matters worse and intensified contractor concerns as to when the government may procure foreign-made products. With the sole aspiration of decoding the Buy American regime and placing the ARRA’s Buy American provision in context, this article was born.

Buy American Act

In order to understand the post-ARRA legal environment in which we find ourselves, we must first explore the pre-existing legal landscape, which continues to govern, in part, today. In 1933, similar to the impetus for the ARRA, Congress enacted the BAA to save and create jobs for American workers.² The BAA

establishes a domestic preference for the use of articles, materials, and supplies manufactured in the United States when acquired by the federal government.³ The BAA only applies (1) to supplies acquired by the federal government for use in the United States where the contract exceeds the micro-purchase threshold; and (2) to contracts for the construction, alteration, or repair of any public building or public work in the United States.

Products protected by the BAA’s domestic preference are referred to as *domestic end products*. To be classified as a such, the end product must satisfy a two-part test. First, the supply must be manufactured in the United States, and second, the cost of domestic components comprising the supply must exceed 50 percent of the cost of all components. This component test however does *not* apply to acquisitions of commercially available off-the-shelf (COTS) items.⁴ While the BAA establishes a preference for domestic products, it does *not* create an absolute requirement as is often misperceived. In fact, several exceptions exist that empower the government to acquire foreign-made products without violating the BAA, including the unreasonable cost, nonavailability, and public interest exceptions as will be discussed.

Unreasonable Cost

The BAA preference need not be applied where the cost of the domestic end product is “unreasonable,” which is determined by applying an evaluation factor to the price of the low foreign offer. The *Federal Acquisition Regulation (FAR)* applies a six-percent evaluation factor where a large business domestic offeror is involved and, in an effort to give small businesses a fighting chance, a 12-percent evaluation factor where a small business domestic offeror is involved. Thus, the low foreign offer with a \$100 price point would be evaluated at \$106 or \$112 depending upon the size of the lowest-priced domestic offer. If the foreign offer remains the low offer even after the evaluation factor is applied, the government may make award to the foreign offeror. Agencies may apply different evaluation factors.⁵ For example, the Department of Defense (DOD) applies a 50-percent evaluation factor to the low foreign offer, which really places foreign offers at a disadvantage.⁶

Nonavailability

The BAA domestic preference need not be applied where the product desired by the government is not reasonably available in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quantity.

Public Interest

Finally, the BAA preference need not be applied where its application would not be in the public interest. Thus, while the BAA is a force to be reckoned with and may act as a barrier to doing business with the government in certain instances, several exceptions do exist and should be considered.

Additionally, the TAA, as will be discussed further, waives the BAA preference for certain designated countries and thus, should be considered before abandoning all hope of selling foreign-made products to the federal government.

Trade Agreements Act

In 1979, Congress enacted the TAA to implement various trade agreements to which the United States is a party.⁷ These trade agreements were designed to reduce non-tariff barriers to international trade, such as the BAA's domestic preference. Importantly, the TAA waives application of the BAA to end products *from designated countries that are parties to certain trade agreements*. Products from these countries are referred to as *designated country end products* and, are *treated the same as domestic end products for evaluation purposes*. In other words, the government may acquire products from designated countries as if they are United States-made products.

A product is a designated country end product if it is “wholly the growth, product, or manufacture of the designated country.”⁸ Where the article in question consists in whole or in part of materials from a nondesignated country, however, it may nonetheless qualify for the TAA waiver where it has been “substantially transformed” in a designated country 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.⁹ Unlike the BAA test for domestic end products, the TAA does not apply a component test. Thus, arguably, designated country end products are treated more favorably than domestic

end products given there is no component test.

Designated country end products include World Trade Organization Government Procurement Agreement (WTO GPA) country end products, Free Trade Agreement (FTA) country end products, least developed country end products, and Caribbean Basin country end products. FAR 25.003 identifies the countries that are parties to each of these agreements

Adding another layer of complexity to the determination of whether you may waive application of the BAA, after confirming that the end product is from a designated country, the next step is to determine whether the acquisition equals or exceeds the requisite dollar threshold associated with the particular trade agreement involved. FAR 25.402 identifies the various dollar thresholds applicable to each trade agreement. Notably, there is a distinct dollar threshold for supply contracts and construction contracts. For example, where the designated country end product is from a WTO GPA country, the supply contract threshold is \$194,000 and the construction contract threshold is \$7,443,000, meaning that to apply the TAA waiver, the acquisition amount must exceed \$194,000 for supply contracts and \$7,443,000 for construction contracts. Most of the dollar thresholds are subject to revision by the U.S. Trade Representative every two years. While most federal agencies are subject to these trade agreements, it is imperative that you confirm that the agency administering the acquisition is in fact subject to the applicable trade agreement before making any representations concerning your products. Note: there are several limited exceptions to the TAA.¹⁰

Therefore, before concluding that the TAA waiver applies to your end products, you must: (1) determine whether your product is from a designated country, (2) determine whether the applicable acquisition dollar threshold is satisfied; and (3) confirm that the agency administering the acquisition is subject to the particular trade agreement you intend to rely upon. If your answer to all three questions is “yes,” the BAA likely presents no barrier.

American Recovery and Reinvestment Act

Just when you thought you had finally mastered the BAA-TAA landscape, Congress goes ahead and passes the ARRA. Without further ado, Section 1605 of ARRA contains the Buy American requirements that caused significant uproar from our foreign trading partners and anti-protectionist groups. Unlike the BAA, which pertains to supply and construction contracts, the ARRA's Buy American provision *only applies* to projects for the construction, alteration, maintenance, or repair of a public building or public work (for efficiency, referred to as “construction projects.”) Additionally, ARRA only applies to such construction projects *where ARRA funds are used*. Therefore you are likely free and clear of the ARRA, unless a construction project is involved *and* ARRA funds are utilized. The BAA, however, may nonetheless still apply to your acquisition so check the solicitation or inquire with the administering agency.

The ARRA requires that all iron, steel, and manufactured goods utilized for the construction project must be manufactured in the United States. Importantly, ARRA's Buy American requirements eliminate

the component test for *all* products, unlike the BAA which only eliminates the component test for COTS items. This means that the ARRA's Buy American requirements are less stringent than the BAA for non-COTS items. This means that the ARRA's Buy American requirements are less stringent than the BAA for non-COTS items.

Notably, and as previously mentioned under the TAA discussion, dropping the component test altogether may level the playing field, thereby ensuring that domestic end products and designated country end products compete on equal terms.

Similar to the BAA, the ARRA also provides for three exceptions where the ARRA's Buy American provision need not be applied: (1) where it is in the public interest; (2) where the iron, steel, or manufactured goods are not reasonably available in the United States in sufficient quantities and satisfactory quality; and (3) where the inclusion of the domestic end product will increase the price of the overall project by more than 25 percent. Thus, the only noteworthy difference between the ARRA and the BAA exceptions is the test for determining whether the cost is unreasonable. Unlike the BAA, which applies either a six-percent or 12-percent evaluation factor to the price of the low foreign end product, under the ARRA *the price of the domestic end product is only unreasonable where its inclusion will increase the price of the overall project by more than 25 percent*.

In an effort to ensure compliance with the international obligations of the United States under trade agreements, and perhaps avoid significant international backlash and resulting

trade wars, Congress ultimately opted to require that Section 1605(d) of the ARRA be “applied in a manner consistent with United States obligations under international agreements.” As previously discussed with regard to the TAA waiver, to be eligible, the country of manufacture for the end product must be subject to an international agreement and thus be considered a designated country. Unlike the BAA, however the ARRA excludes Caribbean Basin countries from the TAA waiver.¹¹

In addition, because ARRA only applies to construction projects, you need only consider the acquisition threshold associated with construction projects. (i.e., the must larger figures.) Similarly, the particular agency administering the contract must be subject to the applicable trade agreement in order for the waiver to apply. Given that the ARRA's Buy American requirements *reach beyond the federal government level to state and local governments*, this is an issue that will add complexity to the analysis. To assist in making this determination, the Office of Management and Budget (OMB) has issued guidance identifying the state and local agencies subject to each of the various trade agreements.¹² While the ARRA's Buy American requirement has a narrower focus than the BAA, as it is limited to construction projects, overall the analyses are very similar to that employed in the classic BAA-TAA context.

While the ARRA added another piece to the existing Buy American puzzle, thereby creating additional confusion and anxiety, for the most part it is handled very similarly to the BAA. For those familiar with the existing BAA

Public Practices

and TAA landscape, the ARRA's Buy American requirements should not cause too many more sleepless nights. The ARRA's most significant impact on the procurement community, and perhaps by congressional design, is in applying Buy American requirements to state and local governments, many of whom are not subject to international agreement and, thus, may restrict their acquisitions to domestic end products unless an exception applies.

There is no question that the Buy American regime is complex and somewhat confusing. The

take-away from this overview is that the Buy American requirements set forth in the BAA and ARRA are not *per se* rules that mandate that the government only procure domestic end products. Rather, they are domestic preferences and are subject to exceptions and waiver under various trade agreements. Additionally, and complicating the analysis further, is the fact that each agency, as previously mentioned with regard to the DOD, may muddy the waters by issuing supplemental regulations that vary the general landscape.

Finally, avoid attempts to generalize the analyses required by the Buy American Act, ARRA, and TAA. Each transaction must be assessed independently on the basis of the unique facts and circumstances surrounding it. While this may not be an area of the law that is easily accessible given the labyrinth of statutory and regulatory twists and turns, and thus, does not lend to hard and fast rules, the principles discussed here provide sufficient guidance to allow contract managers to identify critical issues requiring further analysis and consideration.

Endnotes

- ¹ Pub. L. 111-5.
- ² 41 U.S.C. §§ 10a-d; Federal Acquisition Regulation (FAR) Part 25.1, 25.2.
- ³ The BAA applies to the federal government, the District of Columbia, Puerto Rico, American Samoa, the Canal Zone, and the Virgin Islands. See 41 U.S.C. § 10C.
- ⁴ FAR 25.100.
- ⁵ FAR 25.105.
- ⁶ *Defense FAR Supplement (DFARS)* 225.105
- ⁷ 19 U.S.C. § 2501. et seq.
- ⁸ FAR 25.003.
- ⁹ FAR 25.003. Defining, for example, World Trade Organization Government Procurement Agreement (WTO GPA) country end product.
- ¹⁰ FAR 25.401.
- ¹¹ Although outside the scope of this article, it is worth mentioning that separate "Buy America" rules govern the Department of Transportation, Federal Highway Administration's acquisitions using ARRA funds, which are not subject to the TAA waiver. (23 CFR § 635.410.) In essence, and although some exceptions may exist, the same general "Buy America" rules that governed pre-ARRA pertain to post-ARRA acquisitions using ARRA funds.
- ¹² 2 C.F.R. part 176, subpart B, Appendix.

