



Domestic Sourcing in Government Contracts



Karri Palmetier



As a WOSB/SDVOSB, I understand the entrepreneurial spirit of small businesses and appreciate the difficulties faced when entering the government contract arena.

I look forward to becoming a strategic partner and trusted advisor for my clients. I do this by learning the details of my clients' businesses so I can provide the most authentic and effective legal and practical advice for business strategy and operations. My preventative focus helps minimize disputes and adverse situations and may even increase your company's efficiency.

My Primary Practice areas are:

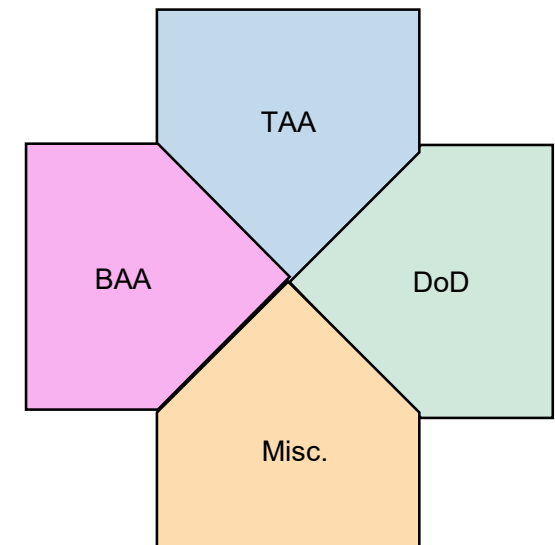
- Small Business Requirements
- Data Rights and Patents
- Ethics Programs
- Contract Administration and Terms/Conditions
- Commercial Item Status
- Subcontract Management
- Non-FAR Contracts
- Compliance and Training

This presentation has been prepared for information purposes and general guidance only and does not constitute professional advice. You should not act upon the information contained in this publication without obtaining specific professional advice.

Protections exist which grant products with domestic content, or certain favored countries, preference or exclusive access to government contracts.

Laws and Regulations:

- Buy American Act
- Trade Agreements Act
- Annual appropriations/authorization acts
- Executive orders

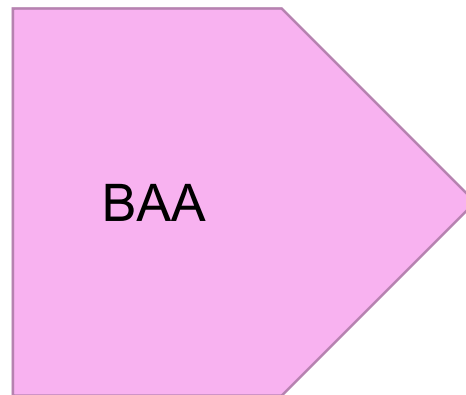


- Implemented in Part 25 of the Federal Acquisition Regulations (FAR) and agency supplements, especially the Defense FAR Supplement (DFARS).

- Buy American Act (BAA)
- Trade Agreement Act (TAA)
- Funding Programs
- Miscellaneous Other Prohibitions
- Contractor considerations
- Subcontract management
- Certifications and Representations
- Enforcement
- Penalties
- New Executive Orders



Buy American Act First Piece of Puzzle



41 U.S.C. Chapter 83
Executive Orders
FAR Subparts 25.1, 25.2 and 25.5

Buy American Act (BAA)

To create a ***preference*** for purchase of US domestic goods by the federal government

- Applicability:

- Goods and Construction Materials;
- Used in United States; and
- Exceeds the micro-purchase threshold (\$10,000) and less than TAA threshold (set by each agreement and differs for construction materials)

- Exceptions

- Public Interest – agreement with foreign government to exclude BAA
- Overseas commissary resale of foreign end products
- Information Technology that is a commercial item
- Sole source procurements

- Waivers are possible if:

- Unreasonable cost after application of the price preference
- Not available in sufficient quantities or of a satisfactory quality – class or individual

Country of Origin Test:

- Goods Manufactured in the US
 - Substantial change in physical character, and whether item is completed in form required by government
 - Assembly may suffice depending on facts, but packaging alone does not
 - Cost of Domestic Components Exceed 55%
 - Does not apply to COTS components
 - Does not include subcomponents
 - For end products made significantly of iron or steel (at least made 50%), cost of domestic components must be at least 95%
 - Includes commercial items
 - COTS fasteners are exempt
- Nonmanufactured goods must be mined or produced in the United States

PRICING EVALUATION PROCESS – Competitive Set Aside

- If domestic offer is lowest price, then it is selected.
- If foreign offer is lowest price, then pricing is adjusted as follows:
 - Civilian agencies
 - Increase price by 20% if the lowest US offer is a large business
 - Increase price by 30% if the lowest US offer is a small business
 - Except:
 - Israeli end products with a value equal to or greater than \$50,000
 - Canadian end products with a value equal to or greater than \$25,000
 - Mexican end products with a value equal to or greater than \$67,826
 - Defense agencies
 - Increase the price by 50%
- May award to foreign offer if it is still lowest after price adjustment

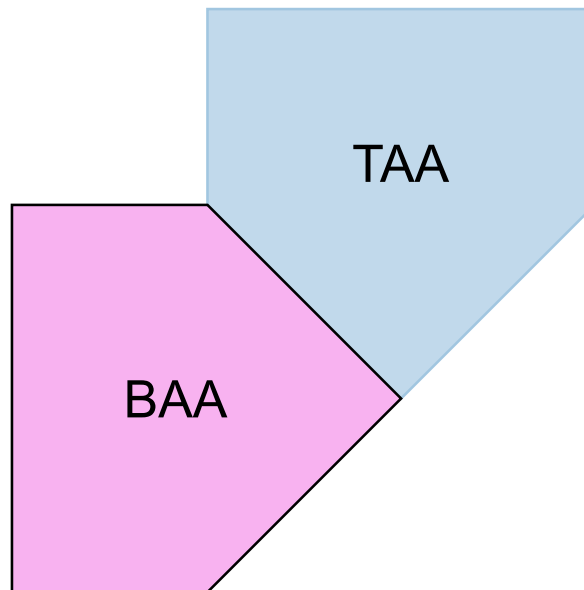
Offer	Proposed Price	FAR Penalty – Large Business (20%)	FAR Penalty – Small Business (30%)	DoD Penalty (50%)
Domestic Product	\$5,000	\$5,000	\$5,000	\$5,000
Foreign Product	\$4,000	\$4,800	\$5,200	\$6,000
Result		Foreign Wins	Domestic Wins	Domestic Wins

- Does not affect price actually paid – for evaluation purposes only
- Foreign offers must be proposed to be considered

- Does BAA apply?
 - Supplies
 - Services
 - Construction materials
- Price Threshold?
- How assess Country of Origin?
- Is there an exception?
 - Availability
 - Computers
- Does price matter?

BAA is a *price* preference

Trade Agreements Act Second Piece of Puzzle



19 USC Chapter 13
Various Trade Agreements
FAR Subpart 25.4

Purpose of the TAA is to encourage free trade with the United States by ***prohibiting*** purchases from non-designated countries.

- In effect, it waives the BAA for applicable contracts
 - Applies in lieu of BAA – cannot comply with both
- Reflects government-to-government trade negotiations
- There is no single trade agreement and rules vary

Trade Agreements Act (TAA)

- Applicability
 - Goods, construction and services
 - From a Designated Country, i.e., those covered by a trade agreement
 - World Trade Agreement Government Procurement Agreement (WTO GPA)
 - 12 Free Trade Agreements (FTA)
 - Least developed country
 - Caribbean Basin Trade Initiative
 - Israeli Trade Act (does not apply to all agencies)
 - Trade in Civil Aircraft
 - Agencies may have additional agreements that meet requirements. DoD has more than 20 such agreements with “Qualifying Countries”

- Exceptions:
 - Small business set aside
 - Arms, ammunition or war materials
 - End products for resale
 - Sole source procurements
 - Services listed in FAR 25.401 as excluded; e.g., research and development, dredging, utility, military support services
 - Indispensable to national security or national defense (DoD only)
 - Ability One and Federal Prisons
- Nonavailability – must list noncompliant products in certification. Contracting officer makes determination when reviewing proposals

Waivers are possible but rare because purpose of TAA is to encourage countries to enter into trade agreements

- Thresholds
 - Updated regularly so always check newest version – FAR 25.402
 - TAA clause applies when value of the procurement (at the prime) exceeds the WTO GPA threshold - \$183,000 or \$7,032,000 for construction currently. FAR 25.2201(c)(1)
 - Individual FTA threshold could be below WTO GPA.
 - Range from \$2,319 to WTO GPA threshold. For example, products and services from Mexico are \$92,319.
 - When below WTO GPA, BAA applies but Designated Country products can be considered and should not be subject to price preference

Trade Agreements Act (TAA)

- Summary of Different Trade Agreements
 - World Trade Organization General Procurement Agreement (WTO GPA)
 - Designated Countries
 - Threshold - \$183,000
 - Prohibition is absolute and noneligible products may not be considered.
 - Free Trade Agreements (FTA)
 - Designated Countries
 - Threshold varies
 - Foreign products may be considered
 - Agency Specific Trade Agreements
 - Qualifying Countries
 - Threshold varies
 - Foreign products may be considered

Country of Origin Tests

- Services
 - Established in US or Designated Country (where either headquartered or incorporated)
 - Unless excepted by trade agreement – FAR 25.401(b)
- Goods
 - End product wholly the growth, product or manufacture in US or Designated Country; or
 - End Product Substantially Transformed in US or Designated Country into new and different article of commerce with a name, character or use distinct (differs by industry)

Construction Materials

- Article, material, or supply brought to the construction site for incorporation into the building or work, includes preassembled items
 - Unmanufactured construction material must be mined or produced in the United States.
 - Manufactured items must:
 - Be manufactured in the United States; or
 - Cost of the components mined, produced, or manufactured in the United States exceeds 55% of the cost of all its components.
- Certain discrete systems incorporated into a public building or work and produced as complete systems (e.g., emergency life safety systems, fire alarm, and audio evacuation systems) are evaluated as a single and distinct construction material
- Materials purchased directly by the Government are supplies, not construction material

Does TAA apply?

Supplies

Services

Construction materials

How assess Substantial Transformation?

Is there an exception?

Does price matter?

Can you request a waiver?

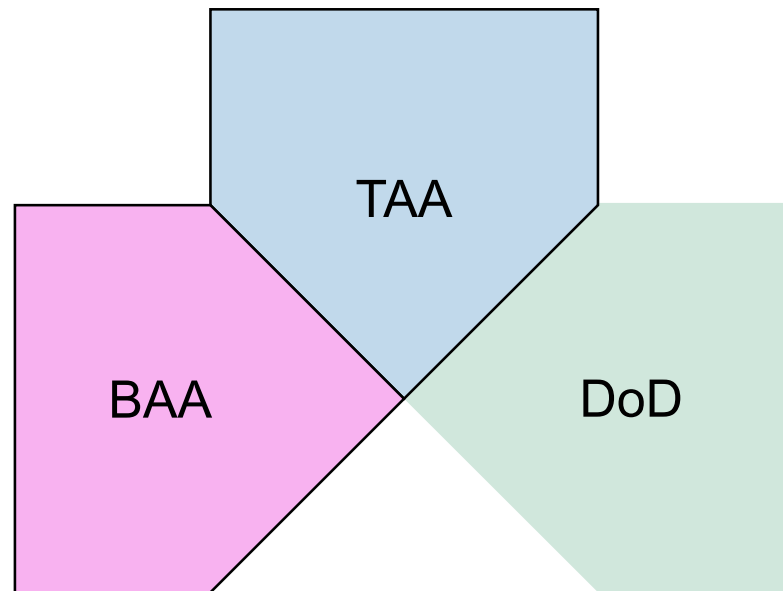
TAA establishes a *prohibition* on products and services unless one of the exceptions applies



BAA/TAA Comparison

Law	Applicability		Country of Origin Test	Waivers Exceptions	Clauses
BAA	Goods Construction	<p>Above Micro purchase and below TAA threshold</p> <p>Preference with pricing preference during evaluations</p> <p>Small Business Set Aside</p>	<p><u>Goods</u> Manufactured in US; and Cost of US components exceeds 55%. Nonmanufactured must be mined or produced in US. <u>Construction</u> – Construction must be mined or produced in the US; or cost of the components exceeds 55% of the cost.</p>	<p>Public Interest Unreasonable cost Nonavailability Used outside US COTS Components Commercial IT</p>	<p>FAR 52.225-1 FAR 52.225-2 FAR 52.225-9 FAR 52.225-10</p>
TAA	Goods Construction Services	<p>Above TAA threshold Below Micro purchase Threshold</p> <p>Absolute prohibition for WTO GPA</p> <p>DoD Qualifying Countries are included</p>	<p><u>Goods</u> End product that is wholly grown, product or manufacture in US or Designated Country End product that has been substantially transformed in US or Designated Country into new and different item <u>Construction</u> – same as BAA <u>Services</u> – Established in US or Designated Country</p>	<p>Nonavailability Small Business Set Aside National security (DoD only)</p>	<p>FAR 52.225-3 FAR 52.225-4 FAR 52.225-5 FAR 52.225-6 FAR 52.225-10 FAR 52.225-11</p>

Third Piece of Puzzle



DFARS Part 225

Purpose: Implements requirements in various annual funding bills to enhance international relationships, help the US economy, strengthen the defense industrial base and protect national security.

The Programs:

- Balance of Payments Program
- Qualifying Country Sources
- Specialty Metals
- Berry Amendment
- Special Countries
- Product Specific

Waivers

Balance of Payments Program (BOPP)

DoD BAA equivalent program (DFARS 225.75)

- Only applies to purchases overseas
- Requires purchase of domestic end products and domestic construction materials
- DoD will use DFARS clauses instead of FAR clauses for BAA

Exceptions

- Similar to BAA/TAA
- Include: petroleum products, spare parts for foreign-manufactured, brand drugs, information technology that is a commercial item, required by treaty to purchase, commissary resale, perishable, and unreasonable cost

Does not apply if TAA applies

DoD TAA equivalent program (DFARS 225.872)

- 16 Specific Trade Agreements
- Applies to all purchases of supplies unless restricted by:
 - U.S. National Disclosure Policy, DoDD 5230.11
 - U.S. defense mobilization base requirements under FAR 6.302-3(a)(2)(i)
 - Other U.S. laws or regulations
 - U.S. industrial security requirements
- Government must follow solicitation procedures:
 - Use FAR Part 19 criteria to determine if contract should be set aside for small business concerns. If qualified, then procurement is exempt.
 - Send solicitation directly to qualifying country sources including Canadian Commercial Corporation
 - Do not impose unusual technical or security requirements solely to preclude Qualifying Country Sources
 - Do not exclude because Qualifying Country Sources have not been tested or evaluated
- Prime contracts may not preclude qualifying country sources from competing in subcontracts except for national security

- Applicability. (DFARS 225.7003)
 - All purchases by DoD
 - Above the simplified acquisition threshold
 - For Aircraft, Missile or space systems, Ships, Tank or automotive items, Weapon systems, Ammunition
- Requires all specialty metals, end items or components be melted or produced in the United States
- Specialty Metal means
 - Steel—
 - With a maximum alloy content exceeding one or more of the following limits: manganese-1.65%; silicon-0.60%; or copper-0.60%; or
 - Containing more than 0.25% of any of the following elements: aluminum, chromium, cobalt, molybdenum, nickel, niobium (columbium), titanium, tungsten, or vanadium
 - Metal alloys consisting of—
 - Nickel or iron-nickel alloys that contain a total of alloying metals other than nickel and iron in excess of 10%; or
 - Cobalt alloys that contain a total of alloying metals other than cobalt and iron in excess of 10%
 - Titanium and titanium alloys; or
 - Zirconium and zirconium alloys

- Exceptions:
 - Outside US in support of combat operations or In support of contingency operations
 - Unusual and compelling urgency in accordance with FAR 6.302-2
 - Items specifically for commissary resale
 - Items for test and evaluation under the foreign comparative testing program (10 U.S.C. 2350a(g)) (except follow-on production contracts)
 - End item or component – if all the conditions for each exception are met:
 - Commercial derivative military articles
 - Waived for National Security reasons

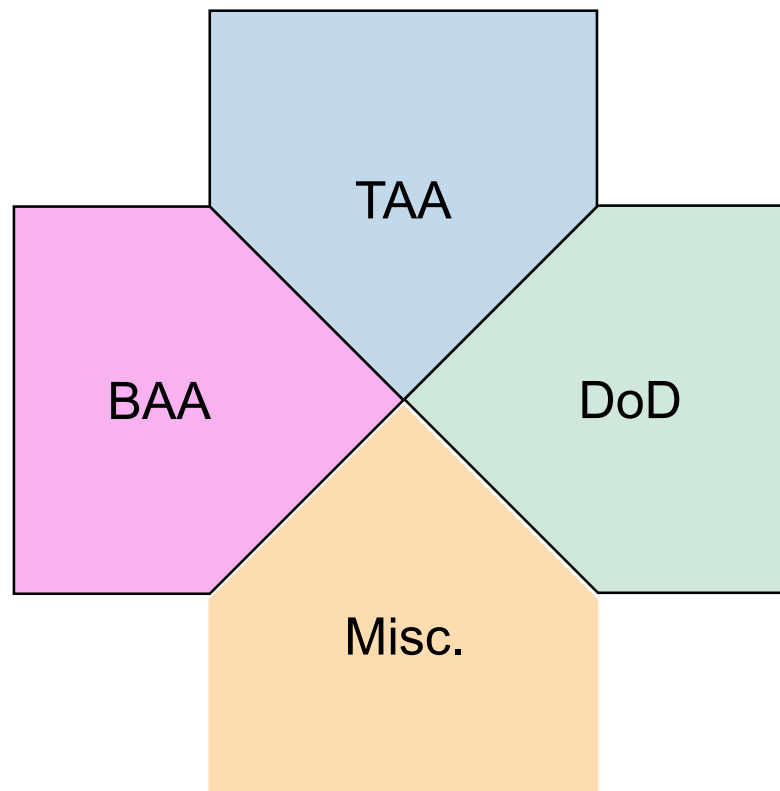
- **Applicability (DFARS 225.7002-1)**
 - Purchases of food, clothing, fabrics, hand or measuring tools, and flags
 - Above the simplified acquisition threshold
 - Except athletic foot ware purchased for use by individuals in initial entry into services
- **Requires all end products and components be grown, reprocessed, reused, or produced in the United States**
- **Exceptions include**
 - Insufficient quantity or satisfactory quality if listed in DFARS 225.7002-1
 - Items listed in FAR 25.104(a)
 - Outside the US
 - Support combat operations
 - Perishable foods
 - Emergency acquisitions
 - Acquisition by vessels in foreign waters
 - Food, hand or measuring tools if
 - In support of contingency operations, or
 - Unusual and compelling under FAR 6.302-2
 - Items for commissary resale
 - Incidental amounts of cotton, wool or other natural fibers as stated
 - Foods manufactured or processed in the US (excluding fish, shellfish and seafood under §8118 of 2005 NDAA)
 - Fibers and yarns to be used in synthetic fabric or coated synthetic fibers as states
 - Chemical warfare protective clothing when furthers a Qualifying Country
 - Interagency, State or local purchases executed by DoD after transferring contracts from GSA as stated

- Special Allies
 - Canadian Commercial Corporation – establishes channel for contracts with Canadian companies excluding research/development, unusual or compelling urgency, at or below simplified acquisition threshold, and DoD activities in Canada. DFARS 225.870
 - NATO Cooperative Projects – establishes special process to work with NATO countries. DFARS 225.871
 - United Kingdom Commercial Exploitation Waiver – waives levies and restrictions between the countries. DFARS 225.873
- Special Prohibitions
 - Communist Chinese Military Companies. DFARS 225.770
 - State Sponsors of Terrorism. DFARS 225.771

- Foreign Commercial Satellite Services (DFARS 225.772)
- Foreign buses (DFARS 225.7004)
- Air circuit breakers for naval vessels (DFARS 225.7006)
- Anchor and mooring chain (DFARS 225.7007)
- Ball and roller bearings (DFARS 225.7009)
- Certain naval vessel components (DFARS 225.7010)
- Carbon, alloy, and armor steel plate (DFARS 225.7011)
- Supercomputers (DFARS 225.7012)
- Construction or repair of vessels in foreign shipyards (DFARS 225.7013)
- Military construction (DFARS 225.7014)
- Overseas architect-engineer services (DFARS 225.7015)
- Domestic photovoltaic devices (DFARS 225.7017)
- Certain magnets and tungsten (DFARS 225.7018)
- Forgings (DFARS 225.7102)

- Applies to requirements in DFARS 225.70
 - Berry Amendment
 - Specialty Metals
 - Miscellaneous items (e.g., air circuit breakers, anchor and mooring chain, ball and roller bearings, photovoltaic devices, magnets and tungsten)
- Undersecretary of Defense (Acquisition and Sustainment) must
 - Determine that: (i) US producers will not be jeopardized by competition from a foreign country and that country does not discriminate (equal treatment); and (ii) The restriction would impede cooperative programs, reciprocal procurements of defense items (equal treatment)
 - Must post public notice
 - Cannot last for more than 1 year
- Head of Contracting Activity may waive on case-by-case basis if determines:
 - Restriction would cause unreasonable delays
 - Satisfactory quality in US and Canada is not available
 - Restriction results in one source
 - Not in national security interest
 - Restriction adversely affects a US company
- Unreasonable costs – the cost of US and Canadian products must exceed 150% of the foreign product

Fourth Piece of Puzzle

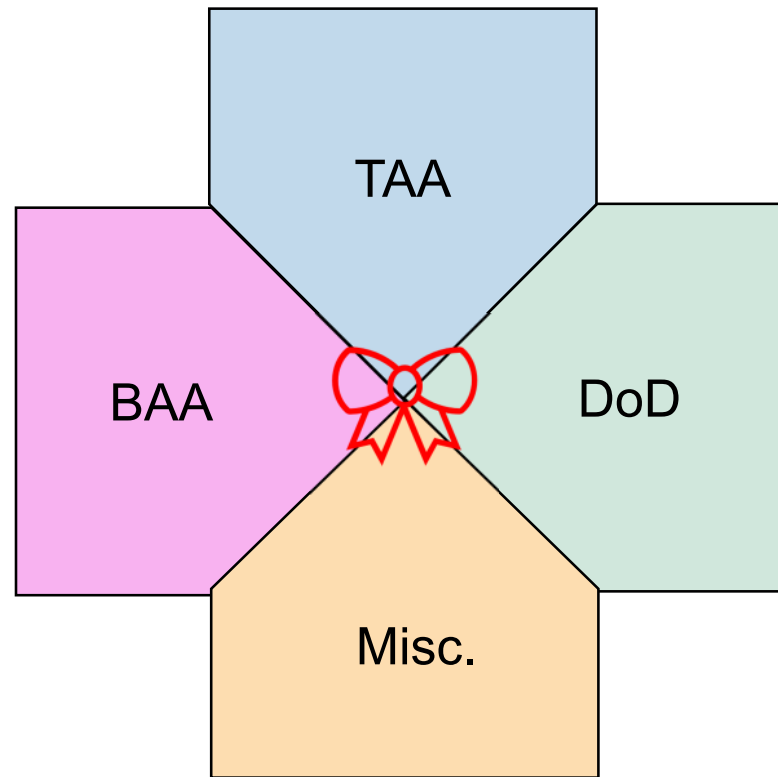


Miscellaneous Other Prohibitions

- Ban on Kaspersky products, FAR 4.20
- Ban on purchase or use of certain Chinese Information Technology, FAR 4.21 - <https://www.trade.gov/data-visualization/csl-search>
- Overseas operations and contingency operations, FAR 25.3, DFARS 225.72, DFARS 225.76, DFARS 225.78
- American Reinvestment and Recovery Act specific requirements, FAR 25.6
- Prohibited Sources, FAR 25.7
 - Includes sanctions issued by the Office of Foreign Asset Controls – <http://www.treas.gov/offices/enforcement/ofac/sdn>
 - Be cautious of China, Russia, North Korea, Syria, Iran and Cuba
- Import Laws by Customs & Border Patrol, FAR 25.9
- Export Laws under International Traffic in Arms Regulations and Export Administration Regulations, DFARS 225.79
- Foreign Military Sales (FMS), DFARS 225.73
- Secondary Arab Boycott of Israel, Antiboycott Act and DFARS 225.76

- Conflict Minerals – Applies if you or customer is subject to Securities Exchange Commission regulation
- Patents – If you develop a patent in performance of a government contract, then there the license must require products embodying the technology must be substantially produced in the United States. FAR 52.227-11(g)
- Small Business Innovation Research / Small Business Technology Transfer (SBIR/STTR) awards required awardees be US companies and that work be performed in the United States. SBA Policy Directive Para 6(a)(4) and 13 CFR 121.702
- Nonmanufacturers Rule – Applies if you sell products under contracts set aside for small businesses but are not the manufacturer. In addition to the other requirements, you must procure the products from a small business manufacturer, processor or producer made in the United States. 13 CFR 121.406(b)(1)(iv)

Fourth Piece of Puzzle



Puzzle is Solved – Right?

Overview of the Government Evaluation Process

- Determine applicable regime: BAA, TAA with WTO GPA or other FTAs
- Initial Steps:
 - Eliminate unacceptable offers; e.g., nonresponsive, debarred/suspended, prohibited source
 - For best value evaluations, evaluate in accordance with solicitation
 - Rank by evaluated cost or price
- WTO GPA
 - Creates absolute prohibition. Do not consider noneligible products unless no eligible products received.
 - Award on low offer
- FTA/Israeli Trade Agreement
 - May consider noneligible products if no domestic offers received
 - If no domestic offers, then award on low offer even if not eligible
 - If noneligible offer is lower than Designated Country offer and Domestic offer is high, then award to noneligible offer.
- BAA – follow pricing preference

Agencies may have different processes, so review agency supplements

Contractor Proposal Process

- Prepare proposals
 - Know which clauses are included and regimes apply
 - Determine if exceptions/waivers may be applicable
 - Ask clarifications during open period
- Start building proposal by considering:
 - What must be delivered
 - What are end products vs components
- Which regime will apply
 - Estimated dollar value
 - Type of product/service
- Determine if each end item and component is Domestic, TAA-Eligible or Foreign
 - Apply rules, tests and exceptions carefully
 - Which suppliers can be used

- Prime contractors are ultimately responsible for end product delivered to the Government
- To protect themselves, prime contractors must conduct due diligence checks on supply chain
 - Questionnaires to request sourcing information whether US or foreign companies
 - Representations and Certifications (do not rely on SAM because subcontractor may not have completed)
 - Follow-up or even inspections if in doubt
- Pick Subcontract Partners carefully
 - May need to have different supply chains for government vs commercial work

Subcontract Management

- Include clauses in subcontracts for end items or components – even if not explicitly required unless:
 - Know can meet 55% through remaining components and can assume subcontractor's component parts are foreign;
 - Product is a subcomponent of a component part that will be manufactured in the U.S.; or
 - Prime contractor obtained a waiver.
- Require subcontractors to notify the prime contractor when sourcing changes to include place of manufacturing.

- Purpose is to obtain prime contractor's certifications that end products and components meet applicable requirements
 - BAA and TAA have representations and certifications
 - DoD has additional representations and certifications
- Contractors complete through SAM or with individual proposals
 - Even if complete through SAM, Contractors must update certifications that have changed in individual proposals.
- After first considering the applicable Country of Origin Test,
 - Must certify compliance with BAA/TAA as applicable; or
 - Must list all **foreign** (BAA and FTA) or **noneligible** (TAA/WTO GPA) end products
- To be able to complete certification, prime contractors must know country of origin of at least 55% of the component cost
 - Additionally, must know that components are not sourced from specific prohibited countries

Know Origin of All
Components

- How issues are discovered
 - Protests
 - Qui Tam or whistleblowers (**do not retaliate**)
 - Inspector General or other audits
 - Disputes between prime and subcontractors
- Common Issues
 - Applying rules, tests or exceptions for wrong regime.
 - Failure to identify or seek clarification on inconsistent requirements
 - If multiple regimes apply, then solicitation and contract should specify by line item.
 - If clauses are missing, assume they apply. Courts may read them in under the *Christian Doctrine*.
 - Incorrect certifications or fail to include foreign end items or components.
 - Failure to obtain and update subcontractor information.

Government is Increasing
Monitoring

Penalties for Violations

- Poor past performance evaluation
- Termination for Default
 - Government pays for work accepted only - may reject noncompliant products or services.
 - Government may recover procurement costs from the contractor.
- Suspension and Debarment
 - Can result in loss of government prime or subcontracts for years.
- Defective Pricing under the Truth in Negotiations Act
 - Would not have received award if had fully disclosed all cost and pricing data.
 - Government can receive refund plus interest.
- Civil/Criminal fraud under False Statements or False Certifications
 - Intentional or wrongful completion of representations and certifications.
 - Lack of any planning or failure to determine source.
 - Recover treble damages and penalties.
 - Individuals may go to jail.

Maintain Documentation

New Executive Order

- On January 25, 2021, President Biden signed new executive order “Ensuring the Future Is Made in All of America by All of America’s Workers”.
 - Proposed Rule issued on July 30, 2021 at 86 FR 40980.
 - Start planning to adjust supply chains or hope that price will be competitive after price preference is applied
 - Not implementing entire E.O. yet but collecting information and more to come
- Sets policy: Should, whenever possible, procure goods, products, materials, and services from sources that will help American businesses compete in strategic industries and help America’s workers thrive.
- Consider suspending, revising, rescinding agency actions inconsistent with this policy.

New Executive Order and FAR Changes

- Establishes Made in America office - <https://www.madeinamerica.gov/>.
 - Waivers with detailed justification must be provided in advance.
 - Decides if waiver consistent with law or policy.
 - Post on public website to promote transparency.
 - Each agency shall provide bi-annual reports.
- Proposed changes to FAR to:
 - Replace “component test” with new test to measure value that is added to the product through U.S.-based production or U.S. job-supporting economic activity
 - Not implemented in Proposed Rule but requests input during comment period

New Executive Order

- Increase numerical threshold
 - Proposed Rule in phases: 60% initially, 65% in two years, and 75% five years later. Will apply in year of delivery (even if contract awarded earlier)
 - Proposed Rule – Fall back for construction materials that does not consist wholly or predominately of iron or steel. Applies until 1 year after 75% implemented. Allows products in excess of new threshold but high cost to be domestic.
- Increase price preferences
 - Proposed Rule applies to critical component/critical item. Must be identified in proposals and new price preference being issued in different rules.
 - Proposed Rule also implements new reporting requirement to collect information on domestic content of critical items.
- Update List of Nonavailable Articles
- Assess list of constraints on information technology that is a commercial item to promote Policy
 - Proposed Rule – no change to commercial items and COTS
- Although revokes prior Executive Orders, new FAR and DFARS regulations will take 1-2 years to implement changes. Comply with current FAR/DFARS.



Questions??



As you can see, these requirements are complex.

If you have a specific question about a government requirement that you are considering, or if you have a question about a contract that you currently have, please contact your PTAC counselor and they can help.



Karri L. Palmetier

Karri@palmetierlaw.com

(303) 697-8914

(317) 397-7344

www.palmetierlaw.com
