

Federal Procurement:

An Overview of Federal Laws Relating to Domestic Content Requirements for Government Procurement



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This chapter will provide readers with an overview of certain country of origin-related requirements used in U.S. federal procurement, including the Buy American Act (BAA), Trade Agreements Act (TAA), the Infrastructure Investment and Jobs Act of 2021 (Public Law 117-58), and the Berry Amendment. We will also discuss practical tips for companies looking to sell products or services to the United States federal government.

Buy American Act

The Buy American Act (or BAA), as implemented by the Federal Acquisition Regulations (FAR), incentivizes U.S. federal agencies to purchase goods that comply with the domestic preference requirements of the BAA. To accomplish this, the BAA deems “domestic end products” as compliant and “foreign end products” as noncompliant. It should be noted that neither the BAA nor the FAR prohibit the purchase of foreign end products (i.e., those items that do not comply with BAA). Instead, the government applies a price penalty to foreign end products. At the time of publication, the price penalty for foreign products range from 20% (large business offerees) to 50% for Department of Defense purchases. The reasoning behind this approach is that when the government is evaluating best and final offers, including any price penalties for foreign end products, domestic end products will most likely represent a lower cost to the government when compared to the foreign end products. This will lead to the procurement of more domestically manufactured items.

Manufactured Products

In order for a manufactured product to qualify as compliant under the BAA, that is, to qualify as a “domestic end product”:

1. the item must be manufactured in the United States; and
2. the cost of the item’s components mined, produced, or manufactured in the United States must exceed 55% of the cost of all components (scheduled to increase to 60% in October 2022, 65% in January 2024, and 75% in January 2029).

The term “manufactured” is not defined in the regulations; however, the term has been interpreted broadly. For instance, the U.S. Government Accountability Office (GAO), which handles federal contracting disputes, has interpreted the term “manufactured” to refer to those operations which make the item suitable for the government’s intended use and establishes its identity. The Civilian Board of Contract Appeals (CBCA) has further held that the scope of manufacturing operations required to meet the “manufactured in United States” standard is understood to require more than packaging, but less than a substantial transformation (i.e., processing that results in an article with a new name, character, and use, as that term is used in U.S. Customs and Border Protection (CBP) country of origin determinations).

On the other hand, the second prong of the BAA test requires that the cost of an item's U.S. components exceed 55% of the cost of all components (scheduled to increase to 60% in October 2022, 65% in January 2024, and 75% in January 2029). When applying the BAA's domestic content test for manufactured products, the cost of components is measured at the component level only and does not include subcomponent cost.

For products that are predominantly made up of iron or steel, the cost of components test level is a much higher 95% (and, of course, the item must also be "manufactured in the United States").

Non-Manufactured Products

Non-manufactured products, on the other hand, are not subject to the two-prong test above. Rather, a non-manufactured product qualifies as a "domestic end product" if it is mined or produced in the United States. "Non-manufactured" items would include items such as raw materials that are mined in the United States and sold to the government in bulk, raw form, for example, this would include precious metals mined in the United States.

The complexity of BAA compliance typically arises in the context of manufactured products and understanding whether both prongs of the BAA compliance test have been met.

BAA Exceptions

There are numerous exceptions to the BAA, as well as the ability for contractors to seek waivers from the procuring agency. Arguably, the most common exception relates to the procurement of Commercially available Off-The-Shelf (COTS) items, as well as for commercial item Information Technology (IT) products. Additional exceptions exist, for instance, where BAA compliance is unavailable and where the government has determined that the BAA's domestic preference is not in the public interest.

'Buy America' Rules

Companies selling to the federal government may also need to comply with 'Buy America' rules, which are different than the BAA, and vary from agency to agency. These rules typically apply to large infrastructure or transportation projects funded by the U.S. Government. While these rules vary across agencies, the 'Buy America' domestic content requirements are often much higher than that of the BAA and there are few, if any, exceptions to the 'Buy America' requirements, including the COTS exception. Similar to the BAA, however, is the requirement that goods be manufactured in the United States. Therefore, contractors selling to the federal government may need to potentially comply with both BAA and 'Buy America' rules for a particular procurement.

Trade Agreements Act

Unlike the BAA's domestic price preference regime, the TAA imposes a complete bar on the purchase of items that do not comply with the TAA. Specifically, the TAA limits government procurement to items which are either: (1) U.S.-origin; or (2) the origin of a TAA-eligible country. TAA eligible countries are those with whom the U.S. has signed either a multilateral or bilateral agreement, such as a Free Trade Agreement, or the World Trade Organization Government Procurement Agreement, or that have otherwise been designated as TAA eligible (i.e., Least Developed Countries and Caribbean Basin Countries). A full list of TAA countries can be found at: <https://www.strtrade.com/services/import-customs-compliance/government-procurement/taa-designated-countries/taa-designated-countries>. The TAA applies to government contracts valued above the TAA threshold, which is currently \$183,000 for a supply contract. In such cases, the BAA requirements are generally waived and the TAA requirements would apply.

In order for an item to be TAA compliant, the item must comply with one of the following:

1. the item must be wholly grown, produced, or manufactured in the United States or in a "Designated Country"; or
2. the item must be substantially transformed into a new and different article of commerce in the United States or in a "Designated Country."

A **substantial transformation** occurs when, as a result of further manufacturing or processing, the item's various components (perhaps originating from one or more countries) lose their individual identity and are transformed into a finished article having a new name, character, and use. There are no bright line rules when it comes to substantial transformation and CBP reviews country of origin determinations on a case-by-case basis. That said, it is generally understood that to rise to the level of a substantial transformation, assembly operations must be complex and meaningful and cannot be mere final assembly or screwdriver-type assembly operations. In making such a determination, CBP will look to a myriad of factors to determine whether a substantial transformation has occurred, including the country of origin of components, the skill and training level required for those performing assembly operations, the cost of assembly, and the character and use of the finished product, among other relevant factors and considerations.

It is important to note that the U.S. Court of Appeals for the Federal Circuit in a 2020 decision (*Acetris Health, LLC v. United States*) held that, in at least the pharmaceutical context, certain manufacturing operations which occur in the United States – even though not rising to the level of a substantial transformation – did in fact satisfy the TAA's compliance standard. However, the scope and reach of this decision in the government contracts context remains unclear.

Additionally, and unlike the BAA, the TAA expressly applies to both products and services (whereas the BAA expressly applies only to products). Thus, for the government to determine

whether services provided are in fact TAA compliant, it will look to the contractor performing those services and where that contractor is incorporated or headquartered. If the contractor is incorporated or has its principal place of business in the U.S. or in a TAA-eligible country, then those services will be compliant for TAA requirements.

Infrastructure Investment and Jobs Act (Public Law 117-58)

The domestic preference requirement in the 2021 Infrastructure Investment and Jobs Act closely tracks the two-pronged BAA test discussed above for manufactured products. However, the law makes clear that the government must issue regulations on a wide range of BAA/domestic preference issues by the end of 2022. Critically, because these implementing regulations are still forthcoming, it is still unclear how important aspects of domestic preference contracting – such as the COTS item exception for manufactured products under the BAA – are to apply to infrastructure bill-funded federal projects.

Berry Amendment

The Berry Amendment applies to DoD contracts and requires that certain DoD purchases of food, clothing, certain textiles (including fabrics, fibers, and yarns), hand or measuring tools, and specialty metals be entirely grown or produced in the United States. For the covered products, the Berry Amendment imposes, by far, the highest bar in terms of the other domestic preference laws discussed above. The Berry Amendment is implemented through the [Defense Federal Acquisition Regulation Supplement](#).

Under the Berry Amendment, purchases of covered products must be “entirely grown, reprocessed, reused, or produced in the United States.” This means that unless an exception applies, the entire production process of a covered product from the growth or production of the raw materials to the manufacture of all components to final assembly, must be performed in the United States. For example, procurement of clothing under the Berry Amendment, requires that the clothing item must be sewn in the United States using fabric, thread, buttons, and zippers made in the United States from raw materials of U.S. origin. Components that are not normally associated with clothing (such as electronic sensors) are not subject to the Berry Amendment domestic sourcing requirements.

Exceptions to the Berry Requirements

The Berry Amendment includes a variety of exceptions, which may apply to specific procurement contracts. For example, the Berry Amendment does not apply to:

- Products that are unavailable from American manufacturers at satisfactory quality and in sufficient quantity at market prices as determined by DoD. If the contractor cannot locate a domestic source, a Domestic Non-Availability Determination, may be requested through the contracting officer;

- Acquisitions of food (other than fish, shellfish, or seafood) that have been manufactured or processed in the United States, regardless of where the foods were grown or produced. Fish, shellfish, and seafood must be taken from the sea by U.S. flagged vessels or caught in U.S. waters and processed in the United States or on a U.S.-flagged ship;
- Acquisitions outside the United States in support of combat operations, contingency operations, or emergency acquisitions outside the United States;
- Products containing noncompliant fibers, if the value of those fibers is not greater than 10% of the product's total price and does not exceed the Simplified Acquisition Threshold (SAT);
- Products are intended for resale at retail stores such as military commissaries or post exchanges; or
- Products that are part of a low-value contract, defined as below the SAT (\$250,000 as of 2020). The SAT is considered for possible change in years evenly divisible by five (i.e., 2020, 2025, etc.).

Finally, there may be instances where a product contains components that are covered by the Berry Amendment and other items which are not. For example, if DoD is purchasing a wooden chair with a padded seat cushion, the fabric of the seat cushion is subject to the Berry Amendment, but the wood is not. In each case, the application of the Berry Amendment is determined on a case-by-case basis by the contracting officer.

Practical Tips for U.S. Procurement

Contracting with the federal government can be complex, costly, and carry certain risks. However, understanding the rules and regulations governing federal contracting will help to mitigate such risks. A few tips in this regard are:

- **Know Your Role:** Prime contractors, that is, companies that contract directly with the federal government, assume greater compliance risk than those in the subcontractor, sub-tier subcontractor, or supplier position. As such, it may be worth exploring opportunities to fulfill government contracts initially as a subcontractor, sub-tier subcontractor, or supplier rather than as prime contractor/direct awardee.



- **Know Your Exceptions:** When selling COTS items to the government, there are often fewer compliance obligations that apply than when selling specially designed or customized products to the government.
- **Know Your Obligations:** Companies should consider which related corporate entity or division will be the entity providing services and/or supplies to the federal government (either directly or indirectly). This is important because the corporate entity will be subject to certain compliance obligations and risks that could impact other parts of the entity's operations.
- **Know Your Options:** Communicate with the relevant contracting agency regarding any questions or concerns. Contracting officers are a great resource. Many contractors are surprised to learn how eager the procuring agency is to assist and help clarify certain issues that are unclear to the contractor.
- **Know Your Limits:** If any issues are unclear or perhaps are legally sensitive, companies are encouraged to communicate with outside counsel, as early and proactive communication with counsel can provide clarity on legal issues and mitigate risk.

About ST&R

Since 1977, Sandler, Travis & Rosenberg, P.A. (ST&R) has set the standard for international trade lawyers and consultants, providing comprehensive and effective services to clients worldwide, including strategic advice and counsel on issues at the intersection of government procurement and international trade. ST&R's Government Procurement practice offers the following compliance-related services to its clients:

- providing company-specific training regarding BAA, TAA, and other "Buy America" requirements;
- reviewing strategic product sets/SKUs to determine BAA/TAA eligibility and compliance;
- preparing and submitting country of origin determination rulings to CBP for specific products/SKUs to determine whether a substantial transformation occurred in a TAA-designated country, and therefore, whether the product is TAA compliant; and
- reviewing contract terms and conditions related to specific product or service offerings to determine BAA/TAA/Buy America applicability.

You can learn more about ST&R's Government Procurement practice and the various other ST&R service offerings by visiting ST&R's Government Procurement webpage at <https://www.strtrade.com/services/import-customs-compliance/government-procurement>.

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Federal Procurement:

The Basics of Entering Federal Contracting in the United States



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Providing services to the federal government is no ordinary business. While the industry can be both rewarding and profitable, it does carry additional compliance requirements which should all be considered as part of the procurement process. Throughout this chapter, we'll explore topics that should be top of mind for organizations that are looking to enter the federal space.

Basics of Entering United States Federal Contracting

Overview of Federal Contracting

The decision to begin conducting business in the federal space is one that involves careful planning and consideration. Both the procurement process and operation of contracts and grants bring with them a set of compliance requirements necessary to both bid on, and to execute the work, within the federal space. Prospective contractors will have to register their business in order to become available to win federal work and will be required to maintain compliance requirements through a company's lifecycle of providing goods and services to the federal government. This differs from the commercial space where there is typically more flexibility in the negotiation of contracts, pursuit of work, and decisions regarding internal accounting, operations, and other business systems.

Before wading into the waters of working with the federal government, prospective contractors should be aware of the key decision makers and their role in both the procurement process and ongoing monitoring of contract and grant performance. Below are several key roles with which contractors should become familiar, along with their often-used abbreviations:

- **Contracting Officer (CO):** This person has the authority to bind the U.S. federal government to a contract with another entity.
- **Contracting Officer's Technical Representative (COTR):** These individuals have experience in a technical area and provide assistance and recommendations to the contracting officer regarding technical matters and performance of a contract against the technical requirements as outlined in the contract document.
- **Administrative Contracting Officer (ACO):** This person has the responsibility of administration over a government contract and is assigned this authority from the contracting officer.

Registration as a Contractor

Unlike opportunities in the commercial sector, bidding and performing work on a federal contract requires an entity to formally register with the federal government. There are several steps a prospective international contractor must take in this process in order to complete these registrations:

- Obtain a NATO Commercial and Government Entity (NCAGE) code. This is a code that uniquely identifies a foreign owned company with the NCAGE system and is required for firms to complete their registration in the System for Award Management (SAM), which we'll discuss below. To obtain this code a company must register with the NATO Support and Procurement Agency, which can be completed using the NATO Codification Tool website (<https://eportal.nspa.nato.int/ac135public/>).
- After obtaining the NCAGE code, a company must next obtain a DUNS number, which can be completed online (<http://fedgov.dnb.com/webform>). Upon completion of the registration a company will receive their DUNS code, which can then be used for registration with SAM.gov.
- Registration on SAM.gov — All companies, foreign and domestic, that are interested in contracting with the United States Federal Government must register on SAM.gov. Entities will need to create an account, and then complete the steps for registration. There is a detailed list of the steps that must be taken to register on SAM.gov in the attached link, which provides step-by-step instructions for an entity to complete the registration ([Quick Guide for Grants Registrations.pdf \(usda.gov\)](#)).

What the Government Looks for in a Contractor, and Where to Find Opportunities

In looking at potential contractors, the federal government looks for a particular set of skills and/or products to fill a need that is either not currently addressed amongst the federal workforce or needed to enhance the workforce and to meet the goal of a particular agency's mission. This can range across a variety of issues and challenges, from process management, information technology process improvement and software development, to manufacture of new and innovative products enhancing the ability of the federal government to meet the mission of its respective agencies. Connecting the skill sets and products to particular contracting opportunities requires the contractor to get to know its end customer, in this case the federal agencies with which it is looking to conduct business. Many of the agencies within the federal government have "industry days" that are designed to facilitate introductions, communicate agency needs, and identify upcoming contract opportunities which contractors can participate in. Prior to the COVID-19 pandemic these were conducted in person. At the time of this writing some industry days are conducted in a hybrid environment, combining both in person and virtual events.

Prospective contractors can also choose to utilize a number of procurement databases and services that are specific to federal contracting to identify upcoming opportunities. These range from government websites (i.e., usa.gov and sba.gov), to subscription databases with increased functionality to identify opportunities that may be relevant to the particular contractor.

Contract Types and Their Importance to Prospective Contractors

Contractors should also be aware of the different contract types typically seen in the federal space. Each contract type brings additional challenges and compliance requirements to successfully navigate working with federal government agencies. Below we identify different contract types that contractors can expect to encounter as they begin to pursue federal work:

- **Fixed Price:** Contracts of this type are fixed at the time of award. Outside of change orders processed during the contract, the pricing does not change during the performance of the project, regardless of the cost incurred by the contractor.
- **Time and Materials:** Contracts of this type are structured whereby the contractor charges for its labor hours incurred times an agreed upon rate by labor category. Some time and materials contracts also allow for a burden of general and administrative to be added to the cost of materials in billing to the government end user.
- **Cost-reimbursable:** This contract type can go by several names (cost-plus fixed fee, cost-plus award fee, cost-plus incentive fee). Contractors are reimbursed the costs they incur plus a burden of indirect cost rate (comprised of fringe, overhead and general and administrative (G&A) expenses) the costs incurred, plus fee (profit).

Each of the contract types provide additional risks and compliance requirements that contractors should consider when determining whether to pursue an opportunity:

- **Fixed Price:** The greatest risk lies on the contractor with fixed price contracts, and places reliance on a strong estimating process to safeguard a profitable result. Contracts of this type typically have the least amount of compliance requirements for the contractor due to the fixed nature of the contract price. Contractors should still be aware that it is possible, though not required, during the procurement process that a contracting officer may request pricing support.
- **Time and Materials:** The primary risk for the contractor lies in its ability to bid out each of the labor rate categories that will be utilized on the contract. Inaccurate pricing could result in a contract that operates at a loss. When preparing bids for this contract type, contractors should make full use of the data within the accounting system, compensation studies, and other relevant information to recover the labor cost plus a profit. Contractors should also note that some time and materials contracts allow the contractor to charge a percentage of G&A costs. When this occurs, the contract then takes on a component of cost-reimbursable contracts, which we will explore further below.

- **Cost-reimbursable:** This contract type bears the greatest risk to the government, and therefore carries the most compliance requirements for the contractor. Prospective contractors will need to ensure they have an adequate accounting system that can accumulate and segregate costs by cost type and contract, and also calculate indirect rates on a timely basis. Performance on cost-reimbursable contracts also carries an annual reporting requirement for an incurred cost submission, which is due six months after the company's fiscal year-end. This is a significant reporting package that provides the government with the company's accounting data for the year, cost allocations, indirect rate calculations, and costs incurred per contract, among other additional information. Contractors should be careful to evaluate the cost/benefit of entering into cost-reimbursable contracts due to the additional compliance burden placed upon the company.

As we've discussed throughout this chapter, doing business with the government requires companies to meet certain compliance requirements, and those requirements can differ depending on contract type and agency with which the company is looking to engage. Depending on the size, complexity, and technical requirements of a contract offering, a company may find they need to comply with certain business systems. We address the significant systems here:



- **Accounting System:** This is the most common compliance requirement amongst government contracting. A company must have an approved accounting system before it can be awarded and perform work on a cost reimbursable contract. The Defense Contract Audit Agency (DCAA) typically performs these assessments, although independent CPA firms are often allowed to provide as well, should the contract opportunity allow for it. Prospective contractors will be responsible for establishing and maintaining an acceptable system design for accumulating costs under federal contracts. Key requirements of an acceptable system are listed in the form SF 1408, and they include the segregation of direct, indirect, and unallowable costs, a timekeeping system with job codes and an approval flow, and an accounting close cycle that occurs at least monthly.
- **Estimating System:** This is the contractor's system, including policies and procedures, for estimating and budgeting for purposes of preparing cost estimates to bid on government contracts. While most companies have informal policies and procedures as part of their procurement process, the estimating system formalizes

these procedures. In order for a contractor's estimating system to be approved, it must meet all the requirements as set forth by the government and will need to be audited by DCAA or an independent CPA firm. Due to the timing of preparing the system, maintaining the system, and obtaining the compliance, small to mid-sized contractors may not all have this system in place.

- **Purchasing System:** This is a formal system that a company has in place that addresses a company's own procurement process for materials, subcontractors, and other costs. The requirement for an approved purchasing system is typically for larger contract offerings and calls for significant compliance requirements. Unless specifically required by a contract, small to mid-sized companies typically do not have an approved purchasing system in place due to the costs for both initial and ongoing compliance.

There are additional business systems that can be required for a prospective contractor, including material management, property management, and earned value management; however, the systems that we have noted above are the three most commonly utilized by small to mid-sized government contractors.

Closing Considerations

Prior to entering the government contracting space, contractors should evaluate the applicable compliance requirements, competitive environment, and specific requirements by agency. Upon making the decision to enter the space, contractors should be careful to read the request for proposal document early in the procurement process for any and all compliance requirements to be considered for award, including the compliance requirements we have listed above. Some components of the RFP can require a significant time investment and will require proper planning in order to meeting these requirements in preparing a successful award.



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