

Supply Chain Management: Understanding “Buy America” and Country of Origin Requirements

Session 1: The Buy American Act

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Overview of the Series

- January 11: Buy American Act
- January 25: Trade Agreements Act
- February 8: Buy America Requirements under Federally-Funded Transportation Programs
- February 22: Country of Origin Requirements under Federal Grant Programs
- March 8: Customs and “Made in the USA” Labeling
- March 22: The Berry Amendment
- April 12: Specialty Metals Restrictions
- April 26: “Buy America” Round-Up
- May 10: Sanctions and Other Prohibited Sources

Today's Agenda: The Buy American Act



1. Introduction to “Buy American” and Country of Origin Requirements
2. Key Concepts Under the Buy American Act (BAA)
3. Recent Rule Changes (2021 & 2022)

1. INTRODUCTION TO “BUY AMERICAN” AND COUNTRY OF ORIGIN REQUIREMENTS

The “Country of Origin” Maze



The Buy American Act

The Trade Agreements Act

**Executive Orders –
Products + Pharmaceuticals**

**Buy America Act
(Infrastructure/
Transportation)**

DoD Specialty Metals

**The 2009
Recovery Act**

DoD Berry Amendment

DoD Photovoltaic Devices

And Many, Many More...

Other Domestic Preference Regimes

- ✓ Aimed at addressing situations the BAA does not cover
- ✓ Certain restrictions applicable only to:
 - specific federal agencies and/or programs
 - funds spent by entities that are not federal agencies
- ✓ Certain provisions that only incentivize “Buying American”
- ✓ Certain provisions that prohibit the procurement of named items

BAA Fundamentals (Civilian)

- To comply with the Buy American Act, an end product must satisfy two criteria:
 - It must be manufactured in the U.S.
 - The cost of all U.S. components must exceed **60%** of the cost of all components (or **95%** for products made predominantly of iron or steel)
- Non-manufactured products must be mined or produced in the U.S.
- Applies purchasing *preference*
 - 20-30% evaluation factor for civilian agencies
- Applies to supplies and construction materials
 - Does *not* apply to services
- Applies domestically

The BAA does **not** require all end products and components to be of U.S. origin
(there are numerous broad exceptions available)

BAA Fundamentals (DoD) (as of Dec 2023)

- To comply with the Buy American Act, an end product must satisfy two criteria:
 - It must be manufactured in the U.S.
 - The cost of all U.S. components must exceed **55%** of the cost of all components (or 95% for products made predominantly of iron or steel)
- Non-manufactured products must be mined or produced in the U.S.
- Applies purchasing *preference*
 - **50%** evaluation factor applied for DoD
- Applies to supplies and construction materials
 - Does *not* apply to services
- Applies domestically **and to foreign acquisitions by DoD**

The BAA does ***not*** require all end products and components to be of U.S. origin
(there are numerous broad exceptions available)

BAA FAR and DFARS Clauses

- Generally, BAA found in FAR Subparts 25.1 (supplies) and 25.2 (construction materials)
 - *See also DFARS 225.1 (supplies) and DFARS 225.2 (construction materials)*
- Number of relevant contract clauses in FAR 52.225 and DFARS 252.225
 - FAR 52.225-1, Buy American – Supplies
 - FAR 52.225-2, Buy American Certificate
 - FAR 52.225-9, Buy American – Construction Materials
 - DFARS 252.225-7000, Buy American – Balance of Payments Program Certificate
 - DFARS 252.225-7001, Buy American and Balance of Payments Program

2. KEY CONCEPTS UNDER THE BUY AMERICAN ACT (BAA)

Key Concepts Under the BAA

- “Domestic End Product”
- “Manufactured”
- Domestic Content & “Cost of Components”
- Domestic Iron and Steel
 - Made “predominantly from iron or steel or a combination of both”
- “Commercially available off-the-shelf” (COTS)
- “Fastener”
- Preference vs. Requirement

“Domestic End Product”

- FAR 25.001(a): “41 U.S.C. chapter 83, Buy American...[r]estricts the purchase of supplies, that are not **domestic end products**, for use within the United States...”
- FAR 25.001(c)(1): “The Buy American statute uses a two-part test to define a ‘**domestic end product**’...”

“Domestic End Product” (cont’d)



Non-Manufactured Products



Mined or Produced in the U.S.

Manufactured Products



- 1. **Manufactured** in the U.S.; and
- 2. Majority **domestic content**

- ✓ Products made predominantly from iron and steel: **≥ 95%** domestic content
- ✓ Other manufactured products: **≥ 55%** **60%** domestic content
 - *Partial* exception for COTS products to domestic content test
 - Domestic content requirement rising incrementally beginning October 2022 to 60-75%

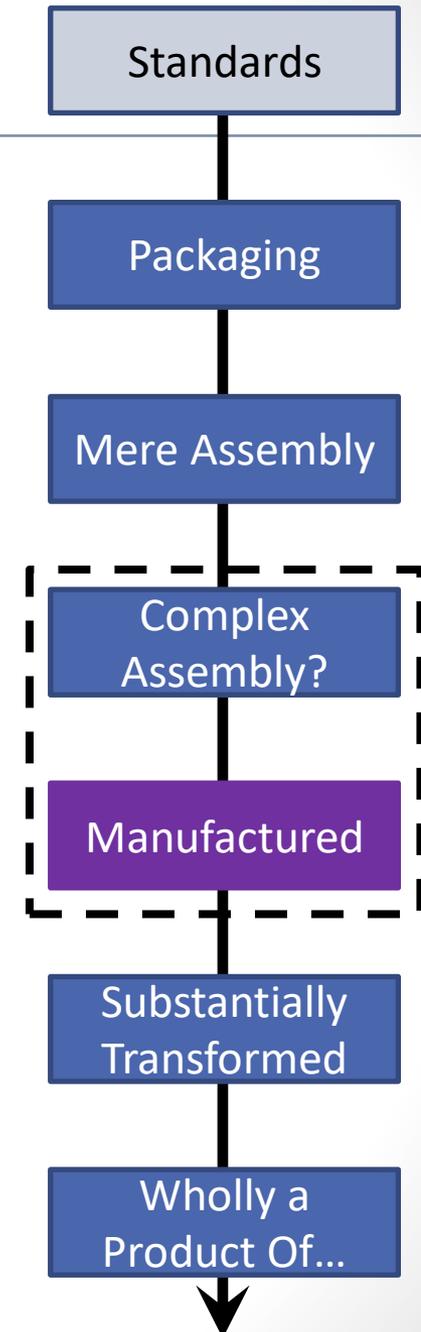
• If it’s not “domestic”... it is **foreign**

“Domestic End Product” (cont’d)

- Definition of “End Product”
 - “Articles, materials and supplies to be acquired for public use”
 - Can be anything from an entire product/system to an individual spare part, and everything in between
 - How the contractor and Government interpret the delivered “end product” under a contract often determines whether you are BAA compliant
 - Typically defined by what is delivered under a particular CLIN

“Manufactured”

- The BAA does not define “manufactured”
- Inconsistent interpretations by courts/Boards
- Key takeaways
 - “Manufacturing” requires more than mere U.S. packaging, but assembly of discrete items into a final form *may* be sufficient
 - **Highly fact-dependent**
 - Reassembly in the U.S. of a disassembled product is not enough
 - Considers whether the item being purchased by the government “is made **suitable for its intended use** and its identity established” in the U.S.
 - Does not necessarily require “substantial transformation” (which must be established under the TAA)



Domestic Content & “Cost of Components”

- Cost of components =

Components Purchased by Contractor	Acquisition Cost (incl. transportation + duties)
Components Mfr'd by Contractor	All costs associated with mfr'ing components, but NOT mfr'ing the end product

- Does not consider the source of sub-components
- Looks only at material costs – not manufacturing labor for the end-item
 - *But should this change when focusing on “domestic content”?*
- If a component is not “domestic” (*i.e.*, manufactured in the U.S.), then it should be treated as “foreign”

Domestic Iron and Steel

- **FAR 25.003:**

Domestic end product means –

(2) For an end product that consists **wholly or predominantly of iron or steel** or a combination of both, an end product **manufactured** in the United States, if the cost of **foreign iron and steel** constitutes **less than 5 percent** of the cost of all the components used in the end product...

- Key Questions:

1. Does the product consist “wholly or predominantly of iron or steel”?
2. Is the product “manufactured in the United States”?
3. What percentage of the product is made of “foreign iron and steel”?

Domestic Iron and Steel (cont'd)

- Made “predominantly from iron or steel or a combination of both”
 - Cost of iron and steel content > 50% of the total cost of all its components.
- “Foreign iron and steel”
 - “Iron or steel products not produced in the United States.”
- “Produced in the United States”
 - “All manufacturing processes of the iron or steel must take place in the United States, from the initial melting stage through the application of coatings, except metallurgical processes involving refinement of steel additives. The origin of the elements of the iron or steel is not relevant to the determination of whether it is domestic or foreign.”

Domestic Iron and Steel (cont'd)

Example:

- Iron safe = \$1,000 (retail)
- Cost of components = \$500
- If $> \$250$ = iron or steel, then the safe is made “predominantly from iron or steel”
 - And thus at least \$475 (95%) of cost of components must be domestic/produced in the U.S. **AND** the safe must be “manufactured” in the U.S.
 - Non-iron or steel components can be based on a good faith estimate of domestic vs. foreign
- If $< \$250$ = iron or steel, then the safe is not made “predominantly from iron or steel”
 - And thus at least \$275 (55%) of cost of components must be domestic (unless this is a COTS product) **AND** the safe must be “manufactured” in the U.S.



“Commercially Available Off-The-Shelf” (COTS)

1. Commercial product
 2. Sold in substantial quantities in the commercial/non-government market
 3. Sold without modification
- *Partial* COTS exception for domestic content requirement:
 - ✓ Manufactured products *not* made predominantly from iron or steel
 - ✓ Fasteners
 - ❖ The end item **must still be manufactured** in the U.S. to qualify as “domestic”

“Fastener”

- “Hardware device that mechanically joins or affixes two or more objects together. Examples of fasteners are nuts, bolts, pins, rivets, nails, clips, and screws.”
- Special exception under BAA for COTS fasteners
 - Need only be manufactured in the U.S. (no “domestic content” requirement)
- COTS fasteners are also excluded from the calculation of “iron and steel” when considering whether something is made “predominantly from iron or steel”



Preference vs. Requirement

- FAR 25.001(a):

41 U.S.C. chapter 83, Buy American...[r]estricts the purchase of supplies, that are not domestic end products, for use within the United States. **A foreign end product may be purchased** if the contracting officer determines that the price of the lowest domestic offer is unreasonable or if another exception applies (see subpart 25.1)...

Preference vs. Requirement (cont'd)

- Waivers available
 - Public interest
 - Nonavailability (FAR 25.104 + other determinations)
 - **Unreasonable cost**
 - Commercial IT products (under review?)
 - Commissary/resale
- If the foreign product is **substantially cheaper** than the domestic one, then the BAA may be waived
 - 20% for most acquisitions
 - 30% if the lowest domestic offer is from a small business
 - 50% for *Department of Defense acquisitions*
 - “Critical items” and “critical components” will get an additional “adder”
 - *FAR Council considering a new rule at FAR 25.105 listing “critical” products and preferences*



3. RECENT RULE CHANGES (2021 & 2022)

Summary of Key 2021/2022 Changes

	U.S. Origin Parts or Materials (Supplies)	U.S. Origin Parts or Materials (Construction)	COTS Items
End Products Made Wholly or Predominantly of Iron or Steel (or Both)	Increasing from $\geq 50\%$ to $\geq 95\%$	Increasing from $\geq 50\%$ to $\geq 95\%$	Domestic content requirements not waived for iron and steel end products, except for fasteners
Other End Products	Increasing from $\geq 50\%$ to $\geq 55\%$ to $\geq 60\%$	Increasing from $\geq 50\%$ to $\geq 55\%$ to $\geq 60\%$	Domestic content requirements waived for COTS items.
Domestic Item Price Preference	Increasing from 6% to 20% (large businesses) and 12% to 30% (small businesses)	Increasing from 6% to 20%	Increasing from 6% to 20% (large businesses) and 12% to 30% (small businesses)

Additional 2022 Changes (Effective Oct. 25, 2022)

Updated Content Requirement For Non-Iron/Steel Manufactured Products:

Effective Date	Domestic Content Threshold*
[Previously]	55%
Present - December 31, 2023	60%
January 1, 2024 - December 31, 2028	65%
January 1, 2029	75%

*Potential Exceptions

- ✓ “Alternate domestic content” threshold may be approved by Agency’s senior procurement executive + White House Made in America Office
- ✓ “Fallback” threshold = $\geq 55\%$, when the Agency concludes that higher content requirement cannot be met or requires an unreasonable cost

Even More Changes Coming (?)

- Domestic item price preference for “critical” items and components
- Postaward reporting requirements for “critical” items and components
- FAR Council direction to analyze:
 - Whether the Government should replace the longstanding “component test” with a more expansive “domestic content” test
 - Whether the Government will change, or possibly remove, the partial COTs waiver
 - Whether the Government will change, or possibly remove, the waiver for Commercial IT items.
 - Whether the Government will extend BAA coverage to services
- Standardized definition for “manufacturing”
- Updates to the DFARS (imminently?)

3. CONCLUSION

Overview of Current BAA Requirements

BAA Requirement	Previously	Now
“Domestic end product”	<ul style="list-style-type: none"> • Manufactured in the U.S. • >50% domestic cost of components (waived if COTS) 	<ul style="list-style-type: none"> • Manufactured in the U.S. • 60% domestic cost of components (partial COTS waiver) for civilian agencies • 55% domestic cost of components (partial COTS waiver) for DoD
“Domestic end products” made “predominantly from iron or steel”	<ul style="list-style-type: none"> • Manufactured in the U.S. • >50% domestic cost of components (waived if COTS) 	<ul style="list-style-type: none"> • Manufactured in the U.S. • >95% domestic cost of components (even if COTS)
COTS Fasteners made “predominantly from iron or steel”	Manufactured in the U.S.	Manufactured in the U.S.
COTS domestic end products (not made “predominantly from iron or steel”)	Manufactured in the U.S.	Manufactured in the U.S.
Exceptions?	<ul style="list-style-type: none"> • Public interest • Nonavailability • Unreasonable cost (6-12%) • COTS • Commercial IT • Resale/commissary 	<ul style="list-style-type: none"> • Public interest (limited) • Nonavailability • Unreasonable cost (20-30%) • COTS (limited) • Commercial IT (under review) • Resale/commissary
Certification?	Yes	Yes

Certification Reminders...

- Be careful when you certify your products...



52.225-2 Buy American Certificate.

As prescribed in 25.1101(a)(2), insert the following provision:

BUY AMERICAN CERTIFICATE (FEB 2021)

(a)(1) The Offeror certifies that each end product, except those listed in paragraph (b) of this provision, is a domestic end product.

(2) The Offeror shall list as foreign end products those end products manufactured in the United States that do not qualify as domestic end products.

(3) The terms "domestic end product," "end product," and "foreign end product" are defined in the clause of this solicitation entitled "Buy American—Supplies."

(b) Foreign End Products:

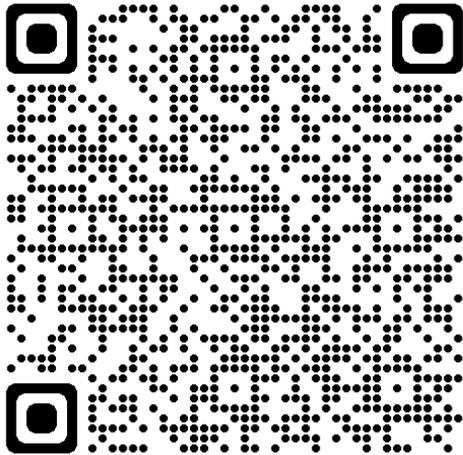
Line Item No.	Country of origin

[List as necessary]

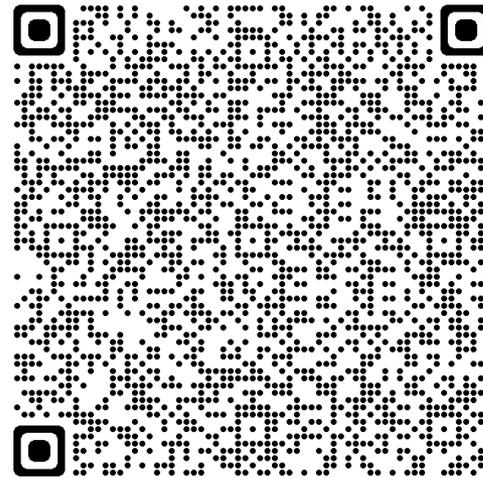
(c) The Government will evaluate offers in accordance with the policies and procedures of part 25 of the Federal Acquisition Regulation.

For More Information...

www.governmentcontractslawblog.com



January 2021 BAA Updates



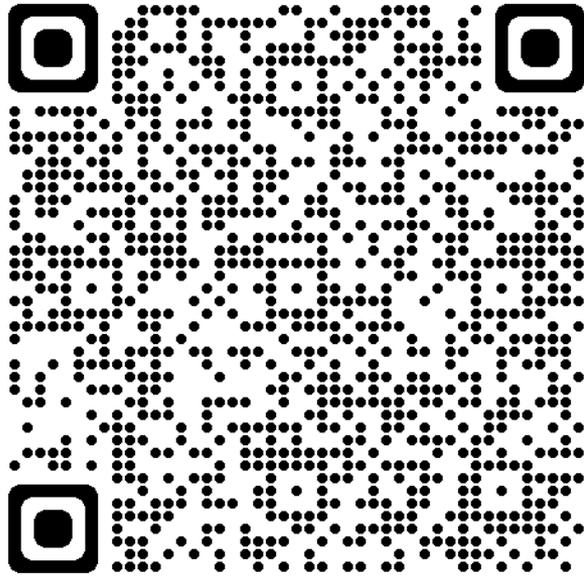
New March 2022 Rules
(Effective October 2022)

Questions?

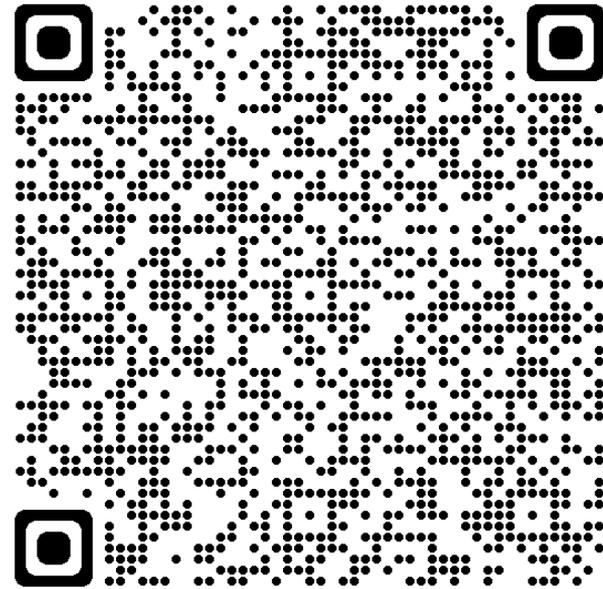


Next Session on January 25, 2023

- Session 2: Trade Agreements Act



Energizer Battery v. U.S.,
Ct. Int'l Trade, 2016



Acetris Health v. U.S.,
Fed. Cir., 2020

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