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Country of Origin and Buy America Requirements

Session 2: The Trade Agreements Act

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Introductions



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Overview of the Series

- January 18: Buy American Act
- February 15: Trade Agreements Act
- March 21: Buy America Requirements under Federally-Funded Transportation Contracts and Programs
- April 18: Build America, Buy America (BABA) and Other Federal Grant Programs
- May 16: Customs and “Made in the USA” Labeling
- June 20: DOD: The Berry Amendment
- July 18: DOD: Specialty Metals Restrictions
- August 15: “Buy America” Round-Up: Additional Country of Origin Requirements
- September 19: Sanctions and Other Prohibited Sources

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**

DHS Kissell Amendment

DoD Berry Amendment

DoD Photovoltaic Devices

**Build America,
Buy America**

And Many, Many More...

Today's Agenda: The Trade Agreements Act



1. **Overview Of The Trade Agreements Act (TAA)**
2. **Key Concepts Under The TAA**
3. **Common Issues Under The TAA**

1. OVERVIEW OF THE TAA

Overview of the TAA

- 19 U.S.C. § 2501-2581
- 1979 statute
- Designed to implement global free-trade agreements (FTAs) and remove trade barriers (such as the Buy American Act/BAA)
- TAA requires delivery of end products from certain approved countries
 - Applies to supplies and services
 - Unapproved country of origin = noncompliant
- **Waivers are rare**
- FAR Subpart 25.4 and DFARS Subpart 225.4
 - 52.225-6, Trade Agreements Certificate
 - 252.225-7020, Trade Agreements Certificate
 - Certification may be express or implied



Overview of the TAA (cont'd)

- Here's how it works...
 - The BAA generally applies to procurements > \$10,000
 - But if:
 - The product being purchased is covered by an FTA;
 - The agency conducting the procurement is covered by an FTA;
 - The procurement is at or above the FTA threshold...
 - Then...



TAA



BAA

TAA Scope



- Applies domestically and overseas
- Typically applies to contracts for covered products valued **≥ \$174,000** (preempting the BAA)
 - \$6.708M for construction contracts
 - Dollar amounts updated every 2 years by USTR (most recent update was **January 1, 2024**); **FAR has not yet been updated...**
- Coverage is determined based on the applicable free trade agreement (*e.g.*, USMCA, WTO GPA)

TAA does not apply to:

1. Small business set-asides
2. Certain national defense procurements
3. Sole-source awards
4. Resale/Commissary
5. Purchases from AbilityOne/UNICOR

TAA Scope (cont'd)



The image shows the cover of the WTO Agreement on Government Procurement 2012. It features a photograph of a modern glass building with a blue sky and trees in the background. The text is overlaid on the image.

 WORLD TRADE ORGANIZATION

Agreement on Government Procurement 2012

and related WTO legal texts



The image shows the USMCA logo and the flags of the United States, Mexico, and Canada. The logo is a circular emblem with the flags' colors and symbols, followed by the text 'USMCA' and 'UNITED STATES - MEXICO - CANADA CENTER'.

 **USMCA**
UNITED STATES - MEXICO - CANADA CENTER

TAA Scope (cont'd)

- Certain product categories will **always** be **excluded from TAA** coverage (i.e., **they will be subject to the BAA**), because they are normally excluded from free trade agreements:

- FSG 10, Weapons
- FSG 11, Nuclear Ordnance
- FSG 12, Fire Control Equipment
- FSG 13, Ammunition and Explosives
- FSG 14, Guided Missiles
- FSG 15, Aircraft and Airframe Structural Components
- FSG 16, Aircraft Components
- FSG 17, Aircraft Launching, Landing, and Ground Handling Equipment
- FSG 18, Space Vehicles
- FSG 19, Ships, Small Craft, Pontoons, and Floating Docks
- FSG 20, Ship and Marine Equipment
- FSG 23 (portions), Ground effect vehicles; Combat, Assault, and Tactical Vehicles; Buses
- FSG 28, Engines, Turbines, and Components
- FSG 31, Bearings
- FSG 36 (portions), Specialized ammunition and ordnance machinery
- FSG 44 (portions), Nuclear reactors
- FSG 49 (portions), Aircraft, rocket, and munition maintenance; fire control maintenance; space vehicle maintenance
- FSG 51, Hand Tools
- FSG 52, Measuring Tools
- FSG 58, Communication, Detection and Coherent Radiation Equipment
- FSG 59, Electrical and Electronic Equipment Components
- FSG 60, Fiber Optics Materials, Components, Assemblies, Accessories
- FSG 66 (portions), Aircraft clocks
- FSG 81 (portions), Ammunition and nuclear ordnance boxes
- FSG 83 (portions), Textiles, leather, furs, apparel and shoes, tents, flags
- FSG 84 (portions), Clothing, individual equipment, and insignia
- FSG 89 (portions), Food and beverages

Compare with DFARS 225.401-70.



TAA Scope (cont'd)

- Certain product categories will usually be covered by the TAA because they are typically listed in the free trade agreements:

- FSG 22, Railway equipment
- FSG 23 (portions), Motor vehicles, trailers, and cycles
- FSG 24, Tractors
- FSG 25, Vehicular equipment components
- FSG 26, Tires and tubes
- FSG 29, Engine accessories
- FSG 30, Mechanical power transmission equipment
- FSG 32, Woodworking machinery and equipment
- FSG 34, Metalworking machinery
- FSG 35, Service and trade equipment
- FSG 36 (portions), Special industry machinery
- FSG 37, Agricultural machinery and equipment
- FSG 38, Construction, mining, excavating, and highway maintenance equipment
- FSG 39, Materials handling equipment
- FSG 40, Rope, cable, chain, and fittings
- FSG 41, Refrigeration, air conditioning, and air circulating equipment
- FSG 42, Firefighting, rescue, and safety equipment; and environmental protection equipment and materials
- FSG 43, Pumps and compressors
- FSG 44 (portions), Furnace, steam plant, and drying equipment
- FSG 45, Plumbing, heating, and waste disposal equipment
- FSG 46, Water purification and sewage treatment equipment
- FSG 47, Pipe, tubing, hose, and fittings
- FSG 48, Valves
- FSG 49 (portions), Maintenance and repair shop equipment
- FSG 53, Hardware and abrasives
- FSG 54, Prefabricated structures and scaffolding
- FSG 55, Lumber, millwork, plywood and veneer
- FSG 56, Construction and building materials
- FSG 61, Electric wire, and power and distribution equipment
- FSG 62, Lighting fixtures and lamps
- FSG 63, Alarm, signal, and security detection systems
- FSG 65, Medical, dental, and veterinary equipment and supplies
- FSG 66 (portions), Instruments and laboratory equipment
- FSG 67, Photographic equipment
- FSG 68, Chemicals and chemical products
- FSG 69, Training aids and devices
- FSG 70, Automatic data processing equipment (including firmware), software, supplies, and support equipment
- FSG 71, Furniture
- FSG 72, Household and commercial furnishings and appliances
- FSG 73, Food preparation and serving equipment
- FSG 74, Office machines, text processing systems and visible record equipment
- FSG 75, Office supplies and devices
- FSG 76, Books, maps, and other publications
- FSG 77, Musical instruments, phonographs, and home-type radios
- FSG 78, Recreational and athletic equipment
- FSG 79, Cleaning equipment and supplies
- FSG 80, Brushes, paints, sealers, and adhesives
- FSG 81 (portions), Containers, packaging, and packing supplies
- FSG 83 (portions), Pins, needles, and sewing kits and flagstuffs, flagpoles, and flagstaff trucks
- FSG 84 (portions), Luggage
- FSG 85, Toiletries
- FSG 87, Agricultural supplies
- FSG 88, Live animals
- FSG 89 (portions), Tobacco products
- FSG 91, Fuels, lubricants, oils, and waxes
- FSG 93, Nonmetallic fabricated materials
- FSG 94, Nonmetallic crude materials
- FSG 96, Ores, minerals, and their primary products
- FSG 99, Miscellaneous

TAA Scope (cont'd)

- To understand whether the BAA or TAA applies –
CHECK YOUR CONTRACT!
- You can also discuss/confirm with the Contracting Officer

2. KEY CONCEPTS UNDER THE TRADE AGREEMENTS ACT (TAA)

Key Concepts Under the TAA

- “U.S.-Made End Product”
- “Substantially Transformed” / “Substantial Transformation”
- “Designated Country End Product”
- “Designated Country”

“U.S.-Made End Product”

- An article that is:
 - “Mined, produced, or manufactured in the United States”; or
 - “Substantially transformed in the United States 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.”



“Substantially Transformed”

Services

- “The country in which the firm providing the services is established” (FAR 25.402(a)(2))

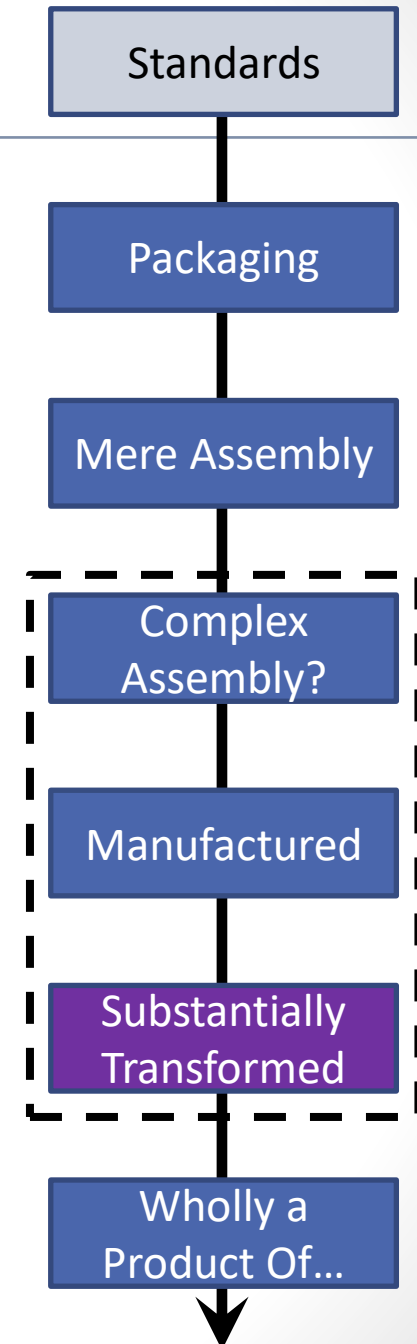
Products

- Requires a **physical change** to the product and components
 - **Origin of components is generally irrelevant** where there has been a substantial transformation
- **Very complicated and fact intensive analysis**
 - Different names?
 - Different characteristics?
 - Different uses?
 - Is the manufacturing process complex and meaningful?
 - What is the country of origin for the main components?

“Substantially Transformed”

Typical questions in assessing “substantial transformation”:

- How has the “name, character or use” changed?
- What level of complexity is involved in assembly process?
 - How many components are there?
 - What technologies are involved?
 - How many operations are required?
 - What machinery or tooling is used?
 - How long does the process take?
- What types of technical skills must employees possess?
- What is the expense and value added of the assembly?



“Substantially Transformed”: *Energizer Battery*

- *Energizer Battery v. United States*, 190 F.Supp.3d 1308 (Ct. Int’l Trade 2016).
- “Substantial transformation” applies to the component parts, **not** just the end product



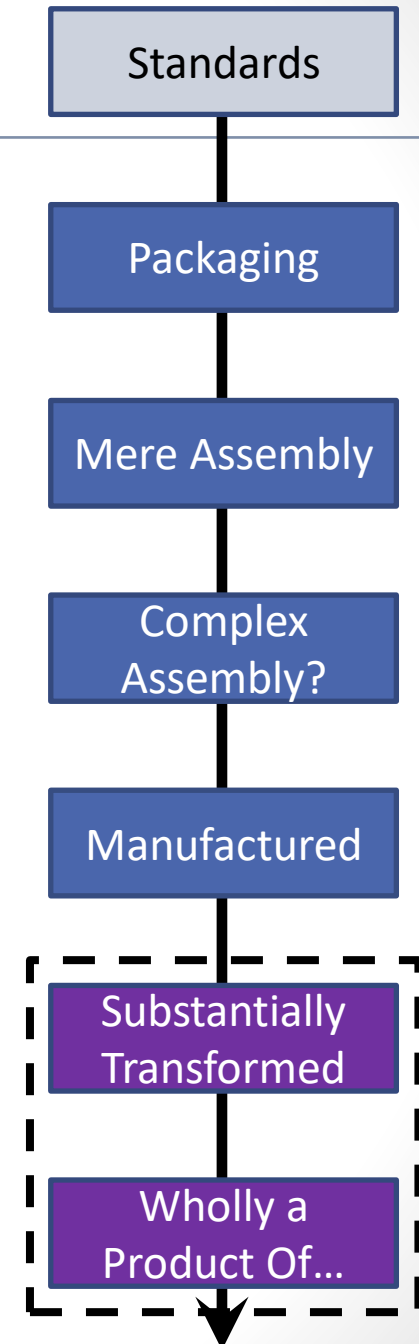
“Manufactured”: *Acetris Health*

- Even though “manufactured” is a lesser standard than “substantially transformed,” a product “manufactured” in the U.S. may still qualify under the TAA
- *Acetris Health LLC v. United States*, 949 F.3d 719 (Fed. Cir. 2020)
 - “U.S.-Made End Product” is a two-part definition:
 - “Mined, produced, or manufactured” OR
 - “Substantially transformed”
 - Products do not need to be “**wholly**” manufactured in the U.S.



“Designated Country End Products”

- An article that is:
 - “**Wholly** the growth, product, or manufacture” of an approved country; or
 - “Substantially transformed” in an approved 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.”



“Designated Country”

- 127 countries
- Four types of countries:
 - ✓ Countries with a Free Trade Agreement with the U.S.
 - ✓ Countries that have signed on to the World Trade Organization Government Procurement Agreement (WTO GPA)
 - ✓ Caribbean Basin countries
 - ✓ “Least Developed Countries”



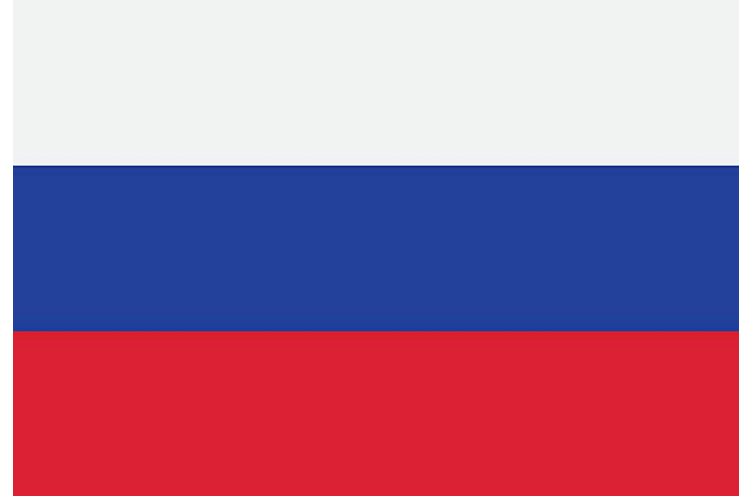
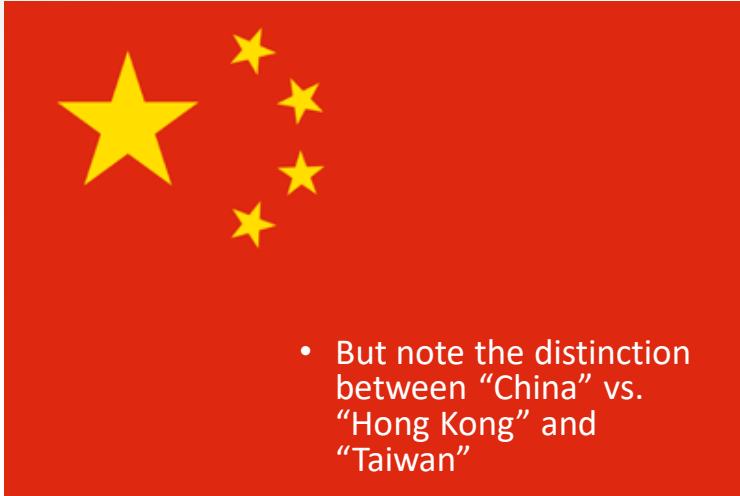
“Designated Country” (cont’d)

- Afghanistan
- Angola
- Antigua and Barbuda
- Armenia
- Aruba
- Australia
- Austria
- Bahamas
- Bahrain
- Bangladesh
- Barbados
- Belgium
- Belize
- Benin
- Bhutan
- Bonaire
- British Virgin Islands
- Bulgaria
- Burkina Faso
- Burundi
- Cambodia
- Canada
- Central African Republic
- Chad
- Chile
- Colombia
- Comoros
- Costa Rica
- Croatia
- Curacao
- Cyprus
- Czech Republic
- Democratic Republic of Congo
- Denmark
- Djibouti
- Dominica
- Dominican Republic
- El Salvador
- Equatorial Guinea
- Eritrea
- Estonia
- Ethiopia
- Finland
- France
- Gambia
- Germany
- Greece
- Grenada
- Guatemala
- Guinea
- Guinea-Bissau
- Guyana
- Haiti
- Honduras
- Hong Kong
- Hungary
- Iceland
- Ireland
- Israel
- Italy
- Jamaica
- Japan
- Kiribati
- Laos

“Designated Country” (cont’d)

- Latvia
- Lesotho
- Liberia
- Liechtenstein
- Lithuania
- Luxembourg
- Madagascar
- Malawi
- Mali
- Malta
- Mauritania
- Mexico
- Moldova
- Montenegro
- Montserrat
- Morocco
- Mozambique
- Nepal
- Netherlands
- New Zealand
- Nicaragua
- Niger
- North Macedonia
- Norway
- Oman
- Panama
- Peru
- Poland
- Portugal
- Romania
- Rwanda
- Saba
- Saint Kitts and Nevis
- Saint Lucia
- Saint Vincent and the Grenadines
- Samoa
- Sao Tome and Principe
- Senegal
- Sierra Leone
- Singapore
- Sint Eustatius
- Sint Maarten
- Slovak Republic
- Slovenia
- Solomon Islands
- Somalia
- South Korea
- South Sudan
- Spain
- Sweden
- Switzerland
- Taiwan
- Tanzania
- Timor-Leste
- Togo
- Trinidad and Tobago
- Tuvalu
- Uganda
- Ukraine
- United Kingdom
- Vanuatu
- Yemen
- Zambia

Non-Approved Countries



3. COMMON ISSUES UNDER THE TAA

Common Issues Under the TAA

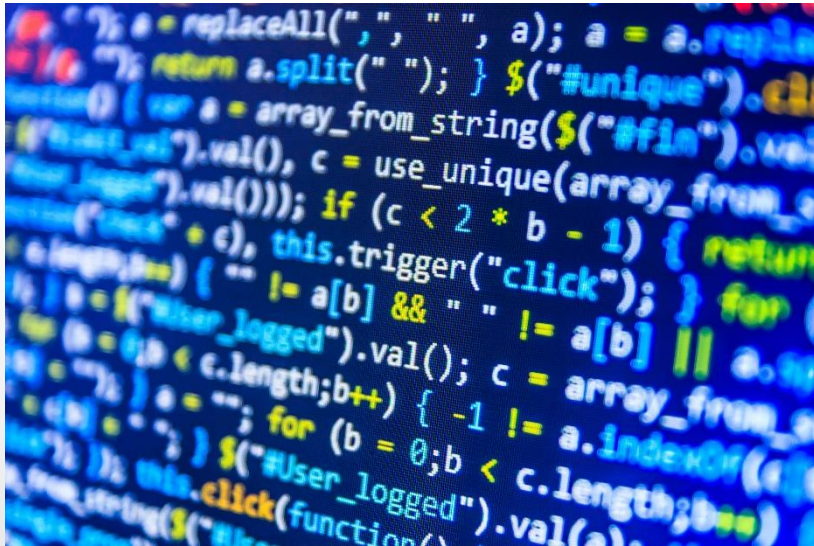
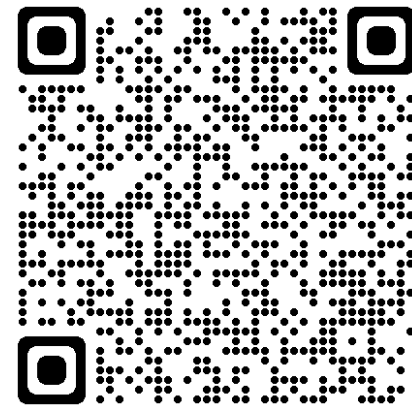
1. How do you determine contract value?
 - \$\$\$ is cumulative; not per order

2. What if products are unavailable from an approved country?
 - Limited waiver authority
 - “Open Market Buy”?

Common Issues Under the TAA (cont'd)

3. Country of origin for software?

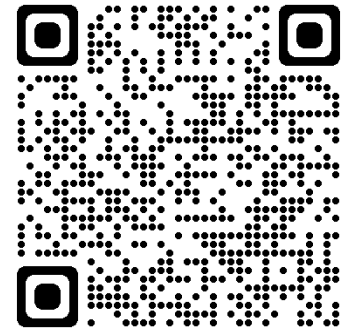
- Software as a “product”
- Software as a Service (SaaS)



Common Issues Under the TAA (cont'd)

4. Applying the NAFTA “tariff shift” test

- *Is there even such a thing anymore under USMCA?*
- 19 C.F.R. Part 181, Appendix (NAFTA Rules of Origin)
- “Tariff shift” ≠ “Substantially Transformed”



5. Relying on product labels/markings?

- “Substantially transformed” is the U.S. Customs standard
- But products “manufactured” in the U.S. might still have a different label (e.g., “Product of India”)



Common Issues Under the TAA (cont'd)

6. Relying on vendor certifications?

- Annual refresh?



7. Potential False Claims Act liability

- 2005: Office supply companies paid \$27M
- 2022: Coloplast paid \$14M

CONCLUSION

How the BAA and TAA Interact...

- The BAA generally applies to procurements > \$10,000
- **But if:**
 - The product being purchased is covered by an FTA;
 - The agency conducting the procurement is covered by an FTA;
 - The procurement is at or above the FTA \$\$\$ threshold...
- **Then...**



TAA



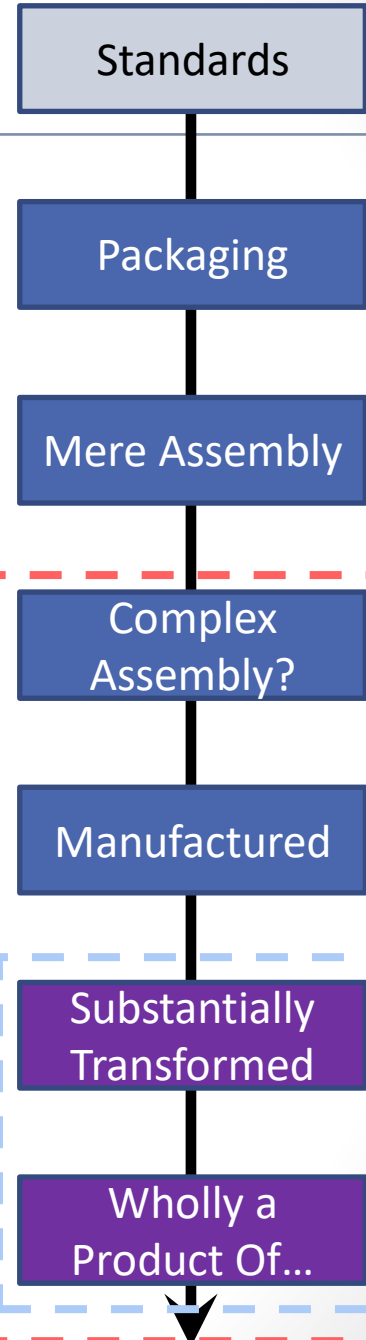
BAA

Differences Between the BAA and the TAA

	Buy American Act	Trade Agreements Act
Processing Requirements	“Manufacturing”	“Substantial Transformation” (and “Manufacturing” for U.S.-made products)
Content/Components	For many products, “domestic content” must $\geq 65\%$	Usually irrelevant
COTS/commercial item	Partial COTS exception relating to “domestic content” requirement is available for <i>some</i> manufactured end-items	Irrelevant
Types of Contract Deliverables	Does not apply to services	Applies to products & services
Types of Products	Distinguishes between: construction materials vs. supplies; products made wholly or predominantly from iron or steel; fasteners; etc.	All covered products & services are subject to the same requirements
Coverage	Applies unless displaced by the TAA	Covered products and services are described in Free Trade Agreements; displaces the BAA when the FTA \$\$\$ threshold is met (typically \$174K)
Prohibition	Non-domestic end products are allowed; waivers available	Non-conforming end products are prohibited; waivers not typically available
Certification	Express or implied	Express or implied

Required Processing

TAA = "Substantially Transformed"	≠	Buy American Act = "Manufactured"
TAA = "Manufactured"	?	Buy American Act = "Manufactured"



Questions?



Next Session on March 21, 2024

- Session 3: Buy America Requirements under Federally-Funding Transportation Contracts and Programs