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# Country of Origin and Buy America Requirements

## Session 1: The Buy American Act

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# Introductions

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# Overview of the Series

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- 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

# 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. BAA and Construction Materials
4. Recent Developments

# 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**

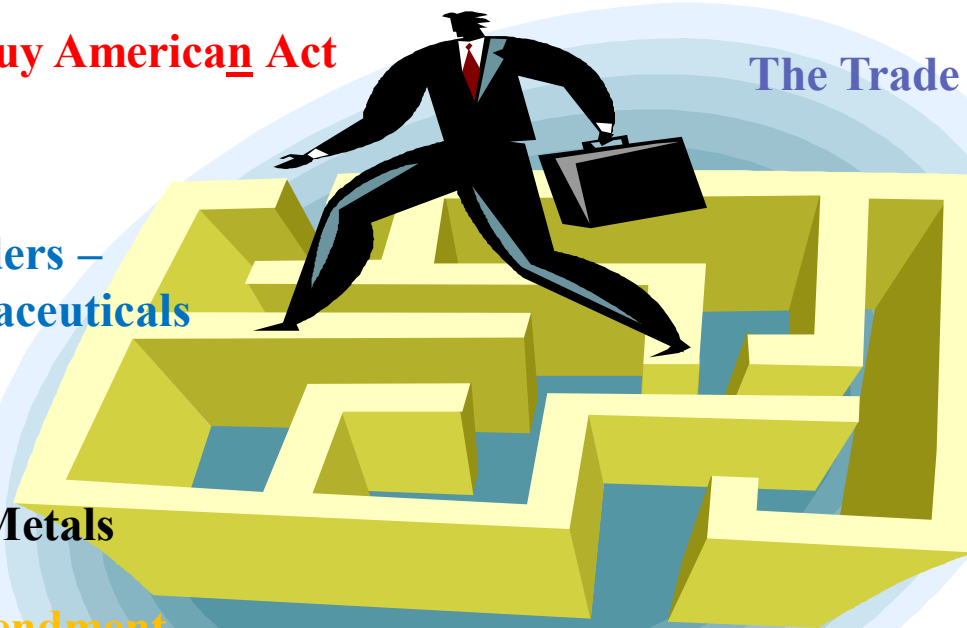
**DHS Kissell Amendment**

**DoD Berry Amendment**

**DoD Photovoltaic Devices**

**Build America,  
Buy America**

**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 **65%** 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 Jan 2024)

- 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)
    - *Proposed Rule issued on June 9, 2023 (88 FR 37942) will harmonize the content requirements with the FAR*
- 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

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- Statute: 41 U.S.C. §§ 8301-8305
- Generally, the BAA is 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 (Supplies)

- “Domestic End Product”
- “Qualifying Country”
- 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
- Certifications

# “Domestic End Product”

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- 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**

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

- ✓ Products made predominantly from iron and steel: **≥ 95%** domestic content
- ✓ Other manufactured products: **≥ 65%** domestic content
  - *Partial* exception for COTS products for domestic content test
  - Domestic content requirement rising to 75% in 2029

# “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

# “Domestic End Product” under the DFARS

Non-Manufactured  
Products

DOMESTIC END PRODUCT

Mined or Produced in the U.S.

Manufactured  
Products

DOMESTIC END PRODUCT

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

- ✓ Products made predominantly from iron and steel: **≥ 95%** domestic or qualifying country content
- ✓ Other manufactured products: **≥ 55%** domestic content
  - *Partial* exception for COTS products for domestic content test
  - *June 2023 proposed rule will match FAR content requirement*



# “Qualifying Country”

- DOD has a unique exception available for products from “qualifying countries”
  - This exception is **not available for civilian agencies**
  - “Qualifying country” = Countries with a cooperative defense Memorandum of Understanding (MOU)
- A “qualifying country end product” is *equivalent* to a “domestic end product” (but not the same)
- Materials from a “qualifying country” are included in the approved “cost of components” for DOD purposes



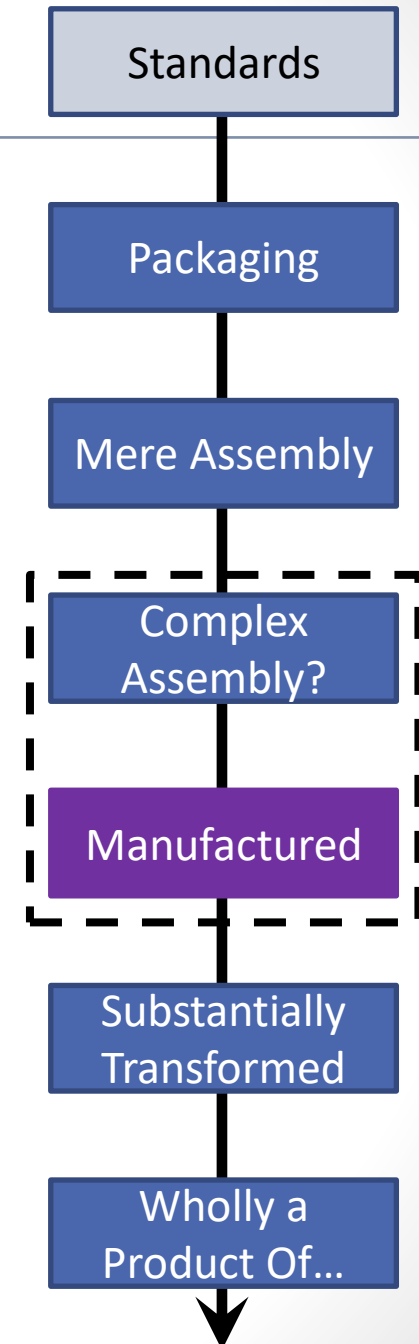
# “Qualifying Country” (cont’d)

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- Australia
- Austria
- Belgium
- Canada
- Czech Republic
- Denmark
- Egypt
- Estonia
- Finland
- France
- Germany
- Greece
- Israel
- Italy
- Japan
- Latvia
- Lithuania
- Luxembourg
- Netherlands
- Norway
- Poland
- Portugal
- Slovenia
- Spain
- Sweden
- Switzerland
- Turkey
- United Kingdom

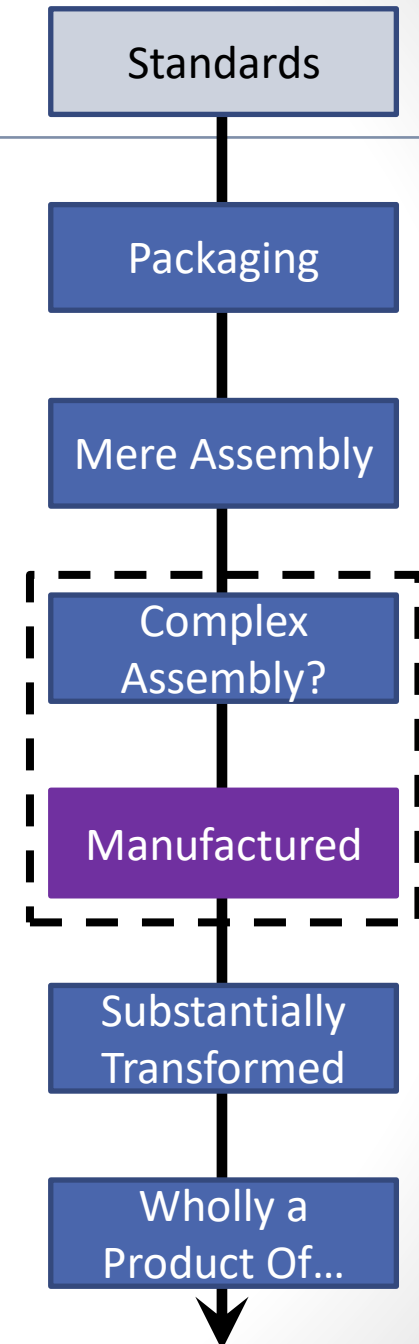
# Manufactured

- 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
  - Does not necessarily require “substantial transformation” (which must be established under the TAA)



# Manufactured (cont'd)

- “The basic test seems to be that if the operations performed on the foreign item create a basically new material or result in a substantial change in physical character....”
  - *United States, ex rel. Kress v. Masonry Solutions Int’l.*, No. 12-2380, June 8, 2015 (E.D. La.)
- Other case law generally considers three variations on this theme:
  - “Completion in the form required by the government”
  - “Made suitable for its intended use and its identity established”
  - “Assembly of components into a usable end item”
- These are highly fact-specific inquiries and the results are not always obvious
  - *See, e.g., TRS Research*, B-285514, Aug. 7, 2000, 2000 CPD ¶ 128 (alteration of cargo shipping containers, without a change in core functionality, did not constitute “manufacturing”)



# 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

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## 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

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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*



# Certifications

- 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.

### 3. BAA AND CONSTRUCTION MATERIALS



# FAR 52.225-9, Buy American – Construction Materials

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“The Contractor shall use only **domestic construction material** in performing this contract, except as provided in paragraphs (b)(2) and (b)(3) of this clause.”



# “Construction Material” Under the BAA

- “An article, material, or supply brought to the construction site by the Contractor or a subcontractor for incorporation into the building or work”
- Includes items brought to the site preassembled from articles, materials, or supplies
- Does not include materials purchased directly by the Government
  - *Those would be considered “supplies”*

# “Construction Material”

## Unmanufactured Products

- Sand
- Unmodified gravel
- Limestone

## Manufactured Products

- Concrete Mix
- Road Base
- Asphalt
- Cable

## Iron & Steel

- Steel Pipe
- Structural Steel

# “Domestic Construction Material”

## Unmanufactured Products

Mined or produced in the U.S.

## Manufactured Products

Manufactured in the U.S. + meet domestic content threshold

## Iron & Steel

All manufacturing processes (from melting through application of coatings) occurs in the U.S.

# Manufactured Products

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Manufactured products *not* made wholly or predominantly from iron or steel are “manufactured” in the United States if:

1. The product is “**manufactured**,” and
2. The cost of components mined, produced, or manufactured in the United States exceeds **65%** of the cost of all its components
  - *Unless* the construction material is a COTS item and that product is *not* made wholly or predominantly from iron or steel...
  - If the product is made wholly or predominantly from iron or steel, then domestic content must be > 95% (more on this in a few slides...)

# Iron & Steel Products

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- “Wholly or predominantly of iron or steel or a combination of both”
- Must be “manufactured” in the United States
- Manufactured = the cost of foreign iron and steel constitutes less than 5% of the cost of **all components** used in such construction material
- No COTS exception for content requirement

# Iron & Steel Products (cont'd)

## Key Questions:

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

## 4. RECENT DEVELOPMENTS

# Summary of Key Changes in 2021/2022

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



# Additional Changes in 2023

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

Effective Date	Domestic Content Threshold
Prior to January 21, 2021	50%
January 21, 2021 – December 31, 2022	55%
January 1, 2023 - December 31, 2023	60%
January 1, 2024 - December 31, 2028	65%*
January 1, 2029 and later	75%*

## \*Potential Exceptions

- ✓ “Alternate domestic content” threshold may be approved by Agency’s senior procurement executive + White House’s 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 (?)

- Additional updates to the DFARS (imminent; proposed rule issued in June 2023)
- Domestic item price preference for “critical” items and components (FAR Case 2022-006)
- Postaward reporting requirements for “critical” items and components
- Enhanced Domestic Content Requirements for “Major Defense Acquisition Programs” (Sec. 835 NDAA FY 2024)
- 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”?

# Waivers

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- Waivers are submitted through the Contracting Officer
- Coordinated through the White House's Made In America Office (MIAO) to allow for greater standardization of waivers
- [www.madeinamerica.gov](http://www.madeinamerica.gov)
  - Provides information about approved and in-process waivers – mostly **nonavailability** and **public interest** waivers
  - Very limited information available regarding waivers based on **unreasonable cost**
  - No information on waivers based on **commercial information technology** exception
- Coordination with MIAO runs the risk that no one “owns” the waiver process...
- Process is continually evolving...



MADE IN  
**AMERICA**.GOV

# Enforcement

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- December 7, 2023: Toner Connect, a NJ-based company, **pled guilty** to falsifying data plates on Chinese forklifts provided to the U.S. Army, claiming they had been manufactured domestically
- November 20, 2023: London Bridge Trading Company, a VA-based tactical gear and equipment company, agreed to pay nearly **\$2.1M** to resolve False Claims Act (FCA) allegations that it failed to comply with requirements of the BAA, the Trade Agreements Act (TAA) and the Berry Amendment
- October 31, 2022: Industrial Equipment and Supply Company, a NY-based company, agreed to pay **\$75,000** to resolve FCA allegations for selling counterfeit batteries (from Singapore) in violation of the BAA
- September 7, 2022: Instec, a CO-based company, agreed to pay **\$625,000** to resolve allegations it violated the FCA by failing to comply with BAA requirements when selling scientific instruments
- September 10, 2021: Southeastern Equipment Co. and SECO Parts and Equipment Co., both located in GA, agreed to pay **\$900,000** to resolve allegations they provided spare parts to the U.S. Army that violated the BAA

# CONCLUSION

# Overview of Current BAA Requirements

BAA Requirement	Pre-2021	Now
“Domestic end product”	<ul style="list-style-type: none"> <li>• Manufactured in the U.S.</li> <li>• &gt;50% domestic cost of components (waived if COTS)</li> </ul>	<ul style="list-style-type: none"> <li>• Manufactured in the U.S.</li> <li>• <b>65%</b> domestic cost of components (partial COTS waiver) for civilian agencies</li> <li>• <b>55% domestic cost of components (partial COTS waiver) for DOD</b></li> </ul>
“Domestic end products” made “predominantly from iron or steel”	<ul style="list-style-type: none"> <li>• Manufactured in the U.S.</li> <li>• &gt;50% domestic cost of components (waived if COTS)</li> </ul>	<ul style="list-style-type: none"> <li>• Manufactured in the U.S.</li> <li>• <b>&gt;95%</b> domestic cost of components (even if COTS)</li> </ul>
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"> <li>• Public interest</li> <li>• Nonavailability</li> <li>• Unreasonable cost (6-12%)</li> <li>• COTS</li> <li>• Commercial IT</li> <li>• Resale/commissary</li> </ul>	<ul style="list-style-type: none"> <li>• Public interest (<b>limited</b>)</li> <li>• Nonavailability</li> <li>• Unreasonable cost (<b>20-30%</b>)</li> <li>• COTS (<b>limited</b>)</li> <li>• Commercial IT (<b>under review</b>)</li> <li>• Resale/commissary</li> </ul>
Certification?	Yes	Yes

# Questions?

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# Next Session on February 15, 2024

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- Session 2: Trade Agreements Act