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Expert Analysis

The Buy American Act information technology exception: Should it apply to the Trade Agreement Act-covered contracts?

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The Buy American Act and the Trade Agreements Act both place restrictions on the U.S. government's purchase of foreign supplies, services and construction material.¹ As implemented in the Federal Acquisition Regulations, acquisitions that are subject to the various trade agreements identified at FAR subpart 25.4 are expressly exempt from the provisions of the Buy American Act.²

There are numerous differences between the purchasing restrictions of both acts that may permit a federal agency to purchase a given end product under one regime but not the other.³ One of the most compelling distinctions has been the application of the congressional exception in the Buy American Act for information technology that is a commercial item.⁴

To date, as interpreted by the Federal Acquisition Regulations Councils, this exception has not been applied to transactions that are covered by the Trade Agreements Act exception to the BAA.⁵

While most analyses of these domestic source restrictions imply that the TAA regime entirely replaces the Buy American Act for covered transactions, it is worth noting that the statutes and regulations consistently describe the TAA as a "waiver" of the BAA.⁶

While a nuance that in most instances has no legal effect, the distinction might have enormous consequences in the realm of commercial IT sales, one of the largest areas of government purchasing, and one of the most difficult areas in which to apply the domestic source restrictions (most particularly, the Trade Agreements Act "substantial transformation" test).

This commentary explores the loophole that some agencies have employed to avoid the TAA in order to enjoy the benefits of the commercial IT exception to the Buy American Act, and traces the recent developments suggesting executive-branch-wide efforts to close that loophole and impose the TAA across virtually all commercial IT sales.

It is worth noting that the statutes and regulations describe the Trade Agreements Act as a “waiver” of the Buy American Act.

We posit here a more straightforward and intellectually honest approach to the law that would allow commercial IT sales to the government without regard to the Trade Agreements Act, which would effectuate the intent behind Congress’ commercial IT exception. At the same time this approach would ease the burden and confusion in and between government agencies and the contracting community. While recent developments suggest a convergence at least on the government’s side of the equation, this convergence may be inconsistent with Congress’ intent.

THE ACTS AND IT EXCEPTION

For supplies, including IT, the Federal Acquisition Regulations make the Buy American Act applicable above the micro-purchase threshold.⁷ The president, relying on authority provided in the Trade Agreements Act, has created a waiver of the BAA above certain purchasing thresholds for various trade agreements.⁸

The most common trade agreement affecting supply purchases is the World Trade Organization Government Procurement Agreement, which applies under the Federal Acquisition Regulations to purchases equal to or in excess of \$194,000.⁹ Traditionally, the key issue for determining whether the IT exception applies is the anticipated value of the underlying contract.

The means of determining the underlying contract value for Buy American Act and Trade Agreements Act purposes is not precisely described in the Federal Acquisition Regulations. In the context of schedule contracting, FAR 25.403 provides:

If, in any 12-month period, recurring or multiple awards for the same type of product or products are anticipated, use the total estimated value of these projected awards to determine whether the WTO GPA or an FTA [free trade agreement] applies. Do not divide any acquisition with the intent of reducing the estimated value of the acquisition below the dollar threshold of the WTO GPA or an FTA.¹⁰

However, there is no direction whether this aggregation should be performed for the overall contract within a single year or within the life of the contract. Nor is there any explicit direction whether the threshold must be met on a contract line item basis before the Trade Agreements Act exception applies to that contract line item. Historically, agencies have diverged on their interpretation of this requirement.

DETERMINING THE APPLICABILITY THRESHOLD

For some time, the U.S. General Services Administration has applied the Trade Agreements Act, rather than the Buy American Act, to all GSA Multiple Award Schedules and Federal Supply Schedules. In this regard, the agency explains as follows: “Since the estimated dollar value of each schedule exceeds the established [Trade Agreements Act] ... threshold, the Trade Agreements Act is applicable to all schedules.”¹¹

As a result of the General Services Administration’s policy, all contractors providing IT under the agency’s IT Schedule 70, a Multiple Award Schedule exclusively for such purchases, must comply with the Trade Agreements Act. Historically that has resulted in the GSA prohibiting the contractors from applying the commercial IT exception within the Buy American Act.

As a point of contrast with the GSA's long-standing policy, NASA's policy with respect to its IT schedule, the Solutions for Enterprise-Wide Procurement Government-Wide Acquisition Contract, or SEWP, historically was the opposite.

NASA took the position that the application of the Trade Agreements Act exception was triggered at the order level as determined by the purchasing agency contracting officer.

As late as November 2009 the frequently asked questions section of NASA's web site stated:

Are SEWP products BAA/TAA compliant?

Buy American Act no longer applies to contracts such as SEWP (IDIQ [indefinite delivery indefinite quantity] commercial IT contracts). *Trade Agreements Act applies only to orders over a certain dollar amount* — depending on the country of origin. See FAR Subpart 25.4 for more information.

For the purposes of SEWP, it is not our intention to restrict or permit the sale of non-domestic end products. It is our and SEWP contract holders duty to notate such products and to make that information available to acquiring contracting officers. It is the duty of the acquiring contracting officer to evaluate offers in accordance with FAR Subpart 25.5 and their own agency policies. If they receive a quote with items noted as being from non-Trade Agreements Act compliant countries and receive other quotes for items from trade compliant countries, then they would need to follow FAR Subpart 25.4 in determining whether or not they may purchase that item.¹²

Yet, NASA had already begun implementing a policy change. The implementation of this policy change began sometime in early 2010, when NASA changed its frequently asked questions section to read as follows:

Are SEWP products BAA/TAA compliant?

Buy American Act no longer applies to contracts such as SEWP (IDIQ commercial IT contracts). Trade Agreements Act applies only to contracts over a certain dollar amount — depending on the country of origin. See FAR Subpart 25.4 for more information.

For the purposes of SEWP, it is not our intention to restrict or permit the sale of non-domestic end products. It is our and SEWP contract holders duty to notate such products and to make that information available to acquiring contracting officers. It is the duty of the acquiring contracting officer to evaluate offers in accordance with FAR Subpart 25.5 and their own agency policies. If they receive a quote with items noted as being from non-Trade Agreements Act compliant countries and receive other quotes for items from trade compliant countries, then they would need to follow FAR Subpart 25.4 in determining whether or not they may purchase that item.

The key issue for determining whether the IT exception applies is the anticipated value of the underlying contract.

The executive branch has made a collective policy decision to try to limit the application of the commercial IT exception on schedule-based contracts.

Contract holders should ensure that all items offered are compliant with the Trade Agreements Act. The Trade Agreements Act (19 U.S.C. § 2501 *et seq.*) is the enabling statute that implements numerous multilateral and bilateral international trade agreements and other trade initiatives. *Since the estimated dollar value of each SEWP contract exceeds the established TAA threshold, the Trade Agreements Act is applicable to all SEWP contracts.* In accordance with the Trade Agreements Act, only U.S.-made or designated country end products shall be purchased under SEWP contracts unless the products fall under the appropriate Federal Acquisition Regulations exceptions.¹³

This obviously did not clarify NASA's position. Eventually, NASA adopted the language currently found in its FAQ, which simplifies the statement from early 2010 applying Trade Agreements Act to all SEWP contracts:

Are SEWP products BAA/TAA compliant?

Contract holders must ensure that all items offered are compliant with the Trade Agreements Act. The Trade Agreements Act (19 U.S.C. § 2501 *et seq.*) is the enabling statute that implements numerous multilateral and bilateral international trade agreements and other trade initiatives. *Since the estimated dollar value of each SEWP contract exceeds the established TAA threshold, the TAA is applicable to all SEWP contracts.* In accordance with the Trade Agreements Act, only U.S.-made or designated country end products shall be purchased under SEWP contracts unless an exception exists and is documented by the contracting officer as noted in FAR 25.401. Otherwise, the contracting officer must follow the procedures as outlined in "FAR 25.408 Procedures."¹⁴

The transition to this new policy approach continues at NASA. For example, certain products on SEWP schedules may still be designated "NC" (noncompliant) — meaning that the product is not TAA-compliant.

This designation is arguably only relevant if the Trade Agreements Act might not apply. If SEWP applies the TAA at the schedule level, though, all products should be compliant and no products should be listed as "NC."

Until this recent change, purchasing agencies were buying off the SEWP contract rather than the Group 70 General Services Administration Schedule very likely in part because of the access to potentially less-expensive products that required no attention to country of origin, given the commercial IT exception to the Buy American Act.¹⁵

APPLICABILITY OF COMMERCIAL IT EXCEPTION

While the transition of all agencies to the same sheet of music may still be in progress, it is clear that the executive branch has made a collective policy decision to try to limit the application of the commercial IT exception on schedule-based contracts. But is this result consistent with the terms and purposes of the Buy American Act, the Trade Agreements Act and the commercial IT exception? Arguably, no, it is not.

Setting aside whether the purchase threshold should be determined at the order or schedule level, the more important issue is whether Congress intended that the IT exception should apply in practice to a relatively small percentage of commer-

cial IT purchases by the government. The Federal Acquisition Regulations currently apply the commercial IT exception to contracts below the Trade Agreements Act threshold.¹⁶

We think the Federal Acquisition Regulations Councils may have been wrong in doing so.

As already noted, through the Trade Agreements Act Congress only provided the executive branch with the power to waive the discriminatory purchasing requirements of the Buy American Act.¹⁷ The TAA did not provide the executive branch and, more specifically, the Federal Acquisition Regulations Councils with authority restrict the later, and broadly worded, commercial IT exception to the Buy American Act that appeared in congressional appropriations bills.

As the Trade Agreements Act is merely an exception to the Buy American Act, the terms of the BAA lay dormant in transactions above the various TAA thresholds.

Stated another way, merely because one exception (Trade Agreements Act) to the Buy American Act applies to a contract does not mean that another exception (commercial IT) cannot or should not also apply.

Thus, the failure to apply to the commercial IT exception is arguably an *ultra vires* act, in conflict with the will of Congress. Applying the IT exception to Trade Agreements Act-covered purchases would bring the Federal Acquisition Regulations in line with the intent of Congress in creating the commercial IT exception to the Buy American Act.

Starting, as we must, with the statutory language, there is no dollar-value limit to Congress's creation of the commercial IT exception.¹⁸ Nor is there any language in the text or the legislative history suggesting that the commercial IT exception shall *not* apply when the Trade Agreements Act exception applies to a particular contract. Congress certainly was aware of the existence of the TAA and presumably was also aware of the Federal Acquisition Regulations Councils' description of the TAA as an exception to Buy American Act-covered transactions.

Consequently, a fair reading of the appropriation laws evince an intention by Congress to apply the commercial IT exception as broadly as possible, without regard to whether the TAA exception to the Buy American Act also happens to apply to a particular contract or order.

Further, a significant portion of government IT purchases is through one of the many indefinite delivery indefinite quantity schedules, including General Services Administration's Group 70 and NASA's SEWP.¹⁹ Given the aggregation language in FAR 25.403, therefore, many commercial IT sales to the government fall under the TAA exception. Could it be that Congress intended for the commercial IT exception to not apply to such a significant portion of government IT purchases?

The Trade Agreements Act and the Federal Acquisition Regulations consistently describe the TAA as an "exception" to the Buy American Act instead of a total replacement of the BAA.

Considering this description, it should be at least considered that Congress intended the commercial IT exception to apply to every government IT purchase. It should also be considered that the Federal Acquisition Regulations Councils overstepped their authority by limiting the imposition of a restriction on the exception, which Congress did not intend.

Applying the IT exception to Trade-Agreements-Act-covered purchases would bring the Federal Acquisition Regulations in line with the intent of Congress.

The Trade Agreements Act and the Federal Acquisition Regulations consistently describe the Trade Agreements Act as an "exception" to the Buy American Act, instead of a total replacement of the Buy American Act.

This (re)interpretation would be a clear benefit to the federal government. After all, the IT exception was originally adopted with the purpose of "promot[ing] government access to commercial information technology."²⁰ Applying the IT exception to purchases otherwise covered by the Trade Agreements Act would open up a significantly broader selection of IT to government agencies.

A broader application of the commercial IT exception would also moot the issue of the applicability of the TAA to all commercial IT orders under certain indefinite delivery indefinite quantity contracts and not others. More importantly, it would also significantly reduce the impact of difficulties of applying the TAA's substantial transformation test to the complex area of commercial IT.²¹

For one example, there is no guidance to determine the country of origin for an end product purchase by the government made of multiple components with multiple points of origin where such items are not substantially transformed in assembling the final line item ordered by the government.

Indeed, some U.S. Customs and Border Protection agency rulings suggest that there may be a single country of origin for the end product based upon the component that provides the end product with its "essential character," while other rulings suggest that the end product might actually have multiple countries of origin.²² This means that federal contractors have no direction with regard to Trade Agreements Act compliance when selling the most basic IT items.

Applying the commercial IT exception to government purchases otherwise covered by the TAA would provide a simple resolution to these complex issues.

CONCLUSION

The commercial IT exception was a just recognition that the 20th century protectionism provided by the Buy American Act is incompatible with the realities of 21st-century IT production.

Nevertheless, the Federal Acquisition Regulations perpetuate the old regime by forcing the application of the TAA upon the government's commercial IT purchases. Not only does this defeat the essential will of Congress in many commercial IT purchases by the government, it is also bad policy.

Extending the commercial IT exception to purchases otherwise covered by the Trade Agreements Act will improve federal government access to IT, avoid the doctrinal shortcomings of the TAA's substantial transformation test in the context of a complex manufacturing process, and eliminate various agencies' need for and desire to find loopholes around the application of Trade Agreements Act.

NOTES

¹ Buy American Act, 41 U.S.C. §§ 10a *et seq.*; Trade Agreements Act, 19 U.S.C. §§ 2501 *et seq.*

² FAR 25.001(b).

³ See Matthew C. Hoyer, *Country-of-Origin Requirement Facing Federal Construction Contractors*, Construction Briefings No. 2009-7, 6 No. 8 INT'L GOV'T CONTRACTOR ¶ 62 (July 2009).

⁴ FAR 25.103(e). "On January 23, 2004, President George W. Bush signed the Omnibus Appropriations Bill (Pub. L. No. 108-199), which contained in Title V, Section 535, an exception to the Buy American Act for the purchase of IT products that are commercial items. Section 535 stated: 'In order to promote government access to commercial information technology, the restriction on purchasing no domestic articles, materials, and supplies set forth in the Buy American Act (41 U.S.C. § 10a *et seq.*), shall not apply to the acquisition by the federal government of information

technology ... that is a commercial item.” See Sean P. Bamford, *A Perfect Asymmetry: The Interplay Between the Buy American Act’s Information Technology Exception and the Trade Agreements Act*, 2 THE PROCUREMENT LAWYER at 1, 1, (Winter 2008).

- ⁵ Bamford, *supra* note 4, at 1.
- ⁶ 19 U.S.C. § 2511(a); FAR 25.402.
- ⁷ FAR 25.100(b)(1). For services contracts that include the provision of supplies, the Buy American Act applies where the supplies portion of the contract exceeds the micro-purchase threshold. FAR 25.100(b)(2). The micro-purchase threshold is \$3,000 for most purchases. FAR 2.101.
- ⁸ FAR 25.402(a)(1).
- ⁹ 19 U.S.C. § 2511; FAR 25.402(b).
- ¹⁰ FAR 25.403(b)(3).
- ¹¹ General Services Administration schedules, <http://www.gsa.gov/portal/content/104447>.
- ¹² NASA Solutions for Enterprise-Wide Procurement IV frequently asked questions, http://www.sewp.nasa.gov/faq.shtml#pcs_q8 (as it appeared Nov. 11, 2009) (emphasis added).
- ¹³ NASA Solutions for Enterprise-Wide Procurement IV frequently asked questions, http://www.sewp.nasa.gov/faq.shtml#pcs_q8 (as it appeared Mar. 9, 2010) (emphasis added).
- ¹⁴ NASA Solutions for Enterprise-Wide Procurement IV frequently asked questions, http://www.sewp.nasa.gov/faq.shtml#pcs_q8 (last visited June 3, 2010) (emphasis added).
- ¹⁵ Other government-wide acquisition contracts have been, to say the least, murky with regard to whether the Trade Agreements Act applies to all purchases under the vehicle or only to those purchases where the purchasing contracting officer incorporates the TAA clause into the contract. For example, the National Institute of Health’s “ECS III” standard contract originally contained both Buy American Act and TAA clauses. See IT Products (ECS III) Contract, [http://nitaac.nih.gov/nitaac/sites/default/files/ecs3_Original_Contract\(04-30-04\).pdf](http://nitaac.nih.gov/nitaac/sites/default/files/ecs3_Original_Contract(04-30-04).pdf) (last visited June 4, 2010). The ECS III standard contract was later modified to delete all references to both the BAA and TAA. See ECS III Master Mod 5 (SF 30) (Mar. 6, 2008), http://nitaac.nih.gov/nitaac/sites/default/files/ECS3_Contract_MasterMod5SF30.pdf (last visited June 4, 2010) (designated “Amendment/Modification No. 0004” but distinct from ECS III Master Mod 4 (SF 30) (June 17, 2005), http://nitaac.nih.gov/nitaac/sites/default/files/ECS3_Contract_MasterMod4SF30.pdf (last visited June 4, 2010)). One might infer that the National Institutes of Health decided that the Buy American Act clause need not be included because of the commercial IT exemption and the Trade Agreements Act clause need not be included because the decision would be made by the ordering agency.
- ¹⁶ The commercial IT exception is only found in the portion of the Federal Acquisition Regulations relating to the Buy American Act, which is FAR subpart 25.1. FAR 25.103(e). FAR subpart 25.4, relating to the Trade Agreements Act, has no such exception. FAR 25.401.
- ¹⁷ 19 U.S.C. § 2511; FAR 25.402(b).
- ¹⁸ See Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, § 535(a), 118 Stat. 3, 345 (2004); see also Consolidated Appropriations Act of 2010, Pub. L. No. 111-117, 123 Stat. 3034, 3203 (2009) (preserving the IT exception as it existed in previous continuing resolutions); Omnibus Appropriations Act of 2009, Pub. L. No. 111-8, 123 Stat. 524, 677 (2009) (same); Consolidated Appropriations Act of 2008, Pub. L. No. 110-161, § 618, 121 Stat. 1844, 2016 (2007) (same); Transportation, Treasury, Housing and Urban Development, The Judiciary, The District of Columbia and Independent Agencies Appropriations Act of 2006, Pub. L. No. 109-115, § 717, 119 Stat. 2396, 2493 (2005) (same); Consolidated Appropriations Act of 2005, Pub. L. No. 108-447, § 517, 118 Stat. 2809, 3267 (2004) (same).
- ¹⁹ Total federal government spending on IT in fiscal year 2009 was \$76 billion. U.S. OFFICE OF MGMT & BUDGET, FEDERAL IT SPENDING FOR BUDGET YEAR 2011 (Feb. 1, 2010), available at http://www.whitehouse.gov/omb/assets/egov_docs/Agency_53_Details_20100201.xls. General Services Administration’s Schedule 70 accounts for \$15.8 billion, which is nearly 21 percent of total federal IT sales and 42 percent of the total \$38 billion across all General Services Administration schedules. Dan Davidson, *GSA Looks to Raise IT Sales*, FED. TIMES (June 9, 2009), available at <http://www.federaltimes.com/article/20090609/DEPARTMENTS07/906090304/0/RSS>. Solutions for Enterprise-Wide Procurement sales were \$1.8 billion in fiscal year 2009. SEWP Solutions for Enterprise-Wide Procurement, SEWP Overview, available at http://www.sewp.nasa.gov/documents/SEWP_overview.ppt.
- ²⁰ Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, § 535, 118 Stat. 3, 345 (2004).
- ²¹ See, e.g., Bamford, *supra* note 4, at 22 (noting that the application of the Trade Agreements Act’s substantial transformation test for country of origin determinations amounts to a “metaphysical soup” when applied to IT hardware and software). This uncertainty is not likely to be resolved

by Customs and Border Patrol's plan to substitute the tariff shift rules for the multi-factor test for substantial transformation. See Letter from Tim Van Oost, Chair, Am. Ass'n of Exporters and Importers, to W. Ralph Bashem, Commissioner, Bureau of Customs and Border Protection (October 2008), available at <http://www.aaei.org/LinkClick.aspx?fileticket=GEA3jBnKkNQ%3d&tabid=82> (discussing problems associated with using the tariff shift standard for Trade Agreements Act country of origin determinations).

²² See, e.g., Notice of Issuance of Final Determination Concerning Bolt Container Seals and Cable Seals, 41 Cust. B. & Dec. 8, 2007 WL 628007 (U.S.C.S. Feb. 13, 2007) (finding that one of the assembly scenarios presented generated two "articles," each with a different country of origin); Notice of Issuance of Final Determination Concerning Standard and Rolled-Edge Ball Seals, 42 Cust. B. & Dec. 44, 2008 WL 562054 (U.S.C.S. Feb. 6, 2008) (applying "essential character" test with one COO for an end product).



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