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# International Aspects of U.S. Government Procurement: Buy American and Beyond

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## Agenda

- I. Background and Introduction
- II. Buy National Programs and Requirements
  - Buy American Act (“BAA”) and Trade Agreements Act (“TAA”)
  - ARRA Buy American Requirements
  - The Berry Amendment
  - BAA /TAA Compliance Programs

## Agenda, Continued

### III. Export Compliance Issues

- ITAR Controls
- Government Contract Interactions with ITAR
- Government contract-related International Sanctions
- FCPA Issue Spotting

## Agenda, Continued

### IV. The Role of Non-U.S. Persons in Government Contracts

- Security Clearances and Contractual Restrictions
- CFIUS, FOCI, and other Investment Issues
- FMS and FMF Financing Issues

## Background: Buy National Rules

- The Buy American Act (“BAA”) requires that the US government purchase US made products.
  - 41 U.S.C. § 10a-10d
  - Federal Acquisition Regulation (“FAR”) Part 25
- The Trade Agreements Act (“TAA”) waives the BAA and allows the US government to purchase from certain countries that have trade agreements with the US – such as the WTO GPA.
  - 19 U.S.C. § 2501

## Background: Importance

- Prosecution
  - False Claims Act, 31 USC § 3729 *et seq* prohibits *knowing* or with *reckless disregard* presenting a false claim to be paid by the government.
  - False Statements Act, 18 USC § 1001 prohibits *knowingly and willfully* making a false statement to the government.
  - Criminal prosecution of the company and/or the individual (including jail time for individuals) and fines.
  - Civil penalties: liability of up to \$10,000 per instance and treble damages.
  - False Claims Act *qui tam* suits.
- Protests
  - For example, Air Force Tanker Procurement
- Debarment and Suspension

## The BAA: What constitutes “American?”

- “Domestic End Product”
- The Two Part Test:
  - “Manufacture in the United States” and
  - The 50% Test: where the cost of the US components must exceed 50%
- What constitutes Manufacture?
- What counts as Cost?

## The BAA: Applicability

- Applies to Small Businesses and Set-Asides
  - FAR Part 25.101(b).
- Must be Above micro-purchase Threshold
  - FAR Part 25.100.

## The BAA: Exceptions

- Various Non-availability, Public Interest, and Cost Exceptions listed in FAR Part 25.103.
- COTS products must be *manufactured* in the US but can contain globally-sourced parts (i.e. not 50% rule).
- Commercial IT can be purchased from any source.

## The Trade Agreements Act (“TAA”)

- The TAA waives the BAA requirements for US supplies.
- The USTR has waived the BAA and other discriminatory provisions for eligible products in acquisitions covered by various international trade agreements such as: the World Trade Organization Government Procurement Agreement, North American Free Trade Agreement, the Israeli Trade Act, etc.
- When the TAA clause is included, the Government may not purchase products from non-designated countries.

## TAA: What qualifies and from where?

- Contract minimum dollar thresholds.
  - FAR Part 25.402(b).
- Product must manufactured or undergo “Substantial Transformation” in a “designated country”.
  - FAR Part 25.400

## TAA: Substantial Transformation

- A substantial transformation occurs when an article emerges from processing as a new and different article of commerce that possesses a new name, character, or use.
- After the act of transformation, it is now something that meets specifications.

## TAA: Substantial Transformation

- Important factors:
  - Country of origin of the item's components,
  - Extent of the processing that occurs within a country,
  - Whether the processing renders a product with a new name, character, and use,
- Other factors:
  - Resources expended on product design and development,
  - Extent and nature of post-assembly inspection and testing procedures, and
  - Degree of skill required during the actual manufacturing process
- Customs Designation Shift

## TAA and Software: the emerging rules

### Issues that Need To Be Considered:

- Where was the source and object code written and compiled?
- Where was the firmware written, and where was it installed?
- Where was the physical installation?
- What are the relative costs, and percentage of time, for each step?
- Can a customer do this work, or does it require “special” equipment or training?

# ARRA Buy American Requirements

Practitioner's Note: ARRA requirements are not always present on the face of the documents; check the funding sources.

- Buy American Restriction in Section 1605 states that no funds appropriated by the Act may be used for a public buildings/works project unless “all iron, steel and manufactured goods used . . . are produced in the U.S.”
- What does “produced” mean?
  - all manufacturing processes of the iron or steel except metallurgical processes involving refinement of steel additives.
- FAR changes came into effect on October 1, 2010.

- Changes the application of the Buy American restriction in cases where the construction material is “wholly or predominately of iron or steel.”
- Example – HVAC Unit:
  - Under the previous interpretation of construction material.
  - Under the current interpretation of construction material.
- What does this mean?
  - More inquires regarding the providence of the iron or steel used in fasteners.
  - More requests make fasteners out of iron or steel produced in the United States.

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# Specialty Metals: The Berry Amendment

## (DoD Contracts Only)



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- Berry was a South Dakota Congressman from 1951-1971 who sponsored the first “Berry Amendment”.
- The Berry Amendment is intended to protect the defense industrial base in the United States.
- Amended in 2007 – split traditional Berry Amendment articles from specialty metals.
  - 10 U.S.C. § 2533b (Specialty Metals)
  - 10 U.S.C. § 2533a (the “Berry Amendment”)
- Restricts the purchase of specialty metals (or aircraft, missile and space systems, ships, tank and automotive items, weapon systems or ammunition containing specialty metals) that were not melted or produced in the United States.

- Defense Federal Acquisition Regulation Supplement (DFARS) Part 225.7003 Restrictions on acquisition of specialty metals.
- DFARS Clause 252.225-7014 (Specialty Metals)
- Read the contract: the rules may be changed by contract clause, and may have special clauses written in.

Contracts awarded and not subsequently modified:

- **Prior to Dec. 6, 2006:** Apply the “original” specialty metals restrictions as listed in 10 U.S.C. § 2533a (under the Berry Amendment)
- **Dec. 6, 2006 to Oct. 26, 2007:** Apply the restrictions and exceptions from the 2007 Defense Appropriations Act.
- **Oct. 26, 2007 to Jan. 28, 2008:** COTS products are excepted from the specialty metal requirements pursuant to Class Deviation 2007-00011. For non-COTS products, apply the restrictions and exceptions from the 2007 Defense Appropriations Act.
- **After Jan 29, 2008:** Apply the restrictions and exceptions from the 2008 Defense Appropriations Act.
- **Read each year’s DPA!!**

Modified contracts follow whatever clause was modified into the contract.

## Specialty Metal Exceptions

- Simplified Acquisition Threshold (<\$100,000).
- Acquisitions outside the US in support of combat operations (Middle East and Afghanistan).
- Acquisitions in support of contingency operations.
- Acquisitions for items specifically for resale in commissaries.
- Acquisitions where other than competitive procedures (i.e., sole source contract) are used because of the existence of an unusual and compelling urgency pursuant to Federal Acquisition Regulation Part 6.302-2.
- Items manufactured in a qualifying country.
- Restrictions on specialty metals generally do not apply to:
  - Commercial Off The Shelf (COTS) products
  - *De Minimis* incorporation
  - Commercially derivative military articles
- However, the clauses are not necessarily self-deleting.

## Specialty Metals: The COTS Exception

- Definition of a COTS product:
  - A commercial item;
  - Sold in “substantial quantities” in the commercial marketplace; and
  - Offered to the Government, without modification, in the same form in which it is sold in the commercial marketplace.
- Does not include:
  - Bulk cargo, such as agricultural products and petroleum products.
  - Purchase of specialty metals
- Unless incorporated into a COTS product, the following items must be compliant
  - Forgings or casting of specialty metals
  - High performance magnets
  - Fasteners

## Other Specialty Metal Exceptions

- **De Minimus Exception:** 2% of the total weight of specialty metals may be non-compliant.
- Do not include specialty metals that fall under another exception (such as the COTS exception) in your calculation of the total weight.
- High performance magnets do not qualify for this exception.
- Exception applies to a manufacturer
- **Designated Commercially Derivative Military Article Exception**
- The contractor (and its subcontractors) must certify that it has entered into a contractual agreement to purchase domestically melted specialty metals in the amount of at least:
  - 120% of the specialty metal required to produce the commercially derivative article; or
  - 50% of all specialty metal for use during the period

## Specialty Metals: DNADs

- Domestic Nonavailability Determinations (DNAD) are still available.
- New Class DNADs require:
  - 30 day notice on FedBizOpps.gov.
  - Solicitation and consideration of information relevant to the notice from all interested parties.
- Previously issued DNADs for circuit card assemblies, fasteners, needle roller bearings, and Caterpillar diesel engine components expired on July 26, 2008.
  - New procurements after July 26, 2008 cannot rely on those DNADs.
  - However, for contracts awarded prior to July 26, 2008, where the award relied upon these Class DNADs, the DoD can continue to accept items after July 26, 2008.

## Continuation of Existing Exceptions

Specialty metal restrictions do not apply in the following situations:

- Simplified Acquisition Threshold (<\$100,000)
- Acquisitions outside the US in support of combat operations (Middle East and Afghanistan)
- Acquisitions in support of contingency operations
- Acquisitions for items specifically for resale in commissaries
- Acquisitions where other than competitive procedures (i.e., sole source contract) are used because of the existence of an unusual and compelling urgency pursuant to Federal Acquisition Regulation Part 6.302-2.
- Items manufactured in a qualifying country.

## Prime/Sub Issues

- Representations and Certifications in the Prime Contract
- “Reasonable reliance” on Subcontractor’s representations
  - Reps and Certs in the subcontract reflect the Reps and Certs in the prime contract
  - Separate signed certification explicitly attesting to TAA/BAA compliance
  - How reliable is the sub?
  - Role of spot checking
  - Flow down compliance requirements to subcontractors

## Compliance Program

- Set up internal controls: no changing of production or product sourcing to certain product lines without approval from the head of government sales (or equivalent)
- Written TAA policies and procedures
- Annual audits
- Internal tracking database updated and checked on a regular basis
- TAA compliance training

# Export Compliance Issues: International Traffic in Arms Regulations (and others....)

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- ITAR restricts the export of a good, service, technology or software that is specifically designed or modified for a military use, commercial satellite or space-related application.
- What is “export?”
- ITAR trumps the Export Administration Regulations.
- Both ITAR and Export Administration Regulations require some classification and may, in some cases, require licensing.
- Dual-use items may have dual registration issues.
- Being a subcontractor, or otherwise in the supply chain, may not protect you.
- Your contract should specify your role, and the classification of the product.

## The Munitions List

- Key to ITAR: The United States Munitions List (“USML” or “Munitions List”)
- An actual list of products subject to export controls
- May include services
- You MUST check the list to see if your products are on it
- Category XXI—in essence, includes any product that was developed or modified for military use, with some exceptions and exemptions

## What to do if your product is on the Munitions List

- You must Register with the State Department, even if you don't export the product
- If you do export the product, you must get an export license
- "Export" is a broad term of art—sending samples, or showing drawings to a non-US person may be an export of the product (the "technical data" rules)
- Services performed on the product for non-US person requires a license
- Sending the product to a DoD customer overseas is still covered by the rules
- Strong sanctions for violations: civil and criminal

## ITAR Compliance Strategy

- Review the Munitions List to determine if your product is covered
- Written policies and procedures
- Training of key employees
- Voluntary disclosure of any past violations
- Build licensing procedures and times in to sales cycle

## Non-ITAR Export Restrictions

- BIS—Commerce Department's Bureau of Industry and Security
- Covers most technological items and data
- Range from purely commercial with no restrictions through dual use to mostly defense, with license requirements
- Intersects with USML; may be concurrent
- Sanctions and compliance strategy similar to ITAR

## Sanctions and the FCPA

1. FAR part 25.7: the key to sanctions
2. Iran, Syria, and beyond
3. Intersection with OFAC
4. DFAR 225.70—DoD-specific
5. A defense contract is still subject to ITAR
6. FCPA: Applicability to government contractors

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# The Role of Non-U.S. Persons in Government Contracts



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## Security Clearances and Contractual Restrictions

- National Industrial Security Operating Manual (“NISPOM”)—the Bible of security issues
- Different agencies may deal differently with clearance issues
- DD 254: the chicken and egg problem
- Timing: “it always takes longer than you think”

## Non-U.S. Persons: Clearances and FOCI Issues

1. Non-U.S. persons may not get a U.S. security clearance
2. Dedicated U.S. subsidiary
3. Proxy Boards
4. Special Security Agreements
5. Contractual Restrictions
6. Optics Issues

## Committee on Foreign Investment in the United States (“FOCI”)

1. Interagency Committee: DoD; State; Justice, IC; Commerce; Energy; DHS; others on a rotating basis
2. Jurisdiction over all transactions involving “National Security”
3. Automatic Coverage for government contractors
4. Voluntary and Mandatory filings
5. Pre and post-closing filings
6. Relationship with FOCI and security clearances

## FMF and FMS Financing Issues

1. Foreign Military Financing: DoD grants for the purchase of U.S. goods and services
2. Like government contracts, with some differences
3. Key issues: agent and commission fees/offset requirements/cost allowability/US content rules
4. Foreign Military Sales: Program to manage sales of military goods; may be financed with FMF funds
5. Key document: the Letter of Request (“LOR”), like the RFP in a traditional contract
6. LOR leads to Letter of Offer and Acceptance (“LOA”), which is the actual contract between DoD and the customer.
7. End result is a set of parallel contracts: one between US company and DoD; the second between DoD and foreign country

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