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PRATT'S
**GOVERNMENT
CONTRACTING
LAW**
REPORT



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Editorial Office
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GAO Reviews Issues in Implementing and Reporting on the Buy American Act

*By Mitchell A. Bashur and Angela M. Jimenez**

The authors of this article discuss a recently published Government Accountability Office report on the federal government's implementation of the Buy American Act.

The Government Accountability Office (“GAO”) recently published a report on the federal government implementation of the Buy American Act. The Buy American Act of 1933 is one of several statutes implementing a preference for federal agencies to procure domestic items and products. The Buy American Act, when it generally applies, contains certain exceptions, including where:

- (1) The head of the agency makes a determination that requiring a domestic preference would be inconsistent with the public interest;
- (2) The domestic items are insufficient or not reasonably available in commercial quantities;
- (3) The domestic products are not available at a reasonable cost;
- (4) The procurement is for information technology acquisitions for commercial items; and
- (5) The procurements relate to the purchase of foreign products for commissary resale.

The U.S. Department of Defense (“DoD”) also applies a blanket public interest exception for qualifying countries.

Recently, Congress requested that GAO conduct an investigation to review the federal agencies implementing and reporting on the Buy American Act. GAO found that the Office of Management and Budget (“OMB”) should take steps to improve the reporting through the Federal Procurement Data Systems—Next Generation (“FPDS-NG”), a government-wide database for contract awards and obligations. GAO further concluded that selected agencies reviewed in the report—the U.S. Department of Health and Human Services (“HHS”), U.S. Department of Homeland Security (“DHS”) and U.S. Depart-

* Mitchell A. Bashur is an associate at Holland & Knight LLP who focuses his practice on government contracts, including small and disadvantaged business issues, claims and disputes, domestic preference programs, as well as compliance issues. He may be contacted at mitchell.bashur@hklaw.com. Angela M. Jimenez is an associate at the firm. She may be contacted at angela.jimenez@hklaw.com.

ment of Veteran Affairs (“VA”)—need to improve their agency guidance and training to ensure compliance with the Act.

EXTENT OF THE USE OF THE BUY AMERICAN ACT’S EXCEPTIONS AND WAIVERS

GAO found that DoD’s reasons for buying non domestic products largely fell within three categories: the purchases were for use outside the United States, which are not subject to the Buy American Act restrictions, were reported under the public interest exception for DoD qualifying countries, or met the qualifying country exception, which allows the DoD to procure foreign end products without regard to dollar thresholds or other trade agreement eligibility limitations. In contrast, the civilian agencies reported a diverse mix of exceptions and waivers of the Buy American Act. While the civilian agencies could not apply DoD’s qualifying country exception, they were more likely to report buying foreign products based on trade agreements or another exception under the Act. As a result, GAO found that civilian agencies are more likely to apply the Act’s exceptions and waiver provisions.

DATA QUALITY ISSUES WITH THE FPDS-NG DATABASE

GAO identified limitations with the FPDS-NG as a core problem. While the FPDS-NG is the primary means for capturing procurement data regarding the Buy American Act, GAO noted that agencies may not always input reliable information. GAO found that, in many instances, the place of manufacture information was misreported in the FPDS-NG, which would lead to additional data reporting errors. Additionally, GAO identified four system limitations with the FPDS-NG that could hinder accurate reporting of the Buy American Act:

- *DoD qualifying country exceptions and trade agreements waivers:* FPDS-NG does not prevent agencies from reporting as a DoD qualifying country exception, although this exception is not available to civilian agencies. FPDS-NG also does not prevent agencies from reporting trade agreement waivers when the contracts are valued below applicable thresholds or waivers that do not apply, such as for small business set asides.
- *Awards under the Micro-Purchase Threshold:* Given that the Buy American Act requirements do not apply to contract awards valued below the micro-purchase threshold, the FPDS-NG does not have an option to indicate whether a contract is under the threshold. The contracting officer entering information for awards under the micro-purchase threshold must still state whether the product is domestic or foreign. If the contracting officer selects the foreign option, the officer must enter an exception, although no exception is required.

- *Awards for both Foreign and Domestic Products:* When entering information for contracts that include multiple products from the United States and a foreign country, FPDS-NG only allows for one country of origin to be identified in the system. GAO referred to a recent change in the FAR, requiring contract reporting at the line item level. The FPDS-NG system cannot accommodate this requirement.
- *Indefinite Delivery Contracts:* FPDS-NG does not give contracting officers the option to enter information for the “place of manufacture” field for indefinite delivery contracts. Rather, the information is entered once the order is placed on the contract. GAO found that, in many cases, obligations are reported on the initial indefinite delivery contract so the Buy American Act exceptions and waivers are not recorded.

LACK OF AGENCY GUIDANCE AND TRAINING

GAO reviewed the approach of four agencies—DoD, HHS, DHS, and VA—to training and guidance relating to the Buy American Act requirements. GAO concluded that DHS and DoD recently updated existing training or added training resources for contracting officers. In contrast, the VA issued a policy memorandum in 2017, emphasizing the importance of meeting the Buy American Act, but did not add training or provide additional guidance. Similarly, GAO noted that the HHS does not provide department-level training or guidance related to the Buy American Act.

As a result, GAO recommended that the Director of OMB instruct the Office of Federal Procurement Policy (“OFPP”) to facilitate additional training to improve understanding of the Buy American Act requirements and provide training for recording information in FPDS-NG. With respect to the individual federal agencies, GAO made the following recommendations for the DHS, VA, and HHS to adopt:

- Clarify existing guidance instructions and provide training to contracting officers;
- Identify factors that should be considered in order to determine the applicability of the Trade Agreements Act and waiver of the Buy American Act;
- Document determinations of the use of Buy American Act exceptions for domestic non-availability and ensure the required approvals are obtained; and
- Identify sources of information available for determining product origins and the steps contracting officials should take to verify information that is inconsistent.

Specifically, GAO noted that the VA should address the Buy American Act requirements and recent changes with the veteran-owned small businesses through the Veterans First Contracting Program. GAO found that contracting officials lacked agency-specific training in response to *Kingdomware Technologies, Inc. v. United States*,¹ which requires that VA contracting officials use set asides and give preference to veteran-owned small businesses for all VA procurements as long as the requirements of the “Rule of Two” are satisfied. Prior to the U.S. Supreme Court’s decision, VA contracting officials noted that more than 90 percent of a division’s procurement were through VA schedule contracts in which the Buy American Act’s applicability had already been established. As a result, the shift in VA contracting practices requires contracting officials to consider more often the applicability of the Buy American Act, but lack agency-specific guidance on the topic.

In response, HHS, DHS, VA, and OFPP concurred with the GAO’s recommendations and agreed to take action to address the issues outlined in the report.

CONCLUSION

Given the recommendations in GAO’s report to focus on training and oversight of Buy American compliance, contractors should expect more scrutiny in procurements where the Buy American Act applies.

¹ 136 S. Ct. 1969 (2016).