

Increased Scrutiny Over GSA Schedule Holders' Compliance with the Trade Agreements Act

June 2016

Government Contracts Issue Update

In early May 2016, the U.S. General Services Administration (GSA) issued notices to thousands of Federal Supply Schedule (FSS) contract holders that it was increasing scrutiny of schedule holders' compliance with the Trade Agreements Act (TAA). These notices, which have been widely reported in the trade press, require contractors holding certain FSS Contracts to verify the country of origin for products on their GSA schedule(s), and to remove any non-compliant products from their schedule(s). According to GSA, these notices were driven in part by increased scrutiny from Congress as a result of reported violations of the TAA. Although the notices were reportedly targeted at certain FSS Contracts, these notices nevertheless serve as an important reminder for all FSS Contract holders, as well as any other government contractors subject to the TAA, regarding the importance of this issue. Indeed, a number of recent False Claims Act cases involving the TAA further illustrate the risks and severe consequences for contractors that fail to comply with these requirements. Thus, all Schedule holders and other government contractors subject to the TAA should take this opportunity to ensure that they have the appropriate controls in place to make sure that the products and services being sold to the Government are TAA compliant.

The TAA applies to agency procurements of goods and services over certain monetary thresholds. Separate dollar thresholds apply for contracts for construction materials, and, for procurements by the Department of Defense (DOD), the TAA does not apply to acquisitions

Authors

Kevin J. Maynard
Partner
202.719.3143
kmaynard@wiley.law
Cara L. Sizemore
Partner
202.719.4192
csizemore@wiley.law

Practice Areas

Government Contracts

of “arms, ammunition, or war materials, or purchases indispensable for national security or for national defense purposes.” Importantly, GSA has taken the position that because the estimated dollar value of each Schedule exceeds the established TAA threshold, the TAA is applicable to *all* Schedules, so that *all* products and services offered through the Schedules program must comply with TAA.

Where the TAA applies, the Act and the implementing regulations prohibit agencies from acquiring products or services that are not from the United States or a “designated country” that has entered into a free trade agreement with the United States. While the list of “designated countries” includes a broad array of countries that are parties to various free trade agreements—including the World Trade Organization (WTO) Government Procurement Agreement (GPA), as well as certain bilateral trade agreements between the United States and individual countries—there are a number of countries (including China and India, as two notable examples) that are not “designated countries” for purposes of the TAA.

A product is TAA compliant if it was made or “substantially transformed” into a “new and different article of commerce” in the United States or a “designated country.” (Services are considered TAA compliant if the company performing the services is “established” in the United States or a “designated country,” which GAO has interpreted to mean “legally established.”) Unfortunately for contractors trying to comply with the TAA, the “substantial transformation” test is not simple or straightforward. According to the FAR as well as case law from the Court of International Trade and rulings from Customs, substantial transformation is the creation of a “new and different article of commerce with a name, character, or use distinct from the original article.” FAR 25.001(c)(2). Whether something has been “substantially transformed” is ultimately a fact-specific question that turns on a number of factors, including the extent and nature of post-assembly inspection procedures; worker skill required during the manufacturing process; and resources expended on product design and development. For example, these forums have found substantial transformation where:

- The function of the finished article is different from the functions of the article’s component parts;
- The component parts of the article could not be disassembled without destroying the final or finished article;
- Production of the finished product involved complex assembly operations;
- Production involved programming and downloading of software that changed or defined the product’s use; and
- Production involved a shift from producers’ goods to consumers’ goods—*i.e.*, transformation from products that would not generally be retailed to consumers to products that would be.

Contractors should be aware, however, that substantial transformation requires more than simple assembly in the United States or a designated country. For example, substantial transformation has **not** been found where components have the same use after assembly or the attachment of another component. In reviewing whether schedule goods are TAA compliant, then, there are several steps contractors should take, and factors to consider:

1. First things first, read the contract! Because TAA obligations and country of origin standards vary depending on specific clauses included in the solicitation or contract, and because there are severe penalties for noncompliance and improper certifications, it is important to know which clauses apply.
2. Contractors should perform the necessary due diligence and analysis before completing certifications—including analyzing the origin of the components that comprise an end product, as well as the location and nature of the manufacturing/assembly operations. Although not required, contractors also have the option to seek a country of origin determination from Customs, which has authority to issue country of origin rulings specifically for purposes of government procurement.
3. Obtain appropriate certifications from the original manufacturer. This is particularly important for resellers and other contractors that do not actually manufacture the end products being delivered to the Government.
4. Contractors should have practices and policies in place to ensure that only TAA compliant products are sold to the Government in contracts subject to the TAA, including, for example, separate pricelists or product numbers for TAA compliant products (particularly where contractors source products from TAA compliant and non-TAA compliant sources).
5. Maintain adequate documentation (e.g., supplier certifications, bills of materials, and manufacturing documentation) to support any country of origin determinations.

For more information on any of these issues, or for guidance in responding to a GSA notice, or request for country of origin verification from other contracting agencies, please contact one of the attorneys listed on this article.