A KCA Construction Industry Article of Interest:

The Buy American Act: Are You Compliant?

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The federal government has a long-standing preference for incorporating domestic materials and products into public construction projects. While a number of statutes and regulations promote this policy, the Buy American Act of 1933 (BAA) is the oldest and arguably most well-known. The essence of the BAA's construction provisions sounds simple: the use of foreign-produced materials and products on public construction projects is prohibited. However, a dense web of regulations and statutes interact to create exceptions and exemptions to the BAA's application, making the BAA one of the most complex bodies of law to comprehend. Those contractors who fail to comply with the BAA's requirements can face costly legal issues, debarment or, in some situations, criminal investigation and prosecution. With the new administration, now is the time to get familiar with the BAA, and the following primer is a good place to start.[1]

1. Does the BAA apply to your project?

The first step is to look at the overall dollar value of the project: contracts for the construction, alteration or repair of any public work valued between $3,000 and $7,358,000 are subject to the BAA. Construction contracts with values of $3,000 or below are exempt from the BAA and are viewed as "micro-purchases." Construction contracts that exceed $7,358,000 may be subject to certain foreign trade agreements.

2. What constitutes domestic construction materials?

The BAA requires the use of only "domestic construction materials" on public projects. So what are domestic construction materials? To answer this question, various definitions must be

[1] This article focuses on the BAA's application to construction materials. The BAA also contains provisions that apply to supplies and products purchased by the government or contractors that are incorporated into public projects. These provisions present an additional set of complicated questions that require a separate in-depth analysis as to their applicability.

collectively considered. Start with the definition of "construction materials," which are any article, material or supply brought to the construction site by a contractor or subcontractor to be incorporated into the project.

Next, consider the domestic requirement for construction materials. The BAA requires that every public contract include a provision requiring contractors, subcontractors and suppliers to use only:

- *unmanufactured materials* that have been mined or produced in the United States; and
- *manufactured materials* that have been manufactured in the United States "substantially" from materials mined, produced or manufactured in the United States.

While unmanufactured materials will be considered domestic if they are mined or produced in the United States, manufactured materials will only be considered domestic if (1) they are manufactured in the United States *and* (2) the cost of the components produced or manufactured in the United States exceeds 50% of the cost of all its components.

A component is any article, material, or supply incorporated directly into a construction material. The method for calculating the cost of components depends on whether the component is purchased or manufactured by the contractor. If the contractor is *purchasing* the component, the acquisition cost will include transportation costs and any applicable tax. If the contractor is *manufacturing* the component, the manufacturing costs will include transportation and overhead. Bottom line: in order for a manufactured construction material to be considered domestic, the cost of the components produced in the United States has to be more than *half* of all of the component's total cost. This in addition to the requirement that the construction material be manufactured in the United States, a requirement that contractors often overlook.

Construction materials may also be considered domestic if the material is a "commercially available off-the-shelf" (COTS) item. To qualify as COTS, an item must be customarily used by the general public for non-governmental purposes and must be sold in substantial quantities in the commercial marketplace.

If the construction material does not meet one of these requirements, it may not be incorporated into the project *unless* an exception to the BAA applies.

3. What are the BAA's exceptions and how do you apply for them?

There are a number of exceptions to the BAA that may allow a contractor to acquire foreign construction materials. In order for an exception to apply, the contracting agency must determine that:

- application of the BAA would be impracticable or inconsistent with public interest. Often times, this occurs when the contracting agency has an agreement with a foreign government that the BAA will not apply;
- a particular construction material is not sufficiently available in commercial quantities or not of sufficient quality; or

- the cost of domestic construction material is unreasonable, i.e., the cost exceeds the cost of foreign construction material by more than 6%.

In addition, the passage of the Trade Agreement Act authorized the government to waive the BAA for eligible foreign products acquired through various trade agreements, such as certain free trade agreements and for World Trade Organization countries.

The onus is on the contractor to request the exception, but when does it need to do so? According to the Court of Appeals for the Federal Circuit Court, a contractor should make the request "in the first instance ***before contract award*** and ***surely before the contract has been performed***." Prior to submitting a price, contractors should determine whether the project will require the use of any foreign construction materials and include the BAA exception request with their offer. To avoid rejection of an offer that includes such a request, it is a best practice to submit an alternate offer based on the use of domestic construction material. Once an agency makes a determination that an exception applies, the foreign materials that have been accepted will be listed in the contract.

Exceptions can be granted *after* a contract is awarded, but this is a dangerous and risky road to go down, particularly if the foreign construction materials are already incorporated into the project. If requesting an exception post-award, a contractor should be prepared to explain why the request was not made pre-award or why it was otherwise not reasonably foreseeable. In the event the exception is granted post-award, adequate consideration must be negotiated and the contract must be modified to allow the use of the foreign construction material. If the request is denied post-installation, the cost of removing and replacing the foreign construction material falls on the contractor's shoulders. Keep in mind that in addition to the removal and replacement costs, there may be delay and schedule impact costs assessed to the contractor.

4. What about your subcontractors and suppliers?

The BAA applies to *all* construction materials used on public projects, including those provided by subcontractors and suppliers. In fact, contractors can be held liable for noncompliant construction materials incorporated into projects by their subcontractors or suppliers. It is, therefore, extremely important for contractors to be mindful of the BAA when entering into subcontracts and purchasing construction materials from suppliers. It is critical that a contractor confirm with its subcontractors and/or suppliers that all construction materials comply with the BAA. In addition to the required contract provision relating to manufactured and unmanufactured materials previously discussed, it is highly recommended that contractors include a flowdown provision in their subcontract that requires subcontractors to comply with the BAA.

5. What happens if you fail to comply?

If the contracting agency determines that a contractor or subcontractor has used foreign construction materials without authorization, the agency can require that the materials be removed and replaced. If removal and replacement would be impracticable or cause undue delay to the project, the agency can decide to leave the unauthorized foreign construction material in place. However, the contractor is not out of the woods. If the agency finds the BAA violation to

be "sufficiently serious," the government can terminate the contract for default or suspend or debar the contractor, subcontractor or supplier. If the noncompliance with the BAA appears to be fraudulent, the agency can refer the matter for criminal investigation.

In addition, if an agency finds that a contractor has failed to comply with the BAA, those findings become a public record. Most importantly, the contractor, ***and*** any subcontractor or supplier associated or affiliated with the contractor, cannot be awarded another public contract for 3 years. Because all parties to a contract can be implicated in a single violation, it is in each party's best interest to ensure that all construction materials incorporated into a project are BAA compliant or that an appropriate waiver has been timely requested and granted.

6. Isn't all of this going to change?

On April 18, 2017, President Trump signed an Executive Order—Buy American and Hire American. The Order confirms the executive branch's policy of maximizing the use of domestic goods and materials. Consistent with this policy, the Order directs agencies to "scrupulously" enforce the BAA and to minimize the use of waivers granted under the BAA.

While the Order itself does not substantively change the application of the BAA, it signals that significant changes to government contracting may be on the horizon. Now is the time to gain a better understanding of the BAA and its requirements. This article only scratches the surface of the BAA—a more in-depth analysis is necessary to ensure full compliance and prevent an unwary contractor from inadvertently jeopardizing its ability to perform on future federal construction projects.

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