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15 Tips For Navigating The 'Buy American' Maze

Law360, New York (June 19, 2013, 12:11 PM ET) -- Government contracts frequently include restrictions on the country of origin of the products that the government is purchasing. These are commonly referred to as "Buy American" requirements, but not all "Buy American" requirements are created equal. Here are 15 tips to consider when someone asks you if your products satisfy "Buy American."

1) There is no single "Buy American" requirement.

You have the Buy American Act (41 U.S.C. §§ 8301-8305); you have the Trade Agreements Act (19 U.S.C. §§ 2501-2581); you also have the Buy America Act (49 U.S.C. 5323(j) and 23 U.S.C. § 313) (which is different from the Buy American Act), the Recovery Act (Pub. L. No. 111-5, § 1605), and the Berry Amendment (10 U.S.C. § 2533a) — just to name a few. Each statute is unique – each was enacted with different policy goals and imposes different requirements. Make sure you know which statute applies.

2) Whether you are a prime or a subcontractor, certify only to the specific "Buy American" requirements in a solicitation, and do not make a broader certification than is required.

Given the maze of country of origin requirements and the difficulty in understanding how these various statutes interact, most companies do not completely understand what they need to do. As such, we commonly see companies asking their vendors companies to "certify that a product meets Buy American." Not only is this certification overly broad (because, as noted above, "Buy American" can mean lots of different things), but it also demonstrates a fundamental lack of understanding as to what the contract requires.

The better course of action is to identify a particular statutory requirement and to certify compliance with that specific requirement. But make sure that you have investigated whether you do, in fact, meet that requirement. Making false (or even negligent) certifications is never a good idea.

3) Country of origin requirements can vary from procurement to procurement based on: (1) the buying agency, (2) what is being bought and (3) the value of the contract.

As noted in the first tip above, different statutory authorities and different policy concerns drive different results. Certain products (like, for example, photovoltaic devices) have been singled out by the government to receive domestic manufacturing preferences. See Defense Federal Acquisition Regulation Supplement 225.7017.

Additionally, different procurements may be subject to different statutes and different rules based on whether the agency/product/purchase amount is covered by any one of the dozens of free trade agreements entered into by the United States. The key is to look closely at the solicitation because the contracting officer should be making these kinds of determinations before the solicitation is even issued.

4) The Buy American Act and the Trade Agreements Act are different animals — do not confuse them.

These two statutes are the ones that most commonly apply to most government procurements. As such, most companies craft their compliance policies around these two statutes. But make no mistake — compliance with one is not compliance with the other. Companies should carefully consider how these two statutes overlap, how they differ, and what their specific contracts require before concluding that the company is "in compliance" with their country of origin obligations.

5) The government often includes multiple, contradictory country of origin requirements in a solicitation.

This is because the various contract clauses in Federal Acquisition Regulation Subpart 52.225 present a menu of options from which the contracting officer can choose. But rather than sifting through and distinguishing between the various requirements, many contracting officers will simply include all of the clauses (fearing that they might otherwise "miss something"). Do not be afraid to discuss the issue with the contracting officer to eliminate the duplicate and inconsistent clauses — he or she may be just as confused as you are.

While some contracting officers may be skeptical of any attempts to "clean up" the contract, some of the country of origin clauses are mutually exclusive as a matter of law and really should not be included in the same contract. Improved clarity in a contract is a virtue for which we should all strive.

6) The Buy American Act does not prohibit the purchase of foreign-made products; it merely provides a price preference (6-50 percent) for "domestic end products."

Perhaps one of the biggest misperceptions about the Buy American Act is that it forces the government to "buy American." But this is just not the case. The Buy American Act imposes a two-part test: (1) The end-product must be manufactured in the United States, and (2) more than 50 percent of the cost of all the component parts must also be manufactured in the United States. If a product meets this two-part test, then a product can be considered a "domestic end product" under the Buy American Act.

But even where the Buy American Act applies, the government can still purchase a foreign-made end product if any of the act's exceptions apply. If a vendor has disclosed that it will be providing certain foreign-made end products, and if the government has taken that into account when evaluating a vendor's proposal, and if the domestic product being offered is sufficiently more expensive than the foreign alternative (with the differential amounts set forth in the regulations), then the government can purchase the product manufactured outside the United States while still satisfying the Buy American Act.

7) The Trade Agreements Act, on the other hand, does prohibit the purchase of products and services that are not "substantially transformed" in the U.S. or a "designated country."

Note the quotes — these terms have special meaning. "Substantial transformation" considers whether a product is transformed into a new and different article of commerce with a name, character or use distinct from the article or articles from which it was transformed. This is a highly fact dependent question, and the U.S. Customs and Border Protection has issued extensive guidance on what does and does not constitute "substantial transformation."

"Designated countries" are countries that U.S. trade policy chooses to favor — whether because the United States has entered into a free trade agreement (such as the North American Free Trade Agreement or the U.S.-Korea Free Trade Agreement) or because the country is small and still developing (as with Afghanistan or Haiti). FAR 25.003 lists these countries (currently numbered at 121), which includes countries such as Canada, Germany, Hong Kong, Japan, Mexico, Singapore, South Korea and Taiwan. Be aware, however, that China and India are not "designated countries." You should know what countries are on the list and be aware that the list is regularly updated.

8) Be aware that there is a partial exception under the Buy American Act for components of commercial off-the-shelf (COTS) products.

As noted in tip 6, above, the Buy American Act typically imposes a two-part test. But if you are delivering a COTS product, the second part of the test (commonly referred to as the "component test") has been waived. See FAR 25.100(a)(3) and 25.101(a)(2). This means that if you are delivering a COTS end-product, you do not need to worry about the origin of the component parts. This also means that compliance just got a whole lot easier, because chances are that your suppliers could not tell you the country of origin of their component parts even if they tried.

9) There is a broad exception under the Buy American Act for purchases of commercial information technology.

See FAR 25.104(e). Both "commercial item" and "information technology" are defined in FAR 2.101. If the Buy American Act applies to your contract, this exception can be a lifesaver, allowing a vendor to provide IT hardware manufactured in China. But be aware that this same exception is not available under the Trade Agreements Act — the Trade Agreements Act specifically prohibits the government from purchasing products that were not substantially transformed in a designated country. There are many people who think that this commercial IT exception should be expanded. You need to call your congressman to make it happen.

10) Some agencies, such as the U.S. Department of Defense, have additional "Buy American" restrictions relating to specific products (such as textiles, body armor and specialty metals).

The Berry Amendment (10 U.S.C. § 2533a), which limits the DOD's ability to purchase food, cloths, clothing, fibers and hand tools from foreign sources, is the most popular of these but it is far from the only one. The individual restrictions are set forth in DFARS Subpart 225.70, and it is a long list. Be aware that these DOD-unique requirements may be in addition to those country of origin requirements imposed by the Buy American Act or the Trade Agreements Act.

11) The terms of certain free trade agreements (like NAFTA or KORUS) could override certain "Buy American" requirements.

Be aware of what you are providing and to what agency to understand the interplay between a free trade agreement and your individual procurement. See tips 3 and 4, above. The rule makers do a pretty good job of ensuring that the regulations are updated, but many of these international policy issues can easily take on a life of their own. For example, in February 2010, the U.S. and Canada negotiated increased access for Canadian companies to Recovery Act spending, and the implementing regulations took a little while to catch up.

12) Just because a product qualifies under any of the various "Buy American" statutes does not mean that you can label the product as "Made in the U.S.A."

Product labeling is separately regulated by the Federal Trade Commission, and the FTC has issued guidance indicating that in order for a product to be labeled "Made in the U.S.A." "all or substantially all" of the end-product must be of U.S.-origin — meaning that the overwhelming majority of the components and the end-product should all be manufactured in the United States. Other qualified claims (such as, for example, "Manufactured in the U.S. from foreign components") may be more appropriate.

13) U.S. Customs and Border Protection makes country of origin determinations for tariff purposes; this tariff classification does not necessarily correspond to the country of origin under the Buy American Act or the Trade Agreements Act, although they do commonly align.

Certain tariff classifications under NAFTA (19 C.F.R. Part 102) apply a different legal standard in determining the country of origin ("tariff shift" under NAFTA vs. "substantial transformation" under the Trade Agreements Act).

14) Be aware that federal "Buy American" requirements can also apply at the state or local level when federal dollars are being spent.

The country of origin restrictions typically attach to the money when Congress appropriates the funds. Even when those funds are administered through grants to state and local governments, the federal restrictions may still attach. Additionally, many states may also impose separate "Buy American" or "Buy Local" requirements of their own. With so many variables at play, the best suggestion on this issue is to make sure that you read your contract or solicitation very closely so that you can understand what, precisely, you are required to deliver.

15) Have a process in place to track and verify the country of origin of products that will be delivered to your government customers.

Where the government routinely asks for certifications, and where the prime contractors routinely do the same, you want to ensure that you are performing some level of due diligence on the products that you are delivering. Often, relying on a certification from a vendor will be sufficient; but if you have cause to question that certification, you may want to subject the vendor to extra scrutiny. Remember, if called upon by governmental auditors or law enforcement authorities, you want to make sure that you have something in place to help you validate whatever representations or certifications you previously made.

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