Made in America?  
Understanding Country of Origin Requirements Under Federal Government Contracts

Government Contracts, Construction and Procurement Policy Practice Group

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Overview

- “Berry Amendment”
- Buy American Act/Balance of Payments Program
- Trade Agreements Act
- Challenges to COO Certifications
- Practical Tips and Compliance Strategies
Berry Amendment—10 U.S.C. 2533a

- Restricts the procurement of specified items
- Applies to DoD procurements only
- Implemented by various DFARS clauses, e.g.,
  - 252.225-7012, Preference for certain domestic commodities
  - 252.225-7014, Preference for domestic specialty metals
  - 252.225-7015, Restriction on acquisition of hand or measuring tools

Berry Amendment—Exceptions—DFARS 225.7002-2

- Acquisitions at or below simplified acquisition threshold
- “Domestic non-availability determinations”
  - Only by secretary, non-delegable
  - Only if alternatives are unacceptable
- Procurement of items listed in FAR 25.104
- Various procurements overseas
  - Combat ops, “emergency” acquisitions, vessels in foreign waters
  - Incidental incorporation of cotton, natural fibers, wool
### Berry Amendment—Issues

- Applies only to DoD
  - As a result, GSA FSS may not meet requirements
- No commercial item exception
- Applies *in addition to* Buy American Act
- More restrictive than Buy American Act
  - No “substantially all” allowance
  - No qualifying country exception (except metals)
  - No price preference
- Can comply with BAA, yet violate Berry Amendment

### Buy American Act—Overview

- Establishes a general preference for U.S. goods, not a prohibition against non-U.S. goods
- Applies to supply (end products) and construction (construction materials) contracts
- Not applicable to services
- Not applicable above TAA threshold
Buy American Act—Supplies

Notwithstanding any other provision of law, and unless the head of the department or independent establishment concerned shall determine it to be inconsistent with the public interest, or the cost to be unreasonable, only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States, shall be acquired for public use.

41 U.S.C. 10a
Buy American Act—Supplies—Applicability

- When items are acquired for use in U.S.
- If estimated value is above $2.5k and below $175k
- Small business set-asides of any value
- “Made in America” distinguished from BAA
  - Federal Trade Commission - more stringent domestic content rule

Buy American Act—Supplies

- Unmanufactured components
- For manufactured end products—
  - Manufactured in United States
  - “Substantially all” from components “mined, produced or manufactured” in United States
**Buy American Act—Supplies**

- Manufacturing
  - No regulatory definition
  - Broadly defined, often confusing, fact specific
  - Basic test:
    
    *Did the operation performed on the foreign item create a basically new material or result in a fundamental change in the item?*

- "Substantially all"
  - Cost of all components domestically mined, produced or manufactured is more than 50% of cost of all components
    - "Components" means only items directly used in manufacture of end product
    - For domestic components, cost is purchase price of component or cost of manufacture, if the contractor manufactured component
**Buy American Act—Supplies—Price Preference**

- If there is a domestic offer that is not the low offer, CO adds to price of low offer:
  - Civilian agency procurements
    - 6%, if low domestic offeror is large
    - 12%, if low domestic offeror is small
  - DoD procurements
    - 50% added to price

**Buy American Act—Supplies—Exceptions**

- Inconsistent with public interest
  - 21 DoD reciprocal defense procurement MOUs
  - Qualifying countries listed in DFARS 225.872-1(a)

- Nonavailability
  - Items identified in FAR 25.104

- Unreasonable cost
  - Application of price preferences

- Commissary resale
Every contract for the construction, alteration, or repair of any public building or public work in the United States growing out of an appropriation heretofore made or hereafter to be made shall contain a provision that in the performance of the work the contractor, subcontractors, material men, or suppliers, shall use only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States except as provided in section 10a of this title.

41 U.S.C. 10b

• “End product” vs. “construction materials”

• Same rules apply for determining compliance with BAA requirements

• Exceptions
  • Impracticable or inconsistent with public interest
  • Nonavailability
  • Unreasonable cost
  • Acquisition under trade agreements
Buy American Act—Construction—Procedures

- Preaward request for determination

- Evaluation of offers
  - Identify proposed FCM
  - CO adds 6% of cost of FCM to offeror’s price
  - May submit alternate offers

- Postaward determinations
  - Unforeseeable
  - Information submitted
  - Exchange consideration

Balance of Payments Program—DFARS 225.75

Acquire only domestic end products for use outside the United States, and use only domestic construction material for construction to be performed outside the United States, including end products and construction material for foreign military sales.
Balance of Payments Program—Application

- DoD procurements for:
  - Supplies to be used outside of the U.S.
  - Construction to be performed outside of the U.S.

Trade Agreements Act (TAA)—Overview

- Implements international trade agreements guaranteeing equal treatment in government procurement

- Waives application of BAA to procurements of supplies above $175,000 for all signatories to Agreement on Government Procurement (GPA)

- Lower BAA waiver thresholds for Israel, NAFTA and FTA countries ($58,500)

- The TAA’s BAA waiver threshold for construction contracts is much higher - $6,725,000
### Trade Agreements Act (TAA)—Overview

- U.S. Trade Representative recently affirmed that TAA applies to services outsourced to non-TAA countries. See FAR 25.402(a)(2)
- Absolute prohibition vs. a “pricing preference” like BAA
- TAA restricts contractors from supplying products and services from non TAA-eligible countries
- “Comply or Go Home”

### Trade Agreements Act—Exceptions

- TAA waiver of BAA does not apply to:
  - Small business set-asides
  - Arms, ammunitions or war materials
  - Purchases indispensable for national security
    - E.g, Project BioShield
  - Sole-source acquisitions
Calculating the “Estimated Value” of a Procurement

- The “Estimated Value” of a procurement is based upon estimated total value, including options
- Some agencies calculate “Estimated Value” based on all CLINs
- Some agencies calculate “estimated value” for each CLIN, such that some CLINS are TAA-covered and others are BAA-covered
- All GSA Multiple Award Schedule contracts and CLINs are exclusively covered by TAA

Determining TAA Country of Origin

- All “end products” supplied under TAA-covered contracts must be from TAA-eligible countries
- Country of origin under TAA is the country in which the end product was last “substantially transformed”
- Component origin is not determinative
- Product “bundling” strategy (w/in a CLIN) to achieve TAA end product compliance
TAA “Substantial Transformation” Test

- Simple assembly does not = “substantial transformation”
- Process must change item’s “essential use” through “complex and meaningful” assembly operations
- Absent “substantial transformation” each component is an “end product” that retains original COO
- Higher standard than BAA “manufacturing”

Examples of Substantial Transformation Test

- E.g., components arriving in a “kit” and assembled without much time or skill retain separate identity, no new “end product” created

- E.g., partially assembled but non-functional laptop computer is “substantially transformed” through addition of memory, hard-drive, keyboard, and software download
  - See Attachment 6 to Course materials.
TAA “Substantial Transformation” Test

- US Customs Service has statutory authority to issue advisory opinions and final determinations on product country of origin

- Customs issues formal and informal rulings on “substantial transformation” for specific end products and manufacturing process

- Government contracts tribunals give “exceptional weight” to Customs Rulings but make independent determinations

TAA Compliance Problems Are Common

- Major problem as production moves to cheaper, non-TAA countries (e.g., Taiwan, China, India)

- Many of biggest problem countries for TAA compliance (e.g., China) have discriminatory government procurement practices that make GPA execution unlikely

- Problem industries:
  - IT hardware
  - Software
  - Hardware
  - Paper products
  - Medical products
  - Clothing (Berets for U.S. Army)
Completing TAA Certificate

- List of TAA countries contained at FAR 52.225-5
- TAA country list changes, regular updates prudent
- Certificate itself (FAR 52.225-6) is relatively easy to complete
- More difficult task is ensuring TAA compliance throughout contract term

New Developments – Proposed Waiver of BAA/TAA for COTS Items

- Proposed FAR rule waives BAA and TAA (and other laws) for commercial off-the-shelf (COTS) items
- COTS = FAR commercial items that are also:
  - Sold in substantial quantities
  - Without modification
- Many ambiguities in proposed COTS Rule
- Adoption uncertain
- See PGE E-Alert on COTS Rule (Attachment 8)
Challenges to COO Certifications

- Pre-award (Bid Protests)
- Post-award (False Certification, Product Substitution Investigations)

Penalties and Government Emphasis on Compliance

- “False” COO certifications = civil false claims
- Civil false claims = treble damages, $11,000 per invoice penalty potential
- Recent GSA/DOJ investigations of GSA MAS contractors for TAA violations have led to multi-million dollar fines. See Attachment 7 to Course Materials.
- General Counsel to GSA IG states that numerous additional TAA investigations currently underway
General COO Compliance Strategies

• Review all government solicitations and contract clauses and certifications contained therein to clearly understand BAA and/or TAA requirements

• Seek clarification re: regulatory inconsistencies:
  - BAA clause in a TAA-covered procurement

• Consider including clarifying language w/ certificates:
  - BAA – “this is how we defined component cost”
  - TAA – “this is how we defined end product”

• Consider obtaining an opinion from the Customs Service with regard to the source of origin of a product

General COO Compliance Strategies

• Supply chain staff must maintain a system capable of tracking COO information by component (BA/BAA) and end product (TAA)

• Supply chain staff must provide advance notice of changes to production point for products supplied to the government

• Resellers should obtain TAA certification and indemnity from their manufacturer suppliers

• Keep in mind that until a postaward waiver (e.g., b/c the sole domestic supplier has ceased operations or dramatically raised prices) is granted, you must deliver the BAA- or TAA-compliant items
## BAA-Specific Compliance Tips and Strategies

- Keep in mind that you may be required to perform a BAA analysis on some CLINs under a TAA-covered contract depending on the CLIN value and agency interpretation.
- End products must be manufactured in the U.S.
- Identify the components of the end product and the place of manufacture of each component.
- Identify the cost of each component. The acquisition value of a component purchased by a contractor is a component's "value".
- DOD procurements exempt "qualifying country" articles from application of the BAA.

## TAA-Specific Compliance Tips and Strategies

- Seek CO clarification if the solicitation does not identify which line items are subject to the TAA.
- The substantial transformation test is applied on a line-item basis, such that each end product=line-item must be substantially transformed in a TAA-eligible country.
- Remember that the substantial transformation test is based solely on the processes used to construct the article; the value of the components, as well as their source of origin, is irrelevant.
- The substantial transformation test is not identical to and is more stringent than the manufacturing test under the BAA.
CONCLUSION

Questions?
Tab 2: Speaker Biographies
Mark G. Jackson
Partner

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Mark Jackson focuses his practice on government contracts, providing counseling and resolving disputes involving Federal, State and local public procurement projects, and construction litigation.

At the federal level, he represents contractors doing business with the government, resolving disputes arising from the award and performance of Federal contracts, defending against government audits and investigations and defective pricing claims, as well as providing counseling and dispute resolution services for issues arising under the False Claims, Miller and Foreign Corrupt Practices Acts. He has been involved in Federal procurement counseling and litigation for more than 20 years, first as a contract negotiator and later as a legal advisor and trial attorney on the Air Force Contract Litigation Team, where he defended the Air Force against contractor claims, prosecuted defective pricing claims and directed audits and investigations. In private practice, Mark has recovered millions of dollars on behalf of government contractors from a variety of Federal agencies and has successfully represented both protesters and proposed awardees in Federal bid protests.

At the state and local level, Mark helps government agencies and other public entities design and implement source selection plans and procedures for a variety of goods and services, including construction of major civil infrastructure projects, transportation systems and public buildings, as well as for A&E and other professional services. Mark has significant experience designing and implementing source selections based on “best value” determinations (including GC/CM, design/build and their variations), as well as defending award decisions against bid protests. His State and local procurement and related litigation experience extends throughout the western United States and Alaska.

Mark is also a construction litigator, representing subcontractors, contractors, sureties and owners in public and private construction disputes. On behalf of contractors, he has successfully prepared and prosecuted through trial a variety of construction claims, including those involving defective specifications, changed conditions, superior knowledge, acceleration and delay, and loss of productivity. On behalf of owners and sureties, Mark has successfully defended against similar claims brought by contractors and subcontractors. Mark has successfully resolved several multi-million dollar construction disputes.

**SPECIFIC EXPERIENCE**

- Audits and Investigations
- Bid Protests
- Claim Preparation
- Construction Litigation
- Contract Compliance
- Contract Pricing
- Defective Pricing
- Small and Disadvantaged Business Issues
- Source Selection Design and Implementation
- Suspension and Debarment
- False Claims Act Litigation
- Miller Act Litigation
- Foreign Corrupt Practices Act Investigations
PUBLICATIONS, PRESENTATIONS AND RELATED EXPERIENCE

- Lecturer, Government Contract Law, Federal Publications, LLC, Seattle, Washington, Summer 2005
- Active Duty, United States Air Force, 1983-1997:
  - Space Division, Contract Analyst and Negotiator: responsible for schedule and cost control of the $1 billion Anti-Satellite Program and the $300 million Space Test Program.
  - Trial Attorney, Air Force Contract Litigation Team: defended the Air Force in the litigation of more than $200 million in contractor claims.

PROFESSIONAL MEMBERSHIPS & CIVIC AFFILIATIONS

- National Contract Management Association, Puget Sound Chapter
- Contract Services Association of America
- American Bar Association, Public Contracts Section and Construction Forum
- United States Air Force Reserves (1997-present)

EDUCATION & CREDENTIALS


J.D., Southern Methodist University School of Law, 1988
Law Review, 1986-88
Outstanding Graduate in Trial Advocacy

B.S., (engineering) United States Air Force Academy, 1983
Brosman Award, Outstanding Graduate in Law
Matt Koehl’s practice focuses on representing companies that transact business with federal, state and local Government agencies, with a special emphasis on the Federal GSA multiple award schedule (MAS) program. Matt has helped numerous companies to negotiate MAS contracts with GSA. He also regularly counsels companies about how properly to administer their MAS contracts and helps companies respond to pre-award and post-award audits by GSA’s Industrial Operations Analysts and Office of Inspector General.

Matt also has extensive bid protest and claim litigation experience, having represented contractors in more than thirty bid protest and contract claim proceedings before the Federal courts and administrative tribunals. He has worked on numerous merger and acquisition projects involving Government contractors, representing both buyers and sellers. Matt has a strong record helping companies respond successfully to False Claims Act investigations and lawsuits. In addition, he has helped companies create and implement compliance programs and to conduct internal audits and investigations. Prior to joining Preston, Gates, Matt spent five years as the General Counsel to Micron Government Computer Systems, a leading GSA Schedule 70 contractor and a Top 3 PC supplier to the Federal Government. Before that, Matt was associated with the Government contracts group of another large, national law firm.

SPECIFIC EXPERIENCE

- Audits and Investigations
- Bid Protests
- Contract Litigation
- Contracting Procedures
- Contractor Compliance
- Electronic Commerce
- Multiple Award Schedules
- Payment Issues
- Small Business and Small Disadvantaged Businesses
- Socio-Economic Issues
- State and Local Contracting
PUBLICATIONS AND SPEECHES

- Miscellaneous client seminars on Federal gift and gratuity requirements, Procurement Integrity Act, rules of FSS contracting and numerous other procurement and compliance related topics (1997 – 2004).
- Contributing author, “Post-Award Bid Protests at the U.S. Court of Federal Claims,” American Bar Association (November 1997)

REPRESENTATIVE MATTERS

MULTIPLE AWARD SCHEDULES

- In 2003 and 2004, represented large Multiple Award Schedule (MAS) contractors in all facets of preparing for and responding to audits of their contracts by GSA. None of the audits resulted in findings of material non-compliance with MAS contract requirements
- In 2003 and 2004, helped to prepare proposals and to negotiate contracts based upon various GSA MAS solicitations, including: IT hardware, software and services; business consulting services; professional engineering services; and, marketing and media services

MERGERS AND ACQUISITIONS

- In 2001, Represented Buyer in all facets of its acquisition of a $150 million Government business subsidiary of a large publicly-traded technology company. Representation included due diligence, drafting and negotiation of purchase agreement and counseling on post-closing compliance issues. The transaction closed on-time and has exceeded sales expectations with no material compliance or performance issues.
- In 2003 and 2004, represented several Buyers in connection with asset acquisitions involving GSA MAS contracts. In each case the acquisition closed as scheduled and the assignment of the contract was approved by the Government

BID PROTESTS

- In 2003, successfully represented the incumbent contractor in a bid protest at the General Accounting Office and, subsequently, the Court of Federal Claims, challenging a $250 million environmental remediation services
contract awarded by the Army Corps of Engineers. Protest was eventually dismissed and settled on favorable terms.

- In 2004, successfully defended against a bid protest filed by a disappointed bidder for a $160 million contract for computer hardware awarded by the Commonwealth of Pennsylvania. This sole-source award is expected to be the largest of its type ever awarded by the Commonwealth.

- *Concept Automation, Inc. v. United States*, 41 Fed. Cl. 361 (Fed.Cl. 1998). Filed and prosecuted complaint in the Court of Federal Claims on behalf of disappointed bidder on a U.S. Postal Service contract for computer hardware valued at several hundred million dollars. The court granted award of bid and proposal and bid protest costs following an administrative bid protest decided by the Postal Services Office of General Counsel.

**CONTRACT LITIGATION**


- *Tri-Ark Industries, Inc. v. Dep't. of Treasury*, GSBCA No. 13588-TD, 1996 WL 670326 (Nov. 18 1996). Prepared a claim for additional costs incurred performing a contract for janitorial services and appealed denial of the claim to the agency’s administrative court. Negotiated a favorable settlement prior to trial.

**PROFESSIONAL MEMBERSHIPS**


- District of Columbia Bar, Public Contract Law Section

**EDUCATION & CREDENTIALS**

**Bar Admissions:** California, District of Columbia, Idaho, United States Court of Federal Claims

J.D., Washington & Lee University School of Law, *cum laude*, 1993

B.A., Colgate University, with Honors in History, 1989
Tab 3: FAR 52.225-2, BAA Certificate
“Cost of components” means—

(1) For components purchased by the Contractor, the acquisition cost, including transportation costs to the place of incorporation into the end product (whether or not such costs are paid to a domestic firm), and any applicable duty (whether or not a duty-free entry certificate is issued); or

(2) For components manufactured by the Contractor, all costs associated with the manufacture of the component, including transportation costs as described in paragraph (1) of this definition, plus allocable overhead costs, but excluding profit. Cost of components does not include any costs associated with the manufacture of the end product.

“Domestic end product” means—

(1) An unmanufactured end product mined or produced in the United States; or

(2) An end product manufactured in the United States, if the cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. Components of foreign origin of the same class or kind as those that the agency determines are not mined, produced, or manufactured in sufficient and reasonably available commercial quantities of a satisfactory quality are treated as domestic. Scrap generated, collected, and prepared for processing in the United States is considered domestic.

“End product” means those articles, materials, and supplies to be acquired under the contract for public use.

“Foreign end product” means an end product other than a domestic end product.

“United States” means the 50 States, the District of Columbia, and outlying areas.

(b) The Buy American Act (41 U.S.C. 10a - 10d) provides a preference for domestic end products for supplies acquired for use in the United States.

(c) Offerors may obtain from the Contracting Officer a list of foreign articles that the Contracting Officer will treat as domestic for this contract.

(d) The Contractor shall deliver only domestic end products except to the extent that it specified delivery of foreign end products in the provision of the solicitation entitled “Buy American Act Certificate.”

(End of clause)

52.225-3 Buy American Act—Free Trade Agreements—Israeli Trade Act.

As prescribed in 25.1101(b)(1)(i), insert the following clause:

BUY AMERICAN ACT—FREE TRADE AGREEMENTS—ISRAELI TRADE ACT (JAN 2005)

(a) Definitions. As used in this clause—

“Component” means an article, material, or supply incorporated directly into an end product.

“Cost of components” means—

(1) For components purchased by the Contractor, the acquisition cost, including transportation costs to the place of incorporation into the end product (whether or not such costs are paid to a domestic firm), and any applicable duty (whether or not a duty-free entry certificate is issued); or

(2) For components manufactured by the Contractor, all costs associated with the manufacture of the component, including transportation costs as described in paragraph (1) of this definition, plus allocable overhead costs, but excluding profit. Cost of components does not include any costs associated with the manufacture of the end product.

“Domestic end product” means—

(1) An unmanufactured end product mined or produced in the United States; or

(2) An end product manufactured in the United States, if the cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. Components of foreign origin of the same class or kind as those that the agency determines are not mined, produced, or manufactured in sufficient and reasonably available commercial quantities of a satisfactory quality are treated as domestic. Scrap generated, collected, and pre-
Tab 4: FAR 52.225-6, TAA Certificate
“United States” means the 50 States, the District of Columbia, and outlying areas.

"U.S.-made end product" means an article that is mined, produced, or manufactured in the United States or that is substantially transformed in the United States into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed.

"WTO GPA country end product" means an article that—

(1) Is wholly the growth, product, or manufacture of a WTO GPA country; or

(2) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a WTO GPA country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services, (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

(b) Delivery of end products. The Contracting Officer has determined that the WTO GPA and FTAs apply to this acquisition. Unless otherwise specified, these trade agreements apply to all items in the Schedule. The Contractor shall deliver under this contract only U.S.-made or designated country end products except to the extent that, in its offer, it specified delivery of other end products in the provision entitled “Trade Agreements Certificate.”

(End of clause)

52.225-6 Trade Agreements Certificate.

As prescribed in 25.1101(c)(2), insert the following provision:

TRADE AGREEMENTS CERTIFICATE (JAN 2005)

(a) The offeror certifies that each end product, except those listed in paragraph (b) of this provision, is a U.S.-made or designated country end product, as defined in the clause of this solicitation entitled “Trade Agreements.”

(b) The offeror shall list as other end products those supplies that are not U.S.-made or designated country end products.

Other End Products:

<table>
<thead>
<tr>
<th>LINE ITEM NO.</th>
<th>COUNTRY OF ORIGIN</th>
</tr>
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<tbody>
<tr>
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</tbody>
</table>

[List as necessary]

(c) The Government will evaluate offers in accordance with the policies and procedures of Part 25 of the Federal Acquisition Regulation. For line items covered by the WTO GPA, the Government will evaluate offers of U.S.-made or designated country end products without regard to the restrictions of the Buy American Act. The Government will consider for award only offers of U.S.-made or designated country end products unless the Contracting Officer determines that there are no offers for such products or that the offers for those products are insufficient to fulfill the requirements of this solicitation.

(End of provision)

52.225-7 Waiver of Buy American Act for Civil Aircraft and Related Articles.

As prescribed in 25.1101(d), insert the following provision:

WAIVER OF BUY AMERICAN ACT FOR CIVIL AIRCRAFT AND RELATED ARTICLES (FEB 2000)

(a) Definition. “Civil aircraft and related articles,” as used in this provision, means—

(1) All aircraft other than aircraft to be purchased for use by the Department of Defense or the U.S. Coast Guard;

(2) The engines (and parts and components for incorporation into the engines) of these aircraft;

(3) Any other parts, components, and subassemblies for incorporation into the aircraft; and

(4) Any ground flight simulators, and parts and components of these simulators, for use with respect to the aircraft, whether to be used as original or replacement equipment in the manufacture, repair, maintenance, rebuilding, modification, or conversion of the aircraft, and without regard to whether the aircraft or articles receive duty-free treatment under section 601(a)(2) of the Trade Agreements Act.

(b) The U.S. Trade Representative has waived the Buy American Act for acquisitions of civil aircraft and related articles from countries that are parties to the Agreement on Trade in Civil Aircraft. Those countries are Austria, Belgium, Bulgaria, Canada, Denmark, Egypt, Finland, France, Germany, Greece, Ireland, Italy, Japan, Luxembourg, Macao, the Netherlands, Norway, Portugal, Romania, Spain, Sweden, Switzerland, and the United Kingdom.

(c) For the purpose of this waiver, an article is a product of a country only if—

(1) It is wholly the growth, product, or manufacture of that country; or

(2) In the case of an article that consists in whole or in part of materials from another country, it has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed.
Tab 5: FAR 52.225-5, Trade Agreements (Country List)
shall supply a Canadian end product, an Israeli end product or, at the Contractor’s option, a domestic end product.

52.225-4 Buy American Act—Free Trade Agreements—Israel Trade Act Certificate.

As prescribed in 25.1101(b)(2)(i), insert the following provision:

BUY AMERICAN ACT—FREE TRADE AGREEMENTS—ISRAELI TRADE ACT CERTIFICATE (JAN 2005)

(a) The offeror certifies that each end product, except those listed in paragraph (b) or (c) of this provision, is a domestic end product and that the offeror has considered components of unknown origin to have been mined, produced, or manufactured outside the United States. The terms “component,” “domestic end product,” “end product,” “end product of Australia, Canada, Chile, Mexico, or Singapore,” “foreign end product,” “Israel end product,” and “United States” are defined in the clause of this solicitation entitled “Buy American Act—Free Trade Agreements—Israeli Trade Act.”

(b) The offeror certifies that the following supplies are end products of Australia, Canada, Chile, Mexico, or Singapore or Israeli end products as defined in the clause of this solicitation entitled “Buy American Act—Free Trade Agreements—Israeli Trade Act”:

Canadian End Products:

LINE ITEM NO. COUNTRY OF ORIGIN

[List as necessary]

(c) The offeror shall list those supplies that are foreign end products (other than those listed in paragraph (b) of this provision) as defined in the clause of this solicitation entitled “Buy American Act—Free Trade Agreements—Israeli Trade Act.” The offeror shall list as other foreign end products those end products manufactured in the United States that do not qualify as domestic end products.

Other Foreign End Products:

LINE ITEM NO. COUNTRY OF ORIGIN

[List as necessary]

(d) The Government will evaluate offers in accordance with the policies and procedures of Part 25 of the Federal Acquisition Regulation.

(End of provision)

Alternate I (Jan 2004). As prescribed in 25.1101(b)(2)(ii), substitute the following paragraph (b) for paragraph (b) of the basic provision:

(b) The offeror certifies that the following supplies are Canadian end products as defined in the clause of this solicitation entitled “Buy American Act—Free Trade Agreements—Israeli Trade Act”:

Canadian or Israeli End Products:

LINE ITEM NO. COUNTRY OF ORIGIN

[List as necessary]

Alternate II (Jan 2004). As prescribed in 25.1101(b)(2)(iii), substitute the following paragraph (b) for paragraph (b) of the basic provision:

(b) The offeror certifies that the following supplies are Canadian end products or Israeli end products as defined in the clause of this solicitation entitled “Buy American Act—Free Trade Agreements—Israeli Trade Act”:

Canadian or Israeli End Products:

LINE ITEM NO. COUNTRY OF ORIGIN

[List as necessary]

52.225-5 Trade Agreements.

As prescribed in 25.1101(c)(1), insert the following clause:

TRADE AGREEMENTS (JAN 2005)

(a) Definitions. As used in this clause—

“Caribbean Basin country end product”—

(1) Means an article that—

(i) Is wholly the growth, product, or manufacture of a Caribbean Basin country; or

(B) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a Caribbean Basin country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed; and
(ii) Is not excluded from duty-free treatment for Caribbean countries under 19 U.S.C. 2703(b).

(A) For this reason, the following articles are not Caribbean Basin country end products:

(1) Tuna, prepared or preserved in any manner in airtight containers;

(2) Petroleum, or any product derived from petroleum;

(3) Watches and watch parts (including cases, bracelets, and straps) of whatever type including, but not limited to, mechanical, quartz digital, or quartz analog, if such watches or watch parts contain any material that is the product of any country to which the Harmonized Tariff Schedule of the United States (HTSUS) column 2 rates of duty apply (i.e., Afghanistan, Cuba, Laos, North Korea, and Vietnam); and

(4) Certain of the following: textiles and apparel articles; footwear, handbags, luggage, flat goods, work gloves, and leather wearing apparel; or handloomed, handwoven, and folkloric articles;

(B) Access to the HTSUS to determine duty-free status of articles of these types is available at http://www.customs.usitrea.gov/impoexpo/impoexpo.htm. In particular, see the following:

(1) General Note 3(c), Products Eligible for Special Tariff treatment.

(2) General Note 17, Products of Countries Designated as Beneficiary Countries under the United States-Caribbean Basin Trade Partnership Act of 2000.

(3) Section XXII, Chapter 98, Subchapter II, Articles Exported and Returned, Advanced or Improved Abroad, U.S. Note 7(b).

(4) Section XXII, Chapter 98, Subchapter XX, Goods Eligible for Special Tariff Benefits under the United States-Caribbean Basin Trade Partnership Act; and

(2) Refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the acquisition, includes services (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

“Designated country” means any of the following countries:

(1) A World Trade Organization Government Procurement Agreement country (Aruba, Austria, Belgium, Canada, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea (Republic of), Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, or United Kingdom);

(2) A Free Trade Agreement country (Australia, Canada, Chile, Mexico, Morocco, or Singapore);

(3) A least developed country (Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Cape Verde, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Djibouti, East Timor, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, Laos, Lesotho, Madagascar, Malawi, Maldives, Mali, Mauritania, Mozambique, Nepal, Niger, Rwanda, Samoa, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, Somalia, Tanzania, Togo, Tuvalu, Uganda, Vanuatu, Yemen, or Zambia); or

(4) A Caribbean Basin country (Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, British Virgin Islands, Costa Rica, Dominica, Dominican Republic, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Montserrat, Netherlands Antilles, Nicaragua, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, or Trinidad and Tobago).

“Designated country end product” means a WTO GPA country end product, an FTA country end product, a least developed country end product, or a Caribbean Basin country end product.

“End product” means those articles, materials, and supplies to be acquired under the contract for public use.

“Free Trade Agreement country end product” means an article that—

(1) Is wholly the growth, product, or manufacture of a Free Trade Agreement (FTA) country; or

(2) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in an FTA country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

“Least developed country end product” means an article that—

(1) Is wholly the growth, product, or manufacture of a least developed country; or

(2) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a least developed country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product, includes services (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.
“United States” means the 50 States, the District of Columbia, and outlying areas.

“U.S.-made end product” means an article that is mined, produced, or manufactured in the United States or that is substantially transformed in the United States into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed.

“WTO GPA country end product” means an article that—

(1) Is wholly the growth, product, or manufacture of a WTO GPA country; or

(2) In the case of an article that consists in whole or in part of materials from another country, has been substantially transformed in a WTO GPA country into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed. The term refers to a product offered for purchase under a supply contract, but for purposes of calculating the value of the end product includes services, (except transportation services) incidental to the article, provided that the value of those incidental services does not exceed that of the article itself.

(b) Delivery of end products. The Contracting Officer has determined that the WTO GPA and FTAs apply to this acquisition. Unless otherwise specified, these trade agreements apply to all items in the Schedule. The Contractor shall deliver under this contract only U.S.-made or designated country end products except to the extent that, in its offer, it specified delivery of other end products in the provision entitled “Trade Agreements Certificate.”

(End of clause)

52.225-6 Trade Agreements Certificate.

As prescribed in 25.1101(c)(2), insert the following provision:

TRADE AGREEMENTS CERTIFICATE (JAN 2005)

(a) The offeror certifies that each end product, except those listed in paragraph (b) of this provision, is a U.S.-made or designated country end product, as defined in the clause of this solicitation entitled “Trade Agreements.”

(b) The offeror shall list as other end products those supplies that are not U.S.-made or designated country end products.

Other End Products:

<table>
<thead>
<tr>
<th>LINE ITEM NO.</th>
<th>COUNTRY OF ORIGIN</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
</tr>
</tbody>
</table>

[List as necessary]

(c) The Government will evaluate offers in accordance with the policies and procedures of Part 25 of the Federal Acquisition Regulation. For line items covered by the WTO GPA, the Government will evaluate offers of U.S.-made or designated country end products without regard to the restrictions of the Buy American Act. The Government will consider for award only offers of U.S.-made or designated country end products unless the Contracting Officer determines that there are no offers for such products or that the offers for those products are insufficient to fulfill the requirements of this solicitation.

(End of provision)

52.225-7 Waiver of Buy American Act for Civil Aircraft and Related Articles.

As prescribed in 25.1101(d), insert the following provision:

WAIVER OF BUY AMERICAN ACT FOR CIVIL AIRCRAFT AND RELATED ARTICLES (FEB 2000)

(a) Definition. “Civil aircraft and related articles,” as used in this provision, means—

(1) All aircraft other than aircraft to be purchased for use by the Department of Defense or the U.S. Coast Guard;

(2) The engines (and parts and components for incorporation into the engines) of these aircraft;

(3) Any other parts, components, and subassemblies for incorporation into the aircraft; and

(4) Any ground flight simulators, and parts and components of these simulators, for use with respect to the aircraft, whether to be used as original or replacement equipment in the manufacture, repair, maintenance, rebuilding, modification, or conversion of the aircraft, and without regard to whether the aircraft or articles receive duty-free treatment under section 601(a)(2) of the Trade Agreements Act.

(b) The U.S. Trade Representative has waived the Buy American Act for acquisitions of civil aircraft and related articles from countries that are parties to the Agreement on Trade in Civil Aircraft. Those countries are Austria, Belgium, Bulgaria, Canada, Denmark, Egypt, Finland, France, Germany, Greece, Ireland, Italy, Japan, Luxembourg, Macao, the Netherlands, Norway, Portugal, Romania, Spain, Sweden, Switzerland, and the United Kingdom.

(c) For the purpose of this waiver, an article is a product of a country only if—

(1) It is wholly the growth, product, or manufacture of that country; or

(2) In the case of an article that consists in whole or in part of materials from another country, it has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed.
Tab 6:  FAR Subpart 25.4 – Trade Agreements
Subpart 25.4—Trade Agreements

25.400 Scope of subpart.

(a) This subpart provides policies and procedures applicable to acquisitions that are covered by—

(1) The World Trade Organization Government Procurement Agreement (WTO GPA), as approved by Congress in the Uruguay Round Agreements Act (Public Law 103-465);

(2) Free Trade Agreements (FTA), consisting of—
   (i) NAFTA (the North American Free Trade Agreement, as approved by Congress in the North American Free Trade Agreement Implementation Act of 1993 (19 U.S.C. 3301 note));
   (ii) Chile FTA (the United States-Chile Free Trade Agreement, as approved by Congress in the United States-Chile Free Trade Agreement Implementation Act (Public Law 108-77));
   (iii) Singapore FTA (the United States-Singapore Free Trade Agreement, as approved by Congress in the United States-Singapore Free Trade Agreement Implementation Act (Public Law 108-78));
   (iv) Australia FTA (the United States-Australia Free Trade Agreement, as approved by Congress in the United States-Australia Free Trade Agreement Implementation Act (Public Law 108-286)); and
   (v) Morocco FTA (The United States-Morocco Free Trade Agreement, as approved by Congress in the United States-Morocco Free Trade Agreement Implementation Act (Public Law 108-302);

(3) The least developed country designation made by the U.S. Trade Representative, pursuant to the Trade Agreements Act (19 U.S.C. 2511(b)(4)), in acquisitions covered by the WTO GPA;

(4) The Caribbean Basin Trade Initiative (CBTI) (determination of the U.S. Trade Representative that end products or construction material granted duty-free entry from countries designated as beneficiaries under the Caribbean Basin Economic Recovery Act (19 U.S.C. 2701, et seq.), with the exception of Panama, must be treated as eligible products in acquisitions covered by the WTO GPA);

(5) The Israeli Trade Act (the U.S.-Israel Free Trade Area Agreement, as approved by Congress in the United States-Israel Free Trade Area Implementation Act of 1985 (19 U.S.C. 2112 note)); or

(6) The Agreement on Trade in Civil Aircraft (U.S. Trade Representative waiver of the Buy American Act for signatories of the Agreement on Trade in Civil Aircraft, as implemented in the Trade Agreements Act of 1979 (19 U.S.C. 2513)).

(b) For application of the trade agreements that are unique to individual agencies, see agency regulations.

25.401 Exceptions.

(a) This subpart does not apply to—

(1) Acquisitions set aside for small businesses;

(2) Acquisitions of arms, ammunition, or war materials, or purchases indispensable for national security or for national defense purposes;

(3) Acquisitions of end products for resale;

(4) Acquisitions from Federal Prison Industries, Inc., under Subpart 8.6, and acquisitions under Subpart 8.7, Acquisition from Nonprofit Agencies Employing People Who Are Blind or Severely Disabled; and

(5) Other acquisitions not using full and open competition, if authorized by Subpart 6.2 or 6.3, when the limitation of competition would preclude use of the procedures of this subpart, or sole source acquisitions justified in accordance with 13.501(a).

(b) In the World Trade Organization Government Procurement Agreement (WTO GPA) and each FTA, there is a U.S. schedule that lists services that are excluded from that agreement in acquisitions by the United States. Acquisitions of the following services are excluded from coverage by the U.S. schedule of the WTO GPA or an FTA as indicated in this table:
<table>
<thead>
<tr>
<th>The Service</th>
<th>WTO GPA</th>
<th>NAFTA and Chile FTA</th>
<th>Singapore FTA</th>
<th>Australia and Morocco FTA</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) All services purchased in support of military services overseas.</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>(2) (i) Automatic data processing (ADP) telecommunications and transmission services (D304), except enhanced (i.e., value-added) telecommunications services.</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(ii) ADP teleprocessing and timesharing services (D305), telecommunications network management services (D316), automated news services, data services or other information services (D317), and other ADP and telecommunications services (D399).</td>
<td>X</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(iii) Basic telecommunications network services (i.e., voice telephone services, packet-switched data transmission services, circuit-switched data transmission services, telex services, telegraph services, facsimile services, and private leased circuit services, but not information services, as defined in 47 U.S.C. 153(20)).</td>
<td>*</td>
<td>*</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>(3) Dredging.</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>(4) (i) Operation and management contracts of certain Government or privately owned facilities used for Government purposes, including Federally Funded Research and Development Centers.</td>
<td>X</td>
<td></td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>(ii) Operation of all Department of Defense, Department of Energy, or the National Aeronautics and Space Administration facilities; and all Government-owned research and development facilities or Government-owned environmental laboratories.</td>
<td>**</td>
<td>X</td>
<td>**</td>
<td>X</td>
</tr>
<tr>
<td>(5) Research and development.</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>(6) Transportation services (including launching services, but not including travel agent services - V503).</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>(7) Utility services.</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>(8) Maintenance, repair, modification, rebuilding and installation of equipment related to ships (J019).</td>
<td>X</td>
<td></td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>(9) Nonnuclear ship repair (J998).</td>
<td></td>
<td>X</td>
<td></td>
<td>X</td>
</tr>
</tbody>
</table>

* Note 1. Acquisitions of the services listed at (2)(iii) of this table are a subset of the excluded services at (2)(i) and (ii), and are therefore not covered under the WTO GPA.

** Note 2. Acquisitions of the services listed at (4)(ii) of this table are a subset of the excluded services at (4)(i), and are therefore not covered under the WTO GPA.

25.402 General.
(a)(1) The Trade Agreements Act (19 U.S.C. 2501, et seq.) provides the authority for the President to waive the Buy American Act and other discriminatory provisions for eligible
products from countries that have signed an international trade agreement with the United States, or that meet certain other criteria, such as being a least developed country. The President has delegated this waiver authority to the U.S. Trade Representative. In acquisitions covered by the WTO GPA, Free Trade Agreements, or the Israeli Trade Act, the USTR has waived the Buy American Act and other discriminatory provisions for eligible products. Offers of eligible products receive equal consideration with domestic offers.

(ii) The contracting officer shall determine the origin of services by the country in which the firm providing the services is established. See Subpart 25.5 for evaluation procedures for supply contracts covered by trade agreements.

(b) The value of the acquisition is a determining factor in the applicability of trade agreements. Most of these dollar thresholds are subject to revision by the U.S. Trade Representative approximately every 2 years. The various thresholds are summarized as follows:

<table>
<thead>
<tr>
<th>Trade Agreement</th>
<th>Supply Contract (equal to or exceeding)</th>
<th>Service Contract (equal to or exceeding)</th>
<th>Construction Contract (equal to or exceeding)</th>
</tr>
</thead>
<tbody>
<tr>
<td>WTO GPA</td>
<td>$175,000</td>
<td>$175,000</td>
<td>$6,725,000</td>
</tr>
<tr>
<td>FTAs</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>NAFTA</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>— Canada</td>
<td>25,000</td>
<td>58,550</td>
<td>7,611,532</td>
</tr>
<tr>
<td>— Mexico</td>
<td>58,550</td>
<td>58,550</td>
<td>7,611,532</td>
</tr>
<tr>
<td>Chile FTA</td>
<td>58,550</td>
<td>58,550</td>
<td>6,725,000</td>
</tr>
<tr>
<td>Singapore FTA</td>
<td>58,550</td>
<td>58,550</td>
<td>6,725,000</td>
</tr>
<tr>
<td>Australia FTA</td>
<td>58,550</td>
<td>58,550</td>
<td>6,725,000</td>
</tr>
<tr>
<td>Morocco FTA</td>
<td>175,000</td>
<td>175,000</td>
<td>6,725,000</td>
</tr>
<tr>
<td>Israeli Trade Act</td>
<td>50,000</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

25.403 World Trade Organization Government Procurement Agreement and Free Trade Agreements.

(a) Eligible products from WTO GPA and FTA countries are entitled to the nondiscriminatory treatment specified in 25.402(a)(1). The WTO GPA and FTAs specify procurement procedures designed to ensure fairness (see 25.408).

(b) Thresholds. (1) To determine whether the acquisition of products by lease, rental, or lease-purchase contract (including lease-to-ownership, or lease-with-option-to-purchase) is covered by the WTO GPA or an FTA, calculate the estimated acquisition value as follows:

(i) If a fixed-term contract of 12 months or less is contemplated, use the total estimated value of the acquisition.

(ii) If a fixed-term contract of more than 12 months is contemplated, use the total estimated value of the acquisition plus the estimated residual value of the leased equipment at the conclusion of the contemplated term of the contract.

(iii) If an indefinite-term contract is contemplated, use the estimated monthly payment multiplied by the total number of months that ordering would be possible under the proposed contract, i.e., the initial ordering period plus any optional ordering periods.

(iv) If there is any doubt as to the contemplated term of the contract, use the estimated monthly payment multiplied by 48.

(2) The estimated value includes the value of all options.

(3) If, in any 12-month period, recurring or multiple awards for the same type of product or products are anticipated, use the total estimated value of these projected awards to determine whether the WTO GPA or an FTA applies. Do not divide any acquisition with the intent of reducing the estimated value of the acquisition below the dollar threshold of the WTO GPA or an FTA.

(c) Purchase restriction. (1) Under the Trade Agreements Act (19 U.S.C. 2512), in acquisitions covered by the WTO GPA, acquire only U.S.-made or designated country end products or U.S. or designated country services, unless offers for such end products or services are either not received or are insufficient to fulfill the requirements. This purchase restriction does not apply below the WTO GPA threshold for supplies and services, even if the acquisition is covered by an FTA.

(2) This restriction does not apply to purchases of supplies by the Department of Defense from a country with which it has entered into a reciprocal agreement, as provided in departmental regulations.

25.404 Least developed countries.

For acquisitions covered by the WTO GPA, least developed country end products, construction material, and services must be treated as eligible products.

25.405 Caribbean Basin Trade Initiative.

Under the Caribbean Basin Trade Initiative, the United States Trade Representative has determined that, for acquisitions covered by the WTO GPA, Caribbean Basin country end products, construction material, and services must be treated as eligible products.


Acquisitions of supplies by most agencies are covered by the Israeli Trade Act, if the estimated value of the acquisition is $50,000 or more but does not exceed the WTO GPA threshold for supplies (see 25.402(b)). Agencies other than the Department of Defense, the Department of Energy, the Department of Transportation, the Bureau of Reclamation of the Department of the Interior, the Federal Housing Finance Board, and the Office of Thrift Supervision must evaluate offers of Israeli end products without regard to the restrictions
of the Buy American Act. The Israeli Trade Act does not prohibit the purchase of other foreign end products.

25.407 Agreement on Trade in Civil Aircraft.
Under the authority of Section 303 of the Trade Agreements Act, the U.S. Trade Representative has waived the Buy American Act for civil aircraft and related articles, that meet the substantial transformation test of the Trade Agreements Act, from countries that are parties to the Agreement on Trade in Civil Aircraft. Those countries are Austria, Belgium, Bulgaria, Canada, Denmark, Egypt, Finland, France, Germany, Greece, Ireland, Italy, Japan, Luxembourg, Macao, the Netherlands, Norway, Portugal, Romania, Spain, Sweden, Switzerland, and the United Kingdom.

25.408 Procedures.
(a) If the WTO GPA or an FTA applies (see 25.401), the contracting officer must—

(1) Comply with the requirements of 5.203, Publicizing and response time;

(2) Comply with the requirements of 5.207, Preparation and Transmittal of Synopses, including the appropriate "Numbered Note";

(3) Not include technical requirements in solicitations solely to preclude the acquisition of eligible products;

(4) Specify in solicitations that offerors must submit offers in the English language and in U.S. dollars (see 52.214-34, Submission of Offers in the English Language, and 52.214-35, Submission of Offers in U.S. Currency, or paragraph (c)(5) of 52.215-1, Instruction to Offerors—Competitive Acquisitions); and

(5) Provide unsuccessful offerors from WTO GPA or FTA countries notice in accordance with 14.409-1 or 15.503.

(b) See Subpart 25.5 for evaluation procedures and examples.
Tab 7: FAR Subparts 25.1, 25.2 – Buy American Act – Supplies; Construction Materials
25.100 Scope of subpart.

This subpart implements the Buy American Act (41 U.S.C. 10a – 10d) and Executive Order 10582, December 17, 1954. It applies to supplies acquired for use in the United States, including supplies acquired under contracts set aside for small business concerns, if—

(a) The supply contract exceeds the micro-purchase threshold; or

(b) The supply portion of a contract for services that involves the furnishing of supplies (e.g., lease) exceeds the micro-purchase threshold.

25.101 General.

(a) The Buy American Act restricts the purchase of supplies that are not domestic end products. For manufactured end products, the Buy American Act uses a two-part test to define a domestic end product.

(1) The article must be manufactured in the United States; and

(2) The cost of domestic components must exceed 50 percent of the cost of all the components.
(b) The Buy American Act applies to small business set-asides. A manufactured product of a small business concern is a U.S.-made end product, but is not a domestic end product unless it meets the component test in paragraph (a)(2) of this section.

(c) Exceptions that allow the purchase of a foreign end product are listed at 25.103. The unreasonable cost exception is implemented through the use of an evaluation factor applied to low foreign offers that are not eligible offers. The evaluation factor is not used to provide a preference for one foreign offer over another. Evaluation procedures and examples are provided in Subpart 25.5.

25.102 Policy.
Except as provided in 25.103, acquire only domestic end products for public use inside the United States.

25.103 Exceptions.
When one of the following exceptions applies, the contracting officer may acquire a foreign end product without regard to the restrictions of the Buy American Act:

(a) Public interest. The head of the agency may make a determination that domestic preference would be inconsistent with the public interest. This exception applies when an agency has an agreement with a foreign government that provides a blanket exception to the Buy American Act.

(b) Nonavailability. The Buy American Act does not apply with respect to articles, materials, or supplies if articles, materials, or supplies of the class or kind to be acquired, either as end items or components, are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.

(i) Class determinations. (i) A nonavailability determination has been made for the articles listed in 25.104. This determination does not necessarily mean that there is no domestic source for the listed items, but that domestic sources can only meet 50 percent or less of total U.S. Government and nongovernment demand.

(ii) Before acquisition of an article on the list, the procuring agency is responsible to conduct market research appropriate to the circumstances, including seeking of domestic sources. This applies to acquisition of an article as—

(A) An end product; or

(B) A significant component (valued at more than 50 percent of the value of all the components).

(iii) The determination in paragraph (b)(1)(i) of this section does not apply if the contracting officer learns at any time before the time designated for receipt of bids in sealed bidding or final offers in negotiation that an article on the list is available domestically in sufficient and reasonably available commercial quantities of a satisfactory quality to meet the requirements of the solicitation. The contracting officer must—

(A) Ensure that the appropriate Buy American Act provision and clause are included in the solicitation (see 25.1101(a), 25.1101(b), or 25.1102);

(B) Specify in the solicitation that the article is available domestically and that offerors and contractors may not treat foreign components of the same class or kind as domestic components; and

(C) Submit a copy of supporting documentation to the appropriate council identified in 1.201-1, in accordance with agency procedures, for possible removal of the article from the list.

(ii) If the contracting officer considers that the nonavailability of an article is likely to affect future acquisitions, the contracting officer may submit a copy of the determination and supporting documentation to the appropriate council identified in 1.201-1, in accordance with agency procedures, for possible addition to the list in 25.104.

(iii) A written determination is not required if all of the following conditions are present:

(A) The acquisition was conducted through use of full and open competition.

(B) The acquisition was synopsis in accordance with 5.201.

(C) No offer for a domestic end product was received.

(d) Unreasonable cost. The contracting officer may determine that the cost of a domestic end product would be unreasonable, in accordance with 25.105 and Subpart 25.5.

(e) Resale. The contracting officer may purchase foreign end products specifically for commissary resale.

25.104 Nonavailable articles.

(a) The following articles have been determined to be nonavailable in accordance with 25.103(b)(1)(i):

Acetylene, black.

Agar, bulk.

Anise.

Antimony, as metal or oxide.

Asbestos, amosite, chrysotile, and crocidolite.

Bamboo shoots.

Bananas.

Bauxite.

Beef, corned, canned.

Beef extract.

Bephenium hydroxynaphthoate.

Bismuth.

Books, trade, text, technical, or scientific; newspapers; pamphlets; magazines; periodicals; printed briefs and films;
not printed in the United States and for which domestic editions are not available.

Brazil nuts, unroasted
Cadmium, ores and flue dust.
Calcium cyanamide.

capers.
Cashew nuts.
Castor beans and castor oil.
Chalk, English.
Chestnuts.
Chicle.
Chrome ore or chromite.
Cinchona bark.
Cobalt, in cathodes, rondelles, or other primary ore and metal forms.

Cocoa beans.
Coconut and coconut meat, unsweetened, in shredded, desiccated, or similarly prepared form.

Coffee, raw or green bean.
Colchicine alkaloid, raw.
Copa.
Cork, wood or bark and waste.
Cover glass, microscope slide.

Cranie (85-pound per foot).
Cryolite, natural.
Dammar gum.

Diamonds, industrial, stones and abrasives.

Emetine, bulk.

Ergot, crude.
Erythritol tetranitrate.

Fiber, linen, altar.
Fibers of the following types: abaca, abage, agave, coir, flax, jute, jute burlap, palm leaf, and sisal.

Goat and kidskins.

Goat hair canvas.

Grapefruit sections, canned.

Graphite, natural, crystalline, crucible grade.

Hand file sets (Swiss pattern).

Handsewing needles.

Hemp yarn.

Hog bristles for brushes.

Hyoscyamine, bulk.

Ipecac, root.

Iodine, crude.

Kauri gum.

Lac.

Leather, sheepskin, hair type.

Lavender oil.

Manganese.

Menthol, natural bulk.

Mica.

Microprocessor chips (brought onto a Government construction site as separate units for incorporation into building systems during construction or repair and alteration of real property).

Modacrylic fur ruff.

Nickel, primary, in ingots, pigs, shots, cathodes, or similar forms; nickel oxide and nickel salts.

Nitroguanidine (also known as picrite).

Nux vomica, crude.

Otitic oil.

Olive oil.

Olives (green), pitted or unpitted, or stuffed, in bulk.

Opium, crude.

Oranges, mandarin, canned.

Petroleum, crude oil, unfinished oils, and finished products.

Pine needle oil.

Platinum and related group metals, refined, as sponge, powder, ingots, or cast bars.

Pyrethrum flowers.

Quartz crystals.

Quebracho.

Quinidine.

Quinine.

Rabbit fur felt.

Radium salts, source and special nuclear materials.

Rosettes.

Rubber, crude and latex.

Rutile.

Santonin, crude.

Secretin.

Shellac.

Silk, raw and unmanufactured.

Spare and replacement parts for equipment of foreign manufacture, and for which domestic parts are not available.

Spices and herbs, in bulk.

Sugars, raw.

Swords and scabbards.

Talc, block, steatite.

Tantalum.

Tapioca flour and cassava.

Tartar, crude; tartaric acid and cream of tartar in bulk.

Tea in bulk.

Thread, metallic (gold).

Thyme oil.

Tin in bars, blocks, and pigs.

Triprodolide hydrochloride.

Tungsten.

Vanilla beans.

Venom, cobra.

Water chestnuts.

Wax, carnauba.

Wire glass.
Woods; logs, veneer, and lumber of the following species: Alaskan yellow cedar, angelique, balsa, ekki, greenheart, lignum vitae, mahogany, and teak.

Yarn, 50 Denier rayon.

(b) This list will be published in the Federal Register for public comment no less frequently than once every five years. Unsolicited recommendations for deletions from this list may be submitted at any time and should provide sufficient data and rationale to permit evaluation (see 1.502).

25.105 Determining reasonableness of cost.

(a) The contracting officer—

(1) Must use the evaluation factors in paragraph (b) of this section unless the head of the agency makes a written determination that the use of higher factors is more appropriate. If the determination applies to all agency acquisitions, the agency evaluation factors must be published in agency regulations; and

(2) Must not apply evaluation factors to offers of eligible products if the acquisition is subject to a trade agreement under Subpart 25.4.

(b) If there is a domestic offer that is not the low offer, and the restrictions of the Buy American Act apply to the low offer, the contracting officer must determine the reasonableness of the cost of the domestic offer by adding to the price of the low offer, inclusive of duty—

(1) 6 percent, if the lowest domestic offer is from a large business concern; or

(2) 12 percent, if the lowest domestic offer is from a small business concern. The contracting officer must use this factor, or another factor established in agency regulations, in small business set-asides if the low offer is from a small business concern offering the product of a small business concern that is not a domestic end product (see Subpart 19.5).

(c) The price of the domestic offer is reasonable if it does not exceed the evaluated price of the low offer after addition of the appropriate evaluation factor in accordance with paragraph (a) or (b) of this section. (See evaluation procedures at Subpart 25.5.)
Subpart 25.2—Buy American Act—Construction Materials

25.200 Scope of subpart.
This subpart implements the Buy American Act (41 U.S.C. 10a - 10d) and Executive Order 10582, December 17, 1954. It applies to contracts for the construction, alteration, or repair of any public building or public work in the United States.

25.201 Policy.
Except as provided in 25.202, use only domestic construction materials in construction contracts performed in the United States.

25.202 Exceptions.
(a) When one of the following exceptions applies, the contracting officer may acquire foreign construction materials without regard to the restrictions of the Buy American Act:

(1) Impracticable or inconsistent with public interest. The head of the agency may determine that application of the restrictions of the Buy American Act to a particular construction material would be impracticable or would be inconsistent with the public interest. The public interest exception applies when an agency has an agreement with a foreign government that provides a blanket exception to the Buy American Act.

(2) Nonavailability. The head of the contracting activity may determine that a particular construction material is not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality. The determinations of nonavailability of the articles listed at 25.104(a) and the procedures at 25.103(b)(1) also apply if any of those articles are acquired as construction materials.

(3) Unreasonable cost. The contracting officer concludes that the cost of domestic construction material is unreasonable in accordance with 25.204.

(b) Determination and findings. When a determination is made for any of the reasons stated in this section that certain foreign construction materials may be used, the contracting officer must list the excepted materials in the contract. The agency must make the findings justifying the exception available for public inspection.

(c) Acquisitions under trade agreements. For construction contracts with an estimated acquisition value of $6,725,000 or more, see Subpart 25.4.

25.203 Preaward determinations.
(a) For any acquisition, an offeror may request from the contracting officer a determination concerning the inapplicability of the Buy American Act for specifically identified construction materials. The time for submitting the request is specified in the solicitation in paragraph (b) of either 52.225-10 or 52.225-12, whichever applies. The information and supporting data that must be included in the request are also specified in the solicitation in paragraphs (c) and (d) of either 52.225-9 or 52.225-11, whichever applies.

(b) Before award, the contracting officer must evaluate all requests based on the information provided and may supplement this information with other readily available information.

25.204 Evaluating offers of foreign construction material.
(a) Offerors proposing to use foreign construction material other than that listed by the Government in the applicable clause at 52.225-9, paragraph (b)(2), or 52.225-11, paragraph (b)(3), or covered by the WTO GPA or a Free Trade Agreement (paragraph (b)(2) of 52.225-11), must provide the information required by paragraphs (c) and (d) of the respective clauses.

(b) Unless the head of the agency specifies a higher percentage, the contracting officer must add to the offered price 6 percent of the cost of any foreign construction material proposed for exception from the requirements of the Buy American Act based on the unreasonable cost of domestic construction materials. In the case of a tie, the contracting officer must give preference to an offer that does not include foreign construction material excepted at the request of the offeror on the basis of unreasonable cost.

(c) Offerors also may submit alternate offers based on use of equivalent domestic construction material to avoid possible rejection of the entire offer if the Government determines that an exception permitting use of a particular foreign construction material does not apply.

(d) If the contracting officer awards a contract to an offeror that proposed foreign construction material not listed in the applicable clause in the solicitation (paragraph (b)(2) of 52.225-9, or paragraph (b)(3) of 52.225-11), the contracting officer must add the excepted materials to the list in the contract clause.

25.205 Postaward determinations.
(a) If a contractor requests a determination regarding the inapplicability of the Buy American Act after contract award, the contractor must explain why it could not request the determination before contract award or why the need for such determination otherwise was not reasonably foreseeable. If the contracting officer concludes that the contractor should have made the request before contract award, the contracting officer may deny the request.

(b) The contracting officer must base evaluation of any request for a determination regarding the inapplicability of the Buy American Act made after contract award on information required by paragraphs (c) and (d) of the applicable clause at 52.225-9 or 52.225-11 and/or other readily available information.
(c) If a determination, under 25.202(a), is made after contract award that an exception to the Buy American Act applies, the contracting officer must negotiate adequate consideration and modify the contract to allow use of the foreign construction material. When the basis for the exception is the unreasonable price of a domestic construction material, adequate consideration is at least the differential established in 25.202(a) or in accordance with agency procedures.

25.206 Noncompliance.

The contracting officer must—

(a) Review allegations of Buy American Act violations;

(b) Unless fraud is suspected, notify the contractor of the apparent unauthorized use of foreign construction material and request a reply, to include proposed corrective action; and

(c) If the review reveals that a contractor or subcontractor has used foreign construction material without authorization, take appropriate action, including one or more of the following:

(1) Process a determination concerning the inapplicability of the Buy American Act in accordance with 25.205.

(2) Consider requiring the removal and replacement of the unauthorized foreign construction material.

(3) If removal and replacement of foreign construction material incorporated in a building or work would be impracticable, cause undue delay, or otherwise be detrimental to the interests of the Government, the contracting officer may determine in writing that the foreign construction material need not be removed and replaced. A determination to retain foreign construction material does not constitute a determination that an exception to the Buy American Act applies, and this should be stated in the determination. Further, a determination to retain foreign construction material does not affect the Government's right to suspend or debar a contractor, subcontractor, or supplier for violation of the Buy American Act, or to exercise other contractual rights and remedies, such as reducing the contract price or terminating the contract for default.

(4) If the noncompliance is sufficiently serious, consider exercising appropriate contractual remedies, such as terminating the contract for default. Also consider preparing and forwarding a report to the agency suspending or debarring official in accordance with Subpart 9.4. If the noncompliance appears to be fraudulent, refer the matter to other appropriate agency officials, such as the officer responsible for criminal investigation.
Tab 8: Customs Ruling on TAA (Dell Mojahve Laptop)
Dear Mr. Busch:

This is in reference to your letters dated September 23 and September 29, 1997, on behalf of Dell Computer Corporation (Dell), requesting a final determination of origin under Subpart B of Part 177, Customs Regulations (19 C.F.R. §177.21 et seq.) in connection with the offering of two portable notebook computer products for sale to the U.S. Government. (Scenarios 1 and 2 of your submission).

In your letter of December 3, 1997, you also advised that Dell was withdrawing its ruling request at this time in connection with Scenario 3, pertaining to certain operations in the U.S., but would re-submit the request with additional information at a later date. Under the circumstances, we will address only the issues pertaining to the notebook computers.

Under Subpart B of Part 177, which implements Title III of the Trade Agreements Act of 1979, as amended (19 U.S.C. §2511 et seq.), the Customs Service issues country of origin advisory rulings and final determinations on whether an article is or would be a product of a designated foreign country or instrumentality for the purpose of granting waivers of certain "Buy America" restrictions in U.S. law or practice for products offered for sale to the U.S. Government. Hall & Evans, L.L.C., as counsel to Dell, a party-at-interest within the meaning of 19 C.F.R. §177.22(d)(1), is entitled to request this final determination.

- 2 - Facts:

The two notebook computer products, "Twister" and "Mojave," are designed and engineered to meet a broad range of custom configurations. Mojave is primarily designed to meet the needs of government agencies/large corporations, and Twister is primarily designed to meet the needs of sophisticated individuals and small businesses.

In general, both the Mojave and Twister notebook computers will be manufactured by Dell from parts and components sourced through multiple vendors in a variety of countries. Dell's Texas manufacturing operation consists of three phases. The first phase is the Government customer's design/order, which is the actual beginning of a customized notebook computer system. The second phase of the manufacturing operation involves the assembly of parts, subassemblies and components during a multi-station production process. Finally, Dell has developed a proprietary systems integration process (FISH/FIDA) that transforms the non-operational "chassis" for Twister and Mojave into customized computer notebook systems that will operate to the precise requirements of different Government customers.

You state that Dell employs software programmers and hardware engineers, who must not only write the appropriate software to configure each system on a build-to-order basis, but also ensure all existing software and components are fully compatible and optimized with the thousands of software and hardware component configurations which the Government may dictate. You also state that all Dell employees who work on the Mojave and Twister production lines must attend internal training to become certified to perform the delicate tasks required in a number of the manufacturing stations.

Assembly of Twister

When the chassis is received from the Taiwanese OEM (original equipment manufacturer), the LCD and the CPU are already installed on the base plastics, but the BIOS and memory modules are not so installed. The components are sourced from various countries, which include: the chassis (Taiwan); hard disk drive (Thailand); BIOS chip (U.S.); floppy disk drive (China); AC adapter (China, but in the future, Thailand); CD ROM (Japan); fax modem cards (U.S.); docking
station (Taiwan); and the memory - 3 - board (Korea, Japan, or Singapore). The process of assembling the product is as follows:

Station 1. Dell receives chassis; it is checked for defects and placed on the assembly line. The chassis is matched with a specific order.

Station 2. System service tag numbers are input; customer-specific testing regime is configured and loaded; customer-specific disk configured.

Station 3. BIOS chip and memory modules installed.

Station 4. Hard Disk Drive prepared for installation.

Station 5. Hard Disk Drive installed into notebook chassis.

Station 6. PCMCIA modem card installed.

Station 7. AC adapter plugged in, PCMCIA insert removed and network interface card inserted. Notebook booted and Flash BIOS burned into non-volatile RAM. FISH/FIDA configures a customer-specific machine and begins running diagnostic tests.

Station 8. Electro-Mechanical Repair. Any notebooks with technical problems are sent to this station for repair.

Station 9. Quality Control.

Station 10-12. Dell customized and proprietary "Pic to Light" assembly process. (A manufacturing system that identifies specific peripherals, components and subassemblies for inclusion into the manufacturing process along the assembly line.)

Station 13. "Out of Box" Audit. Notebooks are taken randomly from the assembly line and tested.

Station 14. Automatic processing and shipping.

- 4 - Assembly of Mojave

The assembly of Mojave is similar but not identical to that of Twister. When Dell receives the notebook chassis from Taiwan, the LCD screen, floppy disc drive and the BIOS chip have been assembled onto the base plastics, but neither the keyboard nor the CPU and other primary chips are installed. The additional components which make up the Mohave are identical to the components assembled to make the Twister with the exception of the keyboard, which is not included as part of the Twister configuration. The components are sourced from various countries, which include: the chassis (Taiwan); hard disk drive (Thailand); floppy disk drive (China); AC adapter (China, but in the future, Thailand); CD ROM (Japan); fax modem cards (U.S.); docking station (Taiwan); and the memory board (Korea, Japan, or Singapore). The country of origin of the keyboard is Japan, but in the future will be Malaysia. The CPU is of U.S.-origin. The process of assembling Mojave is as follows:

Station 1. Dell receives chassis; it is checked for defects and placed on the assembly line. The chassis is matched with a specific order.

Station 2. System service tag numbers are input; customer-specific testing regime is configured and loaded; customer-specific disk configured.

Station 3. CPU processor module and hybrid cooler installed.

Station 4. Keyboard installed.

Station 5. Memory modules installed.

Station 6. Hard Disk Drive prepared for installation.

Station 7. Hard Disk Drive installed into notebook chassis.
Station 8. PCMCIA modem card installed.
Station 9. Notebook booted and Flash BIOS burned into non-volatile RAM. FISH/FIDA configures a customer-specific machine and begins running diagnostic tests.

Station 10. Electro-Mechanical Repair. Any notebooks with technical problems are sent to this station for repair.

-5- The operations performed at Stations 11 through 16 of the Mojave assembly line are identical to the operations that occur at Stations 9 through 14 of the Twister assembly line, including quality control, "Pic to Light" process, testing, and shipping.

ISSUE:

Whether the assembly in the U.S. of the various components into the Twister and Mojave notebook computers constitute a substantial transformation, such that the computers may be considered products of the U.S.

LAW AND ANALYSIS:

As prescribed under Title III of the Trade Agreements Act, the origin of an article not wholly the growth, product, or manufacture of a single country or instrumentality is to be determined by the rule of substantial transformation. 19 U.S.C. §2518(4). Such an article is not a product of a country unless it has been substantially transformed there into a new and different article of commerce with a name, character or use different from that of the article or articles from which it was transformed. See also 19 C.F.R. §177.23(a). Thus, the critical issue that must be addressed in determining the country of origin of “Mojave” and “Twister” is whether the imported foreign components are substantially transformed as a result of the operations performed in the U.S. That is, does the name, character or use of the foreign components change as a result of the processing and assembly operations performed to manufacture the notebook computers. In Belcrest Linens v. United States, 573 F. Supp. 1149 (CIT 1983), aff’d, 741 F.2d 1368 (Fed. Cir. 1984), the issue framed by the court was whether as a result of the assembly process the parts lose their identity and become an integral part of the new article. Assembly operations which are minimal or simple, as opposed to complex or meaningful, will generally not result in a substantial transformation. See C.S.D. 85-25. However, the issue of whether a substantial transformation occurs is determined on a case-by-case basis.

Dell contends that the chassis and other components of both Mojave and Twister undergo manufacturing processes resulting in customized notebook computers distinct from the components from which they were assembled. In this regard, Dell emphasizes that as distinguished from other companies’ manual load, fixed image processes, Mojave and Twister are customer specific at the time of the order, and involve the loading of operational characteristics and the specific software capability requested by the customer. Dell points to the degree of expertise required to implement its proprietary FISH/FIDA manufacturing process, represented by its skilled programmers and engineers. Dell states that the interactions between various software packages and between hardware devices are resolved by Dell’s FISH/FIDA process, which is not the case during a manual installation process (involving operational software from diskettes or CD-ROMs). Accordingly, Dell argues that the assembly operations coupled with the unique customer-specific manufacturing process transform the foreign components into products, notebook computer systems, with a character and use distinct from the parts from which they were made. Customs has previously considered the issue of whether the processing and assembly of electronic components into a finished article results in a substantial transformation of the individual components.

In Headquarters Ruling Letter (HRL) 711967 (March 17, 1980), Customs held that television sets which were assembled in Mexico with printed circuit boards, power transformers, yokes and tuners from Korea and picture tubes, cabinets, and additional wiring from the U.S. were products of Mexico for country of origin marking purposes. The U.S. and Korean parts were substantially
transformed by the processing performed in Mexico and all the components lost their individual identities to become integral parts of the new article.

In **HRL 732170** (January 5, 1990), Customs held that a backless television cabinet containing a tuner, speaker and circuit board imported in the U.S., was substantially transformed there when assembled with a domestic color picture tube, deflection yoke, electron beam bender and degaussed coil, and a remote control into a finished television receiver. Customs stated that the imported components lost their individual identities as a result of the assembly operation in that they became integral parts of a new article--a television.

**HRL 735608** (April 27, 1995) involved various scenarios pertaining to the assembly of a desktop computer in the U.S. and the Netherlands. In one of the scenarios, foreign components to be assembled in the U.S. included the case assembly (including the computer case, system power supply and floppy disc drive), partially completed motherboard, CPU (which controls the interpretation and execution of instructions and includes the arithmetic-logic unit and control unit), hard disk drive, slot board, keyboard BIOS and system BIOS (basic input and output system). Additional components manufactured in the U.S. or the Netherlands to be assembled into the finished desktop computers depending on the model included an additional floppy drive, CD ROM disk, and memory boards. In that case, Customs found that the foreign case assemblies, partially completed motherboards, hard disk drives and slot boards underwent a change in name, character and use as a result of the operations in the U.S. and lost their separate identities in becoming an integral part of a desktop computer. Customs noted that the finished article, a desktop computer, was visibly different from any of the individual foreign components, acquiring a new use, processing and displaying information. Accordingly, Customs held that the individual components underwent a substantial transformation as a result of the operations performed in the U.S.  

Based on the totality of the circumstances of this case and consistent with the rulings cited above, we find that the foreign components that are used in the manufacture of the notebook computers Twister and Mojave in the manner described are substantially transformed as a result of the operations performed in the U.S. The name, character, and use of the foreign chassis in each case, hard disk drive, floppy disc drive, memory boards and other foreign components change as a result of the processing and other assembly operations performed in the U.S. Like the case assemblies in **HRL 735608** and **HRL 559336**, the chassis’, hard disk drives, floppy disc drives, memory boards and other components lose their separate identities and become an integral part of a notebook computer as a result of the assembly operations and other processing. The character and use of the foreign components are changed as a result of the operations performed, in that a new article, a notebook computer, is visibly different from any of the individual foreign components, acquiring a new use, processing and displaying information.

**HOLDING:**

Based on the facts presented, foreign chassis’, hard disk drives, floppy disks, memory boards and other foreign components, which are further processed and assembled into notebook computers in the U.S., in the manner described above, are substantially transformed as a result of the operations performed in the U.S. Accordingly, the country of origin of the notebook computers is the U.S. - Notice of this final determination will be given in the Federal Register as required by 19 C.F.R. §177.29. Any party-at-interest other than the party which requested this final determination may request, pursuant to 19 C.F.R. §177.31, that Customs reexamine the matter anew and issue a new final determination.

Any party-at-interest may, within 30 days after publication of the Federal Register notice referenced above, seek judicial review of this final determination before the Court of International Trade.

Sincerely, Stuart P. Seidel, Assistant Commissioner Office of Regulations and Rulings
Tab 9: DOJ Press Release and Relator Complaint in OfficeMax FCA Matter
Department of Justice

FOR IMMEDIATE RELEASE
MONDAY, SEPTEMBER 19, 2005
WWW.USDOJ.GOV

Office Depot Pays United States $4.75 Million to Resolve False Claims Act Allegations

WASHINGTON, D.C. - Office Depot, Inc. has paid the United States $4.75 million to settle allegations that it submitted false claims when it sold office supply products manufactured in countries not permitted by the Trade Agreements Act to United States government agencies, the Department of Justice announced today.

The settlement resolves allegations that the Delray Beach, Florida-based company sold products from countries, such as China and Taiwan, that do not have reciprocal trade agreements with the U.S. Office Depot was required by its contract with the General Services Administration (GSA) to prevent such items from being offered for sale to U.S. government agencies.

"Federal contractors will be held accountable for their billing practices," said Peter D. Keisler, Assistant Attorney General for the Department of Justice's Civil Division. "This settlement is an example of the Department's determination to ensure that federal funds are protected from fraud and abuse."

This case was filed in January 2003 in the U.S. District Court for the District of Columbia under the qui tam or whistleblower provisions of the False Claims Act by Safina Office Products and two of its executives, Edward Wilder and Robert Hsi Chou Lee. Safina, Wilder and Roberts will collectively receive $712,500 of the total recovery as their statutory award. Under the whistleblower provisions of the False Claims Act, private parties can file an action on behalf of the United States and receive a portion of the proceeds of a settlement or judgment awarded against a defendant.

The settlement resulted from an investigation by the Civil Division of the Department of Justice, the U.S. Attorney's Office for the District of Columbia, and the GSA's Office of the Inspector General. In May 2005, the Department of Justice reached a $9.8 million settlement with Office Max, Inc. based on the same allegations.

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05-483
OFFICEMAX TO PAY UNITED STATES $9.8 MILLION TO RESOLVE FALSE CLAIMS ACT ALLEGATIONS

WASHINGTON, D.C.  OfficeMax, Inc. will pay the United States $9.8 million to settle allegations that it submitted false claims when it sold office supply products manufactured in countries not permitted by the Trade Agreements Act to United States government agencies, the Justice Department announced today. The settlement resolves allegations that the Itasca, Illinois-based company sold products from countries that do not have reciprocal trade agreements with the U.S., such as China. OfficeMax was required by its contract with the General Services Administration (GSA) to prevent such items from being offered for sale to U.S. government agencies.

"Federal contractors will be held accountable for their billing practices," said Peter D. Keisler, Assistant Attorney General of the Justice Department's Civil Division. "This settlement is an example of the Department's determination to ensure that federal funds are protected from fraud and abuse."

"We remain vigilant in our efforts to ensure that federal contractors abide by the terms of their contracts and not violate U.S. trade regulations," agreed U.S. Attorney Kenneth L. Wainstein. He also commended OfficeMax, Inc. for its cooperation during the investigation.

This case was filed under the qui tam or whistleblower provisions of the False Claims Act by Safina Office Products and two of its executives, Edward Wilder and Robert Hsi Chou Lee in U.S. District Court for the District of Columbia in January 2003. Safina, Wilder and Roberts will collectively receive $1.47 million of the total recovery as their statutory award. Under the whistleblower provisions of the False Claims Act, private parties can file an action on behalf of the United States and receive a portion of the proceeds of a settlement or judgment awarded against a defendant.

The settlement resulted from an investigation by the Civil Division of the Justice Department, the United States Attorney's Office for the District of Columbia, and the GSA's Office of the Inspector General.

###
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES ex rel

SAFINA OFFICE PRODUCTS
5803 Sovereign
Suite 214
Houston, Texas 77036

EDWARD M. WILDER
5803 Sovereign
Suite 214
Houston, Texas 77036

ROBERT HSU CHOU LEE
5803 Sovereign
Suite 214
Houston, Texas 77036

BRINGING THIS ACTION ON
BEHALF OF THE UNITED STATES
OF AMERICA
c/o Roscoe C. Howard, Jr.
United States Attorney
555 4th Street, N.W.
Washington, D.C. 20001

- and -

c/o John Ashcroft, Esquire
Attorney General of the United States
Department of Justice
10th & Constitution Avenue, N.W.
Washington, D.C. 20530

Plaintiffs,

v.

OFFICE DEPOT
8870 Greenwood Place
Savage, Maryland 20763

Civil Action No.:

CASE NUMBER 1:03CV00003

JUDGE: Rosemary H. Collyer

DECK TYPE: General Civil

DATE STAMP: 01/02/2003

COMPLAINT FOR
VIOLATIONS OF
FEDERAL FALSE
CLAIMS ACT

JURY TRIAL DEMAND
Serve:
Registered Agent
CSC Lawyer's Incorporating
Service Co.
11 East Chase Street
Baltimore, Maryland 21202

STAPLES NATIONAL ADVANTAGE
45 East Wesley Street, South
Hackensack, New Jersey 07606

Serve:
Registered Agent
C.T. Corporation Systems
820 Bear Tavern Road
West Trenton, New Jersey 08628

TOTAL BUSINESS, INC.
901 West Garden Street
Pensacola, Florida 32501

Serve:
Registered Agent
Gerald S. Howard
Vice President
901 West Garden Street
Pensacola, Florida 32501

BOISE CASCADE OFFICE PRODUCTS
800 West Bryn Mawr Avenue
Itasca, Illinois 60143

Serve:
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President
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CADDIO DESIGN & OFFICE
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Serve:
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Donald G. Kelin
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KM2 INC.
822 B Frederick Road
Catonsville, Maryland 21228-8505

Serve:
Registered Agent
Dorian McCutheon
President, CEO
822 B Frederic Road
Catonsville, Maryland 21228-8505

MERCHANDISE DISTRIBUTORS
6365 N. Broadway
Chicago, Illinois 60660

Serve:
Registered Agent
Kenneth Wheaten
6365 N. Broadway
Chicago, Illinois 60660

Defendants.

COMPLAINT

2. The False Claims Act, originally enacted in 1863 during the Civil War, was substantially amended by the False Claims Amendments Act of 1986 and signed into law on October 17, 1986. Congress enacted these amendments to enhance the Government's ability to recover losses sustained as a result of fraud against the United States and to provide a private cause of action for the protection of employees who act in furtherance of the purposes of the Act. Congress acted after finding that fraud in federal programs and procurement is pervasive and that the False Claims Act, which Congress characterized as the primary tool for combating fraud in government contracting, was in need of modernization.

3. The Act provides that any person who knowingly submits a false or fraudulent claim to the Government for payment or approval is liable for a civil penalty of up to $10,000 for each such claim, plus three times the amount of the damages sustained by the Government, including attorneys' fees. The Act allows any person having information regarding a false or fraudulent claim against the Government to bring a private cause of action for himself and on behalf of the Government and to share in any recovery. The complaint is to be filed under seal for 60 days (without service on the defendant during such 60-day period) to enable the Government (a) to conduct its own investigation without the defendant's knowledge and (b) to determine whether to join the action.

4. Based on these provisions, Relators seek to recover damages and civil penalties arising from defendants' presentation of false claims to the United States Government in connection with the selling of improper products to the federal
government.

PARTIES

5. Relator, Edward M. Wilder, is a resident of the state of Texas. Mr. Wilder is employed by Safina Office Products as its Vice President for Business Operations.

6. Relator, Robert Hsi Chou Lee, is a resident of the state of Texas. Mr. Lee is the President of Safina Office Products.

7. Relator, Safina Office Products, is an office products company incorporated and located in Texas and doing business in Washington, D.C. and throughout the United States.

8. Relators bring this action for violations of 31 U.S.C. §§3729 et seq. on behalf of themselves and the United States Government pursuant to 31 U.S.C. §3730(b)(1). Relators have knowledge of the false statements and/or claims presented by the defendants to the Federal Government as alleged herein.


11. Defendant Total Business, Inc. is a Florida corporation headquartered in


14. Defendant Corporate Express, Inc. is a Delaware corporation headquartered in Virginia and does business with the General Services Administration of the Federal Government in Washington, D.C. and throughout the United States.

15. Defendant Office Pro is an Alabama corporation and is headquartered in Alabama and does business with the General Services Administration of the Federal Government in Washington, D.C. and throughout the United States.


17. Defendant KM2, Inc. is a Maryland corporation headquartered in Maryland and does business with the General Services Administration of the Federal Government in Washington, D.C. and throughout the United States.

18. Defendant Merchandise Distributors is an Illinois corporation

**JURISDICTION AND VENUE**

19. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §1331 and 31 U.S.C. § 3732, which specifically confers jurisdiction on this Court for actions brought pursuant to §§ 3729 and 3730 of Title, 31, United States Code.

20. This Court has personal jurisdiction over the defendants because they transact business in the District of Columbia.

21. Venue is proper in this district pursuant to 31 U.S.C. § 3732(a) because the defendants transact business in the District of Columbia.

**BACKGROUND**

22. The General Services Administration (GSA) is an agency of the Federal Government.

23. GSA has created a website entitled, GSA Advantage, www.gsaadvantage.gov. This website permits Federal Government employees in Federal Government agencies throughout the United States to purchase office products through the website for use in Federal Government offices.

24. The defendants have each entered into contracts with GSA in order to be a part of the GSA website. The defendants are selling office products to various agencies of the Federal Government. Employees at various Federal Government agencies throughout the United States are currently using this website to order office
products and supplies directly from the defendants.

25. The Buy American Act, Title 41 USC Section 10 a - d and the Trade Agreements Act, 19 USC Section 2501 et seq provide that each end product such as office supplies being supplied to the Federal Government, except those that have been specifically identified, is a product that was made in the United States or made in a country that has been specifically designated as an approved country from which end products such as office supplies can be purchased for use by the Federal Government.

26. The countries of China, Taiwan and Thailand are not approved countries in accordance with the Buy American Act or the Trade Agreements Act.


28. When the defendants contracted with the Federal Government to sell their office products via the GSA website, they were required to state that the goods which they sold were in compliance with the Buy American Act and the Trade Agreements Act.

29. The defendants each entered into contracts with the General Services Administration to sell their goods via the GSA website and swore/affirmed that the goods they were selling on the GSA website were in compliance with the Buy American Act and the Trade Agreements Act.

**ALLEGATIONS**

30. As of October 2002 and for sometime prior thereto, the defendants have
been selling to various agencies of the Federal Government through the GSA website, www.gsaadvantage.gov, office products which are end products from China, Taiwan and Thailand in contravention of the Buy American Act and the Trade Agreements Act.

31. Each sell by each defendant of an office product from China, Taiwan or Thailand to employees of Federal Government agencies throughout the United States for use in Federal Government offices on the GSA website which is an end product from China, Taiwan and Thailand is a false claim in violation of the Federal False Claims Act.

32. As of October 2002, there were more than five hundred (500) office products offered for sale by the defendants on the GSA website which were end products from China, Taiwan and Thailand.

33. The defendant Staples National Advantage offered fastener-round head 1 ½ BS from Taiwan, Hanger Hardwood from China, organizer supply smoke from China, pencils from China, clip paper STL #3 from Taiwan, fastener round head 2BS from Taiwan and various other office products from China, Taiwan and Thailand for sale on the GSA Website.

34. The defendant Office Depot offered a magnetic clip dispenser-small from China, pushpins from China, gold tone paper clips from China, and other office products from China, Taiwan and Thailand for sale on the GSA Website.

35. The defendant Caddo Design & Office Products offered 5" bookends from China, a black staple remover from China, standard #1 paper clips from Taiwan and other office products from China, Taiwan and Thailand for sale on the GSA Website.

36. The defendant Total Business, Inc. offered 2 inch binder clips from China,
report covers from China, rubberbands from Thailand and other office products from China, Taiwan and Thailand for sale on the GSA Website.

37. The defendant Office Pro offered bookends from China, push pins from China, stampers from China and other office products from China, Taiwan and Thailand for sale on the GSA Website.

38. The defendant Future Solutions, Inc. offered frames from China, staple removers from China, non-skid bookends from China and other office products from China, Taiwan and Thailand for sale on the GSA Website.

39. The defendant Corporate Express, Inc. offered large and small paper clips from Taiwan, colored push pins from China, letter openers from China and other office products from China, Taiwan and Thailand for sale on the GSA Website.

40. The defendant Boise Cascade Office Products offered filing supplies from China, desk accessories from China, moistener pencils from China and other office products from China, Taiwan and Thailand for sale on the GSA website.

41. The defendant KM2 Inc. offered punch holes from Taiwan, pushpins from China, rubberbands from Thailand and other office products from China, Taiwan and Thailand for sale on the GSA Website.

42. The defendant Merchandise Distributors offered files from China, refill pads from China, staplers from Taiwan and other office products from China, Taiwan and Thailand for sale on the GSA Website.

43. The defendants knowingly offered these office products for sale to the Federal Government through the GSA Website which they knew were end products from
China, Taiwan and Thailand in contravention of the Buy American Act and the Trade Agreements Act.

44. The defendants knowingly sold these office products to the Federal Government through the GSA Website which they knew were end products from China, Taiwan and Thailand in contravention of the Buy American Act and the Trade Agreements Act.

45. The defendants knowingly submitted or caused to be submitted false and fraudulent contracts or false statements in support of contracts to the Federal Government in order to be permitted by GSA to sell its office products which are end products from China, Taiwan and Thailand on the GSA website.

46. The defendants knowingly submitted or caused to be submitted false claims for payment or false statements in support of false claims for payment to the Federal Government as a result of selling its office products which are end products from China, Taiwan and Thailand on the GSA website.

COUNT I

(False Claims Act 31 U.S.C. §3729(a)(1) and (a)(2))

47. Relators reallege and incorporate by reference the allegations made in paragraphs 1 through 46 of this Complaint.

48. This is a claim for treble damages and forfeitures under the False Claims Act, 31 U.S.C. §§3729-32.

49. By virtue of the acts described above, the defendants knowingly submitted,
caused to be submitted and continue to submit and to cause to be submitted false or fraudulent claims for payment and reimbursement by the United States Government through the vehicle of the GSA website, www.gsaadvantage.gov, for office products it sold which were from China, Taiwan and Thailand.

50. By virtue of the acts described above, the defendants knowingly made, used or caused to be made or used, and continues to make or use or cause to be made or used, false statements to obtain Federal Government payment for false or fraudulent claims.

51. The United States Government has been severely damaged as the result of defendants' fraudulent statements that its office products were not from China, Taiwan and Thailand. The United States Government has been severely damaged by the defendants' violations of the False Claims Act.

52. As set forth in the preceding paragraphs, defendants violated 31 U.S.C. §3729 and has thereby damaged and continues to damage the United States Government by its actions in an amount to be determined at trial.

**COUNT II**

*(False Claims Act, 31 U.S.C. §3729 (a)(3)*

53. Relators reallege and incorporate by reference the allegations made in Paragraphs 1 through 52 of this Complaint.

54. This is a claim for treble damages and for forfeitures under the False Claims Act, 31 U.S.C. §§3729-32.

55. By virtue of the acts described above, the defendants defrauded the
United States by getting false or fraudulent claims allowed or paid when they sold to
various Federal Government agencies through the GSA website products that were from
China, Taiwan and Thailand.

56. The United States, unaware of the falsity of the records, statements and/or
claims made by defendants, and in reliance on the accuracy thereof, paid and may
continue to pay for aforementioned false claims as a result of the fact that the
defendants' office products from China, Taiwan and Thailand remain on the GSA
website and continue to be purchased on a daily basis by Federal Government
employees.

57. By reason of these actions and payments, the United States Government
has been damaged and continues to be damaged in substantial amounts.

PRAYER

WHEREFORE, Relators pray for judgment against defendants as follows:

1. That defendants cease and desist from violating 31 U.S.C. §3729;

2. That this Court enter judgment against the defendants in an amount equal
to three times the amount of damages the United States Government has sustained
because of defendants' actions, plus a civil penalty of not less than $5,000 and not more
than $10,000 for each violation of 31 U.S.C. §3729; et seq.

3. That Relators be awarded the maximum amount allowed pursuant to
§3730(d) of the False Claims Act;

4. That Relators be awarded all costs and expenses of this action, including
attorneys’ fees;

5. That Relators recover such other relief as the Court deems just and proper.

Respectfully submitted,

ASHCRAFT & GEREL

[Signature]
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Suite 400
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(202) 783-6400
ATTORNEY FOR RELATORS

Relator hereby demands trial by jury.

[Signature]
H. Vincent McKnight, Jr.
Tab 10: PGE E-Alert on Proposed COTS Revision to FAR
Proposed FAR Rule Eliminates Country of Origin Requirements for “COTS” Products

The FAR Council is proposing the elimination of some of the most problematic requirements for contractors who supply commercially available off-the-shelf (COTS) items to the Federal Government. The FAR Council’s proposed revisions would make twenty statutory requirements inapplicable to COTS items, including the Trade Agreements Act (TAA) and the Buy American Act (BAA). The TAA and BAA country of origin requirements are a significant issue for many companies due to the difficulty in tracking both component sources and place of "substantial transformation" for their product lines.

DEFINING COTS

The proposed rule amends the current FAR definition of "commercial item" to include a subsidiary category of commercial items that are also "COTS" items. To qualify as COTS under the proposed definition, a commercial item must also be "sold in substantial quantities in the commercial marketplace" and be "offered to the Government, without modification, in the same form in which it is sold in the commercial marketplace."

DIFFICULTY POSED BY THE TRADE AGREEMENTS ACT AND BUY AMERICAN ACT

COTS items are currently subject to the requirements of the TAA or the BAA. The TAA requires contractors to certify that they will exclusively supply "U.S.-made, designated country, Caribbean Basin country, or NAFTA country" end products. The TAA applies to contracts above its current applicability threshold of $175,000 in value, and, significantly, to all products purchased in connection with the GSA's popular Multiple Award Schedule program.

Currently, to properly execute a TAA certification, a company must conclusively determine, throughout the term of its contract, that each of the "end products" it supplies is last "substantially transformed" in a designated TAA country. This determination can be especially difficult for COTS products, because their production point is often located in non-TAA designated countries, such as China, Taiwan, Malaysia, Thailand and the Philippines. Compounding this problem, product country of origin can change frequently based on factors such as cost, factory capacity and product availability. In many instances, the same model of a COTS product is concurrently manufactured in both a TAA and a non-TAA country, creating an extreme operational challenge to deliver the compliant product to the government.

Similarly, compliance with the BAA poses a difficult challenge for COTS product suppliers. To determine whether an end product meets the BAA requirements, a company must ensure that the product is manufactured in the U.S. and certify that 50% of the product's components are also manufactured in the U.S.

The proposed rule for COTS items is not yet final or effective. While industry groups strongly support the proposed revisions, they are not without political controversy. In the meantime, COTS item suppliers must continue to ensure that their products meet the specific requirements of the TAA and BAA.

For more information, please contact Matt Koehl (mkoehl@prestongates.com) or the Government Contracts Group at www.prestongates.com.