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DOMESTIC PREFERENCE POLICIES IN FEDERAL PROCUREMENT

By

David Roy Francis

**B.A. May 1977, State University of New York, Geneseo College
J. D. May 1980, University of Dayton School of Law**

A Thesis submitted to

The Faculty of

The National Law Center

**of The George Washington University
in partial satisfaction of the requirements
for the degree of Master of Laws**

May 20, 1990

**Thesis directed by
Ralph Clarke Nash, Jr.
Professor of Law**

TABLE OF CONTENTS

CHAPTER 1	INTRODUCTION	1
CHAPTER 2	THE BUY AMERICAN ACT	6
A.	AFFIRMATIVE REQUIREMENTS.	8
1.	Preference for Domestic, Articles, Materials, and Supplies	10
a.	"Substantially All" - The Fifty Percent Test	16
b.	End Products, Construction Materials, and Components	20
(1)	Distinguishing the Difference	21
(2)	Place of Component Origin - Manipulating the Outcome	30
(3)	"Comparing Component Costs	34
c.	Manufacture" - An Illusive Concept	37
2.	Public vs. Private Works	48
3.	Exceptions	50
a.	Within the Buy American Act	53
(1)	Unreasonable Cost	53
(2)	Use Abroad	63
(3)	Items Not Reasonably Available	65
(4)	Inconsistent With the Public Interest	70
	DoD Memoranda of Understanding	72
b.	External Statutory Exceptions	77
(1)	United States - Canada Free Trade Agreement Implementation Act	77



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(2) United States - Israel Free Trade Area Implementation Act	81
(3) Caribbean Basic Economic Recovery Act	83
4. Implementation and Enforcement Procedures	84
a. Evaluating Foreign Offers.	84
b. Required Clauses.	91
c. Certification Requirements	96
d. Enforcement and Responses to Contractor Violations	101
B. PROHIBITED PROCUREMENTS - A NEW DEVELOPMENT	109
CHAPTER 3 ADDITIONAL DOMESTIC PREFERENCE REQUIREMENTS.	113
A. THE BALANCE OF PAYMENTS PROGRAM	114
1. Scope and Interaction With the Buy American Act	115
2. Exceptions	117
3. Implementation Procedures	119
B. AUTHORIZATION AND APPROPRIATION ACT RESTRICTIONS	120
C. INDUSTRIAL MOBILIZATION BASE RESTRICTIONS	134
D. TRANSPORTATION ACT RESTRICTIONS	138
1. The "Fly American" Act	139
2. "Sail America" Requirements	144
3. The Rail Passenger Service Act.	150
4. The Surface Transportation Assistance Act	152
E. PURCHASES FOR FOREIGN GOVERNMENT	156
1. The Foreign Assistance Act of 1961.	156
2. Foreign Military Sales.	158
F. COMMUNIST AND OTHER SOURCE RESTRICTIONS	161

CHAPTER 4 THE TRADE AGREEMENTS ACT OF 1979.	164
A. EFFECT ON DOMESTIC PREFERENCE REQUIREMENTS.	166
1. "Designated Countries" and "Eligible Products"	167
2. Minimum Purchase Threshold	170
B. EXCEPTIONS.	173
C. THE AGREEMENT ON TRADE IN CIVIL AIRCRAFT.	175
D. IMPLEMENTATION AND ENFORCEMENT	176
1. Required Clauses and Certifications	176
2. Contractor Right of Action	179
E. THE OMNIBUS TRADE AND COMPETIVENESS ACT	180
CHAPTER 5 CONCLUSION	183

CHAPTER ONE

INTRODUCTION

The preference for filling government needs with domestic products expressed in "buy American" legislation is not a recent phenomena, but can be traced back to as early as 1844.¹ Given such an extensive history, one would expect that any deficiencies in the wording of such laws would have long been corrected and that the requirements which they impose would be clearly stated and easy to apply. In fact, just the opposite is true. The oldest and most pervasive of existing federal domestic preference legislation is popularly known as the "Buy American Act".² Since its passage in 1933,³ commentators, courts, and the Comptroller General have consistently criticized the failure of the Act and implementing regulations to define certain key terms.⁴ Despite such criticism, neither Congress nor those agencies responsible for promulgating federal procurement regulations have acted to correct the deficiencies. As a consequence, attempts by |

¹Gantt & Speck, *Domestic V. Foreign Trade Problems in Federal Government Contracting: Buy American Act and Executive Order*, 7 J. Pub. L. 378, 379 (1958).

²The Buy American Act was enacted as Title III of the Act of March 3, 1933, ch. 212, 47 Stat. 1520 (1933). The current version of the Act may be found at 41 U.S.C.A. §§10a-10d (1987 & Supp. 1989).

³See, e.g., Gantt & Speck, *supra*, note 1, at 384; United States v. Rule Industries, Inc., 878 F.2d 535 (1st Cir. 1989); Davis Walker Corp., B-184672, Aug. 23, 1976, 76-2 CPD ¶182. See also the text and accompanying notes at Chapter 2, *infra*.

boards, courts, and the Comptroller General to apply the Act have at times produced very fine, virtually indiscernible legal and factual distinctions, if not outright inconsistent holdings.⁴ The result has been aptly described as a "sea of uncertainty" for contractors in the federal procurement arena.⁵

An additional difficulty confronting contractors attempting to navigate the perils of existing domestic preference requirements is the sheer number and diversity of statutory provisions impacting on this area.⁶ A recent report issued by the Secretary of Defense enumerated twenty different statutory provisions, in addition to the Buy American Act, imposing separate domestic preference requirements on the Department of Defense.⁷ As expected, the regulations which implement these restrictions are correspondingly voluminous and complex. Although the advent of the Federal Acquisition Regulation (FAR)⁸ went a long way toward reducing the regulatory maze that

⁴See, *Buy American: A Case of Form Over Substance*, The Nash & Cibinic Report, Vol. 2, No. 7, ¶39 (Jul. 1988).

⁵*Id.*, at 100.

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⁷Secretary of Defense Report to Congress, *The Impact of Buy American Restrictions Affecting Defense Procurement*, Table 3-1, pp. 18-22 (Jul. 1989).

⁸The Federal Acquisition Regulation (FAR) and the Department of Defense FAR Supplement (DFARS) are codified at 48 C.F.R. §§25.000, *et. seq.*, and 48 C.F.R. §§225.000, *et. seq.*, respectively. These regulations will hereinafter be cited as FAR and DFARS.

previously existed in this area,⁹ it has by no means completely solved the problem. For example, FAR Part 25, though entitled "Foreign Acquisition" does not address, or even cross reference, all of the FAR provisions imposing domestic preference restrictions. The domestic preference provisions of the Cargo Preference Act and the Federal Aviation Act are contained in FAR Part 47. DFARS Part 8 sets forth additional restrictions concerning procurement of specialty metals, ball bearings, and similar items. Moreover, no part of the FAR or DFARS addresses the domestic preference restrictions imposed by other legislation such as the Surface Transportation Assistance Act or the Rail Passenger Service Act. Rather, the buy american requirements of those acts are governed by separate regulations promulgated by the federal agencies responsible for their administration. Such scattered coverage poses obvious difficulties for government contractors attempting to discern and comply with current domestic preference requirements.

A final factor contributing to the volume and complexity of existing domestic preference guidance arises from the very nature of buy american legislation. Buy american provisions are merely protectionist measures designed to foster domestic industries and promote domestic employment by limiting foreign competition.¹⁰ As

⁹See Watkins, *Effects of the Buy American Act on Federal Procurement*, 31 Fed.B.J. 191, 191-193 (1972); Chierichella, *The Buy American Act and the Use of Foreign Sources in Federal Procurements--An Issues Analysis*, 9 Pub.Cont.L.J. 73, 79 n.30 (1977).

¹⁰See Gantt & Speck, *supra*, note 1, at 379-382; Comment, *The Buy American Act: Examination, Analysis and Comparison*, 64 Mil. L. Rev. 101, 112-113 (1974) (authored by Captain Charles W. Trainor).

such, they directly conflict with the liberal international trade policies advocated by the United States since World War II.¹¹ Attempts to accommodate both policies have resulted in a potentially bewildering array of exceptions to existing domestic preference requirements. Moreover, the continuing struggle by Congress to come to grips with these conflicting policies has even led to the creation of exceptions within exceptions.¹²

The combined result of all of the above factors is a complex tangle of rules that can confuse even the most experienced government contractors. This study is intended to unravel that tangle by identifying and analyzing the origins, nature, and requirements of existing domestic preference provisions, as well as the exceptions to such provisions. It will also detail ways in which knowledgeable contractors may take maximum advantage of lower priced foreign parts and labor while still meeting the requirements imposed by existing domestic preference provisions and will explore the potential penalties facing contractors which violate such requirements.

¹¹Comment, *supra*, note 10.

¹²One of the major existing exceptions to current buy american requirements is set forth in the Trade Agreements Act of 1979. 19 U.S.C.A. §§2501 *et seq.* (1980 & Supp. 1989). As implemented, the Act waives application of domestic preference restrictions for products from countries that are signatories to the international Agreement on Government Procurement. See text and accompanying notes at Chapter 4, *infra*. However, on August 23, 1988, President Reagan signed into law the Omnibus Trade & Competitiveness Act of 1988. Pub.L.No. 100-418, 102 Stat. 1107 (1988). Title VII of that Act prohibits the purchase of products and services from countries that are signatories to the Agreement on Government Procurement but have not abided by the terms of that agreement. Further implications of the Omnibus Trade & Competitiveness Act are discussed at Chapter 2 and Chapter 4, *infra*.

Finally, it will recommend changes designed to simplify existing domestic preference requirements, to the benefit of the government, contractors, and domestic industry.

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TABLE OF CONTENTS

CHAPTER 1	INTRODUCTION	1
CHAPTER 2	THE BUY AMERICAN ACT	6
A.	AFFIRMATIVE REQUIREMENTS.	8
1.	Preference for Domestic, Articles, Materials, and Supplies	10
a.	"Substantially All" - The Fifty Percent Test	16
b.	End Products, Construction Materials, and Components	20
	(1) Distinguishing the Difference	21
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2.	Public vs. Private Works	48
3.	Exceptions	50
a.	Within the Buy American Act	53
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(3) Caribbean Basic Economic Recovery Act	83
4. Implementation and Enforcement Procedures	84
a. Evaluating Foreign Offers	84
b. Required Clauses	91
c. Certification Requirements	96
d. Enforcement and Responses to Contractor Violations	101
B. PROHIBITED PROCUREMENTS - A NEW DEVELOPMENT	109
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3. Implementation Procedures	119
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2. Minimum Purchase Threshold	170
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CHAPTER TWO

THE BUY AMERICAN ACT

The Buy American Act¹³ is the oldest and broadest of existing domestic preference legislation. Signed into law by President Hoover in 1933, it was passed as part of a protectionist movement born of the vast unemployment created by the Great Depression.¹⁴ Although the primary purpose was to promote greater domestic employment and thus stimulate the American economy,¹⁵ the Act was also in part a retaliation against the buy national practices of other nations.¹⁶ The immediate impetus for passage of the Act was a protest by American industry against the anticipated award of a contract for heavy electrical equipment for installation in the Hoover Dam to a German

¹³The Buy American Act was enacted as Title III of the Act of March 3, 1933, ch. 212, 47 Stat. 1520 (1933)[hereinafter the Act]. The Act, as amended, may be found at 41 U.S.C.A. §§10a-10d (1987 & Supp. 1989).

¹⁴Watkins, *supra* note 9.

¹⁵Comment, *supra* note 10, at 105-106.

¹⁶Gantt & Speck, *supra* note 1, at 381. As indicated by the Gantt & Speck article, domestic preference legislation is not solely an American invention, but has long been used by other nations to protect their own industries from "foreign" competition. For a discussion and analysis of such other buy national provisions, see Comment, *supra* note 10, at 138-148. See also General Accounting Office, Report No. ID-76-67, *Governmental Buy National Practices of the United States and Other Countries - An Assessment* (Sept. 30, 1976).

manufacturer.¹⁷ Notwithstanding the origins and intended purposes of the Act, it clearly has not alleviated all of American industry's concerns about foreign competition in the federal procurement arena. The same companies which protested against award to foreign manufacturers in conjunction with the Hoover Dam project continue to object to the procurement of foreign source products.¹⁸ The source of this continued dissatisfaction is twofold. First, the language of the Act has long been recognized as deficient, both in terms of clarity and in fulfilling the Act's intended purpose.¹⁹ Indeed, one commentary has even suggested that the language of the Act is deliberately vague,²⁰ and the legislative history of the Act tends to

¹⁷Gantt & Speck, *supra* note 1, at 380. See also Pomeranz, *Toward a New International Order In Government Procurement*, 11 L. & Pol'y in Int'l Bus. 1263, at 1264-1267 (1979).

¹⁸See, e.g., *Allis-Chalmers Corp. v. Friedkin*, 481 F. Supp. 1256 (M.D.Pa. 1980), *aff'd*, 635 F.2d 248 (3rd Cir. 1980)(Allis-Chalmers, which was one of the primary protesters against the Hoover Dam contracts, unsuccessfully sought to enjoin issuance of a notice to proceed to the winning foreign bidder on a contract for the manufacture and installation of hydroelectric power equipment for the Amistad Dam on the Rio Grande river); *Allis-Chalmers Corp. v. Arnold*, 619 F.2d 44 (9th Cir. 1980)(Allis-Chalmers sought to enjoin award to a Swiss firm of a contract to supply fishwater turbines for the Bonneville Dam). It is interesting to note, however, that the limitations of the Buy American Act cut both ways. See, e.g., *George Hyman Construction Co., ASBCA 13777*, 69-2 BCA ¶7830 (1969)(Allis-Chalmers, as a 2nd tier subcontractor, unsuccessfully urged acceptance of foreign produced electrical breaker switches).

¹⁹See, e.g., Gantt & Speck, *supra* note 1, at 384; Comment, *supra* note 10, at 148; Chierichella, *supra* note 9, at 76.

²⁰Reynolds & Phillips, 3 Pub. Cont. L. J. 219, 220 (1970).

support such a conclusion.²¹ Implementing regulations have not eliminated all of these deficiencies. Second, there exist numerous exceptions to the Act. These exceptions not only reduce the potential protection afforded by the Act to American concerns, but also make it far more difficult to determine whether a particular procurement is or is not subject to domestic preference restrictions. The result of these two factors is a complex network of regulations and case law that tends to foster, rather than limit, continued misinterpretations of the requirements of the Act by contractors and courts alike.

A. AFFIRMATIVE REQUIREMENTS

Procurement officials attempting to comply with the domestic preference restrictions of the Buy American Act must necessarily

²¹Representative John B. Hollister, who participated in drafting the bill that ultimately became the Buy American Act, explained the language of the bill as follows:

We made an attempt earlier in our work on this bill to draft a very complicated series of preferences by which goods entirely manufactured in this country from entirely American materials would be given first choice; goods manufactured in America partly from foreign materials and partly from American materials would come next, and so on down the line. We found before we got very far that it meant a complicated list of 9 or 10 different preferences and it was almost impossible to work them out fairly because it would be so difficult to assign in the ultimate value how much weight should attach to the different sources of manufacture or raw material. We realized that the important thing to do was to lay down in general terms the intention of Congress, that the Federal Government and also contractors having to do with the Federal Government should use American goods where possible and where it was a reasonable and proper thing to do.

76 Cong. Rec. 1894 (1933), *quoted in* 41 Comp. Gen. 339, 345-46 (1961).

conduct a three part analysis. Because the Act imposes a preference for domestically produced goods and materials, they must first determine whether a particular bid or proposal offers a foreign or domestic product within the meaning of the Act. If a foreign product is being offered, it must then be determined whether the item or items to be procured are for "public use",²² or, if a construction contract, whether it is for the "construction, alteration, or repair of [a] public building or public work."²³ Finally, if the contract is for a public, rather than private use or work, it must be determined whether any of the stated exceptions to the Act apply. If an exception²⁴ applies, then the bid or proposal offering to provide a foreign product may be evaluated on an equal basis with bids or proposals offering domestic products. If not, the Act, as implemented, requires award to the offeror offering a domestic end product, even if the foreign product is less costly.²⁵

²²41 U.S.C.A. §10a (1987 & Supp. 1989).

²³41 U.S.C.A. §10b(a) (1987 & Supp. 1989).

²⁴Exceptions to the Buy American Act include the "unreasonable cost" exception, which is further discussed at pp. 53-63, *infra*.

²⁵As indicated in the introductory chapter, the basic concept of preferring the procurement of domestic rather than foreign products did not originate with the Buy American Act. However, the Buy American Act was the first domestic preference statute which, in the absence of an applicable exception, required purchase of American goods even if higher priced than foreign goods of the same quality. See, Pomeranz, *supra* note 17, at 1267 n.13.

1. PREFERENCE FOR DOMESTIC ARTICLES, MATERIALS, AND SUPPLIES

With certain enumerated exceptions, the Buy American Act requires that only domestically produced articles, materials, and supplies be acquired for use by the federal government.²⁶ As to supply contracts, the Act requires in pertinent part as follows:

...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.²⁷

An almost identical requirement is levied with respect to all contracts "for the construction, alteration, or repair of any public building or public work in the United States" using appropriated funds.²⁸ The Act requires that all such contracts not falling under one of the enumerated exceptions contain a provision as follows:

...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...in the United States....²⁹

²⁶ Exceptions to the domestic preference restrictions of the Buy American Act originate both from the Act itself and from the operation of other statutes which impact on the Act. Both types of exceptions are further discussed within the body of this thesis.

²⁷ 41 U.S.C.A. §10a (1987 & Supp. 1989). See also FAR 25.102.

²⁸ 41 U.S.C.A. §10b(a) (1987 & Supp. 1989).

²⁹ *Id.* See also FAR 25.202.

To correctly apply these requirements requires an initial understanding of what the Act does not do. First, through use of the words "manufactured...in the United States" as the main requirement, it is clear that the Act is directed only at the *geographic source* of the articles, materials, and supplies to be provided. Thus, the plain language of the Act does not establish a preference for award to domestic contractors, but only a preference for award on the basis of domestic source products. Accordingly, the Comptroller General has consistently held that the nationality of prospective bidders or offerors is irrelevant.³⁰ This long standing line of cases is not affected by the 1988 amendment to the Act.³¹ Although such amendment does introduce considerations of contractor nationality for purposes of prohibiting awards of certain service contracts,³² it does not purport to require such considerations with respect to the award of

³⁰ See, e.g., Lenzar Optics Corp., Comp. Gen. Dec. B-225432, Mar. 4, 1987, 87-1 CPD ¶246; E.J. Murray Co., Inc., et al., Comp. Gen. Dec. B-212107, et al., Mar. 16, 1984, 84-1 CPD ¶316; Dawson Construction Co., Inc., Comp. Gen. Dec. B-214070, Feb. 8, 1984, 84-1 CPD ¶160; E.I. du Pont de Nemours & Co., Inc., Comp. Gen. Dec. B-208095, Sep. 20, 1982, 82-2 CPD ¶245; E-Systems, Inc., 61 Comp. Gen. 431 (1982), 82-1 CPD ¶533; Patterson Pump Co., Comp. Gen. Dec. B-200165, Dec. 31, 1980, 80-2 CPD ¶453; Lemmon Pharmacal Co., Comp. Gen. Dec. B-186124, Aug. 2, 1976, 76-2 CPD ¶110; 45 Comp. Gen. 658 (1966).

³¹ Title VII of the Omnibus Trade & Competitiveness Act of 1988, Pub.L.No. 100-418, 102 Stat. 1107, 1545-1553 (1988), amended the Buy American Act to prohibit the purchase of products and services from countries that are signatories to the Agreement on Government Procurement but have not abided by the terms of that agreement. The amendment is set forth at 41 U.S.C.A. §10b-1 (Supp. 1989). Other aspects of this amendment are discussed later in this chapter and in Chapter 4.

³² 41 U.S.C.A. §10b-1(a)(2) (Supp. 1989).

contracts for the procurement of articles, materials, or supplies.³³ Second, the domestic preference provisions of the Act apply only to the procurement of articles, materials, and supplies.³⁴ The phrase "articles, materials and supplies", as used in the Buy American Act, does not encompass services.³⁵ Accordingly, the domestic preference requirements of the Act do not apply to the procurement of services.³⁶ Policy guidance issued by the Office of Federal Procurement Policy (OFPP) on the 1988 amendment makes it clear that the amendment does not extend the Buy American Act's domestic preference requirements to services, but only prohibits the procurement of services from foreign owned firms under the specified circumstances.³⁷ Third, the Act does not absolutely prohibit the procurement of foreign source articles, materials, and supplies. Rather, through operation of the "unreasonable cost" exception,³⁸ the Act merely establishes a

³³41 U.S.C.A. §10b-1(a)(1) (Supp. 1989).

³⁴41 U.S.C.A. §§10a and 10b(a) (1987 & Supp. 1989).

³⁵Patterson Pump Co., Comp. Gen. Dec. B-200165, Dec. 31, 1980, 80-2 CPD ¶453.

³⁶ See, e.g., Hawaiian Dredging & Construction Co., Comp. Gen. Dec. B-195101, Apr. 8, 1980, 80-1 CPD ¶258, (procurement of research services not subject to the Buy American Act); Blodgett Key punching Co., 56 Comp. Gen. 18 (1976), 76-2 CPD ¶331, (conversion of data to machine readable form is a service not subject to the Buy American Act); MRI Systems Corp., 56 Comp. Gen. 102 (1976), 76-2 CPD ¶437 ("developing" a computer program is a service not subject to the Buy American Act); Westinghouse Electric Corp., 53 Comp. Gen. 259 (1973), 1973 CPD ¶109 (procurement of installation engineering services not subject to the Buy American Act).

³⁷54 Fed. Reg. 9112 (1989).

³⁸See text and accompanying notes, pp. 53-63, *infra*.

preference for the purchase of domestic items.³⁹ That preference is measured in terms of an appropriate evaluation differential added to the price of the foreign source product.⁴⁰ If the price of that product remains low even after adding the evaluation differential, award may be made to the offeror or bidder offering the foreign source product.⁴¹ Thus, bids offering foreign source products need not be rejected as nonresponsive.⁴² Indeed, if after proper evaluation under the Buy American Act a prospective contractor offering a foreign source product is deemed the low, responsive, responsible bidder or offeror, there is no legal basis, in the absence of another specific exception to the Act⁴³ or other statutory provision, for limiting

³⁹See, e.g., Lenzar Optics Corp., Comp. Gen. Dec. B-225432, Mar. 4, 1987, 87-1 CPD ¶246; Yohar Supply Co., 66 Comp. Gen. 251 (1987), 87-1 CPD ¶152; California Mobile Communications, Comp. Gen. Dec. B-224398, Aug. 29, 1986, 86-2 CPD ¶244; Tritan Corp., Comp. Gen. Dec. B-218306, May 24, 1985, 85-1 CPD ¶601; C & M Associates, Comp. Gen. Dec. B-217367, Jan. 3, 1985, 85-1 CPD ¶16; Autoclave Engineers, Inc., Comp. Gen. Dec. B-217212, Dec. 14, 1984, 84-2 CPD ¶668; Lemmon Pharmacal Co., 55 Comp. Gen. 1472 (1976), 76-2 CPD ¶110; 41 Comp. Gen. 339 (1961); 39 Comp. Gen. 309 (1959); Great Western Steel, Inc. v. United States, 3 Cl. Ct. 510 (1983).

⁴⁰*Id.*

⁴¹*Id.* See also FAR 25.105; FAR 25.203.

⁴²E-Systems, Inc., 61 Comp. Gen. 431 (1982), 82-1 CPD ¶ 533. *Accord.*, Autoclave Engineers, Inc., Comp. Gen. Dec. B-217212, Dec. 14, 1984, 84-2 CPD ¶668.

⁴³The "public interest" exception, as implemented, may provide a legitimate basis for limiting competition to domestic concerns. 41 Comp. Gen. 70 (1961). See the text and accompanying notes at pp. 70-72, *infra*, for a further discussion of this exception.

competition to contractors offering domestic source products.⁴⁴ Thus, the fact that contractors offering foreign source products may enjoy a certain competitive advantage, either through subsidies from foreign governments,⁴⁵ or as the result of not having to comply with the same socio-economic policies as domestic firms,⁴⁶ is not a sufficient basis for denying award to a contractor offering a foreign source product. Similarly, the Comptroller General will dismiss protests based on assertions that award to a foreign concern will result in a loss of jobs for United States workers,⁴⁷ or that such an award will threaten the existence of domestic small and disadvantaged businesses.⁴⁸ Assertions that award to a foreign concern will have a negative impact on U.S. energy policy⁴⁹ or will impair the U.S. industrial base⁵⁰ are

⁴⁴See, e.g., Fire and Technical Equipment Corp., Comp. Gen. Dec. B-203858, Sep. 29, 1981, 81-2 CPD ¶266; Hawaiian Dredging & Construction Co., Comp. Gen. Dec. B-195101, Apr. 8, 1980, 80-1 CPD ¶258.

⁴⁵See, e.g., Pyrotechnics Industries, Inc., Comp. Gen. Dec. B-221886, Jun. 2, 1986, 86-1 CPD ¶505; Omega Machine Co., Comp. Gen. Dec. B-204471, Dec. 3, 1981, 81-2 CPD ¶442.

⁴⁶See, e.g., Technical Systems, Inc., 66 Comp. Gen. 297 (1987), 87-1 CPD ¶240; Pall Land and Marine Corp., et al., Comp. Gen. Dec. B-223478, et al., Jul. 16, 1986, 86-2 CPD ¶77; Enidine, Inc., Comp. Gen. Dec. B-222617, Jun. 5, 1986, 86-1 CPD ¶528; Fire and Technical Equipment Corp., Comp. Gen. Dec. B-203858, Sep. 29, 1981, 81-2 CPD ¶266.

⁴⁷See, e.g., Presto Lock, Inc., Comp. Gen. Dec. B-218766, Aug. 16, 1985, 85-2 CPD ¶183; Software Automation Corp., Comp. Gen. Dec. B-216395, Sep. 27, 1984, 84-2 CPD ¶363; The Harshaw/Filtrol Partnership, Comp. Gen. Dec. B-214137, Feb. 28, 1984, 84-1 CPD ¶254.

⁴⁸Fresh Flavor Meals, Inc., Comp. Gen. Dec. B-208965, Oct. 4, 1982, 82-2 CPD ¶310.

⁴⁹Hawaiian Dredging & Construction Co., Comp. Gen. Dec. B-195101, Apr. 8, 1980, 80-1 CPD ¶258.

⁵⁰E-Systems, Inc., 61 Comp. Gen. 431 (1982), 82-1 CPD ¶533.

also not valid grounds for protest.

Even with a basic understanding of what the Act does not do, determining whether those articles, materials, and supplies that are subject to the Act are domestic or foreign source items is not always an easy task. For unmanufactured items, the test is relatively straight forward, and has never been the subject of great controversy.⁵¹ The Act requires only that such items be "...mined or produced in the United States...."⁵² Thus, for purposes of unmanufactured articles, materials, and supplies, one need only determine their geographic origin, i.e., where they were physically mined or produced. If that area is in the "United States" within the meaning of the Act, the items qualify as domestic products.⁵³

Determining whether manufactured items qualify as domestic source products is more difficult. For such items, the Act imposes two requirements. First, the items must themselves be "manufactured" in the United States.⁵⁴ Second, the items must be composed "substantially all from articles, materials or supplies mined, produced or manufactured...in the United States."⁵⁵ The Act itself

⁵¹See J. Cibinic & R. Nash, *Formation of Government Contracts* 969 (1986).

⁵²41 U.S.C.A. §§10a and 10b(a) (1987 & Supp. 1989). See also the definition of "domestic end product" at FAR 25.101.

⁵³See text and accompanying notes at pp. 63-65, *infra*, for a discussion of what constitutes the "United States" within the meaning of the Buy American Act.

⁵⁴41 U.S.C.A. §§10a and 10b(a) (1987 & Supp. 1989).

⁵⁵*Id.*

does not define either the term "manufacture" or the phrase "substantially all". Guidance on the meaning and proper application of these terms is provided through a combination of executive order, implementing regulations, and case law.

a. "Substantially All" - The Fifty Percent Test

Prior to 1954, the prevailing rule for determining whether a particular item was manufactured "substantially all" from domestic articles, materials, and supplies was the "twenty-five percent rule".⁵⁶ Under that rule, items were considered to be manufactured "substantially all" from domestic materials if the cost of all foreign materials was twenty-five percent or less of the cost of all materials.⁵⁷ Materials of unknown origin were considered to be from a foreign source.⁵⁸ A similar "twenty-five" percent rule was widely, but not uniformly, employed by federal agencies to determine when the cost of domestic source products so far exceeded the cost of foreign source products as to make the cost of the domestic products "unreasonable" within the meaning of the Act.⁵⁹ By the early 1950's, these rules had become the subjects of increasing criticism by both

⁵⁶See, e.g., Armed Services Procurement Regulations (ASPR) §6-103.2 (1954).

⁵⁷Gantt & Speck, *supra* note 1, at 386-387, 399 (analyzing ASPR §6-103.2 (1954)).

⁵⁸*Id.*

⁵⁹See, e.g., Gantt & Speck, *supra* note 1, at 390-391; Pomeranz, *supra* note 17, at 1263; Watkins, *supra* note 9, at 203. For a further discussion of the effects of Exec. Order No. 10582 on "unreasonable cost" determinations, see the text at pp.53-63, *infra*.

the domestic media and potential foreign competitors.⁶⁰ Opponents argued that such restrictive domestic practices were the antithesis of the liberal international trade policies urged by the United States and that the removal or relaxation of the Buy American Act restrictions could result in hundreds of millions of dollars of savings in federal expenditure on an annual basis.⁶¹ In response to these criticisms, and in recognition of the need to establish uniform evaluation procedures,⁶² President Eisenhower issued Executive Order 10582 on December 17, 1954.⁶³ The effect of Executive Order 10582 is twofold. First, it established a new, uniform standard for determining when manufactured articles, materials, and supplies are of domestic rather than foreign origin.⁶⁴ Second, it established uniform percentages for use in determining when the cost of domestic source

⁶⁰See Knapp, *The Buy American Act: A Review and Assessment*, 61 Colum. L. Rev. 430, 432-439 (1961).

⁶¹*Id.* See also, Comment, *supra* note 10, at 113, referencing, Commission on Foreign Economic Policy, Report to the President and The Congress, H.R. Doc. No. 220, 83d Cong., 2d Sess. 315-318 (1954).

⁶²See, e.g., *Allis-Chalmers Corp. v. Friedkin*, 481 F. Supp. 1256 (M.D.Pa. 1980), *aff'd*, 635 F.2d 248 (3rd Cir. 1980); 39 Comp. Gen. 309 (1959). See also, Comment, *supra* note 10, at 114; Gantt & Speck, *supra* note 1, at 390-391.

⁶³Exec. Order No. 10582, Dec. 17, 1957, 3 C.F.R. 230 (1954-1958), as amended by Exec. Order No. 11051, Sept. 27, 1962, 3 C.F.R. 635 (1959-1963); Exec. Order No. 12148, Jul. 20, 1979, 3 C.F.R. 412 (1979); Exec. Order No. 12608, Sept. 9, 1987, 52 Fed. Reg. 34,617 (1987). An amended version which reflects all amendments except that affected by Exec. Order No. 12608 may be found in Office of the Federal Register, National Archives and Records Administration, *Codification of Presidential Proclamations and Executive Orders*, 717-719 (1961-1985). The sole effect of Exec. Order No. 12608 was to substitute references to the "Office of Management and Budget" in lieu of the "Bureau of the Budget".

⁶⁴Executive Order No. 10582, §2(a).

products is "unreasonable" in comparison to the cost of comparable foreign source products.⁶⁵ The latter aspect of the Order will be more fully discussed below in conjunction with the "unreasonable cost" exception.

Executive Order 10582 greatly liberalized the test for determining when a manufactured item is composed "substantially all" of articles, materials, and supplies manufactured in the United States and in fact appears to have pushed the meaning of that phrase to its logical limit.⁶⁶ Section 2(a) of the Order provides that "[articles], materials, [and supplies] shall be considered to be of foreign origin if the cost of the foreign products used in such materials constitutes fifty per centum or more of the cost of all the products used in such materials."⁶⁷ Thus, "substantially all", within the meaning of the Buy American Act, as implemented by Executive Order 10582, means greater than fifty percent.⁶⁸ The Comptroller General has rejected claims that the fifty percent rule is an impermissible interpretation of the Buy American Act "substantially all" requirement⁶⁹ or that Executive Order 10582 is itself unconstitutional.⁷⁰

⁶⁵*Id.*, at §2(b)-(c).

⁶⁶Gantt & Speck, *supra* note 1, at 399.

⁶⁷The term "materials", as used within the Order, "includes articles and supplies." Executive Order No. 10582, §1.

⁶⁸*See, e.g.*, Hamilton Watch Co., Inc., Comp. Gen. Dec. B-179939, Jun. 6, 1974, 74-1 CPD ¶306.

⁶⁹41 Comp. Gen. 339, 345-346 (1961).

⁷⁰39 Comp. Gen. 309, 310 (1959).

It should be noted that the fifty percent test and the evaluation differentials required or permitted by Executive Order 10582 do not apply to all procurements covered by the Buy American Act.⁷¹ Rather, the order applies only to "determinations by the departments, independent establishments and other instrumentalities of the executive branch of the United States Government...."⁷² Accordingly, neither the order nor the procurement regulations implementing the same must be applied to procurements by the District of Columbia, which is "a legal entity separate and distinct from the executive agencies of the United States."⁷³ As a practical matter, however, this lack of mandatory coverage is of little import. The procurement regulations for the District of Columbia have adopted the same approach set forth in the Order and the Comptroller General interprets and applies the requirements of such regulations accordingly.⁷⁴ It should also be noted that, by its terms, Executive Order 10582 applies not only to the Buy American Act, but also to "other laws requiring the application of the Buy American Act".⁷⁵ Accordingly, if the domestic preference provisions of other statutes specifically refer to the Buy American Act, Executive Order 10582 will govern the

⁷¹44 Comp. Gen. 539 (1965).

⁷²*Id.*, at 542.

⁷³*Id.* See also, Concrete Technology, Inc., Comp. Gen. Dec. B-202407, Oct. 27, 1981, 81-2 CPD ¶347.

⁷⁴See Concrete Technology, Inc., Comp. Gen. Dec. B-202407, Oct. 27, 1981, 81-2 CPD ¶347.

⁷⁵*Preamble*, Executive Order No. 10582.

administration of the domestic preference provisions of such other statutes.⁷⁶

b. End Products, Construction Materials, and Components

The requirements of the Buy American Act and Executive Order 10582 are implemented in the FAR in terms of "end products", "construction materials", and "components". As to the acquisition of supplies,⁷⁷ FAR 25.102(a) provides in pertinent part that the "Buy American Act requires that only domestic end products be acquired for public use...." Similarly, for construction contracts, FAR 25.202(a) provides that "only domestic construction materials [may] be used in construction in the United States...." Unmanufactured end products and construction materials qualify as "domestic" if they are "mined or produced in the United States."⁷⁸ However, a manufactured end product or construction material may be considered "domestic" only if it is "manufactured in the United States" and "the cost of its components mined, produced, or manufactured in the United States exceeds 50

⁷⁶General Electric Corp., 54 Comp. Gen. 791 (1975), 75-1 CPD ¶176. See also, 48 Comp. Gen. 486 (1969)(Order applies to construction contracts awarded by local housing authorities using federal funds provided by the Department of Housing and Urban Development (HUD) under the United States Housing Act of 1937, 42 U.S.C. §§1401, *et seq.*, section 6(c) of which (42 U.S.C. §1406(c)) provides that such funds are subject to the provisions of the Buy American Act).

⁷⁷The domestic preference provisions of the Buy American Act do not apply to the acquisition of services. See text and accompanying notes at p. 12, *supra*. They do, however, apply to supplies that are furnished as part of a service contract. See FAR 25.100.

⁷⁸FAR 25.101 and FAR 25.201.

percent of the cost of all its components."⁷⁹ Manufactured items must meet both parts of the stated requirement to qualify as domestic end products or construction materials. Thus, items manufactured outside the United States cannot be considered *domestic* end products or construction materials even if manufactured entirely of domestic source components.⁸⁰ However, because the Act, Executive Order 10582, and the implementing regulations do not require that all components be manufactured in the United States, the mere offer of any given foreign *component* is not inconsistent with the offer of a domestic end product or construction material.⁸¹

(1) Distinguishing The Difference

The first step in correctly applying the above requirements is to determine which item or items constitute "end products" or "construction materials" under the contract concerned and which items constitute "components". "End products" are "articles, materials, and supplies...acquired for public use under the contract,"⁸² while "construction materials" are "articles, materials, and supplies brought to the construction site for incorporation into the building

⁷⁹FAR 25.101 and FAR 25.201.

⁸⁰See *Cincinnati Electronics Corp.*, 55 Comp. Gen. 1479, 1494 (1976), 76-2 CPD ¶286, at 16; *Jamar Corp.*, 52 Comp. Gen. 13 (1972), 1972 CPD ¶72.

⁸¹See *Abbott Power Corp.*, Comp. Gen. Dec. B-192792, Apr. 30, 1979, 79-1 CPD ¶295.

⁸²*Id.* See also, *S.F. Durst & Company, Inc.*, 46 Comp. Gen. 784 (1967), 1967 CPD ¶14.

or work."⁸³ "Components" are "articles, materials, and supplies incorporated directly into" the end products or construction materials.⁸⁴ For construction materials, a key requirement is that the item be brought *separately* to the construction site for incorporation in the public building or work rather than incorporated into another item prior to being brought to the site.⁸⁵ Thus, foreign electrical circuit breakers brought to the construction site separately for incorporation into a domestic switch gear unit which was already installed were rejected as foreign materials even though they might have been acceptable, as a foreign component, if installed in the switch gear off site.⁸⁶ To constitute a construction material, the item must also be *incorporated into* the public building or work.⁸⁷ Accordingly, mobile office trailers, relocatable steel buildings, and similar items which are brought to the site by a construction contractor solely to aid in contract performance and which are neither to be provided to the government nor incorporated into the public

⁸³FAR 25.201.

⁸⁴FAR 25.201 and FAR 25.201. The definitions of "end products", "construction materials", and "components" provided by the Defense Acquisition Regulation (DAR) and the Federal Procurement Regulation (FPR) were substantially the same as the current FAR coverage. *Compare, e.g.,* DAR 6-001.1(a) and .2(a)(1976) and FPR 1-6.101(a) and (b) with FAR 25.101. Thus, unless otherwise indicated, the decisions interpreting such prior provisions apply equally to the FAR provisions.

⁸⁵*See, e.g.,* George Hyman Construction Co., ASBCA No. 13777, 69-2 BCA ¶7,830 (1969).

⁸⁶*Id.* *See also* Swanson Products, ASBCA No. 33493, 87-1 BCA ¶19,661 (1987); Allen L. Bender, Inc., ASBCA No. 38068, 89-3 BCA ¶22,092 (1989).

⁸⁷Micro Mobile Sales & Leasing Co., 51 Comp. Gen. 538 (1972), 1972 CPD ¶30.

building or work do not constitute construction materials within the meaning of the Buy American Act.⁸⁸

In the procurement of supplies, whether a particular item constitutes an end product or component within the meaning of the above definitions depends on the purpose and structure of the underlying procurement.⁸⁹ Neither the fact that the same item is classified as an end product under one procurement and as a component under another,⁹⁰ nor the fact that individual components of a particular item have separate federal supply schedule classification numbers⁹¹ is controlling. For example, an agency could issue a solicitation for small motors to be used as replacement parts for repair of drainage pumps previously procured. In such case, the motors would probably be considered the "end products" of that solicitation. However, where the agency issues a solicitation for an integrated drainage pump, consisting of the same motor, a pump unit, and a gear reducer, the motor will be considered to be only a

⁸⁸ *Id.*

⁸⁹ See, e.g., Allis-Chalmers Corp., Comp. Gen. Dec. B-195311, Dec. 7, 1979, 79-2 CPD ¶392, *reconsid. denied*, Jan. 8, 1980, 80-1 CPD ¶21; Dubie-Clark Co., Patterson Pump Div., Comp. Gen. Dec. B-189642, Feb. 28, 78-1 CPD ¶161; Cincinnati Electronics Corp., 55 Comp. Gen. 1479 (1976), 76-2 CPD ¶286; Imperial Eastman Corp., 53 Comp. Gen. 726 (1974), 74-1 CPD ¶153. See also, Textron, Inc., Bell Helicopter Textron Div. v. Adams, 493 F. Supp. 842 (D.D.C. 1980).

⁹⁰ Brown Boveri Corp., 56 Comp. Gen. 596 (1977), 77-1 CPD ¶328; Imperial Eastman Corp., 53 Comp. Gen. 726 (1974), 74-1 CPD ¶153.

⁹¹ See Morey Machinery, Inc., Comp. Gen. Dec. B-233793, Apr. 18, 1989, 89-1 CPD ¶383; A&D Machinery Co., Comp. Gen. Dec. B-234711, Jun. 15, 1989, 89-1 CPD ¶566.

component of the desired end product, i.e., the drainage pump.⁹² Thus, the Comptroller General has held, in a solicitation for a "musical library", that the end product was the entire library, not the individual records and tapes.⁹³ Likewise, where the Government need was for a set of integrated tools, and the desired tasks could not be performed in the absence of any one of such tools, the end product was the entire tool kit, not the individual tools, which were only components of that kit.⁹⁴ Similarly, the Comptroller General held that surgeon's needles were components of "medical kits" in a solicitation for six different medical kits comprised of fifty-six separate medical items.⁹⁵ As in the tool kit cases, the decision turned on the fact that the medical kits were designed for use as a single unit and that the desired tasks could not be accomplished without the needles.⁹⁶

In applying the above guidelines, disputes may arise over whether a particular contract is for the procurement of supplies or for the

⁹²Hicks and Ingle Co. of Va., Inc., ASBCA No. 31871, 86-2 BCA ¶18,956 (1986). *See also*, Dubie-Clark Co., Patterson Pump Div., Comp. Gen. Dec. B-189642, Feb. 28, 1978, 78-1 CPD ¶161.

⁹³Comp. Gen. Dec. B-156768, Aug. 17, 1965 (unpublished).

⁹⁴Imperial Eastman Corp., 53 Comp. Gen. 726 (1974), 74-1 CPD ¶153. *See also* New Britain Hand Tools Div., Litton Industrial Products, Inc., 58 Comp. Gen. 49 (1978), 78-2 CPD ¶312.

⁹⁵McKenna Surgical Supply, Inc., 56 Comp. Gen. 531 (1977), 77-1 CPD ¶261.

⁹⁶*Id.*

construction of a public building or work.⁹⁷ The distinction is important, in that the exceptions applicable to the procurement of supplies are not the same as those available in the construction arena.⁹⁸ In settling such disputes, the Comptroller General tends to give deference to the agency determination.⁹⁹

Difficulties also arise when the agency seeks to procure several different items through the same solicitation. In such case, the mere fact that the items are all being procured under a single contract does not make each item a "component".¹⁰⁰ Rather, the language of the solicitation must be examined to determine what the agency needed and intended to procure.¹⁰¹ If it is clear that the individual items, even though closely interrelated and subject to integration into a single unit or "system" at a later time, are not being procured as a single functioning unit, but are merely being procured under the same contract as a matter of administrative and economic convenience, the items will be considered as separate end products for purposes of the

⁹⁷ See, e.g., 42 Comp. Gen. 467 (1963) (Agency/contractor disagreement over whether naval vessels were "supplies" or "public works" within the meaning of the Buy American Act); PACECO, Inc., Comp. Gen. Dec. B-224303, Dec. 19, 1986, 86-2 CPD ¶688 (Protest over whether a "Cantilevered Elevated Causeway System" consisting of pontoons, pilings, and other components that could be quickly assembled into a cargo-handling pier facility was "supply" or a "public work").

⁹⁸ Compare, e.g., FAR 25.105(d) and (e), which implement certain exceptions applicable to Israeli and Canadian source end products in the procurement of supplies, and FAR 25.203, which contains no such exception for construction materials.

⁹⁹ 42 Comp. Gen. 467 (1963).

¹⁰⁰ 48 Comp. Gen. 384 (1968).

¹⁰¹ *Id.*

Buy American Act and will be evaluated accordingly.¹⁰² However, if the language of the solicitation makes clear that the agency needs, and intends to procure, a single "system", the individual "components" of that system will be evaluated accordingly, even though the components are the subject of individual contract line items.¹⁰³ Thus, while individual dictaphones and similar items of recording, transcribing and dictating equipment might, under a given procurement, themselves be considered end products, they were evaluated as components when the stated purpose of the solicitation was to procure a complete, functional dictation system.¹⁰⁴

Absent an expressed intent to procure a single "system", the mere fact that a solicitation specifies that award is to be made on an all or none basis does not preclude an agency determination that each of several required individual line items is itself a separate end product.¹⁰⁵ Similarly, the submission of an all or none bid on a solicitation involving several distinct items does not require or permit the agency to aggregate the foreign and domestic content

¹⁰²*Id.* See also, Data Transformation Corp., GSBGA No. 8982-P, Jul. 13, 1987, 87-3 BCA ¶20,017 (GSBGA upheld agency determination that 19 separate ADPE line items, consisting primarily of microprocessors, printers, word processors, and software, although ultimately destined for use together, constituted separate end products).

¹⁰³See, e.g., Essex Associates, Inc., Comp. Gen. Dec. B-213279, Jul. 24, 1984, 84-2 CPD ¶97; Dictaphone Corp., Comp. Gen. Dec. B-193614, Jun. 13, 1979, 79-1 CPD ¶416; Dictaphone Corp., Comp. Gen. Dec. B-191383, May 8, 1978, 78-1 CPD ¶343. See also, 46 Comp. Gen. 784 (1967).

¹⁰⁴Dictaphone Corp., Comp. Gen. Dec. B-193614, Jun. 13, 1979, 79-1 CPD ¶416; Dictaphone Corp., Comp. Gen. Dec. B-191383, May 8, 1978, 78-1 CPD ¶343.

¹⁰⁵Data Transformation Corp., GSBGA No. 8982-P, 87-3 BCA ¶20,017.

percentages of the separate end products to arrive at a total domestic content percentage in excess of fifty percent.¹⁰⁶ In fact, FAR 25.105(b) provides that "[t]he evaluation...shall be applied on an item-by-item basis or to any group of items on which award may be made as specifically provided by the solicitation." (Emphasis added). Thus, unless the solicitation specifically indicates that the Buy American Act differentials will be applied on the basis of a particular group or groups of items, all items will be evaluated on an item-by-item basis.¹⁰⁷

In attempting to identify the components of a particular end product or construction material, two additional principles must be kept in mind. First, because "component" is defined in terms of "articles, material, and supplies", anything that does not fall within one of these three categories is automatically excluded from consideration as a component. Thus, manufacturing processes such as "boring, plating and machining" do not constitute components of the resulting end product.¹⁰⁸ Similarly, neither "design effort" used by the contractor in producing an end product¹⁰⁹ nor "testing" of the

¹⁰⁶47 Comp. Gen. 676 (1968). See also, *Essex Associates, Inc.*, Comp. Gen. Dec. B-213279, Jul. 24, 1984, 84-2 CPD ¶97.

¹⁰⁷See *Allis-Chalmers Corp. v. Friedkin*, 481 F. Supp. 1256, 1267 (M.D.Pa. 1980), *aff'd*, 635 F.2d 248 (3rd Cir. 1980); *Imperial Eastman Corp.*, 53 Comp. Gen. 726 (1974), 74-1 CPD ¶153.

¹⁰⁸48 Comp. Gen. 727 (1969).

¹⁰⁹*Akin, Gump, Strauss, Hauer & Feld*, 53 Comp. Gen. 5 (1973), 1973 CPD ¶73.

final end product¹¹⁰ are components of that end product. Further, because the domestic preference provisions of the Buy American Act do not apply to services,¹¹¹ such services cannot themselves be considered components of an end product.¹¹² This last rule was either not understood or completely ignored by the Federal District Court in *Textron, Inc., Bell Helicopter Textron Div. v. Adams*.¹¹³ In analyzing the domestic content of a "helicopter system" being procured by the Coast Guard, the Court considered "training of maintenance personal and instructor pilots" and "services of contractor employees knowledgeable in the operation of the aircraft" as components of the overall "system" being procured.¹¹⁴ Given the clear nature of these services, the Court's conclusion that they qualify as components is

¹¹⁰Patterson Pump Co., Comp. Gen. Dec. B-200165, Dec. 31, 1980, 80-2 CPD ¶453.

¹¹¹See text and accompanying notes, p.11, *supra*.

¹¹²See Patterson Pump Co., Comp. Gen. Dec. B-200165, Dec. 31, 1980, 80-2 CPD ¶453. See also, *Allis-Chalmers Corp. v. Friedkin*, 481 F.Supp. 1256 (M.D.Pa. 1980), *aff'd*, 635 F.2d 248 (3rd Cir. 1980) (holding that the cost of services not covered by the Buy American Act should not be subjected to an evaluation differential).

¹¹³493 F. Supp. 824 (D.D.C. 1980).

¹¹⁴*Id.*, at 826.

contrary to prior rulings in this area and is not supportable.¹¹⁵

The second important principle is that to qualify as components, articles, materials, or supplies must be "incorporated directly into" the end products or construction materials.¹¹⁶ This means that the "component" must be "physically incorporated" into the end product or construction material.¹¹⁷ Thus, shop drawings used to fabricate steel are not components since they are not physically incorporated into the steel.¹¹⁸ Further, maintenance manuals provided in conjunction with the procurement of a particular end product are merely instruction tools for using the end product, rather than components which are directly incorporated into that product.¹¹⁹ Similarly, packaging materials and containers used only as a convenient means of delivering and storing an end product or construction material, and which have no

¹¹⁵The Court accepted without apparent question the Coast Guard's assertion that everything being procured under the contract constituted one complete "helicopter system". In fact, the contract was clearly for the procurement of a "helicopter" (the real end product) and ancillary support services. As a result of this initial error, the Court in effect considered the entire contract as the "end product" and each of the individual line items a "component". The Comptroller General had previously correctly determined that the "end product" was the helicopter itself and did not consider the services as components. Bell Helicopter, Textron Division, 59 Comp. Gen. 158 (1979), 79-2 CPD ¶431.

¹¹⁶FAR 25.201 and FAR 25.201.

¹¹⁷Veterans Administration--Request for Advance Decision, Comp. Gen. Dec. B-230762, May 18, 1988, 88-1 CPD ¶472.

¹¹⁸*Id.*

¹¹⁹Ampex Corp., Comp. Gen. Dec. B-203021, Feb. 24, 1982, 82-1 CPD ¶163. (The case did not address whether the manuals should themselves be considered as separate end products).

other useful purpose, are not components.¹²⁰ If, however, a container is actually part of the desired end product and performs part of the desired function of that end product, it will be considered a component.¹²¹

The requirement for direct incorporation into the end product or construction material does not mean that an item has to lose its separate identity or itself be substantially changed in form to qualify as a component.¹²² Thus, the Comptroller General rejected a protester's argument that batteries provided as part of a diesel electric unit were separate "end products" versus "components" of the electric unit.¹²³

(2) Place of Component Origin - Manipulating the Outcome

To qualify as "domestic", all end products or construction materials must, absent an applicable exception, be mined, produced, or manufactured in the United States".¹²⁴ However, the Act, as implemented, does not require that the end product or construction

¹²⁰46 Comp. Gen. 784 (1967) (bottles in which pills were placed were mere packaging, as the real end items desired for use were the pills, and the bottles were only a convenient means of conveyance, performing no useful part in the function of the pills).

¹²¹Imperial Eastman Corp., 53 Comp. Gen. 726 (1974), 74-1 CPD ¶153 (tool case, in which tools were placed, and which, together with the tools, comprised a single "tool kit" procured as such by the agency, performed a useful part in the function of the desired end product ("tool kit") and was thus a component of that end product).

¹²²47 Comp. Gen. 21 (1967).

¹²³*Id.*

¹²⁴FAR 25.101; FAR 25.201.

material be composed entirely of domestic components and materials.¹²⁵ Rather, it only requires that the cost of the domestic components, i.e., those components mined, produced, or manufactured in the United States, exceed fifty percent of the cost of all components.¹²⁶ Further, because the Act, as implemented, does not levy a domestic content requirement on the individual components, the source of origin of materials and subcomponents that make up the individual components is not a concern.¹²⁷ Accordingly, domestic material "loses its U.S. identity" when used in the manufacture of a foreign component.¹²⁸ Similarly, a component comprised entirely of foreign material or subcomponents can still qualify as "domestic" for purposes of the Buy American Act as long as the component itself is manufactured in the United States.¹²⁹ Thus, if a contractor can introduce two separate, identifiable stages of manufacture into the United States, he can effectively preclude consideration of the cost of all earlier

¹²⁵ See, e.g., Hicks and Ingle Co. of Va., Inc., ASBCA No. 31871, Apr. 16, 1986, 86-2 BCA ¶18,956.

¹²⁶ *Id.*

¹²⁷ See, e.g., Orlite Engineering Co., Ltd., Comp. Gen. Dec. B-229615, Mar. 23, 1988, 88-1 CPD ¶ 300; Davis Walker Corp., Comp. Gen. Dec. B-184672, Aug. 23, 1976, 76-2 CPD ¶182; Hamilton Watch Co., Inc., Comp. Gen. Dec. B-179939, Jun. 6, 1974, 74-1 CPD ¶306; 45 Comp. Gen. 658 (1966).

¹²⁸ Orlite Engineering Co., Ltd., Comp. Gen. Dec. B-229615, Mar. 23, 1988, 88-1 CPD ¶300, at 3.

¹²⁹ Rolm Corp., Comp. Gen. Dec. B-200995, Aug. 7, 1981, 81-2 CPD ¶106; Hamilton Watch, Co. Inc., Comp. Gen. Dec. B-179939, Jun. 6, 1974, 74-1 CPD ¶306.

stages.¹³⁰ This limitation permits knowledgeable contractors to carefully manipulate the location of various stages of manufacture to produce a "domestic" end product or construction material that is, in reality, made almost entirely of foreign materials and foreign labor.¹³¹ For example, in *Hamilton Watch Co., Inc.*,¹³² the end product at issue was a general purpose watch comprised of nine components, by far the most expensive of which was the watch movement, which comprised between 85%-90% of the cost of the completed watch. The watch movement was itself comprised of approximately 60 parts, all of which were of foreign origin. However, because the movement was assembled¹³³ in the United States, it qualified as a domestic component for purposes of the Buy American Act. As a result, the watch also qualified as domestic, even though only 10%-15% of its cost was attributable to domestic material and labor.¹³⁴ The same limitation can also work against a contractor not familiar with Act, as amply illustrated by the recent case of *Orlite Engineering Co.*,

¹³⁰45 Comp. Gen. 658 (1966)(Where a contractor domestically manufactured billets from foreign source steel ingots, and then domestically manufactured steel reinforcing bars from the billets, the reinforcing bars were a domestic source end product).

¹³¹See generally, *Buy American: A Case of Form Over Substance*, *supra*, note 4.

¹³²Comp. Gen. Dec. B-179939, Jun. 6, 1974, 74-1 CPD ¶1306.

¹³³The Comptroller General has held that the mere assembly of previously manufactured parts constitutes "manufacture" within the meaning of the Act. *Id.* See also the text and accompanying notes at p. 40, *infra*.

¹³⁴*Id.*

*Ltd.*¹³⁵ *Orlite* involved a procurement of Army helmets made primarily from Kevlar fabric, which comprised more than fifty percent of the cost of the helmet. *Orlite* purchased the fabric domestically, but made the mistake of shaping the fabric into a component part of the helmet abroad. As a result, the component made from the Kevlar fabric was deemed "foreign" and, because the cost of the Kevlar was so high, the cost of that component exceeded fifty percent of the cost of all components, the remainder of which were domestic.¹³⁶ Accordingly, even though the final helmet was thereafter assembled in the United States and the actual cost of U.S. materials comprised more than fifty percent of the entire helmet cost, *Orlite's* product was held to be a foreign source end product.¹³⁷

Hamilton Watch and *Orlite Engineering* demonstrate the poor results that can occur under current evaluation procedures. In both cases, the final determination of whether a domestic or foreign end product was being offered bore no relationship to the true domestic or foreign content of the product concerned. As a result, the primary intent of the Buy American Act, i.e., to protect and promote domestic employment¹³⁸, was clearly circumvented. To preclude such antithetical outcomes requires a shift from the current artificial practice of considering only component costs to a "total cost"

¹³⁵Comp. Gen. Dec. B-229615, Mar. 23, 1988, 88-1 CPD ¶1300.

¹³⁶*Id.*

¹³⁷*Id.*

¹³⁸Comment, *supra* note 10, at 105-106.

evaluation. If more than fifty percent of the total cost of any given end product arises domestically, regardless of any intervening stages of foreign or domestic manufacture, then that end product should be considered "domestic" for purposes of the Buy American Act. Such an evaluation procedure would not only further the original intent of the Act, but would also reduce or even eliminate the importance attached to the term "manufacture".¹³⁹ Unfortunately, until such a change to the Act is made, knowledgeable contractors will continue to manipulate the place of component manufacture to create artificially "domestic" end products at the expense of their less knowledgeable competitors and the American work force.

(3) Comparing Component Costs

The last step in determining whether a domestic or foreign end product is being offered is to determine if the cost of domestic components exceeds fifty percent of the cost of all components.¹⁴⁰ Such a determination requires a comparison of the cost of the domestic components to the cost of the foreign components.¹⁴¹ It does not require or permit a comparison of the cost of foreign components to the total contract price or to the total manufacturing cost of the end

¹³⁹ See text and accompanying notes at pp. 37-48, *infra*.

¹⁴⁰ FAR 25.101; FAR 25.201.

¹⁴¹ See, e.g., *Ampex Corp.*, Comp. Gen. Dec. B-203021, Feb. 24, 1982, 82-1 CPD ¶163; 46 Comp. Gen. 784 (1967); 43 Comp. Gen. 306 (1963), *overruled on other grounds*, 46 Comp. Gen. 784 (1967); 35 Comp. Gen. 7 (1955).

product or construction material concerned.¹⁴²

The FAR does not define "cost" or specify the point at which such cost is to be computed for determining whether the cost of the domestic components exceeds fifty percent of the cost of all components. However, it is clear that to permit an equitable comparison of the cost of domestic and foreign components, the costs of each must be computed similarly.¹⁴³ Accordingly, any solicitation provision which purports to require dissimilar computation is without effect and bidders are not entitled to have their offers evaluated in accordance with such contrary solicitation language.¹⁴⁴

The "cost" to be compared is the cost to the contractor.¹⁴⁵ Thus, the cost of purchased components is the price paid by the contractor, while the cost of items manufactured in-house includes all costs of manufacturing, including applicable overhead and general and administrative rates, but does not include profit.¹⁴⁶ At least one commentator has argued that because the cost of items purchased from

¹⁴² *Id.*

¹⁴³ See 39 Comp. Gen. 695 (1960); 35 Comp. Gen. 7 (1955).

¹⁴⁴ 39 Comp. Gen. 695 (1960) (The solicitation in this case would have excluded "domestic processing costs" in computing the cost of domestic components but did not exclude similar costs in relation to foreign components. The Comptroller rejected arguments that the error required rejection of all bids and re-solicitation, holding that all bidders are chargeable with notice of the law and that no bidders were therefore prejudiced by the improper solicitation language. Given the numerous deficiencies in the language of the Act and the implementing regulations, the validity of this latter finding is highly questionable).

¹⁴⁵ Avantek, Inc., 50 Comp. Gen. 697 (1971), 1971 CPD ¶28.

¹⁴⁶ *Id.* See also, 35 Comp. Gen. 7 (1955).

vendors includes an element of profit, an element of profit should also be considered in the "cost" of components manufactured by the contractor.¹⁴⁷ However, such a position is contrary to the plain language of Executive Order 10582¹⁴⁸ and has not been adopted by the Comptroller General.

Costs of combining or assembling completed components into the final end product or construction material are not costs of the individual components for purposes of the Buy American Act.¹⁴⁹ Similarly, the costs of testing, inspecting, and packaging either the completed components or the final end product or construction material are not to be considered.¹⁵⁰ Component costs do include, however, "transportation costs to the place of incorporation into" the end product or construction material concerned and "any applicable duty (whether or not a duty-free entry certificate is issued)".¹⁵¹ But, once individual components are incorporated into the end product or construction material, transportation costs may no longer be

¹⁴⁷Chierichella, *supra* note 9, at 99.

¹⁴⁸Section 2(a) of the Order provides that "materials shall be considered to be of foreign origin if the cost of the foreign products used in such materials constitutes fifty per centum or more of the cost of all products used in such materials." (Emphasis added). No reference to profit is made.

¹⁴⁹43 Comp. Gen. 306 (1963), *overruled on other grounds*, 46 Comp. Gen. 784 (1967); 35 Comp. Gen. 7 (1955).

¹⁵⁰*Id.* See also, Patterson Pump Co., Comp. Gen. Dec. B-200165, Dec. 31, 1980, 80-2 CPD ¶453.

¹⁵¹FAR 25.101; FAR 25.201. See also, Dick Holland, Inc. and Rinker Materials Corp., ASBCA No. 21304, 77-1 BCA ¶12,540 (1977); Unicare Vehicle Wash, Inc., Comp. Gen. Dec. B-181852, Dec. 3, 1974, 74-2 CPD ¶304; 35 Comp. Gen. 7 (1955).

separately allocated to the individual components.¹⁵²

c. "Manufacture" - An Illusive Concept

As can be seen from the above discussion, the place of manufacture of end products, construction materials and components is the key to determining whether a domestic end product or construction material is being offered. Accordingly, it is necessary to know what constitutes "manufacture" to determine if such manufacture occurred in the United States or abroad.¹⁵³ Further, because costs are measured only at the component level, it is important to determine when the manufacture of a component ends and the manufacture of the final end product or construction material begins.¹⁵⁴

Despite its obvious importance, the term "manufacture" is not defined in the Buy American Act, Executive Order 10582, or the implementing regulations. Repeated recommendations from the

¹⁵²Dick Holland, Inc. and Rinker Materials Corp., ASBCA No. 21304, 77-1 BCA ¶12,540 (1977)(Contractor not permitted to allocate the cost of plant to site delivery of concrete to the individual components of that concrete. Had it done so, the cost of foreign cement used in the concrete would have constituted only 43% of the cost of all components. However, absent such an allocation, the cost of the foreign cement constituted 53% of the cost of all components. As a result, the concrete was considered a foreign construction material). *Accord.*, Unicare Vehicle Wash, Inc., Comp. Gen. Dec. B-181852, Dec. 3, 1974, 74-2 CPD ¶1304; 35 Comp. Gen. 7 (1955).

¹⁵³See generally, J. Cibinic & R. Nash, *Formation of Government Contracts* 970-972 (2nd ed. 1986).

¹⁵⁴See, e.g., Cincinnati Electronics Corp., 55 Comp. Gen. 1479 (1976), 76-2 CPD ¶286; 45 Comp. Gen. 658 (1966).

Comptroller General¹⁵⁵ and commentators¹⁵⁶ to define the term have been rejected in the interest of retaining agency flexibility.¹⁵⁷ The Comptroller has reluctantly held that the decision not to define manufacture is a matter of agency discretion not subject to review by the GAO.¹⁵⁸ Further, the Comptroller has specifically declined to itself establish such a definition on the basis that such an undertaking is a legislative or administrative function beyond the purview of the GAO, which is constrained to only apply existing legislative and regulatory guidance to the facts of each particular case as the need arises.¹⁵⁹ As a result, what constitutes "manufacture" within the meaning of the Buy American Act is a question of fact, rather than law, and thus necessarily varies on a case by case basis.¹⁶⁰ While such an approach does provide a high degree of flexibility, it has led to decisions that are, in the words of one

¹⁵⁵ See Alan Scott Industries, Comp. Gen. Dec. B-193142, May 8, 1979, 79-1 CPD ¶316; Davis Walker Corp., Comp. Gen. Dec. B-184672, Aug. 23, 1976, 76-2 CPD ¶182; Cincinnati Electronics Corp., 55 Comp. Gen. 1479 (1976), 76-2 CPD ¶286; GAO Audit Report, B-175633, PSAD 76-41, Nov. 3, 1975; 47 Comp. Gen. 21 (1967).

¹⁵⁶ See, e.g., Gantt & Speck, *supra* note 1, at 384; Chierichella, *supra* note 9, at 95-97; Reynolds & Phillips, *supra* note 20, at 223.

¹⁵⁷ See Alan Scott Industries, Comp. Gen. Dec. B-193142, May 8, 1979, 79-1 CPD ¶316. See also, J. Cibinic & R. Nash, *supra* note 157, at 972 (referencing 654 Fed. Ct. Rep. A-5 (1976)).

¹⁵⁸ Alan Scott Industries, Comp. Gen. Dec. B-193142, May 8, 1979, 79-1 CPD ¶316.

¹⁵⁹ 47 Comp. Gen. 21, 25 (1967).

¹⁶⁰ United States v. Rule Industries, Inc., 878 F.2d 535 (1st Cir. 1989).

court, "all over the lot."¹⁶¹ Moreover, attempts to bring some order to this area by analogizing "manufacture" within the meaning of the Buy American Act to the same term as used in other legislative or regulatory provisions have proven unsuccessful. For example, the Comptroller General has held that the requirement, with respect to a small business set-aside, that the contractor furnish items "manufactured or produced" by a small business concern in the United States¹⁶² is "separate and distinct" from and does not necessarily coincide with the meaning of "manufacture" for purposes of the Buy American Act.¹⁶³

Notwithstanding the above, a few rules of general application do exist. It is clear that "manufacture" is not limited to the production of articles directly from raw materials.¹⁶⁴ Further, it is not limited to "mechanical operations" and is not dependent on the "complexity of the process" involved.¹⁶⁵ It has also been held that any definition of "manufacture" that would limit its application to an item that is "off the shelf...rather than...produced to exact specifications as to all components" must be rejected.¹⁶⁶ Finally,

¹⁶¹ *Id.*, at 545 (Appendix of trial judge's instructions to the jury).

¹⁶² See FAR 52.219-6.

¹⁶³ American Amplifier and Television Corp., 53 Comp. Gen. 463 (1974), 74-1 CPD ¶10.

¹⁶⁴ See, e.g., 43 Comp. Gen. 306 (1963), *overruled on other grounds*, 46 Comp. Gen. 784 (1967); 39 Comp. Gen. 435 (1959).

¹⁶⁵ Imperial Eastman Corp., 53 Comp. Gen. 726 (1974), 74-1 CPD ¶153.

¹⁶⁶ Spaw Glass, Inc., ICBA No. 282, 61-2 BCA ¶3,185 (1961).

the Comptroller General has held that the mere act of "purchasing" materials needed for contract performance does not constitute "manufacture". Accordingly, the fact that a foreign firm will act as a purchasing agent for a concern that intends to provide a domestic source end product does not preclude a finding that such product is manufactured in the United States.¹⁶⁷

Beyond these few limited principles, the only rule appears to be that there are no firm rules. For example, many cases have espoused the general principle that "mere assembly" of previously manufactured parts or components constitutes manufacture.¹⁶⁸ However, the board in *Data Transformation Corporation*¹⁶⁹ held that the "installation" of a computer system, consisting of connecting printers and other peripheral automatic data processing equipment to the central processing unit did not constitute "manufacture" of the computer system. It is difficult to see how, if at all, the "installation" described in that case differs from the "mere assembly" of previously manufactured parts or components referenced in previous decisions.

¹⁶⁷To the Secretary of the Army, 52 Comp. Gen. 886 (1973), 1973 CPD ¶56, *request for reconsideration denied*, Cincinnati Electronics Corp., Comp. Gen. Dec. B-175633, Jan. 25, 1974, 74-1 CPD ¶29.

¹⁶⁸See, e.g., *Morey Machinery, Inc.*, Comp. Gen. Dec. B-233793, Apr. 18, 1989, 89-1 CPD ¶383; *Hewlett-Packard Co.*, Comp. Gen. Dec. B-228271, Dec. 3, 1987, 87-2 CPD ¶545; *Rolm Corp.*, Comp. Gen. Dec. B-200995, Aug. 7, 1981, 81-2 CPD ¶106; *Dubie-Clark Company, Patterson Pump Div.*, Comp. Gen. Dec. B-189642, Feb. 28, 1978, 78-1 CPD ¶161; *Hamilton Watch Company, Inc.*, Comp. Gen. Dec. B-179939, Jun. 6, 1974, 74-1 CPD ¶306; *Jamar Corp.*, 52 Comp. Gen. 13 (1972), 1972 CPD ¶72; *Klefstad Engineering Co., Inc. & Blackhawk Heating & Plumbing Co., Inc.*, VACAB No. 551, 67-1 BCA ¶6,393 (1967).

¹⁶⁹GSBCA No. 8982-P, 87-3 BCA ¶20,017 (1987).

Similarly, the court in *Allis-Chalmers Corp. v. Freidkin*¹⁷⁰ held that the on site assembly of huge hydro-turbines for a dam power plant that were simply too large to ship in one piece did not constitute "manufacture" of such hydro-turbines. This case is perhaps distinguishable in that the procurement involved a mixed supply and construction contract and the hydro-turbines were installed into the dam in various stages as the construction progressed rather than as a single unit.¹⁷¹ However, the holding adds confusion to an already difficult area of the law.

Another area of conflict is the proper consideration to be given reassembly of an item after disassembly for purposes of either further manufacture, such as to permit incorporation of a component into the final end product, or for purposes of shipment. The Comptroller General has consistently held that such reassembly does not constitute "manufacture" for purposes of the Buy American Act.¹⁷² The same rule has also been adopted by the Armed Services Board of Contract Appeals.¹⁷³ However, the court in *Textron, Inc., Bell Helicopter Textron Div. v. Adams*¹⁷⁴ held, in direct conflict with the

¹⁷⁰481 F. Supp. 1256 (M.D.Pa. 1980).

¹⁷¹*Id.*

¹⁷²See *Ampex Corp.*, Comp. Gen. Dec. B-203021, Feb. 24, 1982, 82-1 CPD ¶163; *Rolm Corp.*, Comp. Gen. Dec. B-200995, Aug. 7, 1981, 81-2 CPD ¶106; *Bell Helicopter Textron*, 59 Comp. Gen. 158 (1979), 79-2 CPD ¶431.

¹⁷³*Ballantine Laboratories, Inc.*, ASBCA No. 35138, 88-2 BCA ¶20,660 (1988).

¹⁷⁴493 F. Supp. 824 (D.D.C. 1980).

Comptroller's decision on an earlier protest,¹⁷⁵ that the domestic reassembly of a helicopter airframe manufactured abroad and then disassembled for shipment to the United States constituted "manufacture". The holding is a poor one, not only because it contravenes prior decisions, but because it opens the door to further contractor manipulation in an area already rife with uncertainty. It effectively permits contractors to treat as domestic what are in reality foreign end products through the ruse of foreign disassembly and domestic reassembly of such end products.

Many cases have held that the processes of testing, evaluation, and packaging of previously completed end products or components do not constitute "manufacture".¹⁷⁶ Although this principle is, for the most part, fairly straight forward, its application is more difficult in cases in which the container or package is itself deemed a component of the desired end product. For example, the Comptroller General has held in procurements of integrated tool kits that the cases in which the tools are placed and which, together with the tools, comprise the desired "kits", are not mere packaging, but perform a useful part in the function of the desired end products and thus qualify as

¹⁷⁵Bell Helicopter Textron, 59 Comp. Gen. 158 (1979), 79-2 CPD ¶431.

¹⁷⁶See, e.g., Ballantine Laboratories, Inc., ASBCA No. 35138, 88-2 BCA ¶20,660 (1988)(As stated by the board, "...you cannot make a domestic silk purse from a foreign sow's ear through the processes of domestic testing, inspection and packaging prior to delivery."); Patterson Pump Co., Comp. Gen. Dec. B-200165, Dec. 31, 1980, 80-2 CPD ¶453; 48 Comp. Gen. 727 (1969); 46 Comp. Gen. 784 (1967).

components of such end products.¹⁷⁷ Thus, assembling the tools and placing them in the cases constitutes "manufacture".¹⁷⁸ However, a different holding will result if the packaging, though necessary, serves only as a convenient means of conveyance.¹⁷⁹ Thus, in a procurement of pills, the Comptroller held that the act of placing the pills in bottles did not constitute "manufacture", as the bottles, although necessary to effect delivery, served no useful part in the ultimate function of the desired end product, *i.e.*, the pills.¹⁸⁰

A large part of the confusion surrounding the meaning of "manufacture" arises from the fact that the application of what is clearly a manufacturing process to a given material or component does not necessarily result in the "manufacture" of a new component for purposes of the Buy American Act.¹⁸¹ Rather, the test is whether any given manufacturing process "may be properly regarded as producing a basically new manufactured article or material at the end of any particular operation...."¹⁸² The application of this test has resulted in some very fine distinctions. For example, the domestic processes of "boring, plating and machining" an imported cylinder

¹⁷⁷Imperial Eastman Corp., 53 Comp. Gen. 726 (1974), 74-1 CPD ¶153; New Britain Hand Tool Div., Litton Industrial Products, Inc., 58 Comp. Gen. 49 (1978), 78-2 CPD ¶312.

¹⁷⁸*Id.*

¹⁷⁹46 Comp. Gen. 784 (1967).

¹⁸⁰*Id.*

¹⁸¹48 Comp. Gen. 727 (1969).

¹⁸²*Id.*, at 730.

liner was held not to constitute domestic manufacture of a new component cylinder.¹⁸³ Similarly, in a procurement of hacksaw blades, the domestic processes of grinding and setting teeth, flame treating, tempering and painting, when applied to imported hacksaw blanks (thin strips of steel in the general shape of the finished blade) did not result in the domestic manufacture of an interim component blade.¹⁸⁴ In contrast, the processes of stamping, shaping and smoothing lock parts from sheet steel constituted manufacture of the component lock parts.¹⁸⁵ Similarly, the cutting, bonding, trimming, heating and molding of fabric into a helmet shell constituted manufacture and made the shell, rather than the fabric, a component of the completed helmet.¹⁸⁶ The "test" established by these cases is further blurred by the Comptroller General's decision in *Marbex, Inc*, which involved a procurement of sterilized surgeons gloves.¹⁸⁷ The Comptroller there held that the domestic sterilization of surgeons gloves produced abroad did not constitute "manufacture" in the United States, since it did not "materially alter the form" of the gloves.¹⁸⁸ This language appears to significantly narrow the effect of prior decisions in that the Comptroller had previously stated that a change "in the physical

¹⁸³ *Id.*

¹⁸⁴ *United States v. Rule Industries, Inc.*, 878 F.2d 535 (1st Cir. 1989).

¹⁸⁵ *Yohar Supply Co.*, 66 Comp. Gen. 251 (1987), 87-1 CPD ¶152.

¹⁸⁶ *Orlite Engineering Co.*, Comp. Gen. Dec. B-229615, 88-1 CPD ¶300.

¹⁸⁷ Comp. Gen. Dec. B-225799, May 4, 1987, 87-1 CPD ¶468.

¹⁸⁸ *Id.*

or structural identity" of an item, though an appropriate consideration, is not required.¹⁸⁹ Moreover, the Comptroller in *Marbex* went on to state that the "manufacture" of an end product means the "completion of the article in the form required for use by the government."¹⁹⁰ The meaning of this latter statement is unclear, in that it appears to directly conflict with the basic holding of the case. From the facts related in the decision, it is evident that the "form required" by the government was not simply surgeons gloves, but *sterilized* surgeons gloves. Unsterilized gloves would have no doubt been of little value to the government and would have been rejected as not in compliance with the specifications. Given the obvious importance of the sterilization process, the Comptroller's insistence upon a material alteration in the physical form of the gloves is neither understandable nor in line with prior decisions.

A final area of difficulty associated with the term "manufacture" is the status of a material or component that has been subjected to several distinct, but related manufacturing processes. In such cases, whether the individual processes are closely related in time or geographic location is not determinative.¹⁹¹ Rather, the key factors appear to be the standard practice in the industry and the extent of the effect of any given process on the underlying material or

¹⁸⁹*Yohar Supply Co.*, 66 Comp. Gen. 251, 254 (1987), 87-1 CPD ¶152, at 4.

¹⁹⁰*Id.*, at 4.

¹⁹¹See, e.g., *Davis Walker Corp.*, Comp. Gen. Dec. B-184672, Aug. 23, 1976, 76-2 CPD ¶182; *Cincinnati Electronics Corp.*, 55 Comp. Gen. 1479 (1976), 76-2 CPD ¶286; 45 Comp. Gen. 658 (1966).

component.¹⁹² Thus, the mere fact that steel ingots were transformed into billets and then steel reinforcing bars in one continuous process in the same factory did not make the ingots, rather than the billets, components of the reinforcing bars.¹⁹³ The Comptroller reasoned that the standard practice in the industry was to perform the two processes in separate stages and the differences in the physical characteristics of the ingot and the billet were substantial.¹⁹⁴ Similar reasoning was used to hold that the domestic "drawing" of foreign steel rod into wire and then galvanizing the wire were two separate stages of manufacture.¹⁹⁵ As a result, the galvanized wire was deemed to be a domestic, rather than foreign end product.¹⁹⁶ Attempts to determine whether separate stages of manufacture are involved without regard to the geographical or chronological relationship of the processes concerned can, however, lead to an absurd result, as amply illustrated by the Comptroller's decision in *Cincinnati Electronics Corp.*¹⁹⁷ In *Cincinnati Electronics*, electronic radio parts were purchased in the United States, shipped to Mexico for almost complete assembly, and then returned to the United States for final assembly. In holding that the resulting radios were domestic end products, the Comptroller

¹⁹² *Id.*

¹⁹³ 45 Comp. Gen. 658 (1966).

¹⁹⁴ *Id.*

¹⁹⁵ Davis Walker Corp., Comp. Gen. Dec. B-184672, Aug. 23, 1976, 76-2 CPD ¶182.

¹⁹⁶ *Id.*

¹⁹⁷ 55 Comp. Gen. 1479 (1976), 76-2 CPD ¶286.

reasoned that even though the radios were assembled in widely separated geographic locations, they were not subjected to *separate* stages of manufacture, but were part of one continuous manufacturing process. As such, the "components" of the finished radios were *not* the subassemblies made in Mexico, but the parts purchased in the United States.¹⁹⁸ The result was that the radios were declared to be domestic end products, even though only ten to fifteen percent of all assembly operations were performed in the United States.¹⁹⁹ The decision clearly deviates from the prior decisions and has been the subject of much criticism by commentators.²⁰⁰

Given the many conflicting case decisions in this area, it is difficult to understand the government's reluctance to provide guidance on the meaning of "manufacture".²⁰¹ Such guidance has the potential to benefit both industry and the government. It would provide contractors with a clearer understanding of what the Buy American Act requires. The result would be a corresponding reduction in the number of related protests and alleged performance violations with which the government must contend, along with the increased contract administration costs which such actions necessarily cause. As an alternative to defining "manufacture", the Buy American Act should be substantially revised to require only that greater than

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ See Chierichella, *supra* note 9, at 91-95.

²⁰¹ See Alan Scott Industries, B-193142, May 8, 1979, 79-1 CPD ¶1316.

fifty percent of the *total cost* of a given end product or construction material arise domestically. Such an approach would shift the current artificial focus from the place of intermediate stages of manufacture to the true domestic content of the item concerned and would thus come far closer to fulfilling the true intent of the Act. Until this or similar corrective action is taken, knowledgeable contractors will continue to manipulate the manufacturing process to pass off as "domestic" items which are of predominantly foreign content.

2. Public vs Private Works

The Buy American Act does not apply to every procurement of the United States, but only to the procurement of supplies "acquired for public use"²⁰² and to procurements for the "construction, alteration, or repair" of "public buildings" or "public works".²⁰³ "Public use", "public building", and "public work" are defined as "use by, public building of, and public work of, the United States, the District of Columbia, Puerto Rico, American Samoa, the Canal Zone, and the Virgin Islands."²⁰⁴ Items "acquired" for public use include leased items.²⁰⁵

²⁰²41 U.S.C.A. §10a (1987 & Supp. 1989).

²⁰³41 U.S.C.A. §10b(a) (1987 & Supp. 1989).

²⁰⁴41 U.S.C.A. §10c(b) (1987 & Supp. 1989). See also, Department of the Treasury - Request for Advance Decision, 58 Comp. Gen. 327 (1979), 79-1 CPD ¶181; General Electric Corp., 54 Comp. Gen. 791 (1975), 75-1 CPD ¶176.

²⁰⁵See, e.g., Lanier Business Products, Inc., Comp. Gen. Dec. B-196736, Mar. 10, 1981, 81-1 CPD ¶186; National Office Equipment Co., Comp. Gen. Dec. B-191003, Jun. 6, 1978, 78-1 CPD ¶413; 46 Comp. Gen. 47 (1966).

Although it may be assumed that most materials purchased by the government are for public use, such is not always the case.²⁰⁶ For example, items "purchased specifically for commissary resale" are not purchases for use by the United States and are thus not covered by the Act.²⁰⁷ Similarly, the Comptroller General has held that procurements of nickel by the Bureau of the Mint for use in manufacturing coins for foreign governments are not "for the United States" and thus not subject to the strictures of the Act.²⁰⁸ Procurements by state and local governments or private concerns using federal funds provided through grants or federal loan guarantee programs are also not subject to Buy American Act requirements.²⁰⁹ Such procurements may, however, be subject to other federal domestic preference restrictions²¹⁰ or to state domestic preference laws.²¹¹

In one unique case, a protester sought a determination of whether a foreign built scale model which was not required by the specifications but was purchased for the contractor's use in performance of a cost

²⁰⁶Department of the Treasury--Request for Advance Decision, 58 Comp. Gen. 327 (1979), 79-1 CPD ¶181.

²⁰⁷FAR 25.102(a)(5). Procurements of such items for use in domestic commissaries are, however subject to the Department of Defense balance of payments restrictions. DFARS 225.102(4).

²⁰⁸Department of the Treasury--Request for Advance Decision, 58 Comp. Gen. 327 (1979), 79-1 CPD ¶181.

²⁰⁹Babcock & Wilcox Co., 57 Comp. Gen. 85 (1977), 77-2 CPD ¶368; General Electric Corp., 54 Comp. Gen. 791 (1975), 75-1 CPD ¶176.

²¹⁰See text and accompanying notes at Chapter 3, *infra*.

²¹¹For a discussion of such state domestic preference laws, see Watkins, *supra* note 9, at 217-218.

reimbursement, research and development contract was "acquired for public use."²¹² Because the item was bought on a cost reimbursement basis, it became government property and would ultimately be turned over to the government at the end of the contract. However, the Navy argued that because the specifications did not require purchase of the model, the government's possession was merely "incidental" and that the item was therefore not being "acquired for public use."²¹³ The Comptroller General neatly sidestepped the issue by finding that even if the Buy American Act requirements did apply to such an item, the evaluated cost of the foreign model remained low even after application of the appropriate evaluation differential.²¹⁴

3. EXCEPTIONS

Exceptions to the Buy American Act domestic preference provisions arise both from the language of the Act itself and through the operation of other statutory provisions. However, it is clear that, notwithstanding all of the exceptions which currently exist, the Act is alive and well and the restrictions which it imposes will be enforced absent the granting of an exception to the Act by the agency concerned.²¹⁵ Moreover, any exceptions to the Act may only be granted in strict accordance with the existing statutory and regulatory

²¹²Centro Corp., 51 Comp. Gen. 217 (1971), 1971 CPD ¶74.

²¹³*Id.*, at 220.

²¹⁴*Id.*

²¹⁵*A. Hollow Metal Warehouse, Inc. v. United States Fidelity and Guaranty Co.*, 700 F.Supp. 410 (N.D.Ill. 1988).

framework.²¹⁶

There is no statutory or regulatory requirement that a solicitation provide notice of the possible applicability of an exception before that exception may be invoked.²¹⁷ However, the Comptroller General will entertain allegations that an agency improperly applied the requirements of the Act during the course of contract award.²¹⁸ Absent an allegation that the agency, at the time of contract award, intended to grant a post-award exception to the Act, the Comptroller will not review agency determinations to grant an exception during the course of contract performance.²¹⁹ Such actions are matters of contract administration beyond the purview of the GAO bid protest procedures.²²⁰ However, the Boards of Contract Appeals do have jurisdiction to entertain contractor claims arising out of an agency's granting or refusal to grant an exception during contract performance.²²¹

For many years, it was held that a contractor's failure to request

²¹⁶LaCoste Builders, Inc., ASBCA Nos. 30085, *et al.*, 88-1 BCA ¶20,360 (1988).

²¹⁷Crockett Machine Co., Comp. Gen. Dec. B-189380, Feb. 9, 1978, 78-1 CPD ¶109. *See also*, A&P Surgical Company, Inc., 62 Comp. Gen. 256 (1983), 83-1 CPD ¶263.

²¹⁸*See, e.g.*, E.J. Murray Company Inc., Comp. Gen. Dec. B-212107.3, Dec. 18, 1984, 84-2 CPD ¶680.

²¹⁹*Id.*

²²⁰*Id.*

²²¹John C. Grimberg Company, Inc., ASBCA Nos. 32288, *et al.*, 88-1 BCA ¶20,346 (1987), *aff'd on reconsid.*, 88-2 BCA ¶20,713 (1988), *rev'd on other grounds sub nom.*, John C. Grimberg Co., Inc. v. United States, 869 F.2d 1475 (Fed.Cir. 1989).

an exception to the Act when submitting its bid or offer precluded an agency from considering such a request after contract award.²²²

However, this line of cases was overturned by the United States Court of Claims in 1981, which held that post-award exceptions could be requested and granted under appropriate circumstances.²²³ In considering post-award exception requests, contracting officers are bound by the same statutory and regulatory guidelines which govern the granting of pre-award exceptions.²²⁴ An agency's refusal to grant a post-award exception will be examined using an "abuse of discretion" standard of review.²²⁵ If the circumstances do warrant granting a post-award exception, forcing the contractor to "comply" with the Act by furnishing domestic end products or construction materials amounts to a constructive change compensable under the changes clause.²²⁶ However, if an agency refusal to grant a post-award exception is deemed proper, no change is warranted, even though it may cost the

²²² See, e.g., *Edwin Moss & Son, Inc.*, GSBGA No. 4521, 77-1 BCA ¶12,517 (1977); *Wright & Morrissey, Inc.*, VACAB No. 1147, 76-2 BCA ¶11,955 (1976); *Kleftsted Engineering Company, Inc. & Blackhawk Heating & Plumbing Company, Inc.*, VACAB No. 551, 66-2 BCA ¶5,987 (1966), *vacated on other grounds*, 67-1 BCA ¶6,393 (1967).

²²³ *John T. Brady & Company v. United States*, ___ Ct.Cl. ___ (1981), *aff'd*, 693 F.2d 1380 (Fed.Cir. 1982).

²²⁴ *L.G. Lefler, Inc. v. United States*, 6 Cl.Ct. 514, 519 n.5 (1984), *aff'd on other grounds*, 801 F.2d 387 (Fed.Cir. 1986).

²²⁵ See *John C. Grimberg Co., Inc. v. United States*, 869 F.2d 1475 (Fed.Cir. 1989); *Blinderman Construction Co., Inc. v. United States*, 15 Cl.Ct. 121 (1988); *John T. Brady & Company v. United States*, 693 F.2d 1380 (Fed.Cir. 1982).

²²⁶ *John T. Brady & Company v. United States*, 693 F.2d 1380 (Fed.Cir. 1982).

contractor more to perform using domestic end products or construction materials.²²⁷

a. Within The Buy American Act

(1) Unreasonable Cost

With respect to the acquisition of supplies, the Act, as implemented, provides that domestic end products need not be acquired if the agency head "determines...the cost to be unreasonable...."²²⁸ For construction contracts, the Act similarly provides that domestic construction materials need not be acquired if the agency head determines "that it would unreasonably increase the cost...."²²⁹ However, the Act does not offer any guidance on when the cost of domestic products so far exceeds the cost of foreign products as to be considered "unreasonable" and its legislative history is similarly silent on this issue.²³⁰ To fill this void, the Treasury Department issued a directive in 1934 providing that the cost of domestic goods was "unreasonable" if it exceeded the cost of comparable foreign goods

²²⁷ See, e.g., *Huntington Construction, Inc.*, ASBCA No. 33525, 89-2 BCA ¶21,867 (1989).

²²⁸ 41 U.S.C.A. §10a (1987 & Supp. 1989); FAR 25.102(a)(2).

²²⁹ 41 U.S.C.A. §10b(a) (1987 & Supp. 1989); FAR 25.203(a). Except for minor differences in language that have proven inconsequential in application, the portion of the Act applicable to construction contracts sets out the same exceptions that are applicable to the procurement of supplies. As an added measure, the construction portion also specifically adopts all of the exceptions applicable to the procurement of supplies. 41 U.S.C.A. §10b(a) (1987 & Supp. 1989). See generally *Gantt & Speck*, *supra* note 1, at 392-393.

²³⁰ 49 Comp. Gen. 539 (1965).

by more than twenty-five percent.²³¹ Although many agencies thereafter adopted a similar rule, its use was not uniform, either in terms of the percentage factor used or the way in which it was applied.²³² The uncertainties which this lack of uniformity caused for federal contractors was largely eliminated with the issuance of Executive Order 10582 in 1954.²³³

Executive Order 10582 provides in pertinent part that "the bid or offered price of materials²³⁴ of domestic origin shall be deemed to be unreasonable...if the...price thereof exceeds...the bid or offered price of like materials of foreign origin" plus one of two alternative evaluation differentials.²³⁵ The evaluation differential to be added to the price of the foreign bid or offer may equal six percent of such price.²³⁶ Applicable duty is not excluded from the bid or offered price for purposes of this six percent evaluation differential.²³⁷ Alternatively, the agency may apply an evaluation differential equal to ten percent of the price of the foreign material, "exclusive of

²³¹Treasury Department Circular Letter No. 6, Mar. 31, 1934. See also, 30 Comp. Gen. 385 (1951)(referencing a later Treasury Department Circular of similar effect).

²³²See generally, Gantt & Speck, *supra* note 1, at 390-391; Knapp, *supra* note 60, at 432.

²³³For a complete citation to Executive Order 10582, see note 63, *supra*.

²³⁴§1(a) of the Order provides that "the term 'materials' includes articles and supplies."

²³⁵Executive Order 10582, §2(b).

²³⁶Executive Order 10582, §2(c)(1).

²³⁷FAR 25.105(a).

applicable duty and all costs incurred after arrival in the United States" if the price of the foreign materials is \$25,000 or more, or "exclusive only of applicable duty" if the price of the foreign materials is less than \$25,000.²³⁸ Although an agency may, within its discretion, employ either evaluation scheme,²³⁹ only the six percent differential is widely used, and the FAR does not even reference the ten percent differential.²⁴⁰ The Comptroller General has rejected arguments that the unreasonable cost evaluation scheme is unconstitutional²⁴¹ or that it violates "the stated provisions or intent of the Buy American Act."²⁴²

Executive Order 10582 permits additional special consideration for domestic small business or labor surplus area concerns. Section 3 of the Order provides that an agency may place "a fair proportion of the total purchases with small business concerns"²⁴³ and may reject a bid or offer of foreign materials if the low offeror of domestic materials "undertakes to produce substantially all of such materials in areas of substantial unemployment...."²⁴⁴ These policy considerations are reflected in the FAR through application of an additional six percent

²³⁸Executive Order 10582, §2(c)(2).

²³⁹41 Comp. Gen. 70 (1961).

²⁴⁰See FAR 25.105(a). See generally, Watkins, *supra* note 9, at 203.

²⁴¹39 Comp. Gen. 309 (1959).

²⁴²General Electric Corp., 54 Comp. Gen. 791 (1975), 75-1 CPD ¶176.

²⁴³Executive Order 10582, §3(b).

²⁴⁴Executive Order 10582, §3(c).

differential, for a total of twelve percent, if the lowest acceptable domestic offer is from a small business or labor surplus area concern.²⁴⁵ However, the FAR requires a specific determination by the agency head as to whether award to the offeror of a domestic end product would result in unreasonable cost "if an award of more than \$250,000 would be made to a domestic concern if the 12-percent factor were applied, but not if the 6-percent factor were applied...."²⁴⁶ If an agency has reason to question whether a bidder or offeror qualifies as a small business or labor surplus area concern, it must make reasonable attempts to verify such status prior to applying the additional six percent evaluation differential.²⁴⁷

With respect to small business concerns, the Comptroller has rejected arguments that use of a Buy American Act provision in small business set asides is improper.²⁴⁸ The fact that a small business offers a foreign end product within the meaning of the Buy American Act does not automatically negate its status as a small business concern for purposes of that procurement. Rather, the key is whether the small business concern "makes some significant contribution to the manufacture or production of the end product concerned."²⁴⁹ Such a

²⁴⁵FAR 25.105(a)(2).

²⁴⁶FAR 25.105(c).

²⁴⁷See *Towmotor Corp.*, 65 Comp. Gen. 373 (1986), 86-1 CPD ¶1219; *Allis-Chalmers Corp. v. Freidkin*, 481 F.Supp. 1256 (M.D.Pa. 1980), *aff'd*, 635 F.2d 248 (3rd Cir. 1980).

²⁴⁸*A&P Surgical Co., Inc.*, Comp. Gen. Dec. B-196843, *et al.*, Apr. 8, 1980, 80-1 CPD ¶1262.

²⁴⁹*Id.*, at 2.

determination is different from and is not governed by the domestic preference requirements of the Buy American Act.²⁵⁰

The Comptroller has also rejected arguments that the extra evaluation differential accorded to labor surplus concerns violates the Maybank Amendment prohibition against the use of appropriated funds "for the payment of a price differential on contracts...for the purpose of relieving economic dislocations."²⁵¹ The Comptroller reasoned that although the Buy American Act labor surplus concern differential does help relieve economic dislocations, the differential is not applied for that purpose but only for the purpose of preferring domestic products over foreign made products.²⁵²

A bidder or offeror seeking to qualify for the twelve percent evaluation differential as a labor surplus area concern need not be a "certified eligible concern" within the meaning of a labor surplus set aside.²⁵³ Failure to specify which labor surplus area the bidder or offeror is claiming is also not critical.²⁵⁴ Rather, to qualify for the labor surplus differential, it need only be clear from the entirety of the bid or proposal package that the effort will be

²⁵⁰ *Id.* *Accord.*, American Amplifier and Television Corp., 53 Comp. Gen. 463 (1974), 74-1 CPD ¶10.

²⁵¹ Maybank Amendment, 57 Comp. Gen. 34 (1977), 77-2 CPD ¶1333. (The Maybank Amendment was a standard appropriation act feature since first enacted as part of the FY54 Appropriation Act, Pub. L. No. 179, 67 Stat. 336 (1953)). Although not renewed in the FY90 Appropriation Act, it still applies to procurements using earlier year appropriations.

²⁵² *Id.*

²⁵³ Brown Boveri Corp., 52 Comp. Gen. 265 (1972), 1972 CPD ¶101.

²⁵⁴ *Id.*

performed in a labor surplus area.²⁵⁵

The Comptroller General has also ruled that because the twelve percent labor surplus differential is intended to *prospectively* increase or encourage performance in a labor surplus area, the extra differential should not be applied to goods *previously* manufactured to a labor surplus area if the offeror, prior to the instant contract, closed that labor surplus area facility.²⁵⁶ In such case, application of the additional differential would not further the national policy of promoting performance in a labor surplus area.²⁵⁷ However, the extra differential is applicable to goods previously manufactured in a labor surplus area if that facility is still in operation, since there is a "reasonable presumption" that stock drawn from inventory will be replaced and that such replacement will generate the need for additional employment by the labor surplus area concern.²⁵⁸

Regardless of which evaluation differential is ultimately used, it is clear that a determination of whether the cost of domestic articles, materials and supplies is "unreasonable" within the meaning of the Buy American Act cannot be made in advance of a solicitation.²⁵⁹ Such a determination contemplates a comparison of

²⁵⁵ *Id.*

²⁵⁶ Dictaphone Corp., 58 Comp. Gen. 234 (1979), 79-1 CPD ¶49.

²⁵⁷ *Id.*

²⁵⁸ *Id.*, at 239.

²⁵⁹ See, e.g., Lear Siegler, Inc., 64 Comp. Gen. 452 (1985), 85-1 CPD ¶403; General Electric Corp., 54 Comp. Gen. 791 (1975), 75-1 CPD ¶176; 48 Comp. Gen. 486 (1969).

the prices of bids received for both domestic and foreign source end products and thus can only be made after receipt of such bids or offers.²⁶⁰ It is also clear that whichever differential is used it may only be applied to the price of the end product or construction material up to the point of delivery at the specified destination.²⁶¹ Thus, all post delivery expenses are excluded from application of the applicable evaluation differential.²⁶²

Although the FAR explicitly specifies use of either a six or twelve percent differential with respect to the acquisition of supplies, the regulations do not specify any particular evaluation differential for construction contracts.²⁶³ Thus, for construction contracts, only the six percent differential, as set forth in Executive Order 10582, need be applied.²⁶⁴ Application of the twelve percent differential is not required and it is typically not applied.²⁶⁵

In lieu of the evaluation schemes specifically addressed, Executive Order 10582 permits agency heads to apply a greater differential if it

²⁶⁰ *Id.*

²⁶¹ See, e.g., Allis-Chalmers Corp., Comp. Gen. Dec. B-195311, Dec. 7, 1979, 79-2 CPD ¶1392, *request for reconsid. denied*, Jan. 8, 1980, 80-1 CPD ¶121; Westinghouse Electric Corp., 53 Comp. Gen. 259 (1973), 1973 CPD ¶109; 41 Comp. Gen. 70 (1961).

²⁶² *Id.*

²⁶³ Compare FAR 25.105(a) and FAR 25.203(a).

²⁶⁴ Concrete Technology, Inc., Comp. Gen. Dec. B-202407, Oct. 27, 1981, 81-2 CPD ¶1347.

²⁶⁵ *Id.*

is determined that doing so will not result in unreasonable cost.²⁶⁶ All determinations to apply a greater differential must be submitted to the President for review within thirty days.²⁶⁷ Executive agency determinations to apply such a greater differential are matters of agency discretion not subject to review by the GAO.²⁶⁸ However, absent a determination by the agency head to apply a greater price differential, the six percent differential (or twelve percent if a small business or labor surplus area concern is the low domestic bidder) imposed by Executive Order 10582 and the implementing regulations is mandatory.²⁶⁹ Thus, for pre-award evaluations, if the applicable differential is exceeded, the price of the offered domestic end product or construction material is, by definition, unreasonable.²⁷⁰ For post-award exceptions, this rule is somewhat relaxed. In such case, exceeding the applicable differential does not automatically require an exception to the Buy American Act requirement to use only domestic end products and construction materials. Rather, the contracting officer may also consider factors such as whether granting an exception would result in additional cost to the government or whether not granting it would result in severe

²⁶⁶Executive Order 10582, §5.

²⁶⁷*Id.*

²⁶⁸39 Comp. Gen. 309 (1959).

²⁶⁹*John C. Grimberg Co., Inc. v. United States*, 869 F.2d 1475 (Fed.Cir. 1989).

²⁷⁰*Id.*

consequences to the contractor.²⁷¹ Where the applicable differential is exceeded and granting an exception would result in no additional cost to the government and severe consequences to the contractor, a post-award exception must be granted.²⁷²

The only agency to consistently apply a greater evaluation differential is the Department of Defense (DoD). In 1962, then Secretary of Defense Robert McNamara initiated a "Balance of Payments" program designed to help alleviate the impact of DoD procurements on the nation's balance of international payments by creating a domestic preference requirement for supplies and services procured for use outside the United States, to which the Buy American Act does not otherwise apply.²⁷³ As originally implemented, the program required that only domestic supplies or services be procured by the military departments for use outside the United States unless the cost the domestic items or services exceeded the cost of comparable foreign items or services by more than 50 percent.²⁷⁴ This aspect of the Balance of Payments program is more fully discussed in Chapter 3, *infra*. However, in 1964, the same 50 percent evaluation differential was ordered applied to the procurement of supplies for use inside the

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ 43 Comp. Gen. 217 (1963); 42 Comp. Gen. 608 (1963). See also, ASPR 6-102.2.

²⁷⁴ Memorandum from the Secretary of Defense to all Military Departments (July 16, 1962) (Subject: Supplies and Services for Use Outside the United States).

United States.²⁷⁵ As currently implemented, this aspect of the program requires application of either the six percent differential (or twelve percent if the low domestic offeror is a small business or labor surplus area concern) or the 50 percent differential, whichever results in the greater evaluated foreign price.²⁷⁶ The 50 percent evaluation differential is applied "exclusive of duty".²⁷⁷ Further guidance on the application of the various evaluation differentials may be found in the discussion of evaluation procedures, below.

The Comptroller General has consistently upheld the authority of the Department of Defense to apply such a large evaluation differential.²⁷⁸ Moreover, because the application of a differential other than those specified in Executive Order 10582 is discretionary, the extra 50 percent evaluation differential may be waived by the Secretary of Defense as desired, even after bid opening.²⁷⁹ Such waiver after bid opening does not give bidders the opportunity to change their bids, but only affects the way such bids are evaluated,

²⁷⁵Memorandum For the Assistant Secretary of Defense (I&L) from Deputy Secretary of Defense Cyrus Vance (March 7, 1964) (Subject: Procurement Procedures Under the Buy American Act).

²⁷⁶DFARS 225.105 (S-71).

²⁷⁷*Id.*

²⁷⁸*See, e.g.,* Westinghouse Electric Corp., Comp. Gen. Dec. B-223992, *et al.*, Sept. 4, 1986, 86-2 CPD ¶263; Sandtex Corp., Comp. Gen. Dec. B-224527, Jan. 30, 1987 (unpublished); 47 Comp. Gen. 676 (1968); 46 Comp. Gen. 784 (1967).

²⁷⁹*Lear Siegler, Inc., Energy Products Div. v. Lehman*, 842 F.2d 1102 (9th Cir. 1988).

and thus does not compromise the integrity of the bidding process.²⁸⁰

(2) Use Abroad

By its terms, the Buy American Act does not apply to the procurement of "articles, materials, or supplies for use outside the United States"²⁸¹ or to contracts for the construction, alteration, or repair of public buildings or works outside the United States.²⁸² These exceptions are carried directly into the implementing regulations.²⁸³ The term "United States", for purposes of the Buy American Act, "includes the United States and any place subject to the jurisdiction thereof"²⁸⁴. "Jurisdiction" means "complete sovereign jurisdiction in the fullest sense...."²⁸⁵ Thus, the Act does not apply to procurements of items for use at military bases leased from foreign sovereigns,²⁸⁶ or of items for use in trust territories,²⁸⁷

²⁸⁰ *Id.*

²⁸¹ 41 U.S.C.A. §10a (1987 & Supp. 1989). See also, *Lemmon Pharmacal Co.*, Comp. Gen. Dec. B-186124, Aug. 2, 1976, 76-2 CPD ¶1110; *Unicare Health Services, Inc.*, Comp. Gen. Dec. B-180262, Apr. 18, 1975, 75-1 CPD ¶234.

²⁸² 41 U.S.C.A. §10b(a) (1987 & Supp. 1989). See also, *AME Matex Corp.*, Comp. Gen. Dec. B-218588.2, Jun. 20, 1985, 85-1 CPD ¶704, *request for reconsid. denied*, Comp. Gen. Dec. B-218588.3, Jul. 18, 1985, 85-2 CPD ¶58.

²⁸³ See FAR 25.102(a)(1); FAR 25.200 (stating that the Act applies only to construction *in* the United States).

²⁸⁴ 41 U.S.C.A. §10c(a) (1987 & Supp. 1989); FAR 25.101.

²⁸⁵ 34 Comp. Gen. 448, 449 (1955).

²⁸⁶ *Id.* See also FAR 25.101.

²⁸⁷ FAR 25.101.

since the United States, though exercising some powers over these areas, does not enjoy complete sovereign jurisdiction. Because the United States has relinquished jurisdiction over Okinawa²⁸⁸ and the Philippine Islands,²⁸⁹ the Act no longer applies to procurements of items for use in those areas. It does, however, apply to procurements for use in Puerto Rico, over which the United States continues to exercise sovereign jurisdiction.²⁹⁰

Not all of the items being purchased under a given procurement have to be scheduled for use abroad for this exception to apply. Procurements of items *primarily* for use outside the United States are exempt from the Act even though some of such items may also be used inside the United States.²⁹¹ However, if at the time of procurement the ultimate place of use is not known, such as when items are procured to replenishment stocks for potential later use either abroad or in the United States, use within the United States should be presumed and the proper evaluation differentials applied to foreign

²⁸⁸See 23 United States Treaties and Other International Agreements 447 (1972). See also, Ralston-Regulux, Comp. Gen. Dec. B-165293, Jan. 30, 1975, 75-1 CPD ¶166.

²⁸⁹ See Proc. No. 2695, effective July 4, 1946, 11 Fed. Reg. 7517, 60 Stat. 1352 (1946).

²⁹⁰FAR 25.101. See also, Caribbean Tubular Corp. v. Fernandez Torrecillas, 67 B.R. 172 (D.P.R. 1986), *appeal dismissed, remanded with order to vacate on other grounds*, 813 F.2d 533 (1st Cir. 1987).

²⁹¹Maremont Corp., 55 Comp. Gen. 1362 (1976), 76-2 CPD ¶181 (Procurement of 2800 machine guns intended primarily for use in Europe exempt even though 300 of the weapons were to be used for stateside training); Comp. Gen. Dec. B-168333, May 27, 1970 (unpublished) (Procurement of ammunition for use abroad exempt even though 5% was to be used for training in the United States).

offers.²⁹²

If items are destined for use outside the United States, then the other exceptions to the Buy American Act have no application and need not be considered by the procuring agency.²⁹³ The requirement for synopsis in the Commerce Business Daily is also not applicable to such procurements.²⁹⁴

(3) Items Not Reasonably Available

The Buy American Act does not apply "if articles, materials, or supplies of the class or kind to be used or the articles, materials, or supplies from which they are manufactured are not mined, produced, or manufactured...in the United states in sufficient and reasonably available commercial quantities and of a satisfactory quality."²⁹⁵ Unlike the unreasonable cost exception, a determination of whether a particular material or item is not reasonably available may be and often is made in advance of a solicitation.²⁹⁶ Agency determinations of whether or not domestic materials are available that will meet the

²⁹² See Comment, *supra* note 10, at 108-109.

²⁹³ 49 Comp. Gen. 176 (1969); 34 Comp. Gen. 448 (1955).

²⁹⁴ FAR 5.202(a)(12); Viktoria F.I.T. GmbH, Comp. Gen. Dec. B-233125, *et al.*, Jan. 24, 1989, 89-1 CPD ¶70.

²⁹⁵ 41 U.S.C.A. §§10a - 10b(a) (1987 & Supp. 1989) (Although the language applicable to this exception is contained only in §10a, §10b(a) specifically incorporates all of the exceptions enumerated in §10a). See also FAR 25.102(a)(4). The first recorded determination of non-availability under this exception appears to have been made by the Secretary of War July 23, 1941, with respect to aluminum. See 21 Comp. Gen. 298 (1941).

²⁹⁶ 42 Comp. Gen. 467, 475 (1963).

specification requirements will not be overturned unless "unreasonable, arbitrary, or capricious."²⁹⁷ For purposes of such determinations, the sole issue is whether the item in question is reasonably available *in the United States*.²⁹⁸ The fact that the item is reasonably available from another country, the products of which may, through operation of another exception, be exempt from operation of the Buy American Act is not relevant.²⁹⁹

FAR 25.108(d)(1) sets forth a lengthy list of items and materials which one or more agencies has determined is not reasonably available within the meaning of the Buy American Act. Until recently, the inclusion of any item on such list constituted a determination of non-availability for all agencies subject to the FAR. Agencies could, of course, make additional non-availability determinations as the need arises.³⁰⁰ However, effective December 28, 1989, FAR 25.102(a)(4) and FAR 25.108(d) were amended to specify that the FAR list is for informational purposes only and that each agency must make its own determination as to whether domestic items or materials are reasonably available.³⁰¹ The Comptroller General specifically acquiesced in such

²⁹⁷Blinderman Construction Co., Inc. v. United States, 15 CL.Ct. 121, 127 (1988).

²⁹⁸Richlyn Laboratories, Inc., Comp. Gen. Dec. B-225046, Jan. 29, 1987, 87-1 CPD ¶194, *aff'd*, B-225046.2, 87-1 CPD ¶477.

²⁹⁹*Id.*

³⁰⁰FAR 25.108(b).

³⁰¹Federal Acquisition Circular (FAC) 84-53, Dec. 28, 1989.

a change prior to its implementation.³⁰² Of course, any change in the status of exempted items after contract award which results in an increase in performance costs entitles the contractor to an appropriate equitable adjustment under the changes clause.³⁰³

Although the Comptroller General at one time ruled that if a material is not reasonably available in the United States, no preference is to be accorded to domestic manufacturers of end products made from that material,³⁰⁴ such holding was quickly negated by enactment of the 1950 National Military Establishment Appropriation Act.³⁰⁵ Section 633 of that provision added a new section to the Buy American Act to "clarify" the original intent of Congress.³⁰⁶ That section provides in pertinent part that the other provisions of the Buy American Act "shall be regarded as requiring the purchase...of articles, materials, or supplies *manufactured* in the United States in sufficient and reasonably available commercial quantities and of a

³⁰² See Comp. Gen. Dec. B-234591, *et al.*, Jun. 20, 1989 (unpublished).

³⁰³ 40 Comp. Gen. 644 (1961) (contractor entitled to recover difference in cost of foreign and domestic copper and cost of disposing of previously purchased foreign copper after improperly advised that the agency had determined that copper was not reasonably available in the United States).

³⁰⁴ 28 Comp. Gen. 592 (1949) (*reversing* prior contrary ruling at 17 Comp. Gen. 244 (1937)).

³⁰⁵ 63 Stat. 987 (1949).

³⁰⁶ 63 Stat. 987, 1024 (1950). The added section is set forth at 41 U.S.C.A. §10d (1987 & Supp. 1989).

satisfactory quality...."³⁰⁷ (Emphasis added). As a result of such clarification, it is now clear that regardless of the status of the underlying components, unless a manufactured end product or construction material is itself not *manufactured* in the United States in sufficient and reasonably available commercial quantities, a preference is to be accorded to such items as are domestically manufactured.³⁰⁸ Accordingly, unless otherwise specified, the exception granted for articles, materials, and supplies listed in FAR 25.108(d) applies only to such items in their raw or unmanufactured state.³⁰⁹ It does not apply to manufactured products which incorporate such excepted materials, even if the excepted materials constitute a major part of the finished end product or construction material.³¹⁰ For evaluation purposes, if any item which has been determined to be not reasonably available is *required* to be incorporated into a manufactured end product or construction material, it is treated as a domestic component.³¹¹ However, where a specified end product may be made of any one of several different component materials, some of which are available domestically and some of which

³⁰⁷ 41 U.S.C.A. §10d (1987 & Supp. 1989). The GAO, at the request of congressional staff members, itself drafted the new provision. 46 Comp. Gen. 47, 49 (1966).

³⁰⁸ See, e.g., 42 Comp. Gen. 401 (1963).

³⁰⁹ 42 Comp. Gen. 401 (1963); C.H. Leavell & Co., GSBGA No. 2860, Slip Opinion, April 23, 1971.

³¹⁰ *Id.*

³¹¹ FAR 25.101 (definition of "domestic end product"); Octagon Press, Inc., Comp. Gen. Dec. B-186850, Dec. 22, 1976, 76-2 CPD ¶521.

are not, any offer which proposes to use the foreign material, even if it is unavailable domestically, must be evaluated as foreign.³¹² The reason for this rule is that even if the material used is not available domestically, its use is not required. Rather, other materials, which are available domestically, may be used.³¹³ Thus, a solicitation provision which purports to treat the non-domestically available alternative as "domestic" is improper.³¹⁴ The same rule applies to a contractor's selection of alternative construction materials.³¹⁵

For purposes of the non-availability exception, the phrase "in sufficient and reasonably commercial quantities" does not mean that the item in question must be commercially available to more than one company interested in competing for the solicitation concerned.³¹⁶ Rather, it requires only that it be available to the *government* in commercial sized quantities.³¹⁷ Thus, the fact that a particular item or component is domestically available from only one source is not sufficient to trigger the non-availability exception.³¹⁸ In contrast,

³¹²To the Director, Defense Supply Agency, 50 Comp. Gen. 239 (1970), 1970 CPD ¶93.

³¹³*Id.*

³¹⁴*Id.*

³¹⁵See Alpha Roofing & Sheet Metal Corp., GSBGA No. 1115, 1964 BCA ¶4461 (1964)

³¹⁶Lemmon Pharmacal Co., Comp. Gen. Dec. B-186124, Aug. 2, 1976, 76-2 CPD ¶110.

³¹⁷*Id.*

³¹⁸*Id.*

if an agency has sufficient justification to make a sole source award on the basis of foreign source end products, "it can validly determine that...the items are not manufactured in the United States in sufficient and reasonably available commercial quantities" and the non-availability exception may be properly invoked.³¹⁹

Contractors which are contractually required to comply with the Buy American Act and required by the specifications to provide a particular material are obligated to notify the government if the specified material is or becomes unavailable domestically.³²⁰ However, once the government is so notified, it must decide within a reasonable time whether it will delete the specified requirement or determine the material at issue to be not reasonably available within the meaning of the Act.³²¹ Failure to do so entitles the contractor to additional compensation for extra costs incurred because of the delay.³²²

(4) Inconsistent With The Public Interest

The domestic preference provisions of the Buy American Act do not

³¹⁹Maremont Corp., 55 Comp. Gen. 1362, 1392 (1976), 76-2 CPD ¶181. See also, Bartlett Technologies Corp., Comp. Gen. Dec. B-218786, Aug. 20, 1989, 85-2 CPD ¶198; Design Pak, Inc., Comp. Gen. Dec. B-212579, Sept. 16, 1983, 83-2 CPD ¶336.

³²⁰M.S.I. Corp., VACAB No. 503, 65-2 BCA ¶5,203 (1965), *motion for reconsid. denied*, 66-1 BCA ¶5,340 (1966). See also H&W Contracting Co., ASBCA No. 28972, 87-2 BCA ¶19,878 (1987).

³²¹M.S.I. Corp., VACAB No. 503, 65-2 BCA ¶5,203 (1965), *motion for reconsid. denied*, 66-1 BCA ¶5,340 (1966) (holding 30 days reasonable, 67 days unreasonable).

³²²*Id.*

apply if the head of the agency concerned determines that the application of the preference is "inconsistent with the public interest."³²³ The authority of an agency head to invoke this exception is non-delegable,³²⁴ and may be made before or after bid opening.³²⁵ Although the Act further specifies, with respect to construction contracts, that the domestic preference provisions need not be applied if "it is impracticable",³²⁶ such language is generally deemed to be of similar purpose, though much narrower in scope, than the "public interest" exception and is thus rarely, if ever, used.³²⁷ On its face, Executive Order 10582 also provides additional similar exceptions by permitting agency heads "to reject any bid or offer for reasons of the national interest",³²⁸ or "if such rejection is necessary to protect essential national-security interests...."³²⁹ However, the Comptroller General has recognized that there is little practical distinction between these exceptions and the public interest exception and they are generally applied in a similar manner.³³⁰

³²³41 U.S.C.A. §10a (1987 & Supp. 1989) (41 U.S.C.A. §10b(a) incorporates by reference the same exception for construction contracts). See also FAR 25.102(a)(3).

³²⁴14 Comp. Gen. 601 (1935).

³²⁵Lear Siegler, Inc., 64 Comp. Gen. 452 (1985), 85-1 CPD ¶403.

³²⁶41 U.S.C.A. §10b(a) (1987 & Supp. 1989); FAR 25.202(a)(2).

³²⁷See generally, Gantt & Speck, *supra* note 1, at 393

³²⁸Executive Order 10582, §3(a).

³²⁹Executive Order 10582, §3(d).

³³⁰See generally, Lear Siegler, Inc., 64 Comp. Gen. 452 (1985), 85-1 CPD ¶403.

The Comptroller has also long recognized that determinations of whether to waive the Buy American Act domestic preference provisions as "inconsistent with the public interest" or to restrict competition to domestic concerns in the interest of "national security" are matters of agency discretion which are not subject to review by the GAO.³³¹ However, such discretion is limited to determinations of whether to waive domestic preference provisions for purposes of comparing domestic and foreign bids. Neither the Buy American Act nor Executive Order 10582 provide a legal basis for favoring one domestic bidder over another domestic bidder.³³²

DOD Memoranda of Understanding

By far the most extensive use of the public interest exception is through international Memoranda of Understanding between the Department of Defense and foreign governments. Since World War II, DoD has entered into a number of such agreements to promote greater defense cooperation between the United States, its NATO allies, and other governments friendly to the United States and to promote greater standardization and interoperability of their respective weapons systems. The authority to enter into such agreements initially arose

³³¹ *Id.* See also, e.g., Orlite Engineering Co., Ltd., Comp. Gen. Dec. B-227157, Aug. 17, 1987, 87-2 CPD ¶168; Rudel Machinery Co., Inc., Comp. Gen. Dec. B-224606, Nov. 6, 1986, 86-2 CPD ¶529; Israel Military Industries, Comp. Gen. Dec. B-211761, Nov. 21, 1983, 83-2 CPD ¶598; Maremont Corp., 55 Comp. Gen. 1362 (1976), 76-2 CPD ¶181.

³³² 42 Comp. Gen. 467 (1963).

out of section 402 of the Mutual Defense Assistance Act of 1949,³³³ and has since been reiterated in the 1976 DoD Appropriation Authorization Act³³⁴ and the 1989 National Defense Authorization Act.³³⁵ As part of such agreements, DoD has issued blanket waivers of the Buy American Act, under authority of the public interest exception, for defense articles purchased from the affected countries. The Comptroller General has consistently upheld the authority of DoD to issue such blanket waivers,³³⁶ and Congress has itself specifically recognized the authority of the Secretary of Defense in this area.³³⁷

DoD currently has active Memoranda of Understanding with sixteen

³³³Act of October 6, 1949, Pub. L. No. 63-329, 1949 U.S. Code Cong. Service (63 Stat) 731, 733. See also, Campbell Chain, Div. of Unitec Industries, Inc., 51 Comp. Gen. 195 (1971), 1971 CPD ¶70.

³³⁴Act of July 14, 1976, Pub. L. No. 94-361, §802, 90 Stat. 923, 930. See also, Idealspaten, GmbH., Comp. Gen. Dec. B-205323, Apr. 27, 1982, 82-1 CPD ¶389.

³³⁵Act of September 29, 1988, Pub. L. No. 100-456, §824, 102 Stat. 2019 (codified at 10 U.S.C.A. §2504 (Supp. 1989)).

³³⁶See Idealspaten, GmbH., Comp. Gen. Dec. B-205323, Apr. 27, 1982, 82-1 CPD ¶389; Keuffel & Esser Co., Comp. Gen. Dec. B-193083, Jul. 17, 1979, 79-2 CPD ¶35; Campbell Chain, Div. of Unitec Industries, Inc., 51 Comp. Gen. 195 (1971), 1971 CPD ¶70.

³³⁷See §802(a)(2), 1976 DoD Appropriation Authorization Act, Pub. L. No. 94-361, 90 Stat. 923, 930 (1976). Despite such Congressional recognition, challenges to DoD's authority to issue blanket waivers of the Buy American Act continue. A lawsuit filed by the National Counsel For Industrial Defense (NCID) in federal district court in early 1989 alleged that DoD has failed to properly enforce the domestic preference provisions of the Buy American Act and has exceeded its statutory authority in granting blanket waivers of the Act through the Memoranda of Understanding. In preliminary hearings, the court ruled that NCID, a non-profit organization of professional associations, labor unions, and the executives of companies engaged in the production or sale of defense products, has standing to pursue such an action. National Council For Industrial Defense, Inc. v. U.S. Department of Defense, Civ. Action No. 88-0949, (D.D.C. Apr. 20, 1989) (1989 WESTLAW 46766).

countries. The texts of these agreements are set forth in DFARS Appendix T and are implemented through DFARS Subparts 225.74 and 225.75. Fourteen of the affected countries are categorized as "NATO Participating Countries".³³⁸ With the exception of certain excluded items listed at DFARS 225.7405, participating country end products are exempt from the Buy American Act domestic preference restrictions and thus no evaluation differential is added to offers of such products.³³⁹ An item is a "participating country end product" if it is either an unmanufactured end product mined or produced in a participating country or an end product manufactured in a participating country and the cost of its components mined produced or manufactured in the United States and any "qualifying country" exceeds fifty percent of the cost of all its components.³⁴⁰ A "qualifying country" is in turn defined as a participating country, a defense cooperation country, or an FMS/Offset arrangement country.³⁴¹ For purposes of end products manufactured in the United States, components mined, produced, or manufactured in a participating country are

³³⁸DFARS 225.7401.

³³⁹DFARS 225.7403(a)(3). See also, Technical Systems Inc., 66 Comp. Gen. 297 (1987), 87-1 CPD ¶240; American Hospital Supply, Equipping and Consulting, Comp. Gen. Dec. B-221357, Jan. 22, 1986, 86-1 CPD ¶170; Self-Powered Lighting, Ltd. v. United States, 492 F.Supp.1267 (S.D.N.Y. 1980).

³⁴⁰DFARS 225.101. See also, J.I. Case Co., Comp. Gen. Dec. B-221588, May 5, 1986, 86-1 CPD ¶430.

³⁴¹*Id.* "Defense cooperation country" is further discussed within this section. The meaning of "FMS/Offset arrangement country" is discussed in Chapter 3, *infra*.

treated as domestic components.³⁴² As with domestic source end products, ownership of the producing firm is of no consequence.³⁴³ Rather, the key question is whether the particular end product or component was mined, produced, or manufactured in the participating or qualifying country.³⁴⁴

Unless otherwise listed in DFARS 225.7405 as an excluded item, the exception granted to participating country end products extends to any equipment or item of supply purchased by DoD.³⁴⁵ The fact that such items may also have civilian applications is not controlling.³⁴⁶ Further, even those items excluded under DFARS 225.7405 may be acquired from participating countries without application of a Buy American Act evaluation differential if the quantity required is greater than that needed to maintain the U.S. defense mobilization base.³⁴⁷

In addition to NATO participating countries, DoD may also enter into Memoranda of Understanding with a "defense cooperation

³⁴²DFARS 225.7403(a)(3)(iii).

³⁴³E-Systems, Inc., 61 Comp. Gen. 431 (1982), 82-1 CPD ¶533.

³⁴⁴*Id.*

³⁴⁵Self-Powered Lighting, Ltd. v. United States, 492 F.Supp.1267 (S.D.N.Y. 1980); Sandtex Corp., Comp. Gen. Dec. B-224527, Jan. 30, 1987 (unpublished).

³⁴⁶Dosimeter Corporation of America, Comp. Gen. Dec. B-189733, Jul. 14, 1978, 78-2 CPD ¶35.

³⁴⁷DFARS 225.7405. See also, Technical Systems, Inc., 66 Comp. Gen. 297 (1987), 87-1 CPD ¶240.

country".³⁴⁸ Currently, the only country that falls into this category is Egypt.³⁴⁹ A copy of the Egyptian Memorandum may also be found at DFARS Appendix T. Like the agreements with NATO participating countries, defense cooperation country agreements also waive application of the Buy American Act domestic preference provisions.³⁵⁰ However, whereas the waiver for NATO participating countries applies to all DoD procurements except those specifically excluded, the waiver for defense cooperation countries applies only to those items specifically listed on annexes to such agreements maintained by the DoD Director for International Acquisition.³⁵¹

DoD has also entered into a Memorandum of Understanding with the Government of Sweden.³⁵² Although the agreement contains many of the same provisions as the other previously discussed agreements, to include waiver of Buy American Act restrictions, the DFARS contains no provision implementing that agreement. Under the terms of the Sweden agreement, a blanket waiver of the Buy American Act has not been granted. Rather, both parties agree to process waiver requests on a case by case basis "as national laws and regulations permit."³⁵³

³⁴⁸DFARS Subpart 225.75.

³⁴⁹DFARS 225.7501.

³⁵⁰Pall Land & Marine Corp., *et al.*, Comp. Gen. Dec. B-223478, *et al.*, Jul. 16, 1986, 86-2 CPD ¶77.

³⁵¹DFARS 225.7502(b).

³⁵²DFARS Appendix T, Part 4.

³⁵³*Id.*, Article I, ¶4.

b. External Statutory Exceptions

Exceptions to the domestic preference requirements of the Buy American Act also originate through operation of other statutory provisions. Although the Trade Agreements Act of 1979³⁵⁴ falls within this category, the broad impact, and thus importance of that Act necessitates separate discussion and analysis and it will be addressed in Chapter 4, *infra*. The remaining important external statutory exceptions are discussed within this section.

(1) United States - Canada Free Trade Agreement Implementation Act

The United States - Canada Free Trade Agreement Implementation Act of 1988³⁵⁵ is the latest step in a long standing history of favorable U.S. - Canada trade relations. Through operation of section 306 of the Act, the Buy American Act and Balance of Payments Program domestic preference restrictions are inapplicable to acquisitions of Canadian supplies with a contract value in excess of \$25,000. The FAR implements these exceptions by providing that for any procurement meeting the specified dollar threshold, Canadian components are to be treated as domestic³⁵⁶ and that no evaluation differential is to be

³⁵⁴19 U.S.C.A. §§2501 *et seq.* (1980 & Supp. 1989).

³⁵⁵Act of Sept. 28, 1988, Pub. L. No. 100-449, 102 Stat. 1851 (set forth at 19 U.S.C.A. §2112 note (Supp. 1989)). The Act is effective Jan. 1, 1989 for an initial period of 7 years, with provisions for congressional review and extension after that period. *Id.*, §101(b) and §410.

³⁵⁶FAR 25.101 (definition of "domestic end product").

applied to offers of Canadian end products.³⁵⁷

"Canadian end products" are defined in a manner very similar to domestic end products. They include unmanufactured end products mined or produced in Canada and end products manufactured in Canada if the cost of the components mined, produced or manufactured either in Canada or the United States exceeds 50 percent of the cost of all components.³⁵⁸ Under this definition, a manufacturer can, as is the case with the manufacture of domestic end products, insulate the higher cost of foreign (non-Canadian or U.S.) materials by introducing at least two stages of manufacture in Canada.³⁵⁹

The Canadian exemption afforded by the Act applies only to the procurement of supplies. It does not apply to construction contracts or to procurement of any of the other types of items or services set forth at FAR 25.403.³⁶⁰ Accordingly, an appropriate evaluation differential must be applied to Canadian materials and components in construction contracts.³⁶¹ The Act also does not provide the GAO with a jurisdictional basis for considering a protest by a potential Canadian supplier that is not, having not submitted a bid, an

³⁵⁷FAR 25.105(e); FAR 25.402(a)(4).

³⁵⁸FAR 25.401.

³⁵⁹See Davis Walker Corp., Comp. Gen. Dec. B-184672, Aug. 23, 1976, 76-2 CPD ¶182 (applying the same definition previously set forth at ASPR §6-101(b) (1975) for DoD purchases of Canadian end products under authority of a Memorandum of Understanding with the Government of Canada).

³⁶⁰See North Coast Electric Co., Comp. Gen. Dec. B-202208, Aug. 14, 1981, 81-2 CPD ¶141, *aff'd*, Nov. 4, 1981, 81-2 CPD ¶1382.

³⁶¹*Id.*

otherwise interested party.³⁶²

Although the Act considerably expanded the extent of exceptions granted to Canadian end products for procurements by most federal agencies,³⁶³ it did not expand the existing preference accorded to such end products by DoD. Since World War II, it has been DoD policy "to coordinate closely the material program of Canada and the U.S. and to assure Canada 'a fair opportunity' to share in the production of military equipment and material."³⁶⁴ Thus, through operation of a U.S. - Canadian Memorandum of Understanding initiated in 1956, DoD has waived application of the Buy American Act evaluation differentials to Canadian source end products³⁶⁵ and Canada is listed in DFARS 225.7401 as a NATO participating country.

Although Canada is designated a NATO participating country, its relationship with DoD is in many ways more unique than that of other such countries. For example, the restriction imposed by DFARS

³⁶²Dunlop Construction Products, Inc. - Request for Reconsideration, Comp. Gen. Dec. B-234905.2, May 16, 1989, 89-1 CPD ¶469.

³⁶³Prior to the U.S. - Canada Free Trade Agreement Implementation Act, Canadian products were afforded a preference under the Trade Agreements Act of 1979. However, the preferential treatment applied only to contracts which exceeded the standard drawing rights (SDR) dollar threshold set by the U.S. Trade Representative (currently \$150,000). See generally, FAR 25.402(a)(1). See also the discussion at Chapter 4, *infra*.

³⁶⁴Letter to The Honorable Ed Zschau, House of Representatives, Comp. Gen. Dec. B-224093, Oct. 15, 1986 (unpublished). See also FAR 225.7101.

³⁶⁵See, e.g., Questek, Inc., Comp. Gen. Dec. B-232290, Aug. 19, 1988, 88-2 CPD ¶166; Fire & Technical Equipment Corp., Comp. Gen. Dec. B-203858, Sep. 29, 1981, 81-2 CPD ¶266; Baganoff Associates, Inc., Comp. Gen. Dec. B-179607, Jul. 25, 1974, 74-2 CPD ¶56.

225.7405 on the procurement of certain excluded items from NATO participating countries "does not apply to Canadian Planned Producers." Similarly, many of the DoD appropriation act restrictions, which further limit the purchase of certain items to "domestic" sources, permit the procurement of either United States or Canadian end products.³⁶⁶ Moreover, even the method of contracting for Canadian end products by DoD is unique. Rather than contracting directly with a Canadian firm, most DoD contracts for Canadian end products are with the Canadian Commercial Corporation (CCC), a wholly owned corporation of the Canadian government established in 1946 to enhance the development of international trade between Canada and other countries.³⁶⁷ Canadian firms wishing to compete submit their proposals through the CCC, which in turn endorses the underlying proposal in its own name and, upon award, subcontracts with the Canadian firm.³⁶⁸ The Canadian Government guarantees to the United States Government all of the obligations and commitments of the CCC and thus, indirectly, the Canadian firm.³⁶⁹ Although the CCC may authorize the submission of an offer from a Canadian firm directly to the agency concerned, the endorsement from CCC must be received prior to contract award.³⁷⁰ Contracting directly with Canadian firms is

³⁶⁶ See text and notes at Chapter 3, *infra*.

³⁶⁷ Baganoff Associates, Inc., 54 Comp. Gen. 44 (1974), 74-2 CPD ¶56.

³⁶⁸ *Id.* See also, DFARS 225.7104.

³⁶⁹ DFARS 225.7103.

³⁷⁰ DFARS 225.7104(a)(2)(ii).

permitted in the case of small purchases, purchases by DoD activities located in Canada, purchases in support of Defense Research and Development Cooperation Projects, and purchases of unusual or compelling urgency.³⁷¹ Procurements with CCC are further unique in that the normal procedures for determining the responsibility of prospective government contractors do not apply.³⁷² Most DoD agencies have also waived the requirements for submission and certification of cost or pricing data in all contracts with the CCC.³⁷³

(2) United States - Israel Free Trade Area Implementation Act

The United States - Israel Free Trade Area Implementation Act of 1985³⁷⁴ waives application of the Buy American Act and the Balance of Payments program domestic preference restrictions for Israeli end products in a manner similar, but not identical to the waiver for Canadian products discussed above. Section 7 of the Act provides that the domestic preference restrictions are not applicable to purchases of Israeli end products where the contract value equals or exceeds \$50,000. The exception is implemented through FAR 25.105(d) and FAR

³⁷¹DFARS 225.7104(b)(2).

³⁷²49 Comp. Gen. 176 (1969).

³⁷³See Air Force Acquisition Circular (AFAC) 88-29, ITEM D1, Aug. 15, 1988 (Joint Determination & Findings by the Army, Navy, Air Force, Defense Communications Agency, Defense Logistics Agency, Defense Mapping Agency, Defense Nuclear Agency, and the National Security Agency. The waiver is effective from June, 1988 through June, 1991. A similar waiver was previously in effect from 1982-1988).

³⁷⁴Act of Jun. 11, 1985, Pub. L. No. 99-47, 99 Stat. 82 (set forth at 19 U.S.C.A. §2112 note).

25.402(a)(2), which provide that no evaluation differential is to be applied to offers of Israeli end products for contracts meeting the required dollar threshold. The exception does not apply to construction contracts or to procurements of the other items and services set forth at FAR 25.403.

Unlike Canadian components, the FAR does not provide for the treatment of Israeli components as domestic. The FAR also does not define what constitutes an "Israeli end product" for purposes of manufactured items. However, section 7 of the Israeli Act, by its language, actually amends paragraph 4 of section 308 of the Trade Agreements Act of 1979³⁷⁵ by adding a new subsection (C) to that provision.³⁷⁶ Subsection (B) of that provision provides that an article is a "product" of a country "if it is wholly the growth, product, or manufacture of that country" or, if made "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 so transformed."³⁷⁷ Since the exemption for Israeli end products falls within the same general provision, this same definition should be used to determine whether a particular item is an end product of Israel for purposes of the U.S. - Israel Free Trade Area Agreement. Neither the GAO nor any other forums have yet addressed

³⁷⁵19 U.S.C.A. §2518(4) (1980 & Supp. 1989).

³⁷⁶19 U.S.C.A. §2518(4)(C) (Supp. 1989).

³⁷⁷19 U.S.C.A. §2518(4)(B) (1980).

this issue.

Like Canada, Israel has entered into a Memorandum of Understanding with DoD and is designated as a NATO participating country.³⁷⁸ With the exception of the excluded products listed at DFARS 225.7405, Israeli products purchased by DoD agencies are therefore exempt from the Buy American Act and Balance of Payments Program restrictions, without regard to the \$50,000 threshold set by the free trade area agreement.

(3) Caribbean Basin Economic Recovery Act

Under authority of the Caribbean Basin Economic Recovery Act of 1983,³⁷⁹ the United States Trade Representative has determined that offers of most end products from certain Caribbean basin countries are exempt from the domestic preference restrictions of the Buy American Act and Balance of Payments Program.³⁸⁰ A list of the countries eligible for such exemption is set forth at FAR 25.401. The exception does not apply to textiles, footwear and leather goods, tuna, petroleum and petroleum products, or watches and watch parts,³⁸¹ and is effective only until September 30, 1995, unless otherwise extended.³⁸² "Caribbean basin country end products" are any items

³⁷⁸DFARS 225.7401.

³⁷⁹Act of Aug. 5, 1983, Pub. L. No. 98-67, 97 Stat. 384 (codified, as amended, at 19 U.S.C.A. §§2701 *et seq.* (Supp. 1989)).

³⁸⁰FAR 25.402(a)(1) and FAR 25.402(b).

³⁸¹FAR 25.401; 25.403(m).

³⁸²FAR 25.402(b).

(other than those specifically excluded) that are "wholly the growth, product, or manufacture of the Caribbean Basin country" or, if manufactured in whole or in part of materials from another country, have 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 so transformed."³³³ The term includes incidental services (excluding transportation services) as long as the cost of such services does not exceed the cost of the underlying supply item. The exception does not apply to construction contracts or to procurements of the types of items specifically listed at FAR 25.403.

4. IMPLEMENTATION AND ENFORCEMENT PROCEDURES

a. Evaluating Foreign Offers

If both foreign and domestic offers are received and no other available exception applies, the agency concerned must apply the appropriate evaluation differential to determine if the "unreasonable cost" exception will permit award to a lower priced foreign offer. For non-DoD agencies, the procedure is relatively straight forward. In the procurement of supplies, if the offered price of the lowest acceptable foreign end product is lower than the lowest offered price of a domestic end product, the evaluated price of the foreign end product (inclusive of duty) is increased by either six or twelve percent, depending on whether the low domestic offeror qualifies as a

³³³FAR 25.401.

small business or labor surplus area concern.³⁸⁴ If the evaluated price of the foreign end product still remains low, the cost of the domestic end product is deemed "unreasonable" and award may be made on the basis of the foreign end product.³⁸⁵ Agencies must apply the appropriate evaluation differential even when ordering off a mandatory Federal Supply Schedule if more than one item on the schedule will meet agency needs and one of the acceptable items is of foreign origin.³⁸⁶

Regardless of which differential is used, it may only be applied to the price of the end product concerned, not to the entire contract price.³⁸⁷ Thus, the differential is not applied to post-delivery installation and inspection costs.³⁸⁸ Similarly, where the solicitation contemplates consideration of trade-in allowances as part of a contract to purchase a new item, the evaluation differential must be applied to the new item price *before* subtraction of the trade-in

³⁸⁴FAR 25.105(a).

³⁸⁵*Id.* However, if an award of more than \$250,000 would be made to a domestic concern if the 12% factor were applied but not if the 6% factor were applied, the case must be submitted to the agency head for a personal determination of whether the cost of the domestic end product is unreasonable. FAR 25.105(c).

³⁸⁶*Prestype, Inc.*, Comp. Gen. Dec. B-187093, Apr. 27, 1977, 77-1 CPD ¶1286. See also *Lanier Business Products*, Comp. Gen. Dec. B-187969, May 11, 1977, 77-1 CPD ¶1336.

³⁸⁷See, e.g., *Allis-Chalmers Corp.*, Comp. Gen. Dec. B-195311, Dec. 7, 1979, 79-2 CPD ¶1392, *request for reconsid. denied*, Jan. 8, 1980, 80-1 CPD ¶121; *Westinghouse Electric Corp.*, 53 Comp. Gen. 259 (1973), 1973 CPD ¶109; 41 Comp. Gen. 70 (1961).

³⁸⁸*Id.*

allowance.³⁹⁹

In sealed bid procurements, evaluation differentials may not be applied to offers of foreign source end products if no responsive bids offering domestic end products are received.³⁹⁰ Similarly, in negotiated procurements, no evaluation differential is applied if the only technically acceptable offers are of foreign source end products.³⁹¹ In both of these situations, foreign offers are evaluated on an equal basis.³⁹²

The Comptroller General has also ruled that in a negotiated procurement, the mere fact that a foreign offer is, after application of the appropriate evaluation differential, higher in price than the lowest acceptable domestic offer does not ensure award to the domestic offeror.³⁹³ If the award criteria considered technical rating more important than cost, the agency may still award to the foreign offeror if it is higher rated technically and the contracting officer

³⁹⁹ See Lanier Business Products, Comp. Gen. Dec. B-187969, May 11, 1977, 77-1 CPD ¶1336; Miller Printing Machinery Co., 53 Comp. Gen. 225 (1973), 1973 CPD ¶1104.

³⁹⁰ E.I. du Pont de Nemours & Company, Inc., Comp. Gen. Dec. B-208095, Sept. 20, 1982, 82-2 CPD ¶1245. See also DFARS 225.105 (S-72)(Example G); Cal Capital Exports, 62 Comp. Gen. 345 (1983), 83-1 CPD ¶1439.

³⁹¹ See, e.g., Gerber Scientific Instrument Co., Comp. Gen. Dec. B-225383, Jan. 6, 1987, 87-1 CPD ¶17; Tiger Optical Electronics Corp., Comp. Gen. Dec. B-225358, Nov. 13, 1986, 86-2 CPD ¶560; Broomall Industries, Inc., Comp. Gen. Dec. B-193166, Jun. 28, 1979, 79-1 CPD ¶467.

³⁹² See, e.g., Cal Capital Exports, 62 Comp. Gen. 345 (1983), 83-1 CPD ¶1439; Tiger Optical Electronics Corp., Comp. Gen. Dec. B-225358, Nov. 13, 1986, 86-2 CPD ¶560.

³⁹³ Litton Systems, Inc., Electron Tube Div., Comp. Gen. Dec. B-215106, Sept. 18, 1984, 84-2 CPD ¶317.

determines that the technical advantages outweigh the higher evaluated cost.³⁹⁴ Further, a contracting officer may properly cancel a solicitation if, after application of the Buy American Act evaluation differentials, he or she determines that the resulting low bid, offering a domestic source end product, is unreasonably high.³⁹⁵ The contracting officer may not, however, simply ignore the result of the evaluation and award to the higher evaluated, but lower actual cost, foreign offer.³⁹⁶

For construction contracts, the basic test remains the same, but the focus is somewhat different. In such contracts, the evaluation differential is applied on a material by material basis rather than to the price of the entire building or public work being constructed.³⁹⁷ As a result, contractors proposing to use foreign construction materials are required, as part of their bids, to list what foreign materials are to be used in what quantities and to provide sufficiently detailed information on the cost of such materials to permit the agency to intelligently determine if the unreasonable cost

³⁹⁴ *Id.*

³⁹⁵ Sandtex Corp., Comp. Gen. Dec. B-224527, Jan. 30, 1987 (unpublished).

³⁹⁶ *Id.*

³⁹⁷ See, e.g., Concrete Technology, Inc., Comp. Gen. Dec. B-202407, Oct. 27, 1981, 81-2 CPD ¶1347; Allis-Chalmers Corp. v. Friedkin, 481 F. Supp. 1256 (M.D.Pa. 1980); United States Steel Corp., Comp. Gen. Dec. B-194403, Feb. 11, 1980, 80-1 CPD ¶118; To the Acting Administrator, General Services Administration, 51 Comp. Gen. 814 (1972), 1972 CPD ¶66.

exception applies to such materials.³⁹⁹ If the contractor fails to provide such information or if the agency determines that use of a domestic material would not result in unreasonable cost, the bid must be rejected as nonresponsive.⁴⁰⁰ The rationale for such a rule is that allowing a bidder to provide such information after bid opening or to change its original selection of foreign versus domestic materials would effectively permit the bidder to control the manner in which its bid is evaluated and its relative bid standing and thus compromise the integrity of the competitive procurement process.⁴⁰¹ Although it is helpful if the bidder also provides data concerning the cost of comparable domestic materials, the failure to submit such additional information is not critical, since the agency can readily determine such information through its own investigation.⁴⁰² Any detailed cost information submitted by a bidder to establish its status as foreign or domestic for purposes of the Buy American Act need not be made public as part of the bid.⁴⁰³

Although the same rules apply to procurements by DoD, their application to such procurements is complicated by two factors.

³⁹⁹ See, e.g., Key Constructors, Inc., Comp. Gen. Dec. B-205280, Apr. 8, 1982, 82-1 CPD ¶328; To the Acting Administrator, General Services Administration, 51 Comp. Gen. 814 (1972), 1972 CPD ¶66.

⁴⁰⁰ *Id.* See also H.E. Crain, Comp. Gen. Dec. B-194329, Nov. 15, 1979, 79-2 CPD ¶355.

⁴⁰¹ *Id.*

⁴⁰² Illinois Constructors Corp., Comp. Gen. Dec. B-209214, Feb. 28, 1983, 83-1 CPD ¶197; Key Constructors, Inc., Comp. Gen. Dec. B-205280, Apr. 8, 1982, 82-1 CPD ¶328.

⁴⁰³ 41 Comp. Gen. 338 (1961); 39 Comp. Gen. 695 (1960).

First, the DoD domestic Balance of Payments program requires that offers of foreign end products be evaluated at the *higher* of the offered price plus 50% (exclusive of duty) or the offered price plus the normal 6% or 12% differential (inclusive of duty).⁴⁰³ Second, the blanket waivers of the Buy American Act provided by the many DoD Memoranda of Understanding⁴⁰⁴ often result in the need for three way comparisons of domestic offers, "qualifying country" offers, (those from countries exempt from the Act), and "nonqualifying country" offers (those from countries not exempt from the Act).⁴⁰⁵ To aid in proper application of these rules, the DoD procurement regulations detail numerous practical examples of how such three way comparisons should be made.⁴⁰⁶ The examples do not, however, cover every possible contingency. Example G provides that if no offer of a domestic end product is received, "nonqualifying country and qualifying country offers are evaluated on an equal basis", with no differential added to either offer.⁴⁰⁷ In 1983, GAO for the first time considered the proper application of this rule to nonqualifying country offers competing against partial domestic offers.⁴⁰⁸ The case involved an

⁴⁰³DFARS 225.105(S-71)(1). See also the text and accompanying notes at pp. 61-62, *supra*.

⁴⁰⁴See text and accompanying notes, pp. 72-76, *supra*.

⁴⁰⁵See generally DFARS 225.105.

⁴⁰⁶DFARS 225.105.

⁴⁰⁷DFARS 225.105(S-72).

⁴⁰⁸Cal Capital Exports, 62 Comp. Gen. 345 (1983), 83-1 CPD ¶439. (Interpreting DAR §6-104.4, the language of which was identical to that of current Example G).

Army solicitation of 1,413,025 pounds of hexachloroethane. The solicitation specifically permitted bids on less than the quantity specified and the sole domestic bid was on 960,000 pounds at \$.67/lb. In contrast, a qualifying country source bid on the entire amount at \$.60/lb., and a nonqualifying country source bid on the entire amount at \$.47/lb. Because the domestic bid was higher than the qualifying country bid (which was exempt from application of an evaluation differential), the final evaluation was between the qualifying and nonqualifying country bids. The Comptroller ruled that since the domestic bidder did not bid on quantities in excess of 960,000 lbs., Example G required that the nonqualifying and qualifying country offers be evaluated equally for the amounts in excess of 960,000 lbs. Thus, a split award was required. Due to application of the required evaluation differential for the first 960,000 lbs. the qualifying country offer was evaluated at low for that quantity, while the nonqualifying country offer was evaluated as low for the remaining 453,025 lbs., to which no evaluation differential was applied.⁴⁰⁹

The differing DoD evaluation procedures also cause inconsistent treatment of the same bids or offers between government agencies. The Comptroller has held that in evaluating foreign offers, the procuring agency must comply with the evaluation differentials applicable to that agency, even though the items being procured are for ultimate use by another agency which employs a different

⁴⁰⁹ *Id.*

evaluation scheme.⁴¹⁰ Thus, absent other specific statutory limitations to the contrary,⁴¹¹ the fact that items procured by the General Services Administration (GSA), which employs the normal 6% and 12% evaluation differentials, will be used primarily by DoD does not require application of the higher 50% differential employed by DoD under its Balance of Payments program.⁴¹² Under this rule, the same domestic item, offered for the same price by the same offeror could be deemed to result in unreasonable cost if procured by DoD, but not if procured by the GSA. Such an anomalous result, though legally supportable, clearly creates "unrealistic...determinations of whether the price of a particular domestic item is unreasonable" and has been a continuing source of concern to Congress and the GAO.⁴¹³

b. Required Clauses

The domestic preference requirements of the Buy American Act are contractually implemented primarily through two types of clauses. First, offerors are required to certify that, absent an applicable exception or unless otherwise indicated, only domestic end products will be provided under the contract.⁴¹⁴ This requirement will be

⁴¹⁰Idealspaten, GmbH., Comp. Gen. Dec. B-205323, Apr. 27, 1982, 82-1 CPD ¶389.

⁴¹¹See the discussion of Appropriations Act restrictions at Chapter 3, *infra*.

⁴¹²48 Comp. Gen. 403 (1968). See also FAR 25.107.

⁴¹³48 Comp. Gen. 403, 406 (1968).

⁴¹⁴See, e.g., FAR 52.225-1; FAR 52.225-8.

further discussed below. In addition, a clause is included in each contract detailing the requirements of the Act, defining what products qualify as domestic end products or construction materials, and, depending on the nature of the procurement concerned, detailing what products or source of products are exempted from application of the Act.⁴¹⁵ Some variation of these clauses is required to be included in each government contract. Indeed, because the clauses requiring compliance with the Act stem from the underlying statute, they may be read into the contract through operation of the Christian doctrine⁴¹⁶ if otherwise omitted.⁴¹⁷ However, there is no requirement that prospective bidders or offerors be warned of the potential foreign competition that may result from operation of a particular exception to the Act.⁴¹⁸

Whether the clauses requiring enforcement of the Buy American Act must or should be flowed down to subcontractors depends primarily on whether the contract concerned is for the procurement of supplies or for construction. The Act, as implemented, requires that each construction contract "contain a provision that in the performance of

⁴¹⁵ See, e.g., FAR 52.225-3; FAR 52.225-5; FAR 52.225-9.

⁴¹⁶ So named after the seminal case of *G.L. Christian & Associates, Inc. v. United States*, 160 Ct.Cl. 58 (1963).

⁴¹⁷ See generally *General Exhibits, Inc. & Rhombi-12, Ltd., A Joint Venture*, DOT CAB No. 72-38, 77-1 BCA ¶12,236 (1977).

⁴¹⁸ See, e.g., *Technical Systems, Inc.*, 66 Comp. Gen. 297 (1987), 87-1 CPD ¶240; *Omega Machine Co.*, Comp. Gen. Dec. B-204471, Dec. 3, 1981, 81-2 CPD ¶442; *Self-Powered Lighting, Ltd. v. United States*, 492 F. Supp. 1267 (S.D.N.Y. 1980); *Maryland Machine Tool Sales*, Comp. Gen. Dec. B-192019, Jul. 6, 1978, 78-2 CPD ¶14; *Crockett Machine Co.*, Comp. Gen. Dec. B-189380, Feb. 9, 1978, 78-1 CPD ¶109.

the work, the contractor, subcontractors, materialmen, and suppliers, shall", absent an applicable exception, use only domestic construction materials.⁴¹⁹ Through the standard clause used for construction contracts, the prime contractor specifically agrees to comply with this requirement.⁴²⁰ Because the wording of both the underlying statutory provision and the resulting clause requires compliance at all levels of contract performance, a prime contractor must necessarily flow that requirement to each subcontractor, materialman, and supplier to ensure fulfillment of its own contractual obligation.⁴²¹ The same requirement does not, however, apply to procurements of supplies. For supplies, the Act requires only that the desired end product be mined, produced, or manufactured in the United States and that the cost of components mined, produced or manufactured in the United States exceed fifty percent of the cost of all components. Thus, not all of the components must be manufactured in the United States and the origin of the materials that go into those components that are manufactured domestically is of no concern.⁴²² Accordingly, while a prime contractor cannot escape the requirement to provide a domestic end product by buying the end

⁴¹⁹41 U.S.C.A. §10b(a) (1987 & Supp. 1989). See also FAR 25.202.

⁴²⁰FAR 52.225-5 (Buy American Act - Construction Materials (Apr 1984)) (subparagraph (b)).

⁴²¹See generally *E.J. Murray Company, Inc., et al.*, Comp. Gen. Dec. B-212107, *et al.*, Mar. 16, 1984, 84-1 CPD ¶316; *Brown Boveri Corp.*, 56 Comp. Gen. 596 (1977), 77-1 CPD ¶328.

⁴²²See text and accompanying notes, pp. 20-34, *supra*.

product or components from subcontractors,⁴²³ there is absolutely no need to impose Buy American Act requirements on each subcontractor. Rather, to take maximum advantage of cheap foreign labor and materials while still providing a domestic end product, contractors should determine in advance which components must be manufactured domestically and which may be manufactured abroad and fashion their subcontract requirements accordingly. If a subcontractor is to produce a particular *domestic* component, the sole requirement imposed on that subcontractor for purposes of the Buy American Act should be that the component itself be mined, produced, or manufactured in the United States. The subcontract should not impose any domestic origin requirements on the material of which a manufactured component is composed. Of course, if the prime contractor intends to simply procure the desired end product from a subcontractor, the full requirements of the Act should be flowed to that subcontractor.

For procurements over \$100,000 that are anticipated to require furnishing to the government of imported supplies, the FAR also requires inclusion of a "Duty-Free Entry" clause.⁴²⁴ The purpose of such clause, the substance of which must be flowed to subcontractors, is to preclude procuring agencies from having to use appropriated funds to pay, as part of the contract price, the cost of customs duties which the contractor has in turn paid to another arm of the

⁴²³46 Comp. Gen. 784 (1967).

⁴²⁴FAR 25.605. (Requiring use of FAR clause 52.225-10, Duty-Free Entry (Apr 1984)).

government.⁴²⁵ To facilitate this policy, the FAR requires that duty free entry certificates be sought in all cases in which the "anticipated savings...outweigh the administrative costs [of] processing the required documentation."⁴²⁶ The standard clause in turn provides that unless "otherwise approved by the Contracting officer, no amount is or will be included in the contract price for any duties on supplies specifically identified in the Schedule to be accorded duty-free entry."⁴²⁷ If a solicitation is ambiguous as to whether a particular supply is to be accorded duty-free entry, and thus whether the import duties should or should not be included in the bid price for that item, all bids should be rejected and a new, corrected solicitation issued.⁴²⁸ Such action is necessary to ensure that all bidders are being treated equally.⁴²⁹

The fact that a duty-free entry certificate will be issued for any given foreign supply does not control whether the amount of the normal duty applicable to such item is to be considered for purposes of evaluating offers under the Buy American Act.⁴³⁰ Rather, such offers are nonetheless evaluated by adding the applicable differential to the

⁴²⁵ See FAR 25.602.

⁴²⁶ *Id.*

⁴²⁷ FAR 52.225-10 (Duty-Free Entry (Apr 1984), subparagraph (a)).

⁴²⁸ R.H. Pines Corp., Comp. Gen. Dec. B-198608, Dec. 24, 1980, 80-2 CPD ¶442.

⁴²⁹ *Id.*

⁴³⁰ To the Secretary of the Army, 51 Comp. Gen. 650 (1972), 1972 CPD ¶48. See also DFARS 225.600.

bid price "*inclusive of duty*".⁴³¹

c. Certification Requirements

The FAR requires inclusion in every procurement of supplies subject to the Buy American Act a certification from the contractor that each end product, except those specifically listed by the contractor in the certificate, is a domestic end product.⁴³² Although different variations of the certificate are used depending on whether the particular procurement is subject to the Trade Agreements Act of 1979 or some other broad exception to the Act, the basic requirements of each are the same and are applied in the same manner.⁴³³

Because the certificate provides that all end products *except those specifically excluded* will be domestic end products, failure to list any excluded products, in the absence of other indications that the bidder or offeror intends to supply a foreign end product, results in a binding obligation, through operation of the standard Buy American Act provision, to furnish only domestic end products.⁴³⁴ Accordingly,

⁴³¹FAR 25.105(a).

⁴³²FAR 25.109(a). No similar requirement is imposed for construction contracts. For such procurements, the contractor merely agrees to use only domestic construction materials. See FAR clause 52.225-5 (Buy American Act - Construction Materials (Apr 1984)).

⁴³³Compare FAR 52.225-1 (Buy American Certificate (Dec 1989) and FAR 52.225-8 (Buy American Act - Trade Agreements Act - Balance of Payments Program Certificate (May 1986)).

⁴³⁴See, e.g., Troemner, Inc., ASBCA No. 32646, 87-1 BCA ¶19,537 (1987); D.H. Industries, Comp. Gen. Dec. B-232963, Jan. 25, 1989, 89-1 CPD ¶80; Schlumberger Industries, Comp. Gen. Dec. B-232608, Dec. 27, 1988, 88-2 CPD ¶626; Unicare Vehicle Wash, Inc., Comp. Gen. Dec. B-181852, Dec. 3, 1974, 74-2 CPD ¶304.

a failure to "complete" the certificate is not a basis for rejection of a bid as nonresponsive.⁴³⁵ Similarly, an agency's failure to include the certificate in a solicitation does not require cancellation and resolicitation, in that the absence of the certificate has the same effect as a bidder's failure to complete the certificate. *i.e.*, binds the bidder to supply only domestic end products.⁴³⁶

Bidders or offerors which intend to use some foreign components need not make any entries in the required certificate as long as the resulting end products qualify as domestic end products within the meaning of the Act.⁴³⁷ Bidders which do intend to provide some foreign end products should only provide a generic reference to such excluded products. Reference should not be made in the certificate to particular brand names or model numbers as it may result in an ambiguity in the proposal as to whether the specified model number will meet the specifications and thus require rejection of the bid as nonresponsive.⁴³⁸

A contracting officer may normally rely on a blank Buy American Act certificate as an indication that the bidder or offeror concerned

⁴³⁵See *International Salt Co., Comp. Gen. Dec. B-200128, Jan. 7, 1981, 81-1 CPD ¶142; 48 Comp. Gen. 142 (1968).*

⁴³⁶*Engineered Air Systems, Inc., Comp. Gen. Dec. B-224269.2, Oct. 28, 1986, 86-2 CPD ¶484; 47 Comp. Gen. 624 (1968).*

⁴³⁷*Fordice Construction Co., Comp. Gen. Dec. B-206633, Apr. 30, 1982, 82-1 CPD ¶401.*

⁴³⁸*J.S. Staedtler, Inc., Comp. Gen. Dec. B-188459, Jun. 1, 1977, 77-1 CPD ¶379.*

intends to supply only domestic end products.⁴³⁹ However, the certificate cannot be considered in a vacuum, but must be considered in light of the entire bid package, as finally submitted, and any other information made known to the contracting officer about the expected source of the end products.⁴⁴⁰ When a question does arise as to the accuracy of an offeror's certification that it will provide only domestic end products, the agency must obtain sufficiently detailed cost information to make an affirmative determination that only domestic end products will in fact be provided.⁴⁴¹ Thus, a bid or offer which fails to exclude any items from the certificate must nonetheless be evaluated as offering foreign end products if, elsewhere in the proposal, it either lists a foreign place of manufacture, or lists domestic and foreign places of manufacture in the alternative, such that the actual place of manufacture cannot be determined from the face of the bid.⁴⁴² Similarly, where an offeror

⁴³⁹ See, e.g., Hewlett-Packard Co., Comp. Gen. Dec. B-228271, Dec. 3, 1987, 87-2 CPD ¶545; Wire Rope Corp. of America, Inc., Comp. Gen. Dec. B-225672, Mar. 13, 1987, 87-1 CPD ¶286; Spectrum Leasing Corp., Comp. Gen. Dec. B-218323.3, *et al.*, Jul. 11, 1986, 86-2 CPD ¶56. See also FAR 25.407(b).

⁴⁴⁰ See, e.g., Towmotor Corp., 65 Comp. Gen. 373 (1986), 86-1 CPD ¶219; Cameron Manufacturing Co., Comp. Gen. Dec. B-184767, May 17, 1976, 76-1 CPD ¶328.

⁴⁴¹ Avantek, Inc., 50 Comp. Gen. 697 (1971), 1971 CPD ¶28. Such detailed cost information does not have to be made public as part of the bid. *Id.*

⁴⁴² Trail Equipment Co., Comp. Gen. Dec. B-205026, Jan. 27, 1982, 82-1 CPD ¶63. (Bidder listed place of manufacture as "USA or France"). Accord Airpro Equipment, Inc., 62 Comp. Gen. 154 (1983), 83-1 CPD ¶105. (Use of a virgule in identifying the place of manufacture, as in "USA/England" has the same meaning as "or" and thus must be interpreted to mean that the end product might be manufactured in England).

changes the normal wording of the certificate from indicating that components of unknown origin shall be considered as manufactured *outside* the United States to *inside* the United States, the offer must be treated as one of foreign end products.⁴⁴³ Failure to do so would permit the offeror to classify what is truly a foreign end product as domestic solely because it does not *know* (and probably does not care to know) the true origin of the component parts.⁴⁴⁴

If an offeror unambiguously certifies an intent to provide only domestic end products, and thus imposes on itself a binding obligation to do so, the Comptroller General will not entertain allegations of a contrary intent. Whether or not the offeror complies with its obligation to provide only domestic end products under such circumstances is a matter of contract administration beyond the purview of the GAO bid protest authority.⁴⁴⁵ In a similar vein, the Comptroller has consistently held that whether an offeror has the *ability* to provide only domestic end products is a matter of responsibility for determination by the contracting officer. Such determinations will not be reviewed by the GAO absent allegations of fraud or bad faith or misapplication of definitive responsibility

⁴⁴³48 Comp. Gen. 458 (1969).

⁴⁴⁴*Id.*

⁴⁴⁵See, e.g., D.H. Industries, Comp. Gen. Dec. B-232963, Jan. 25, 1989, 89-1 CPD ¶80; Schlumberger Industries, Comp. Gen. Dec. B-232608, Dec. 27, 1988, 88-2 CPD ¶626; International Pressure Service, Inc., Comp. Gen. Dec. B-227952, Oct. 5, 1987, 87-2 CPD ¶339.

criteria.⁴⁴⁶ Of course, knowingly false certifications of intent to provide only domestic end products may result in criminal prosecution of the offeror concerned.⁴⁴⁷

In sealed bid procurements, bidders are not normally permitted, after bid opening, to change their certification of whether foreign or domestic end products are to be provided.⁴⁴⁸ Such a change would effectively permit a bidder to alter its bid price and thus its relative bid standing and so compromise the integrity of the procurement process.⁴⁴⁹ However, where a bidder clearly intended to offer a foreign end product, the contracting officer knew that fact prior to bid opening, and the bid would remain low even after application of the applicable evaluation differential, there is no prejudice to other bidders and the certificate may be properly corrected as a "mistake in bid" to reflect offer of a foreign end product.⁴⁵⁰ A bidder may also alter its intended plan of performance after bid opening to ensure compliance with its certified obligation

⁴⁴⁶ See, e.g., Atlas Powder Co., Comp. Gen. Dec. B-227812, Sept. 11, 1987, 87-2 CPD ¶235; W.H. Smith Hardware Co., Comp. Gen. Dec. B-219405, Jul. 26, 1985, 85-2 CPD ¶100.

⁴⁴⁷ See United States v. Ernest Hoesterey, et al., Criminal No.83-80-2, Slip Opinion (D.Mass. Aug. 10, 1983) (LEXIS, Genfed Library) (Defendants charged with conspiracy and with making false statements to and false claims against the United States in connection with a GSA contract for the purchase of medical supplies. They allegedly falsely certified that such instruments were manufactured in the United States).

⁴⁴⁸ See, e.g., H.E. Crain, Comp. Gen. Dec. B-194329, Nov. 15, 1979, 79-2 CPD ¶355; 40 Comp. Gen. 668 (1961); 39 Comp. Gen. 531 (1960).

⁴⁴⁹ *Id.*

⁴⁵⁰ 48 Comp. Gen. 142 (1968).

to provide only domestic end products.⁴⁵¹

d. Enforcement and Responses to Contractor Violations

Notice of potential violations of the Buy American Act come to light in a variety of ways. In many cases, a contractor itself may notify the agency of its intent to provide foreign end products or construction materials. This usually occurs when the contractor is seeking relief from the domestic preference restrictions of the Act on the grounds that suitable domestic materials or end products are not reasonably available or that use of the domestic items would result in unreasonable cost. Alternatively, a contracting officer may discover a violation, either on his own, or through use of government inspectors. Most often though, notice of potential violations is provided through complaints by disgruntled competitors.

Regardless of how a potential violation is uncovered, it is clear that the contracting officer has primary responsibility to enforce the Act. Indeed, in meeting that responsibility, a contracting officer is entitled to take whatever steps are reasonably necessary.⁴⁵²

Unfortunately, with only one exception, neither the Act nor the implementing regulations provide the contracting officer with any guidance on the range of actions available to enforce the Act or to

⁴⁵¹Propper Manufacturing Co., Comp. Gen. Dec. B-193230, Feb. 16, 1979, 79-1 CPD ¶117; Arizona Industrial Machinery Co., Comp. Gen. Dec. B-191178, Jul. 25, 1978, 78-2 CPD ¶68.

⁴⁵²See A&H Automotive, Inc., ASBCA No. 28982, 85-2 BCA ¶17,978 (1985) (Board upheld a contract provision requiring the contractor to submit evidence of "traceability to the actual manufacturer" to ensure compliance with the Act).

compensate the government for violations of the Act. Rather, such guidance must be gleaned from decisions of the Comptroller General, the Boards of Contract Appeals, and the Courts. The sole exception is that, in the case of construction contracts, both the Act and the regulations provide that any contractor found by the agency head to have violated the Act during performance of such a contract shall not be awarded another construction contract for a period of 3 years after such finding is made public.⁴⁵³ In practice, however, this "mandatory" debarment provision is rarely invoked. The Comptroller General very early ruled that, despite the language of the statute, debarment is required only if the circumstances surrounding the violation indicate that the contractor was acting in bad faith.⁴⁵⁴ Violations arising from bona fide misunderstandings or inadvertence were deemed not to trigger the debarment provisions.⁴⁵⁵ These holdings are understandable from a fairness standpoint and are arguably justifiable in that the framers of the Act probably only intended to punish knowing violations. However, in 1963, the Comptroller virtually emasculated the debarment rule by holding that a "violation [may] be cured by removal of the unauthorized material and

⁴⁵³41 U.S.C.A. §10b(b) (1987 & Supp. 1989); FAR 25.204.

⁴⁵⁴36 Comp. Gen. 718 (1957) (Comptroller cited the apparent good faith of the contractor and lack of additional profit through use of foreign material in agreeing that discontinuance of further debarment proceedings was proper).

⁴⁵⁵*Id.* Accord. 39 Comp. Gen. 599 (1960) (Comptroller approved of debarment of three subcontractors which knowingly violated the Act, but only a reduction in the price of the prime contract, since the prime contractor had no knowledge of the violation).

installation of material of domestic manufacture."⁴⁵⁶ The Comptroller further ruled that if requiring removal of previously incorporated foreign material would be "unduly harsh" on the contractor, the material may be accepted conditioned upon an appropriate downward equitable adjustment in contract price measured by the difference between the cost of the foreign material and the cost of similar domestic material.⁴⁵⁷ A review of virtually all Buy American Act decisions since that date, as well as a recent issue of the GSA consolidated suspension and debarment list,⁴⁵⁸ failed to disclose a single reported case in which the debarment penalty had been invoked based on a violation of the Act. In lieu of debarment, a wide range of alternative remedies has evolved over the years to permit effective enforcement of the Act and, when necessary, punish knowing violations. The specific remedy used depends on the nature of the violation, the type of contract concerned (supply or construction), and the stage of contract performance at which the violation occurs.

Where a misapplication of the Buy American Act occurs during contract formation, the remedy is relatively straight forward. If a contractor, either through active misrepresentation, or through failure to make an appropriate disclosure, causes an erroneous determination that the contractor is offering a domestic end product,

⁴⁵⁶42 Comp. Gen. 401, 404 (1963).

⁴⁵⁷*Id.*, at 404-405.

⁴⁵⁸General Services Administration Office of Acquisition Policy, *Consolidated List of Debarred, Suspended, and Ineligible Contractors* (March 1988).

the resulting contract is void *ab initio* and must be cancelled.⁴⁵⁹ However, if the improper classification is solely the result of an error by the contracting officer without the fault or knowledge of the contractor, the contract may not be cancelled, but should be terminated for convenience.⁴⁶⁰

Enforcement of the Act with respect to performance of a properly awarded contract is somewhat more involved. A contracting officer may, absent an applicable exception, properly reject foreign end products and, if not yet incorporated into the public building or work, foreign construction materials.⁴⁶¹ In such case, the contractor bears the risk and cost of any additional time needed to furnish properly conforming domestic end products or materials.⁴⁶² However, if the contracting officer improperly rejects as foreign a material or product that is later determined to be domestic, the contractor is entitled to an equitable adjustment to compensate for any increased performance time or cost caused by the improper rejection.⁴⁶³ A contractor also bears the risk of increased time and cost attendant with the *voluntary* return of supplies which the contractor believes

⁴⁵⁹Lanier Business Products, Comp. Gen. Dec. B-187969, May 11, 1977, 77-1 CPD ¶336; 48 Comp. Gen. 504 (1969).

⁴⁶⁰McKenna Surgical Supply, Inc., 56 Comp. Gen. 531 (1977), 77-1 CPD ¶261; Lanier Business Products, Comp. Gen. Dec. B-187969, May 11, 1977, 77-1 CPD ¶336.

⁴⁶¹See, e.g., Huntington Construction, Inc., ASBCA No. 33525, 89-2 BCA ¶21,867 (1989).

⁴⁶²*Id.*

⁴⁶³See, e.g., Spaw Glass, Inc., ICBA No. 282, 61-2 BCA ¶3185 (1961).

violate the Act, but which the contracting officer later determines would have been acceptable.⁴⁶⁴ Absent evidence of an abuse of discretion, a contracting officer's determination that use of a particular item or material is not contrary to the Act will not be overturned.⁴⁶⁵

Once foreign material has actually been incorporated into the construction, the contracting officer has two options. He or she may order removal of the offending material, even if it results in considerable delay and increased performance costs.⁴⁶⁶ Of course, the government bears the burden of proving that use of a particular material is not in compliance with the Act,⁴⁶⁷ and the contractor will be entitled to an equitable adjustment for increased time and costs caused by an improper contracting officer order to remove materials that are actually in compliance with the Act.⁴⁶⁸

In lieu of ordering removal of the foreign material, the contracting officer may adjust the contract price downward in an

⁴⁶⁴XL Industries, ASBCA No. 20217, *et al.*, 78-1 BCA ¶12,919 (1977).

⁴⁶⁵C.E. Wylie Construction Co., ASBCA No. 26545, *et al.*, 85-1 BCA ¶17,933 (1985).

⁴⁶⁶See Ed Loshbaugh & Sons, Inc., ASBCA No. 36104, 88-3 BCA ¶21,023 (1988)(\$12,182 in increased costs on a \$5,390 subcontract); Two State Construction Co., DOT CAB No. 1006, *et al.*, 81-1 BCA ¶15,149 (1981)(176 day delay and \$122,451 in increased costs) Whitesell-Green, Inc., ASBCA No. 26695, 85-1 BCA ¶17,934 (1985)(67 day delay and \$150,000 in increased costs and liquidated damages).

⁴⁶⁷Troemner, Inc., ASBCA No. 32646, 87-1 BCA ¶19,537 (1987); A&H Automotive, Inc., ASBCA No. 28982, 85-2 BCA ¶17,978 (1985).

⁴⁶⁸Klefstad Engineering Co., Inc. & Blackhawk Heating & Plumbing Co., Inc., VACAB No. 551, 67-1 BCA ¶6393 (1967); 46 Comp. Gen. 813 (1967).

amount equal to the difference in cost between the foreign material and an equal amount of the same domestic material.⁴⁶⁹ However, the government's ability to make such an adjustment is not unlimited. If an agency has properly granted a post award waiver of the Act, it may not thereafter reduce the original contract price based on such waiver if the contractor's bid was based on use of foreign materials, the contractor realized no additional profit through use of such materials, and the contractor's bid, had it encompassed use of domestic materials, would still have been the lowest evaluated bid.⁴⁷⁰ Moreover, although adjustments in contract price are permitted, the Boards of Contract Appeals may not, absent a specific contract clause authorizing such a remedy, grant a government request for return of the entire contract purchase price for a breach of contract action based on an alleged violation of the Act.⁴⁷¹

Another remedy available against contractors that are unable or unwilling to comply with the Act is a termination for default.⁴⁷² Contracting officers seeking such action must, of course, follow normal termination procedures. Thus, if the contractor, in response

⁴⁶⁹Dick Holland, Inc. & Rinker Materials Corp., ASBCA No. 21304, 77-1 BCA ¶12,540 (1977).

⁴⁷⁰L.G. Lefler, Inc. v. United States, 6 Cl.Ct. 514 (1984), *aff'd*, 801 F.2d 387 (Fed.Cir. 1986).

⁴⁷¹Southern Pipe & Supply Co., A Division of Hajoca Corp., NASA BCA No. 570-7, 72-2 BCA ¶9512 (1972), *aff'd on reconsid.*, 73-2 BCA ¶10,118 (1973).

⁴⁷²*See, e.g.*, Ballantine Laboratories, Inc., ASBCA No. 35138, 88-2 BCA ¶20,660 (1988); A&H Automotive, Inc., ASBCA No. 28982, 85-2 BCA ¶17,978 (1985); Sunox, Inc., ASBCA No. 30025, 85-2 BCA ¶18,077 (1985).

to a cure notice, provides sufficient information to show that the material which it proposes to use qualifies as domestic, a termination for default may not be issued.⁴⁷³ A contractor having difficulty fulfilling the terms of its contract through use of domestic supplies and materials should not rely on its own belief that the Act precludes use of more readily available foreign materials. Rather, it should seek an appropriate decision on the issue from the contracting officer. Failure to do so will preclude the contractor from raising the lack of reasonably available domestic materials as a defense to a termination for default for failure to perform.⁴⁷⁴

As is the case in any termination for default, the measure of the excess costs of reprocurement which may be assessed against the defaulting contractor is, in most instances, the difference between what the government would have paid under the original contract and what it actually paid on the reprocurement contract. Thus, if the lowest actual bid on a reprocurement contract is foreign, but is displaced by a higher domestic bid after application of the appropriate evaluation differential, reprocurement costs must be calculated on the basis of the higher priced winning domestic bid, since that is the price the government is required to pay.⁴⁷⁵ The rationale is that procurement officials have no choice but to apply

⁴⁷³Troemner, Inc., ASBCA No. 32646, 87-1 BCA ¶19,537 (1987).

⁴⁷⁴See Carter Manufacturing Corp., ASBCA No. 21975, 79-1 BCA ¶13,676 (1979).

⁴⁷⁵Gerand Daniel Supply Corp., ASBCA No. 9193, *et al.*, 65-1 BCA ¶14639 (1965).

the applicable differential and to thereafter award on the basis of the lowest evaluated price.⁴⁷⁶ Similarly, excess costs of reprocurement for a defaulted contractor whose offer was evaluated as foreign during the original competition are calculated based on the price the government would have actually paid under the defaulted contract, not on the original higher evaluated price after application of the appropriate Buy American Act differential.⁴⁷⁷ Because the government could issue a duty-free import certificate for the defaulting contractor, the anticipated cost to the government of the defaulted contract *excludes* the applicable import duty even though such duty was required by regulation to be included for evaluation purposes during the original competition.⁴⁷⁸

The government is not, under most circumstances, required to waive application of the Buy American Act in order to mitigate damages on reprocurement of a defaulted contract.⁴⁷⁹ However, if a lower priced bidder offering a foreign end product for the reprocurement contract requests such a waiver and the contracting officer improperly denies that request and awards to a higher priced domestic bidder, excess costs of reprocurement will be computed on the basis of the lower

⁴⁷⁶ *Id.*

⁴⁷⁷ American KAL Enterprises, Inc., GSBGA No. 4987, 80-2 BCA ¶14,522 (1980).

⁴⁷⁸ Metimpex Corp., ASBCA No. 4658, 59-2 BCA ¶2421 (1959).

⁴⁷⁹ X-Tyal International Corp., ASBCA No. 24353, *et al.*, 84-2 BCA ¶17,251 (1984).

foreign price.⁴⁸⁰

As a final enforcement measure, the government may pursue civil or criminal penalties against contractors which intentionally falsely certify that the end products or construction materials to be provided are of domestic origin within the meaning of the Act.⁴⁸¹

B. PROHIBITED PROCUREMENTS - A NEW DEVELOPMENT

On August 23, 1988, President Reagan signed into law the Omnibus Trade & Competitiveness Act of 1988.⁴⁸² Title VII of that Act amends the Buy American Act⁴⁸³ to prohibit the purchase of articles, materials, and supplies mined, produced or manufactured in foreign countries that are signatories to the International Agreement on Government Procurement⁴⁸⁴ but do not abide by the terms of that agreement⁴⁸⁵ and from countries whose governments, maintain "a significant and persistent pattern or practice of discrimination

⁴⁸⁰ *Id.*

⁴⁸¹ See *United States v. Rule Industries*, 878 F.2d 535 (1st Cir. 1989) (civil penalties sought under the False Claims Act); *United States v. Ernest Hoestery, et al.*, Criminal No. 83-80-2, Slip Opinion (D.Mass. Aug. 10, 1983) (LEXIS, Genfed Library) (criminal prosecution under 18 U.S.C. §1001 for false statements).

⁴⁸² Pub. L. No. 100-418, 102 Stat. 1107 (1988). The Act arose out of a 1987 bill sponsored by Representatives Brooks and Horton. H.R. 1750, 100th Cong., 1st Sess. (1987).

⁴⁸³ The new provision is to be codified as 41 U.S.C. §10b-1.

⁴⁸⁴ The agreement on Government Procurement was initiated as part of the General Agreement on Tariffs and Trade (GATT) and is implemented through the Trade Agreements Act of 1979. A further discussion of this area is contained in Chapter 4, *infra*.

⁴⁸⁵ 41 U.S.C.A. 10b-1(a)(1)(A) (Supp. 1989).

against United States products or services which results in identifiable harm to United States businesses."⁴⁸⁶ The amendment also prohibits the procurement of services from "any contractor or subcontractor that is a citizen or national" of such foreign countries or "is owned or controlled directly or indirectly by citizens or nationals" of such countries.⁴⁸⁷ For purposes of "construction services", the amendment provides detailed instructions on when a contractor or subcontractor "is owned or controlled directly or indirectly by citizens or nationals" of discriminating countries.⁴⁸⁸ Guidelines for what constitutes such control for all other types of services is to be later provided by the Administrator for Federal Procurement Policy.⁴⁸⁹

The amendment provides for several exceptions to the prohibitions set forth therein, many of which are similar to the exceptions long recognized with respect to the domestic preference provisions of the Buy American Act. The prohibitions do not apply to services or items "procured and used outside the United States and its territories," or to procurements from "least developed countries."⁴⁹⁰ Further, the President or the head of a Federal agency may waive the prohibitions with respect to the award of a particular contract if such waiver is

⁴⁸⁶41 U.S.C.A. §10b-1(a)(1)(B) (Supp. 1989).

⁴⁸⁷41 U.S.C.A. §10b-1(a)(2) (Supp. 1989).

⁴⁸⁸41 U.S.C.A. §10b-1(g)(1) (Supp. 1989).

⁴⁸⁹41 U.S.C.A. §10b-1(g)(2) (Supp. 1989).

⁴⁹⁰41 U.S.C.A. §10b-1(b)(1)&(3) (Supp. 1989).

deemed necessary "in the public interest", to avoid restricting the solicitation to a single source, or to ensure the availability of sufficient quantities of items of satisfactory quality.⁴⁹¹ Congress must be notified of any such waiver at least 30 days prior to award or, if the agency's need is urgent, within 90 days after award.⁴⁹²

The prohibitions of the Act, though effective immediately, are not expected to have any real effect until April 30, 1990, when the countries which fall within the prohibitions of the Act are expected to be first identified by the President.⁴⁹³ The amendment is to remain in effect until April 30, 1996, unless otherwise extended.⁴⁹⁴

The 1988 amendment is unique, not only because of the prohibitions which it establishes, but because it for the first time extends application of the Buy American Act to services.⁴⁹⁵ Although guidance issued by the Office of Federal Procurement Policy makes it clear that the amendment does not extend the Buy American Act's *domestic preference requirements* to services,⁴⁹⁶ such a change may well be the next step in the overall evolution of the Act. The 1988 amendment also reflects the continuing trend, evidenced by the many

⁴⁹¹41 U.S.C.A. §10b-1(c)(1) (Supp. 1989).

⁴⁹²41 U.S.C.A. §10b-1(c)(2) (Supp. 1989).

⁴⁹³54 Fed. Reg. 9112 (1989).

⁴⁹⁴Pub. L. No. 100-418, §7004, 102 Stat. 1107, 1552 (1988).

⁴⁹⁵See the text and notes at pp. 11-12, *supra*, for a discussion of the applicability of the domestic preference provisions of the Buy American Act to services.

⁴⁹⁶54 Fed. Reg. 9112 (1989).

exceptions to the Act accorded the products of nations on favorable trading terms with the United States, to use the Buy American Act not as a means of expressing a national preference for domestic products, but as a means of penalizing those nations that do not, as evidenced by their own restrictive buying practices, support the free international trade so long advocated by the United States. Thus, although the 1988 amendment may initially raise additional barriers to the procurement of foreign goods and services, it may ultimately serve as a basis for eliminating the few remaining preferences imposed by the original Act for domestic goods over the goods of other nations that do support free international trade.

CHAPTER THREE

ADDITIONAL DOMESTIC PREFERENCE REQUIREMENTS

In addition to the Buy American Act, a number of other domestic preference requirements have arisen over the years. All of these additional requirements are, in the broadest sense, aimed at closing some of the perceived "loop holes" created by the many exceptions to the Buy American Act. However, the actual form and effect of each such additional domestic preference requirement varies, depending on the specific gap which the requirement is intended to fill. For example, the intent may be to narrow or limit the effect of a particular exception to the Buy American Act. If so, the additional domestic preference requirement will generally apply across the board to all procurements which would otherwise fall under the exception concerned. The domestic preference requirements imposed by the Balance of Payments Program fall into this category. Alternatively, the intent may be to provide extra protection and assistance for a specific domestic industry. In such case, the additional domestic preference requirement will apply only to procurements of a specific item or type of item, and will override the effect of all exceptions to the Buy American Act which might otherwise apply. Many of the authorization and appropriation act restrictions fall within this category. Both types of additional domestic preference requirements are addressed in this chapter.

A. THE BALANCE OF PAYMENTS PROGRAM

In 1962, Secretary of Defense McNamara initiated a "Balance of Payments" program designed to help alleviate the impact of DoD procurements on the nation's balance of international payments by creating a domestic preference requirement for supplies and services procured for use *outside* the United States, to which the Buy American Act does not otherwise apply.⁴⁹⁷ As originally implemented, the program required that only domestic supplies or services be procured by the military departments for use outside the United States unless the cost of such items exceeded the cost of comparable foreign items or services by more than 50 percent.⁴⁹⁸ This same requirement is contained in current defense procurement regulations⁴⁹⁹ and has since been made applicable to procurements by other federal agencies.⁵⁰⁰ Although DoD later required the same 50 percent evaluation differential to be applied to procurements of supplies for use inside the United States,⁵⁰¹ this aspect of the program was never adopted by other agencies and remains unique to DoD. Application of the DoD Balance of Payments Program requirements to procurements of supplies for use inside the United

⁴⁹⁷ See text and accompanying notes at pp. 63-65, *supra*.

⁴⁹⁸ Memorandum from the Secretary of Defense to all Military Departments (July 16, 1962) (Subject: Supplies and Services for Use Outside the United States).

⁴⁹⁹ See DFARS Subpart 225.3.

⁵⁰⁰ See FAR Subpart 25.3.

⁵⁰¹ Memorandum For the Assistant Secretary of Defense (I&L) from Deputy Secretary of Defense Cyrus Vance (March 7, 1964) (Subject: Procurement Procedures Under the Buy American Act). See also DFARS 225.102(S-73).

States is separately addressed in Chapter 2, *supra*.⁵⁰²

1. Scope and Interaction With The Buy American Act

The primary effect of the Balance of Payments Program is to fill the gap in the domestic preference requirements of the Buy American Act created by the "use abroad" exception.⁵⁰³ Similar to the Buy American Act, the Program does not prohibit the procurement of foreign items, but merely requires that an evaluation differential of 50 percent be added to the bid or offered price of foreign offers submitted in response to solicitations for the procurement of supplies and construction for use outside the United States.⁵⁰⁴ If, after adding the required differential, the cost or price of the foreign offer still remains low, procurement of the domestic end products or construction materials is deemed to result in unreasonable cost or to be inconsistent with the public interest.⁵⁰⁵ The same requirement is extended to procurements of services to be performed outside the United States.⁵⁰⁶ Beyond these two differences, the restrictions imposed by the Balance of Payments Program are "virtually identical" to the Buy American Act restrictions and,

⁵⁰² See text and accompanying notes, pp. 61-63 and 88-91, *supra*.

⁵⁰³ AME Matex Corp., Comp. Gen. Dec. B-218588.2, Jun. 20, 1985, 85-1 CPD ¶704, *request for reconsid. denied*, Comp. Gen. Dec. B-218588.3, Jul. 18, 1985, 85-2 CPD ¶58.

⁵⁰⁴ *Id.* See also FAR 25.300; FAR 25.303.

⁵⁰⁵ FAR 25.303(b).

⁵⁰⁶ *Id.* The domestic preference requirements of the Buy American Act do not apply to procurements of services. See text and accompanying notes, p. 12, *supra*.

except for the size of the evaluation differential (50% vs 6% or 12%), are administered and interpreted in a similar manner.⁵⁰⁷

The regulatory provisions which implement the Balance of Payments Program employ the same concepts of "end products", "components" and "construction materials" as the Buy American Act regulatory provisions to determine whether a particular offer is foreign or domestic and incorporate by reference the same definitions of such terms.⁵⁰⁸ However, because the Balance of Payments Program, unlike the Buy American Act, also applies to acquisitions of services,⁵⁰⁹ the regulation necessarily adds a definition of "domestic services". Such services are defined as those "performed in the United States."⁵¹⁰ However, if the services are to be "performed both inside and outside the United States, they [are still] considered domestic if 25 percent or less of their total cost is attributable to services (including incidental supplies used in connection with these services) performed outside the United States."⁵¹¹ The 25% threshold imposed by this definition for purposes of determining whether a particular offer is classified as foreign or domestic applies only to services procured under a contract for the performance of services and not to incidental

⁵⁰⁷Unicare Health Services, Inc., Comp. Gen. Dec. B-180262, Apr. 18, 1975, 75-1 CPD ¶234. See also Lemmon Pharmacal Co., Comp. Gen. Dec. B-186124, Aug. 2, 1976, 76-2 CPD ¶110.

⁵⁰⁸See FAR 25.301; FAR 25.302(c).

⁵⁰⁹FAR 25.300; FAR 25.302(a).

⁵¹⁰FAR 25.301.

⁵¹¹*Id.*

services performed as part of a contract to supply a particular end product.⁵¹² Accordingly, the "assembly" of components into an end product, which might, in the broadest sense, be considered a "service", does not constitute a service within the meaning of the Balance of Payments Program provisions.⁵¹³ Therefore, even if the cost of assembling all domestic components into an end product, if performed abroad, accounts for less than 25% of the cost of that end product, the product, which would otherwise be considered "foreign" due to its manufacture outside the United States,⁵¹⁴ is not considered domestic.⁵¹⁵

2. Exceptions

Virtually all of the exceptions available under the Buy American Act, except of course the "use broad" exception, are also applicable to Balance of Payments Program procurements. As is clear from the above analysis, the manner in which the program is implemented effectively results in an "unreasonable cost" exception identical to that available under the Buy American Act except for the size of the evaluation differential employed to make that determination (50% vs 6% or 12%). The Balance of Payments Program restrictions also do not apply to procurements of items not available in the United States in sufficient

⁵¹²Jamar Corp., 52 Comp. Gen. 13 (1972), 1972 CPD ¶72.

⁵¹³*Id.*

⁵¹⁴It has been held that the mere assembly of previously manufactured parts or components may constitute manufacture. See text and accompanying notes at pp. 40-41, *supra*.

⁵¹⁵Jamar Corp., 52 Comp. Gen. 13 (1972), 1972 CPD ¶72.

and reasonably available commercial quantities of a satisfactory quality.⁵¹⁶ Further, the agency head may waive application of the Balance of Payments Program restrictions if such waiver is in the "public interest".⁵¹⁷ Accordingly, application of such restrictions has been waived with respect to purchases under the various Memoranda of Understanding between DoD and foreign governments.⁵¹⁸ Waiver under the public interest exception may be made before or after bid opening.⁵¹⁹ Waiver after bid opening does not give bidders the opportunity to change their bids, but only affects the way such bids are evaluated, and thus does not compromise the integrity of the bidding process.⁵²⁰ All of the external statutory exceptions to the Buy American Act created by the Trade Agreements Act of 1979, the United States-Canada Free-Trade Agreement Act, the United States-Israel Free-Trade Area Act, and the Caribbean Basin Economic Recovery Act also apply to the Balance of Payments Program restrictions.⁵²¹

In addition to the exceptions common to the Buy American Act, the Balance of Payments Program restrictions do not apply to small purchases

⁵¹⁶See FAR 25.302(b)(3) and (7) (referencing FAR 25.108, "Excepted articles, materials, and supplies.").

⁵¹⁷Maremont Corp., 55 Comp. Gen. 1362, 1394 (1976), 76-2 CPD ¶181.

⁵¹⁸See DFARS 225.7403(a)(3)(i)-(ii); DFARS 225.7502(b).

⁵¹⁹See Lear Siegler Inc., Energy Products Div. v. Lehman, 842 F.2d 1102 (9th Cir. 1988).

⁵²⁰*Id.*

⁵²¹See FAR 25.402(a)(1)-(4) and (b).

of \$25,000 or less,⁵²² to procurements of perishable items if "delivery from the United States would significantly impair their quality at the point of consumption",⁵²³ or to procurements of "materials or services that, by their nature or as a practical matter, can only be acquired or performed in the country concerned."⁵²⁴ Also excepted are procurements mandated by international treaties or agreements,⁵²⁵ procurements of items or services paid for with excess or near-excess foreign currencies,⁵²⁶ and procurements of products or services "mined, produced, or manufactured in Panama...required for use by United States Forces in Panama."⁵²⁷

3. Implementation Procedures

The Balance of Payments Program restrictions are implemented in the same manner as the Buy American Act restrictions. Each procurement subject to the Balance of Payments Program (*i.e.*, procurements for use outside the United States) must include a certification from the offerors that, except as otherwise specified by the offeror in the

⁵²²FAR 25.302(b)(1). See also Auchter Industries, Comp. Gen. Dec. B-221211, Dec. 12, 1985, 85-2 CPD ¶653.

⁵²³FAR 25.302(b)(2).

⁵²⁴FAR 25.302(b)(4).

⁵²⁵FAR 25.302(b)(6).

⁵²⁶FAR 25.302(b)(8). The nature and amount of such currencies is determined annually by the Secretary of the Treasury. A contractor's willingness to accept payment in such currency may, under appropriate circumstances, permit award to that contractor even if its price is not the lowest offer received. See FAR 25.304.

⁵²⁷FAR 25.302(b)(9).

certification, only domestic products and services will be provided under the contract.⁵²⁸ An additional provision detailing the regulatory guidelines for determining whether domestic or foreign products and services are being offered is also required.⁵²⁹ Completion of the required certification and compliance with the resulting contract requirements are governed by the same rules applicable to the Buy American Act, as discussed in Chapter 2, *supra*.

B. AUTHORIZATION AND APPROPRIATION ACT RESTRICTIONS

One of the most prolific sources of additional domestic preference restrictions are authorization and appropriation acts. Although such restrictions may arise with respect to funds appropriated for use by any governmental agency,⁵³⁰ by far the greatest number of restrictions in this area are those applicable to appropriations for the Department of Defense. The DoD authorization and appropriation act restrictions are the primary focus of this study.⁵³¹

Authorization and appropriation act domestic preference restrictions are, for the most part, aimed at protecting specific domestic industries

⁵²⁸FAR 25.305(a); FAR 52.225-6 (Balance of Payments Program Certificate (Apr 1985)).

⁵²⁹FAR 25.305(c); FAR 52.225-7 (Balance of Payments Program (Apr 1984)).

⁵³⁰See generally, Kenney & Duberstein, *supra* note 6, at 17. (detailing various GSA appropriations act restrictions). See also Imperial Eastman Corp., 53 Comp. Gen. 726 (1974), 74-1 CPD ¶153 (discussing the annual GSA appropriation act restriction on the purchase of hand or measuring tools produced outside the United States).

⁵³¹Current DoD authorization and appropriation act restrictions are implemented through DFARS Subpart 225.70.

from foreign competition in the federal procurement arena. As such, the prohibitions which they impose are directed toward very specific products or types of products. Such specific prohibitions override any of the *exceptions* to the more general domestic preference restrictions imposed by the Buy American Act or the Balance of Payments Program that might otherwise be available.⁵³² They do not, however, make the *restrictions* imposed by such other domestic preference laws inapplicable. Rather, the restrictions of the Buy American Act, the Balance of Payments Program, and any applicable authorization or appropriation act must all be satisfied in those procurements where the coverage of the different restrictions overlap.⁵³³

The practice of using authorization and appropriation acts as a vehicle to impose *ad hoc* domestic preference restrictions on DoD procurements is a long standing one⁵³⁴ that continues to be used more and more frequently by Congress.⁵³⁵ Many of such restrictions are not one time prohibitions, but continue to be imposed year after year. Indeed, many have been re-enacted, virtually unchanged, for so many years that Congress has now started to enact some of such funding

⁵³²17 Comp. Gen. 252 (1937).

⁵³³See, e.g., DFARS 225.7000 ("Nothing herein shall affect the applicability of the Buy American Act or the Balance of Payments Program.").

⁵³⁴See 17 Comp. Gen. 252 (1937) (detailing a prohibition in the Navy Appropriation Act of February 28, 1931, 46 Stat. 1431, against "the purchase of any kind of fuel oil of foreign production.").

⁵³⁵See Secretary of Defense Report to Congress, *The Impact of Buy American Restrictions Affecting Defense Procurement* (Jul. 1989) (documenting the substantial growth of authorization and appropriation act restrictions that occurred during the 1980s).

limitations as permanent legislation.⁵³⁶ Despite such a long standing history, the utility of these piecemeal domestic preference restrictions is highly questionable. A recent DoD study of such provisions indicates that they provide little real protection to domestic industry. Rather, they may, in the long run, actually harm domestic industry in that they reduce incentives for modernization, act as an impetus for increased purchases of American firms by foreign companies seeking to comply with the domestic origin requirements, and cause U.S. allies to retaliate with reciprocal buy national measures, thereby restricting U.S. export markets.⁵³⁷ In addition, such provisions as a whole "significantly increase [DoD] procurement costs" and "cause significant confusion and administrative delays" as DoD and industry struggle to understand and comply with each new requirement.⁵³⁸ Although DoD has accordingly recommended that the practice of enacting such piecemeal domestic preference legislation be discontinued,⁵³⁹ Congress has yet to heed such advice.

Because authorization and appropriation act restrictions are enacted on an *ad hoc* basis, an understanding and interpretation of the meaning

⁵³⁶ See 10 U.S.C.A. §2507 (Supp. 1989). See also H.R. Rep. No. 100-696, 100th Cong., 2d Sess. 3-4, *reprinted in* 1988 U.S. Code Cong. & Admin. News 1077, 1077-1078 (detailing the rationale for such action). See also §1624, Pub. L. No. 101-189, 103 Stat. 1352, 1606 (1989), requiring DoD to report, in general, on recurring defense appropriation act provisions and to recommend whether such recurring provisions should be continued, discontinued, or enacted as permanent legislation.

⁵³⁷ See Secretary of Defense Report to Congress, *supra* note 535, at 5-11.

⁵³⁸ *Id.*, at 7.

⁵³⁹ *Id.*, at 12-13.

and effect of the prohibitions, exceptions, and waiver authority for one such restriction does not necessarily apply to other restrictions. However, a few rules of general application do exist. First, it is clear that the agency concerned, whether DoD or otherwise, is responsible for compliance with the particular restrictions applicable to procurements by that agency, even if the items being procured are for ultimate use by another agency.⁵⁴⁰ Moreover, an agency cannot escape the domestic origin restrictions imposed by its own authorization and appropriation acts by requisitioning foreign items from other government agencies not subject to the same restrictions.⁵⁴¹ Second, unlike the Buy American Act and the Balance of Payments Program restrictions, many of the authorization and appropriation act restrictions are mandatory in that they require purchase of domestic items regardless of the amount of savings that might be realized through purchase of cheaper foreign products. In other words, "unreasonable cost" is not a factor. Accordingly, failure to designate a domestic source for items subject to such mandatory domestic preference requirements will result in rejection of a bid as nonresponsive.⁵⁴² Finally, GAO review of a contractor's

⁵⁴⁰ See *Idealspaten, GmbH.*, Comp. Gen. Dec. B-205323, Apr. 27, 1982, 82-1 CPD ¶389 (GSA procurement of hand or measuring tools for ultimate use by DoD).

⁵⁴¹ *Procurement of Stainless Steel Flatware*, Comp. Gen. Dec. B-186422, Oct. 26, 1976, 76-2 CPD ¶364 (DoD attempt to requisition foreign flatware from GSA supply stores).

⁵⁴² See generally *A&H Automotive Industries, Inc.*, Comp. Gen. Dec. B-225775, May 28, 1987, 87-1 CPD ¶546 (failure to agree to provide domestic forgings as required by DFARS 252.208-7005). Although this case concerned an industrial mobilization base restriction, the similarity of such restrictions to those imposed by authorization and appropriation acts arguably make it applicable to the latter type of restrictions.

intent or ability to comply with any given authorization or appropriation act restriction is governed by the same general rules applicable to Buy American Act restrictions. Thus, an offeror which unambiguously agrees to supply only domestic products as required by an authorization or appropriation act restriction is contractually bound to do so.⁵⁴³ Whether a contractor will in fact comply with such requirement is a matter of contract administration not subject to review by the GAO.⁵⁴⁴ Whether an offeror has the *ability* to provide the required domestic products is a matter of responsibility for determination by the contracting officer. Such determinations will not be reviewed by the GAO absent allegations of fraud or bad faith or misapplication of definitive responsibility criteria.⁵⁴⁵ Contracting officers may generally rely on a contractor's assertion that it will comply with applicable authorization and appropriation act restrictions as sufficient evidence that it in fact intends to do so absent other information in the offer or bid of a contrary intent.⁵⁴⁶

⁵⁴³ See, e.g., *The Pratt & Whitney Co., Inc., et al.*, Comp. Gen. Dec. B-232190, *et al.*, Dec. 13, 1988, 88-2 CPD ¶588; *Yale Materials Handling Corp.*, Comp. Gen. Dec. B-226985.2, *et al.*, Jun. 17, 1987, 87-1 CPD ¶607; *Hamilton Watch Co., Inc.*, Comp. Gen. Dec. B-179939, Jun. 6, 1974, 74-1 CPD ¶306.

⁵⁴⁴ *Id.* See also *Autospin, Inc.*, Comp. Gen. Dec. B-233778, Feb. 23, 1989, 89-1 CPD ¶197.

⁵⁴⁵ See, e.g., *Baldt, Inc.*, Comp. Gen. Dec. B-235102, May 11, 1989, 89-1 CPD ¶445; *Fryer Engineering*, Comp. Gen. Dec. B-233835, Mar. 17, 1989, 89-1 CPD ¶284.

⁵⁴⁶ *The Pratt & Whitney Co., Inc., et al.*, Comp. Gen. Dec. B-232190, *et al.*, Dec. 13, 1988, 88-2 CPD ¶588.

The number and focus of authorization and appropriation act domestic preference restrictions tends to fluctuate somewhat from year to year. As a result, the language of each such act must be reviewed to determine exactly what restrictions apply to the particular funds concerned. However, some restrictions have become regular, recurring features of each years' acts, and thus bear further discussion.

By far the oldest and most comprehensive of the regular appropriation act restrictions applicable to DoD is that which is commonly referred to as the "Berry Amendment".⁵⁴⁷ First enacted in 1941 as part of the Fifth Supplemental National Defense Appropriations Act,⁵⁴⁸ the amendment has been a continuous feature of defense appropriation acts since that time.⁵⁴⁹ As originally enacted, the provision only prohibited the procurement of food and clothing not grown or produced in the United States.⁵⁵⁰ However, the provision has been repeatedly expanded over the years and now generally prohibits the procurement of food and clothing, cotton, wool, and other natural and synthetic textiles, materials, and fabrics, specialty metals (to include stainless steel flatware), and hand or measuring tools "not grown, reprocessed, reused, or produced in the United States or its

⁵⁴⁷ See, e.g., *Gumsur, Ltd.*, Comp. Gen. Dec. B-231630, Oct. 6, 1988, 8-2 CPD ¶1329; *A&P Surgical Co., Inc.*, 62 Comp. Gen. 256 (1983), 83-1 CPD ¶1263.

⁵⁴⁸ Pub. L. No. 77-29, 55 Stat. 123 (1941).

⁵⁴⁹ *A&P Surgical Co., Inc.*, 62 Comp. Gen. 256 (1983), 83-1 CPD ¶1263. See also, §9009, DoD FY90 Appropriation Act, Pub. L. No. 101-165 (1989).

⁵⁵⁰ Pub. L. No. 77-29, 55 Stat. 123 (1941).

possessions."⁵⁵¹ The current restrictions and exceptions of the Berry Amendment are set forth in DFARS 225.7002 and DFARS 225.7003.⁵⁵² In addition, definitions of "hand or measuring tools" and "specialty metals", as used within the meaning of the Berry Amendment and the implementing regulatory provisions, are contained in DFARS 225.7001. All of the restrictions imposed by the Berry Amendment are, for the most part, broadly construed to promote the underlying intent of protecting the United States industrial base.⁵⁵³ However, the Comptroller will defer to an agency interpretation of any given restriction, whether broadly or narrowly construed, as long as such interpretation is reasonable.⁵⁵⁴

The various items addressed by the Berry Amendment are not all subject to the same restrictions. The amendment is really simply a convenient conglomeration of different restrictions under one provision and the language applicable to any given item or type of item must be independently analyzed and applied. For example, the effect of the prohibition against the procurement of cotton or wool products "not grown, reprocessed, reused, or produced in the United States" depends on

⁵⁵¹ See, e.g., §9009 of the FY90 DoD Appropriations Act, Pub. L. No. 101-165 (1989). See generally, Secretary of Defense Report to Congress, *supra* note 536, at 15-16.

⁵⁵² The current DFARS provisions have not yet been changed to reflect the \$25,000 small purchase threshold first imposed by the FY89 DoD Appropriations Act. Earlier appropriation acts established the \$10,000 threshold reflected in the DFARS.

⁵⁵³ Gumsur, Ltd., Comp. Gen. Dec. B-231630, Oct. 6, 1988, 88-2 CPD ¶329.

⁵⁵⁴ *Id.*

whether the cotton or wool is new or whether it is reprocessed or reused. Products made from new cotton and wool are considered "grown...or produced in the United States" within the meaning of the Berry Amendment only if the raw fiber is grown or produced in the United States and *each successive stage of manufacture* is also performed in the United States.⁵⁵⁵ However, where reprocessed or reused cotton or wool is involved, the only requirement is that the *reprocessing* take place in the United States.⁵⁵⁶ In contrast to products made from new cotton or wool, the same restriction, when applied to specialty metals, requires only that such metals be melted in the United States, not that the metal be mined or wholly manufactured in the United States.⁵⁵⁷ As to food items, the standard prohibition against "the procurement of any article or item of food...not grown, reprocessed, reused, or produced in the United States" is not limited to food items in their natural state, but also encompasses food items that are processed or manufactured from naturally grown or produced food items.⁵⁵⁸ However, the restriction does not prohibit foreign packaging of food items, even though such packaging may require some "incidental mixing and processing."⁵⁵⁹

⁵⁵⁵See, e.g., Penthouse Manufacturing Co., Inc., Comp. Gen. Dec. B-217480, Apr. 30, 1985, 85-1 CPD ¶487, *aff'd*, 85-2 CPD ¶96; National Graphics, 49 Comp. Gen. 606 (1970); 45 Comp. Gen. 658 (1966).

⁵⁵⁶Comp. Gen. Dec. B-110974, Sept. 5, 1952 (Unpublished).

⁵⁵⁷A&P Surgical Co., Inc., 62 Comp. Gen. 256 (1983), 83-1 CPD ¶263. See also DFARS 225.7002.

⁵⁵⁸Southern Packaging & Storage Co., Comp. Gen. Dec. B-203400, Aug. 10, 1981, 81-1 CPD ¶113.

⁵⁵⁹*Id.*, at 4.

The restrictions imposed by the Berry Amendment are not absolute, but typically provide for several exceptions. As set forth in the FY90 Appropriations Act, the prohibitions do not apply to small purchases of \$25,000 or less, or if the Secretary of the Department concerned determines that items of "satisfactory quality and sufficient quantity...cannot be procured as and when needed at United States market prices."⁵⁶⁰ Although the phrase "at United States market prices" is not further defined, it is clear that it does *not* require the purchase of domestic articles, regardless of price, if the price is "equal to or less than the U.S. price of *foreign* [articles]."⁵⁶¹ It also does not require the purchase of domestic articles, regardless of price, "until the domestic supply is exhausted".⁵⁶² Rather, it only requires a determination of whether the domestic bid price is "within the reasonable range of normal United States market prices" for the articles concerned.⁵⁶³

The Berry Amendment restrictions also do not apply to "procurements outside the United States in support of combat operations, procurements by vessels in foreign waters, and emergency procurements or procurements of perishable foods by establishments located outside the United States

⁵⁶⁰ See §9009, FY90 DoD Appropriations Act, Pub. L. No. 101-165 (1989).

⁵⁶¹ Comp. Gen. Dec. B-110974, at 3, Sept. 5, 1952 (unpublished).

⁵⁶² *Id.*

⁵⁶³ *Id.*, at 8. See also National Graphics, 49 Comp. Gen. 606 (1970).

for the personnel attached thereto."⁵⁶⁴ Further, the prohibitions against the procurement of foreign specialty metals and clothing do not apply to procurements of specialty metals or chemical warfare protective clothing that are required by international agreement or to promote NATO standardization and interoperability.⁵⁶⁵ The various DoD Memoranda of Understanding discussed in Chapter 2, *supra*, are, among other things, designed to promote NATO standardization and interoperability, and thus serve as a valid basis for exercise of this exception.⁵⁶⁶ The exception for "chemical warfare protective clothing" is strictly construed, and thus does not apply to protective suits worn by DoD civilian personnel when dismantling chemical munitions.⁵⁶⁷

All of the stated exceptions to the restrictions imposed by the Berry Amendment (or any other authorization or appropriation act provision) are governed strictly by the language of the restriction concerned. Thus, unless otherwise specified in the provision imposing the restriction, the exceptions normally available under the Buy American Act for the same item or type of item do not apply.⁵⁶⁸

⁵⁶⁴§9009, FY90 DoD Appropriations Act, Pub. L. No. 101-165 (1989); See also DFARS 225.7002(a).

⁵⁶⁵*Id.*

⁵⁶⁶See Dosimeter Corp. of America, Comp. Gen. Dec. B-189733, Jul. 14, 1978, 78-2 CPD ¶135 (procurement of foreign specialty metals).

⁵⁶⁷Gumsur, Ltd., Comp. Gen. Dec. B-231630, Oct. 6, 1988, 88-2 CPD ¶1329.

⁵⁶⁸Penthouse Manufacturing Co., Inc., Comp. Gen. Dec. B-217480, Apr. 30, 1985, 85-1 CPD ¶1487, *aff'd on reconsid.*, 85-2 CPD ¶196.

In addition to those restrictions set forth in the Berry Amendment, several other restrictions have become regular features of DoD appropriation acts. Since 1964, a provision, typically referred to as the Byrnes-Tollefson Amendment, has been included prohibiting the expenditure of funds "in foreign shipyards for the construction of major components of the hull or superstructure" of a vessel.⁵⁶⁹ Since 1968, the provision has also prohibited expenditure of DoD funds for "the construction of any Navy vessel in foreign shipyards."⁵⁷⁰ These restrictions apply only to the actual construction of a complete vessel and do not prohibit small portions of the work from being done in foreign shipyards.⁵⁷¹ Since 1986, the Byrnes-Tollefson provisions have been supplemented with a provision prohibiting the overhaul, repair, or maintenance of naval vessels in foreign shipyards.⁵⁷²

Starting in 1968, a provision has also been included which precludes the procurement of buses not manufactured in the United States.⁵⁷³ An exception is permitted if the restriction would not be in the national interests of the United States or would result in an uneconomical

⁵⁶⁹ See Pub. L. No. 88-446, 78 Stat. 465 (1964) (initial provision). See also DFARS 225.7005.

⁵⁷⁰ See DoD Authorization Appropriation Act of 1968, Pub. L. No. 90-96, 81 Stat. 231 (1967) (initial provision). See also DFARS 225.7005.

⁵⁷¹ 48 Comp. Gen. 709 (1969) (Comptroller approved work in foreign shipyard which comprised "substantially less than 10 percent of the overall construction cost of each vessel.").

⁵⁷² See Pub. L. No. 99-591, 100 Stat. 3341 (1986) (initial provision).

⁵⁷³ See Pub. L. No. 90-500, 82 Stat. 849 (1968) (initial provision). See also DFARS 225.7006.

procurement.⁵⁷⁴ Congress has become so enamored with this restriction that it has since been enacted as permanent legislation.⁵⁷⁵ Other annual restrictions that have also been codified include the prohibition, first enacted in 1987,⁵⁷⁶ against the procurement of certain chemical weapons antidotes not manufactured in the United States,⁵⁷⁷ and the annual prohibitions, first initiated in 1986 and 1988, respectively,⁵⁷⁸ against the procurement of certain machine tools and valves not manufactured in the United States or Canada.⁵⁷⁹ The term "manufactured", as used in connection with these restrictions, is not further defined, but is generally interpreted in the same manner as it is under the Buy American Act, with the same attendant difficulties.⁵⁸⁰ Other appropriations act restrictions address procurements of coal,⁵⁸¹ floating storage of petroleum,⁵⁸² certain ammunition,⁵⁸³ anchor and

⁵⁷⁴ *Id.*

⁵⁷⁵ 10 U.S.C.A. §2507(a) (Supp. 1989).

⁵⁷⁶ See Pub. L. No. 100-180, 101 Stat. 1019 (1987).

⁵⁷⁷ Codified at 10 U.S.C.A. §2507(b) (Supp. 1989). See also DFARS 225.7010.

⁵⁷⁸ See Pub. L. No. 99-591, 100 Stat. 3341 (1986) (initial machine tool restriction); Pub. L. No. 100-456, 102 Stat. 1918 (1988) (initial valve restriction).

⁵⁷⁹ Codified at 10 U.S.C.A. §2507(d) (Supp. 1989). See also DFARS 225.7008; DFARS 225.7012. The restriction on machine tools was not renewed in the DoD FY90 Appropriations Act.

⁵⁸⁰ See, e.g., Morey Machinery, Inc., Comp. Gen. Dec. B-233793, Apr. 18, 1989, 89-1 CPD ¶383.

⁵⁸¹ See Pub. L. No. 97-377, 96 Stat. 1830 (1982) (initial provision).

⁵⁸² See Pub. L. No. 98-396, 98 Stat. 1369 (1984) (initial provision).

⁵⁸³ See Pub. L. No. 99-190, 99 Stat. 1185 (1985) (initial provision).

mooring chain,⁵⁸⁴ super computers,⁵⁸⁵ aircraft ejection seats,⁵⁸⁶ and PAN carbon fiber.⁵⁸⁷

Finally, Congress has enacted two restrictions aimed not at specific products, but targeting research and development contracts in general. The Bayh Amendment, enacted as part of the FY73 Defense Appropriations Act,⁵⁸⁸ prohibits award of research and development contracts to foreign entities if a domestic entity is equally competent to perform the contract concerned and is willing to do so at a lower price.⁵⁸⁹ The effect of this requirement is somewhat limited, since it only requires, in the event a domestic and foreign offeror are rated technically equal, award to the lowest bidder, which equates to the full and open competition requirement already imposed by the Competition in Contracting Act of 1984.⁵⁹⁰ It does, however, prohibit defense agencies from circumventing such competition requirements through any of the

⁵⁸⁴ See Pub. L. No. 100-202, 101 Stat. 1329 (1987) (initial provision).

⁵⁸⁵ *Id.*

⁵⁸⁶ See Pub. L. No. 97-377, 96 Stat. 1830 (1982) (initial provision). See also DFARS 225.7009. This restriction was also not renewed in the FY90 Appropriation Act.

⁵⁸⁷ *Id.* For a detailed summary of each of these restrictions, See Secretary of Defense Report to Congress, *supra* note 535, Table 3-1.

⁵⁸⁸ §744, Pub. L. No. 92-570, 86 Stat. 1184 (1972).

⁵⁸⁹ *Id.*

⁵⁹⁰ 10 U.S.C.A. §§2301 *et seq.* (Supp. 1989). See also *Survival Technology, Inc.*, 69 Comp. Gen. ____ (1989), 89-2 CPD ¶315 (holding that the Bayh amendment simply "restates traditional procurement rules.").

normal CICA exceptions, such as those applicable to procurements under international agreements or pursuant to national security requirements. It is also interesting to note that although the Bayh Amendment has never been repeated in later acts and does not purport to be a permanent restriction, DoD continues to apply the restriction to use of later year funds.⁵⁹¹ The second research and development restriction originated in 1985⁵⁹² and applies to the award of Research, Development, Test, and Evaluation (RDT&E) contracts associated with the Strategic Defense Initiative (SDI).⁵⁹³ The current version, which is imposed by the Defense Authorization Act for 1988 and 1989,⁵⁹⁴ prohibits the award of SDI RDT&E contracts to foreign governments or firms⁵⁹⁵ "unless the Secretary of Defense certifies to Congress...that [the] work cannot be competently performed by a U.S. firm at a price equal to or less than the price of the foreign government or firm."⁵⁹⁶ As implemented, the prohibition does not apply if the contracting officer determines that the contract, though awarded to a foreign government or firm, will be performed in the United States, that the research concerned relates exclusively to antitactical ballistic missile systems, or that the

⁵⁹¹ See DFARS 225.7007.

⁵⁹² Pub. L. No. 99-190, 99 Stat. 1185 (1985).

⁵⁹³ *Id.*

⁵⁹⁴ §222, Pub. L. No. 100-180, 101 Stat. 1019 (1987).

⁵⁹⁵ "Foreign firm" is defined as "a business entity owned or controlled by one or more foreign nationals or a business entity in which more than 50 percent of the stock is owned or controlled by one or more foreign nationals." DFARS 225.7013(a).

⁵⁹⁶ DFARS 225.7013(b).

foreign government or firm will share a substantial portion of the total contract cost.⁵⁹⁷

C. INDUSTRIAL MOBILIZATION BASE RESTRICTIONS

A number of domestic preference restrictions are imposed under the authority granted to the President, and largely delegated to the Secretary of Defense, to maintain a domestic industrial mobilization base capable of meeting emergency and wartime production requirements.⁵⁹⁸ These restrictions are implemented in FAR and DFARS Part 8 and, like authorization and appropriation act restrictions, override any exceptions to the Buy American Act or Balance of Payments Program restrictions that might otherwise apply.

Most industrial mobilization base restrictions are applicable only to procurements by DoD. The sole exception is the requirement, implemented by FAR Subpart 8.2, that "jewel bearings" be acquired only from a specified Government owned, contractor operated plant (GOCO), and that "related items" be acquired only from domestic manufacturers or the

⁵⁹⁷DFARS 225.7013(c).

⁵⁹⁸The most commonly cited statutory authority for such actions is the National Security Act of 1947, 50 U.S.C.A. §404 (1951 & Supp. 1989) and the Defense Production Act of 1950, 50 U.S.C.A. App. §§2061 *et seq.* (1951 & Supp. 1989), as amended. The primary delegations of authority to the Secretary of Defense are through Executive Order 12656, "Assignment of Emergency Preparedness Responsibilities", Nov. 18, 1988, and Defense Mobilization Order II, "Maintenance of the Mobilization Base", 44 C.F.R. Part 321, Jul. 1, 1980. See generally, Secretary of Defense Report to Congress, *supra* note 535, at 24-34. CICA also provides a specific exception to the requirement for full and open competition for procurements necessary to maintain the industrial mobilization base. 10 U.S.C.A. §2304(b)(1)(B) (Supp. 1989); FAR 6.302-3.

same GOCO.⁸⁹⁹ The restriction applies to both procurements of the specified items and to procurements of other items into which "jewel bearings" and "related items" are incorporated.⁹⁰⁰ Exceptions exist for small purchases of \$25,000 or less and for items purchased and used outside the United States.⁹⁰¹

There are currently six industrial mobilization base restrictions applicable solely to DoD procurements. These restrictions apply to procurements of miniature and instrument ball bearings,⁹⁰² precision components for mechanical time devices,⁹⁰³ high-purity silicon,⁹⁰⁴ high carbon ferrochrome,⁹⁰⁵ certain defense forging products and welded shipboard anchor chain,⁹⁰⁶ and antifriction bearings.⁹⁰⁷ The restrictions applicable to ball bearings, time devices, and silicon are virtually identical, and basically require that all such items, as well as all components thereof, be manufactured in the United States or

⁸⁹⁹FAR 8.202. "Jewel bearings" and "related items" are rather extensively defined in FAR 8.201.

⁹⁰⁰FAR 8.203-1(a).

⁹⁰¹FAR 8.203-1(a)(1) & (2).

⁹⁰²DFARS Subpart 208.73.

⁹⁰³DFARS Subpart 208.74.

⁹⁰⁴DFARS Subpart 208.75.

⁹⁰⁵DFARS Subpart 208.76.

⁹⁰⁶DFARS Subpart 208.78.

⁹⁰⁷DFARS Subpart 208.79.

Canada.⁶⁰⁸ The restrictions apply whether the items are purchased separately or are merely parts or components of other end items.⁶⁰⁹ Pre-award exceptions to each restriction exist for small purchases of \$25,000 or less (other than purchases of the restricted item as an end item), for items purchased and used outside the United States, and, with certain limitations, purchases of standard commercial items.⁶¹⁰ Urgent procurements of ball bearings⁶¹¹ and time devices⁶¹² are also excepted. During contract performance, additional exceptions may be granted by the contracting officer to prevent interference with "economical or normal production scheduling" or to protect the delivery schedule.⁶¹³

The remaining industrial mobilization base restrictions, though similar, impose slightly different restrictions and permit different exceptions. The restriction applicable to high carbon ferrochrome (HCF) does not permit procurements from Canadian sources, but requires that all HCF be manufactured in the United States.⁶¹⁴ It also permits an additional exception for procurements required by DoD Memoranda of Understanding or offset agreements with U.S. NATO allies.⁶¹⁵ Further,

⁶⁰⁸ See DFARS 208.7301/7302 (ball bearings); DFARS 208.7401/7402 (time devices); DFARS 208.7501/7502 (silicon).

⁶⁰⁹ *Id.*

⁶¹⁰ See DFARS 208.7303(a); DFARS 208.7403(a); DFARS 208.7503(a).

⁶¹¹ DFARS 208.7303(a)(2).

⁶¹² DFARS 208.7403(a)(2).

⁶¹³ DFARS 208.7303(b); DFARS 208.7403(b); DFARS 208.7503(b).

⁶¹⁴ DFARS 208.7601/7602.

⁶¹⁵ DFARS 208.7603(a)(5).

subsequent to contract award, the restriction may be waived by the contracting officer "on a case-by-case basis when adequate U.S. supplies of HCF are not available to meet DoD needs on a timely basis."⁶¹⁶

The restriction applicable to antifriction bearings permits procurement from either U.S. or Canadian sources and provides for all of the pre-award exceptions listed above, to include procurements required under international agreement (such as applicable DoD Memoranda of Understanding).⁶¹⁷ However, the restrictions applicable to antifriction bearings may be waived by the Head of the Contracting Activity based on a determination that "no domestic bearing manufacturer [can meet contract] requirement[s] or that it is not in the best interest of the United States to qualify a domestic bearing to replace a qualified nondomestic bearing" in that such qualification would cause "unreasonable costs or delays."⁶¹⁸ The antifriction bearing restriction is also unique in that it is the only industrial mobilization base restriction with an established expiration date. The restriction will expire September 30, 1991 unless otherwise extended.⁶¹⁹

The restriction applicable to forgings and shipboard anchor chain is also unique. It requires that such items be acquired from U.S. or Canadian sources "to the maximum extent practicable."⁶²⁰ Although the

⁶¹⁶DFARS 208.7603(b).

⁶¹⁷See DFARS 208.7900; DFARS 208.7902; DFARS 208.7905.

⁶¹⁸DFARS 208.7903.

⁶¹⁹DFARS 208.7902.

⁶²⁰DFARS 208.7802.

regulatory provisions do not provide further guidance on the meaning of that phrase, it arguably permits greater leeway than is possible under the other industrial mobilization base restrictions, which are stated more affirmatively. The restriction also provides for only two pre-award exceptions. It does not apply to items procured and used outside the United States or to quantities greater than that necessary to maintain the defense mobilization base.⁶²¹ The restriction may also be waived subsequent to contract award on a case-by-case basis if domestic items are not available to meet DoD needs on a timely basis.⁶²²

Procedures for imposing additional industrial mobilization base restrictions are set forth in DFARS 208.070.

D. TRANSPORTATION ACT RESTRICTIONS

Transportation acts are another source of federal domestic preference restrictions. Such restrictions fall into two major categories. Some, like the provisions that are sometimes referred to as the "Fly America" and "Sail America" requirements, govern the use of specified transportation services by the government and government contractors. Others, like the Rail Passenger Service Act and the Surface Transportation Assistance Act, govern the procurement of articles, materials, and supplies by government sponsored corporations or state and local governments using federal funds. Both types of acts are examined below.

⁶²¹DFARS 208.7803(a).

⁶²²DFARS 208.7803(c).

1. The "Fly America" Act

The International Air Transportation Fair Competitive Practices Act of 1974⁶²³ amended the Federal Aviation Act of 1958⁶²⁴ to limit the procurement of foreign air carrier services with federal funds. The resulting restriction, which is codified at 49 U.S.C.A. §1517, is commonly referred to as the "Fly America Act".⁶²⁵ The restrictions imposed by the Fly America Act apply to travel by federal employees and to Government shipment of property as well to government-financed travel and shipments by government contractors.⁶²⁶ This study focuses on the application of the Act to government contractors.

The Fly America Act requires that government contractors use U.S.-flag air carriers⁶²⁷ for government-financed international air travel or transportation of property by air to the extent that service by such carriers is available.⁶²⁸ "International" air travel or transportation

⁶²³Pub. L. No. 93-623, 88 Stat. 2104 (1975), *codified at* 49 U.S.C.A. §1517 (Supp. 1989).

⁶²⁴Pub. L. No. 85-726, 72 Stat. 731 (1958), *codified as amended*, 49 U.S.C.A. §§1301 *et seq.* (1976 & Supp. 1989).

⁶²⁵*See* FAR 47.402; FAR 47.403.

⁶²⁶49 U.S.C.A. §1517(a) (Supp. 1989).

⁶²⁷"U.S.-flag air carrier" is defined as an air carrier certified under 49 U.S.C.A. §1371. *See* 49 U.S.C.A. §1517(a) (Supp. 1989); FAR 47.401.

⁶²⁸49 U.S.C.A. §1517 (Supp. 1989); FAR 47.402.

includes transportation between the United States⁶²⁹ and a place outside the United States and transportation between two places outside the United States.⁶³⁰ Air services are considered "government-financed" when financed with appropriated funds or other funds "owned, controlled, granted, or conditionally granted or utilized by or otherwise established for the account of the United States."⁶³¹ The restrictions of the Act do not apply to use of foreign air carriers under an international air transport agreement between the United States and a foreign government if such agreement is consistent with the goals of international aviation policy set forth at 49 U.S.C.A. §1502(b) and provides for reciprocal rights and benefits for U.S.-flag air carriers by the foreign government.⁶³² The FAR also does not require enforcement of the restrictions of the Act for small purchases of \$25,000 or less.⁶³³

The primary issue for purposes of determining compliance with the Fly America Act is whether service by U.S.-flag carriers is reasonably

⁶²⁹"United States", for purposes of the Fly America Act provisions, includes "the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, and the possessions of the United States." FAR 47.401.

⁶³⁰49 U.S.C.A. §§1517(a) and (b) (Supp. 1989).

⁶³¹49 U.S.C.A. §1517(a) (Supp. 1989).

⁶³²49 U.S.C.A. §1517(c) (Supp. 1989); FAR 47.403-2. Though the exception is of little utility to government contractors, the restrictions also do not to apply to the procurement of air travel services between two places outside the United States for officers and employees of the Department of State, the International Communication Agency, the Agency for International Development, or the Arms Control and Disarmament Agency. 49 U.S.C.A. §1518 (Supp. 1989).

⁶³³FAR 47.405.

available. Guidelines for making such determinations have been promulgated by the Comptroller General and are implemented through FAR Subpart 47.4.⁶³⁴ In determining whether U.S.-flag carrier service is reasonably available, neither the fact that foreign-flag carrier service is less costly, nor that foreign-flag carrier service is preferred by or is more convenient for the agency or traveler concerned is to be considered.⁶³⁵ However, if a traveler's religious convictions prevent travel on a day on which he would have to travel for a U.S. carrier to be available, the U.S. carrier is "unavailable" for purposes of the Fly America Act.⁶³⁶ In addition, U.S.-flag carrier services are not reasonably available if the U.S. carrier cannot provide the transportation needed or if use of a U.S. carrier "would not accomplish an agency's mission."⁶³⁷ Use of a foreign carrier is also permitted if the original U.S. carrier involuntarily reroutes the traveler via a foreign carrier, even if an alternative U.S. carrier is then available.⁶³⁸

The regulations also establish a set of detailed, arbitrary rules for determining when use of a U.S. carrier would result in so great a delay as to make U.S.-flag carrier service not reasonably available. If

⁶³⁴The Comptroller has issued a series of opinions on such topic, most under the same "B" number (B-138942). The latest such opinion, per FAR 47.403, was issued Mar. 31, 1981.

⁶³⁵FAR 47.403-1(b).

⁶³⁶Department of Treasury - Fly America Act, 59 Comp. Gen. 66 (1979).

⁶³⁷FAR 47.403-1(a).

⁶³⁸FAR 47.403-1(c)(3).

use of a foreign carrier would result in a total travel time of three hours or less from origin to destination airport, U.S. air carrier service is not reasonably available if use of the U.S. carrier "would involve twice such travel time."⁶³⁹ For longer flights, the breaking point varies, depending on whether the travel is between the United States and a foreign location or between two foreign locations. If the travel is between the United States and a foreign location, and the initial point of landing at the foreign location is the traveler's destination point, use of a U.S. carrier is not required if it would delay arrival by 24 hours or more.⁶⁴⁰ If the initial foreign airport is only an interchange point, use of a U.S. carrier is not required if it would result in a lay over at the foreign airport of six hours or more or would increase the traveler's time in a travel status by six hours or more.⁶⁴¹ If the travel is between two foreign points, use of a foreign-flag carrier is permitted if it would eliminate two or more transfers between aircraft or if use of a U.S. carrier would increase the total travel status time by six or more hours.⁶⁴²

The penalty for failure to comply with the requirements of the Fly America Act is disallowance of the cost of the air transportation concerned.⁶⁴³ Although the statute only provides express authority to

⁶³⁹FAR 47.403-1(f).

⁶⁴⁰FAR 47.403-1(d)(1).

⁶⁴¹FAR 47.403-1(d)(2).

⁶⁴²FAR 47.403-1(e).

⁶⁴³49 U.S.C.A. §1517(d) (Supp. 1989); FAR 47.403-3(a).

disallow expenditure of appropriated funds,⁶⁴⁴ the regulations, in keeping with the prohibition against the expenditure of any government controlled funds for foreign air carrier services except as otherwise provided by the Act,⁶⁴⁵ extend such authority to all funds, "appropriated or otherwise established for the account of the United States."⁶⁴⁶ The amount of the disallowance is based on the amount of the loss of revenue to U.S. air carriers caused by the use of foreign carriers. A pre-determined formula for computing such loss is set forth at FAR 47.403-3(b). The Fly America Act requirements are contractually implemented and enforced through a mandatory contract clause setting forth the requirements of the Act and establishing the contractor's agreement to comply with such requirements.⁶⁴⁷ If the contractor uses foreign air carrier services, it must submit with its voucher for payment concerning such transportation a certification that a U.S. carrier was not available and provide the basis for the determination of non-availability.⁶⁴⁸ The substance of such clause must be flowed down to all subcontracts that may involve international air transportation.⁶⁴⁹

⁶⁴⁴49 U.S.C.A. §1517(d) (Supp. 1989).

⁶⁴⁵49 U.S.C.A. §1517(a) (Supp. 1989).

⁶⁴⁶See FAR 52.247-63 (Preference For U.S.-Flag Air Carriers (Apr 1984)).

⁶⁴⁷*Id.*

⁶⁴⁸*Id.*

⁶⁴⁹*Id.*

2. "Sail America" Requirements

A number of statutory provisions establish domestic preference requirements in connection with meeting the ocean transportation requirements of the government and government contractors.⁶⁵⁰ Such provisions are embodied in the Cargo Preference Act of 1904,⁶⁵¹ the Merchant Marine Act of 1936,⁶⁵² and the Cargo Preference Act of 1954.⁶⁵³ All of these provisions are implemented through FAR Subpart 47.5 and DFARS Subpart 247.5.

The oldest of current "sail america" requirements is the Cargo Preference Act of 1904, which requires that DoD use *only* U.S.-flag vessels for ocean transportation of supplies bought or purchased for the military departments *unless* such vessels are not "available" at "fair and reasonable" rates.⁶⁵⁴ Contractors are not required to delay planned shipments for long periods simply to ensure that a U.S. vessel is

⁶⁵⁰For a good discussion of the history of such provisions, their continued development, and their importance to the continued health of the U.S. Merchant Marine, see Costello, *Trends and Developments in U.S. Cargo Preference Laws*, Fed. B. News & J., Vol. 36, No. 8, Oct. 1989, at 365.

⁶⁵¹10 U.S.C.A. §2631 (1983).

⁶⁵²46 U.S.C.A. §§1101 *et seq.* (1975 & Supp. 1989).

⁶⁵³46 U.S.C.A. §1241(b) (1975 & Supp. 1989). The Cargo Preference Act of 1954 actually amended and is a part of the Merchant Marine Act of 1936, but is usually discussed and applied as a separate domestic preference requirement.

⁶⁵⁴10 U.S.C.A. §2631 (1983); FAR 47.502(a)(1). A "U.S.-flag vessel" may be either a "government vessel or a privately owned U.S.-flag commercial vessel." FAR 47.501.

"available".⁶⁵⁵ However, under current procedures, the contractor must, prior to using a foreign carrier, notify the contracting officer, and request use of other than U.S.-flag vessels.⁶⁵⁶ If the ocean transportation in question is incidental to a contract for supplies, services, or construction, the Director, Office of Contracts and Business Management, Military Sealift Command (MSC), must confirm that no U.S. vessels are available.⁶⁵⁷ If the contract is for the direct purchase of ocean transportation services, the confirmation must be made by the Commander, MSC or a designated representative.⁶⁵⁸ Whether the rates offered by the U.S. vessel are "fair and reasonable" is not dependent on whether foreign rates are cheaper. Rather, the contracting officer must determine, with the approval of the Commander, MSC or a designated representative, that the price offered the agency, the contractor or a subcontractor at any tier is "higher than charges to private persons for transportation of like goods."⁶⁵⁹ Alternatively, if the U.S. vessel charges are considered "excessive or otherwise unreasonable", taking into consideration excessive profits to the vessel owner or excessive costs (i.e., costs beyond the premium normally incurred by exclusion of foreign competition), the contracting officer

⁶⁵⁵See Comp. Gen. Dec. B-159313 (Dec. 8, 1966), 11 CCF ¶80,828 (Unsuccessful 5 day search by contractor to find U.S. carrier sufficient to justify a determination that such a carrier was "unavailable").

⁶⁵⁶Subparagraph (d), DFARS 252.247-7203 (Transportation of Supplies by Sea (Jan 1990)).

⁶⁵⁷DFARS 247.573-1(e)(1).

⁶⁵⁸DFARS 247.573-2(c)(1).

⁶⁵⁹DFARS 247.573-1(e)(2); DFARS 247.573-2(c)(2).

may forward a waiver request through the Commander, MSC or a designated representative to the Secretary of the Navy for a determination.⁶⁸⁰

As long as U.S. vessels are available at fair and reasonable rates, the requirement to use such vessels is absolute and applies to all stages of shipment of the supplies concerned. Thus, the Act does not permit splitting the various stages of shipment between foreign and U.S.-flag vessels.⁶⁸¹ Further, although the Act refers only to "ocean" transportation, it arguably applies to all shipments by water in foreign commerce, including shipments between U.S. ports on the great lakes and Canadian ports on the St. Lawrence river.⁶⁸² However, because the Act only applies to the shipment of supplies *on* U.S.-flag vessels, it does not prohibit the use of foreign towing or tug boat services.⁶⁸³

Because the 1904 Act only addresses supplies "bought for" the military departments, DoD for many years maintained that it only applied if DoD, at the time of shipment, had already taken title to the items concerned.⁶⁸⁴ However, the Department of Justice expressly rejected this argument in 1988,⁶⁸⁵ and the DFARS now recognize that the Act applies to items that are either "owned" or "readily identifiable for

⁶⁸⁰DFARS 247.573-1(e)(3); DFARS 247.573-2(c)(3).

⁶⁸¹See 57 Comp. Gen. 531 (1978); 49 Comp. Gen. 755 (1970); 43 Comp. Gen. 792 (1964).

⁶⁸²See 39 Comp. Gen. 758 (1960) (interpreting the similar language and requirements of the Cargo Preference Act of 1954).

⁶⁸³Galland, Kharasch, Calkins & Brown, 52 Comp. Gen. 327 (1972), 1972 CPD ¶107.

⁶⁸⁴Costello, *supra*, note 650, at 368.

⁶⁸⁵*Id.*

use by" DoD at the time of shipment.⁶⁶⁶

The 1904 Act is enforced through mandatory clauses by which the contractor certifies whether transportation by sea is anticipated and agrees to comply with the requirements of the Act.⁶⁶⁷ Failure to comply with such requirements during contract performance may constitute grounds for termination of the contract,⁶⁶⁸ and may be considered for purposes of negative responsibility determinations on later procurements.⁶⁶⁹ Foreign competitors can meet the requirements of the 1904 Act and of the Cargo Preference Act of 1954 by chartering space on U.S.-flag vessels only if such proposals are previously approved by the Maritime Administration.⁶⁷⁰

The Cargo Preference of 1954 imposes additional "sail america" requirements. Enacted as an amendment to the Merchant Marine Act of 1936, the 1954 Act requires that government agencies, including DoD, ensure that at least 50 percent of the gross tonnage of acquired supplies⁶⁷¹ requiring ocean transportation be transported on privately

⁶⁶⁶DFARS 247.571 (definition of "supplies").

⁶⁶⁷DFARS 252.247-7202 (Representation of Extent of Transportation of Supplies by Sea (Jan 1990)); DFARS 252.247-7203 (Transportation of Supplies by Sea (Jan 1990)); DFARS 252.247-7204 (Notification of Transportation of Supplies by Sea (Jan 1990)).

⁶⁶⁸37 Comp. Gen. 826 (1958).

⁶⁶⁹Inter-Continental Equipment, Inc., Comp. Gen. Dec. B-230266, Mar. 4, 1988, 88-1 CPD ¶1237.

⁶⁷⁰Topgallant Group, Inc., Comp. Gen. Dec. B-227865.4, Dec. 15, 1988, 88-2 CPD ¶594.

⁶⁷¹The Act also applies to shipments in connection with construction contracts. FAR 47.505.

owned U.S.-flag commercial vessels if such vessels are available at fair and reasonable rates.⁶⁷² "Availability" is determined by the contracting officer with the assistance of the agency transportation office.⁶⁷³ Whether the offered rates are "fair and reasonable" is determined on the basis of rate schedules published by the Maritime Administration of the Department of Transportation.⁶⁷⁴

Like the 1904 Act, the 1954 Act requires use of U.S.-flag vessels at all stages of shipment and does not permit splitting various stages of shipment between U.S. and foreign vessels.⁶⁷⁵ The 1954 Act also applies to all shipments in foreign commerce, including shipments on the great lakes.⁶⁷⁶ Similar to the 1904 Act, the 1954 Act covers shipment of both supplies owned by the government at the time of shipment, even if in the physical possession of a contractor or subcontractor, and supplies destined for use by a government agency "that are contracted for and require subsequent delivery to [the government] but are not owned by the government at the time of shipment."⁶⁷⁷

The restrictions of the 1954 Act do not apply to shipment on vessels of the Panama Canal Commission or shipments aboard foreign

⁶⁷²46 U.S.C.A. §1241(b) (1975 & Supp. 1989); FAR 47.502(a)(3).

⁶⁷³FAR 47.506(b); FAR 47.105.

⁶⁷⁴FAR 47.506(c).

⁶⁷⁵55 Comp. Gen. 1097 (1976). Of course, unlike the 1904 Act, the 1954 Act requires that only 50% of the supplies (gross tonnage), rather than 100%, be shipped via U.S.vessels.

⁶⁷⁶39 Comp. Gen. 758 (1960).

⁶⁷⁷FAR 47.503(a).

vessels pursuant to an international treaty.⁸⁷⁸ The Act also does not apply to certain shipments under the authority of the Secretary of Agriculture or the Commodity Credit Corporation,⁸⁷⁹ to shipments of classified supplies,⁸⁸⁰ or to certain foreign aid shipments under the Foreign Assistance Act of 1961.⁸⁸¹ In addition, the FAR does not require application of the Act to small purchases of \$25,000 or less.⁸⁸² Finally, the provisions of the Act may be temporarily waived by Congress, the President, or the Secretary of Defense during periods of emergency.⁸⁸³

The 1954 Act is enforced through a mandatory clause detailing the requirements of the Act and contractually binding the contractor to comply.⁸⁸⁴ The clause also imposes certain reporting requirements to the contracting officer and the Maritime Administration concerning shipments under the contract and requires that the substance of the clause be included in all subcontracts *and purchase orders* other than small purchases of \$25,000 or less.⁸⁸⁵

⁸⁷⁸46 U.S.C.A. §1241(b) (1975 & Supp. 1989); FAR 47.504(a).

⁸⁷⁹46 U.S.C.A. §1241e (1975 & Supp. 1989).

⁸⁸⁰FAR 47.504(c).

⁸⁸¹22 U.S.C.A. §2353 (1979); FAR 47.504(b). *See also* Crowley Caribbean Transport, Inc. v. United States, 865 F.2d 1281 (D.C.Cir. 1989).

⁸⁸²FAR 47.504(d).

⁸⁸³46 U.S.C.A. §1241(b) (1975 & Supp. 1989); FAR 47.502(c).

⁸⁸⁴FAR 52.247-64 (Preference For Privately Owned U.S.-Flag Commercial Vessels (Apr 1984)).

⁸⁸⁵*Id.*

The Merchant Marine Act of 1936 and other statutory provisions impose additional, though less extensive "sail america" requirements. These include the requirement that officers and employees of the United States traveling on official business use U.S.-flag vessels unless the mission requires use of a foreign vessel,⁶⁶⁶ and the requirement that requirement that private vehicles of military and other government personnel shipped at government expense be transported on U.S. vessels.⁶⁶⁷

3. The Rail Passenger Service Act

The Amtrak Improvement Act of 1978⁶⁶⁸ amended the Rail Passenger Service Act⁶⁶⁹ to require that the National Railroad Passenger Corporation purchase only domestic articles, materials, and supplies.⁶⁷⁰ The restrictions are virtually identical to those imposed by the Buy American Act, and require that the Corporation purchase only "unmanufactured articles, materials and supplies...mined or produced in the United States" and "manufactured articles, materials, and supplies...manufactured in the United States substantially all from articles, materials, and supplies mined, produced, or manufactured...in

⁶⁶⁶46 U.S.C.A. §1241(a) (1975 & Supp. 1989).

⁶⁶⁷10 U.S.C.A. §2634 (1983) (military personnel vehicles); 46 U.S.C.A. §1241(c) (1975 & Supp. 1989) (other government personnel vehicles). See also FAR 47.502(b).

⁶⁶⁸Pub. L. No. 95-421, 92 Stat. 923 (1978).

⁶⁶⁹45 U.S.C.A. §§501 *et seq.* (1987 & Supp. 1989).

⁶⁷⁰45 U.S.C.A. §545(k) (1987).

the United States."⁶⁹¹ The "United States" is defined to include the District of Columbia, Puerto Rico, and any territory or possession of the United States.⁶⁹² The Act also provides for several exceptions similar to those available under the Buy American Act. The Secretary of Transportation may, upon application of the Corporation, exempt the Corporation from the domestic preference requirements if it is determined that imposition of such requirements is "inconsistent with the public interest" or would result in "unreasonable cost", or that the items required or the items from which they are manufactured "are not mined, produced, or manufactured...in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality."⁶⁹³ The Secretary may also exempt purchases of rolling stock or power train equipment if it is determined that such items "cannot be purchased and delivered in the United States within a reasonable time."⁶⁹⁴ The restrictions also do not apply to purchases of less than \$1,000,000 or to purchases made pursuant to contracts executed prior to October 5, 1978.⁶⁹⁵

Although no cases were discovered specifically interpreting the domestic preference requirements of the Rail Passenger Service Act, it is highly probable, given the virtually identical language, that such

⁶⁹¹ 45 U.S.C.A. §545(k)(1) (1987).

⁶⁹² 45 U.S.C.A. §545(k)(5) (1987).

⁶⁹³ 45 U.S.C.A. §545(k)(2) (1987).

⁶⁹⁴ 45 U.S.C.A. §545(k)(3) (1987).

⁶⁹⁵ 45 U.S.C.A. §545(k)(4) (1987).

requirements would be interpreted in a manner similar to those of the Buy American Act in the event of a contractual dispute. However, the additional guidance provided by Executive Order 10582 concerning "unreasonable cost" and the meaning of "substantially all" would not control, in that the Rail Passenger Service Act does not specifically reference the provisions of the Buy American Act.⁶⁹⁶

Given the tortured history of the Buy American Act, it is interesting, though no doubt frustrating for government contractors, to note that Congress continues to rely on the same vague, ill defined language to impose new domestic preference requirements.

4. The Surface Transportation Assistance Act

The Surface Transportation Assistance Act of 1982⁶⁹⁷ imposes domestic preference requirements with respect to funds appropriated under that Act, the Surface Transportation Assistance Act of 1978,⁶⁹⁸ the Urban Mass Transportation Act of 1964,⁶⁹⁹ and the Federal-Aid Highway Act.⁷⁰⁰ The domestic preference restrictions which the 1982 Act imposes are unique, in that they apply not to purchases by or for the federal government or a government sponsored corporation, but to

⁶⁹⁶See text and accompanying notes at pp. 19-20, *supra*, for a discussion of the applicability of Executive Order 10582 to statutes other than the Buy American Act.

⁶⁹⁷Pub. L. No. 97-424, 96 Stat. 2097 (1983) (hereinafter the Act).

⁶⁹⁸Pub. L. No. 95-599, 92 Stat. 2689 (1978).

⁶⁹⁹49 U.S.C.A. §§1601 *et seq.* (1976 & Supp. 1989).

⁷⁰⁰23 U.S.C.A. §§101 *et seq.* (Supp. 1989).

procurements by state governments using federal funds. As a result, the restrictions are not implemented through the FAR, but through separate regulations promulgated by the Secretary of Transportation.⁷⁰¹

The Act provides that only "steel and manufactured products ...produced in the United States" may be used in projects funded under any of the referenced acts.⁷⁰² For purposes of buses and other rolling stock procured under the Urban Mass Transportation Act of 1964, the Act provides for a "50 percent test" similar to that mandated by Executive Order 10582 under the Buy American Act. Such items are considered "produced in the United States" if "the cost of components...produced in the United States is more than 50 per centum of the cost of all components" and "final assembly [occurs] in the United States."⁷⁰³ For purposes of this provision, "component costs" do not include the labor costs of final assembly.⁷⁰⁴

The domestic preference requirement imposed by the Act is not absolute, but is subject to several exceptions. It does not apply if the Secretary of Transportation determines it to be "inconsistent with the public interest" or if the required steel and manufactured products

⁷⁰¹Regulatory guidance on the domestic preference restrictions imposed by the Surface Transportation Act of 1982 may be found at 23 C.F.R. §635.410 (1989) (applicable to the Federal-Aid Highway Act) and 49 C.F.R. §§661.1 *et seq.* (1988) (applicable to both the Urban Mass Transportation Assistance Act of 1964 and the Federal-Aid Highway Act).

⁷⁰²23 U.S.C.A. §101 note (paragraph (a)) (Supp. 1989).

⁷⁰³23 U.S.C.A. §101 note (paragraph (b)(3)) (Supp. 1989). Effective for contracts entered into after October 1, 1989, the required percentage increases to 55%. It increases to 60% for contracts entered into after October 1, 1991. See §337, Pub. L. No. 100-17, 101 Stat. 132 (1987).

⁷⁰⁴23 U.S.C.A. §101 note (paragraph (c)) (Supp. 1989).

"are not produced in the United States in sufficient and reasonably available quantities and of a satisfactory quality."⁷⁰⁶ As in the case of the Buy American Act "public interest" exception, a decision by the Secretary of Transportation to waive application of the Surface Transportation Assistance Act as "inconsistent with the public interest" is a matter of discretion not subject to review by the GAO.⁷⁰⁸ The Act also embodies an "unreasonable cost" exception similar to that available under the Buy American Act. It provides that domestic materials need not be used if it would "increase the cost of the overall project contract by more than 10 per centum in the case of projects for the acquisition of rolling stock, and 25 per centum in the case of all other projects."⁷⁰⁷ For purposes of this exception, the phrase "overall project contract" means each individual prime contract for a discrete portion of the overall project.⁷⁰⁸ Thus, where a large project is split into several smaller projects for administrative convenience and to reduce overall cost through increased competition, a determination of whether use of domestic materials will result in unreasonable cost is made on the basis of each individual prime contract and not on the basis of the "project" as a whole.⁷⁰⁹

⁷⁰⁶23 U.S.C.A. §101 note (paragraphs (b)(1) and (b)(2)) (Supp. 1989).

⁷⁰⁷General Motors of Canada, Ltd., Comp. Gen. Dec. B-212884, Oct. 7, 1983, 83-2 CPD ¶427.

⁷⁰⁸23 U.S.C.A. §101 note (paragraph (b)(4)) (Supp. 1989).

⁷⁰⁹See *Wampler, et al. v. Goldschmidt, et al.*, 486 F. Supp. 1130 (D. Minn. 1980) (interpreting same phrase in the Surface Transportation Act of 1978).

⁷¹⁰*Id.*

An exception to the domestic preference restrictions of the Act on the basis of the "public interest" or "nonavailability" exceptions may be granted by the Secretary after bid opening on his own initiative.⁷¹⁰ If no bids offering domestic source products are received, domestic products are presumed to be unavailable within the meaning of the Act.⁷¹¹ Individual bidders may not request waiver of the restrictions of the Act on their own accord, but may only seek such a waiver through a "grantee".⁷¹² However, individual bidders may protest to the GAO to enforce compliance with the domestic preference requirements of the Act.⁷¹³ Further, because the Act was designed to protect the American work force, labor unions have standing to bring suit to force compliance with the requirements of the Act.⁷¹⁴

Like other domestic preference requirements, the Act is implemented and contractually enforced through a certification by the offeror that it will provide only steel and manufactured products produced in the

⁷¹⁰See *Hispano American Corp.*, Comp. Gen. Dec. B-200268, Mar. 17, 1981, 81-1 CPD ¶201, *aff'd on reconsid.*, Comp. Gen. Dec. B-200268.2, Jul. 1 1981, 81-2 CPD ¶1 (interpreting similar provisions of prior act).

⁷¹¹*Id.*

⁷¹²49 C.F.R. §661.9 (1988). See also *Valiant Steel & Equipment, Inc. v. Goldschmidt*, 499 F. Supp. 410 (D.D.C. 1980) (applying similar provisions of a prior act). "Grantees" are defined as the direct recipients of the federal funds, *e.g.*, the state highway departments. See 49 C.F.R. §661.3 (1988).

⁷¹³See, *e.g.*, *General Motors of Canada, Ltd.*, Comp. Gen. Dec. B-212884, Oct. 7, 1983, 83-2 CPD ¶427; *Hispano American Corp.*, Comp. Gen. Dec. B-200268, Mar. 17, 1981, 81-1 CPD ¶201, *aff'd on reconsid.*, Comp. Gen. Dec. B-200268.2, Jul. 1 1981, 81-2 CPD ¶1.

⁷¹⁴See *Wampler, et al. v. Goldschmidt, et al.*, 486 F. Supp. 1130 (D. Minn. 1980).

United States. Failure to comply with the certification during contract performance may be deemed a breach of contract,⁷¹⁵ and may result in initiation of debarment proceedings.⁷¹⁶

The Act expressly provides that State governments receiving federal funds under any of the referenced acts may impose more stringent domestic preference requirements if desired.⁷¹⁷

E. PURCHASES FOR FOREIGN GOVERNMENTS

1. The Foreign Assistance Act of 1961

The Foreign Assistance Act of 1961⁷¹⁸ permits the President to furnish military and nonmilitary assistance to friendly foreign nations and international organizations. To facilitate such aid, section 633 of the Act permits the President to provide such assistance "without regard to [any] provisions of law regulating the making, performance, amendment, or modification of contracts and the expenditure of funds of the United States Government."⁷¹⁹ Through Executive Order 11223, President Johnson exercised the authority provided by section 633 to waive the application of the Buy American Act requirements to

⁷¹⁵49 C.F.R. §661.17 (1988).

⁷¹⁶49 C.F.R. §661.19 (1988).

⁷¹⁷23 U.S.C.A. §101 note (paragraph (d)) (Supp. 1989). See also 49 C.F.R. §661.21 (1988).

⁷¹⁸22 U.S.C.A. §§2151 *et seq.* (1979 & Supp. 1989).

⁷¹⁹22 U.S.C.A. §2393(a) (1979).

procurements under the Foreign Assistance Act.⁷²⁰ However, such waiver is of little practical effect, in that the Foreign Assistance Act imposes its own domestic preference requirement for procurements made in furtherance of that Act. Section 604(a) provides that funds made available under the Act may not be used to procure foreign products unless it is determined that such procurement "will not result in adverse effects upon the economy of the United States or the industrial mobilization base, with special reference to any areas of labor surplus or to the net position of the United States in its balance of payments with the rest of the world...."⁷²¹ This requirement is implemented for Military Assistance procurements through DFARS Subpart 225.72. The regulations provide, with certain limited exceptions, that funds made available under the Foreign Assistance Act may only be used to procure "United States end products" and require inclusion of a clause to that effect in all Military Assistance Program Acquisitions.⁷²² "United States end products" are defined in the same manner as "domestic end products" under the regulatory provisions applicable to the Buy American Act and the underlying domestic preference requirements are similarly

⁷²⁰Exec. Order No. 11223, May 12, 1965, 3 C.F.R. 312 (1964-1965), as amended by Exec. Order No. 12163, Sept. 29, 1979, 3 C.F.R. 435 (1979); Exec. Order No. 12178, Dec. 10, 1979, 3 C.F.R. 465 (1979). See also *Constructores Civiles de Centroamerica, S.A. v. John Hannah, et al.*, 459 F.2d 1183 (D.C. Cir. 1972).

⁷²¹22 U.S.C.A. §2354(a) (1979).

⁷²²See DFARS 225.7201(a); DFARS 252.225-7015 (United States Product Certificate (Military Assistance Program) (Dec 1962)); DFARS 252.25-7016 (United States Products (Military Assistance Program) (Dec 1962)).

applied.⁷²³ The domestic preference restrictions imposed by the Foreign Assistance Act do not apply to procurements of items "not produced in the United States", to "local purchases for administrative purposes", to purchases with "local currency", or where the Assistant Secretary of Defense (ISA) determines that exclusion of foreign products "would seriously impede attainment of Military Assistance Program objectives."⁷²⁴

Nonmilitary assistance under the Foreign Assistance Act is administered by the Agency for International Development (AID). Regulations promulgated by AID to implement the domestic preference requirements of the Act are also similar to the FAR provisions implementing the Buy American Act, and are interpreted and applied in the same manner.⁷²⁵ Applicable AID regulatory provisions are contained in AID Handbook 1, Supplement B (Procurement Policies).⁷²⁶ The standard contract clause used to implement such provisions may be found at 48 C.F.R. §752.7004 (1988).

2. Foreign Military Sales

DoD has been delegated authority under the Arms Export Control Act to enter into contracts for the procurement of defense articles or

⁷²³ Compare DFARS 252.225-7016 (United States Products (Military Assistance Program) (Dec 1962)) and FAR 25.101.

⁷²⁴ DFARS 225.7201(a)(1)-(4).

⁷²⁵ See 56 Comp. Gen. 353 (1977).

⁷²⁶ See 48 C.F.R. §725.701 (1988).

services for resale to foreign governments.⁷²⁷ Because the items procured under such contracts are not intended for "use by the United States", it is highly questionable whether they are or should be subject to the domestic preference requirements imposed by the Buy American Act.⁷²⁸ The DFARS nonetheless do not purport to exempt foreign military sales from operation of the Buy American Act or the Balance of Payments program. Rather, the regulations require that such contracts "be implemented under normal acquisition and contract management procedures set forth in the FAR...and other directives," to include, presumably, the Buy American Act and Balance of Payments Program.⁷²⁹ However, the Buy American Act, even if applicable, is often of little practical effect in the Foreign Military Sales arena. The regulations specifically provide that the foreign military sales customer may request that the items in question be obtained from a particular contractor and that such a request is sufficient authority for a sole

⁷²⁷ 22 U.S.C.A. §§2751-2794, §2762(a) (1979 & Supp. 1989); DFARS 225.7301(a). The Arms Export control Act was previously designated the "Foreign Military Sales Act". For a somewhat dated, but useful general discussion of foreign military sales issues, see Arnavas, *Foreign Military Sales - A Current Look at Some Problem Areas*, 9 Pub. Cont. L. J. 154 (1977).

⁷²⁸ The Buy American Act applies only to the procurement of supplies "acquired for public use", which is defined as "use by the United States." The Comptroller has held that procurements for foreign governments are not for "use by the United States" and thus not subject to the strictures of the Act. Department of the Treasury--Request for Advance Decision, 58 Comp. Gen. 327 (1979), 79-1 CPD ¶181. See also the text and accompanying notes at pp.48-49, *supra*.

⁷²⁹ DFARS 225.7307(a).

source award to that contractor.⁷³⁰ The Comptroller General has consistently held that if an agency has sufficient justification to make a sole source award, it automatically has a sufficient basis for waiver of the Buy American Act requirements.⁷³¹ The fact that such sole source award is itself made in accordance with an international agreement should not affect the outcome of such cases.

Not only are many Foreign Military Sales contracts themselves exempt from the domestic preference requirements of the Buy American Act and the Balance of Payments Program, they may also serve as a basis for exempting other procurements. As part of a Foreign Military Sales (FMS) agreement, DoD may enter an "FMS/offset arrangement" whereby it agrees to permit contractors of the foreign country concerned to compete on an equal basis, without regard to the requirements of the Buy American Act or the Balance of Payments Program, with domestic sources for certain products, up to a specified FMS/offset dollar level.⁷³² In such case, offers from FMS/offset arrangement country sources are evaluated in the same manner as offers from Nato participating countries under DFARS Subpart 225.74.⁷³³ If the FMS/offset arrangement country source is

⁷³⁰DFARS 225.7307(a). See also Comp. Gen. Dec. B-1672209, Sept. 3, 1969 (unpublished); Comp. Gen. Dec. B-176571, Oct. 20, 1972 (unpublished).

⁷³¹See, e.g., Maremont Corp., 55 Comp. Gen. 1362, 1392 (1976), 76-2 CPD ¶181; Bartlett Technologies Corp., Comp. Gen. Dec. B-218786, Aug. 20, 1989, 85-2 CPD ¶198; Design Pak, Inc., Comp. Gen. Dec. B-212579, Sept. 16, 1983, 83-2 CPD ¶336.

⁷³²DFARS 225.7310(a), (b)(2), & (c)(2).

⁷³³DFARS 225.7310(c)(2). See the text and accompanying notes at pp. 74-77, *supra*, for a discussion of DoD procurements from Nato participating countries.

evaluated as the winning offeror, the contracting officer must request a specific determination from the Secretary of the department concerned exempting the acquisition from the strictures of the Buy American Act and the Balance of Payments Program.⁷³⁴ Existing FMS/offset arrangements are set forth at DFARS Appendix T, Subpart 1.

Despite the fact that FMS contracts do not involve the use of appropriated funds, the Boards of Contract Appeals have jurisdiction over disputes arising under such contracts.⁷³⁵ The jurisdiction of the Comptroller General to entertain protests involving such procurements is less clear.⁷³⁶

F. COMMUNIST AND OTHER SOURCE RESTRICTIONS

A number of procurement restrictions exist which, though not specifically designed as domestic preference restrictions, nonetheless provide some assistance to domestic concerns by limiting the field of foreign competition. One such restriction is the prohibition against certain communist source procurements. FAR 25.702 prohibits the

⁷³⁴DFARS 225.3710(c)(2).

⁷³⁵United States v. General Electric Corp., 727 F.2d 1567 (Fed.Cir. 1984).

⁷³⁶Compare Tele-Dynamics, Division of AMBAC Industries, 55 Comp. Gen. 674 (1976), 76-1 CPD ¶60 (GAO declined to entertain a protest involving an award of a contract to financed with non-appropriated funds) with Cincinnati Electronics Corp., 55 Comp. Gen. 1479 (1976), 76-2 CPD ¶286 (GAO recognized the non-appropriated funds jurisdictional issue posed by the earlier case, but sidestepped the issue, in effect holding that the government's argument on the merits was in any event correct and that the jurisdictional argument was therefore of no practical concern). In the latter case it is interesting to note the GAO apparently saw no difficulty in disposing of a case on the merits without first determining whether it had jurisdiction to hear the case at all.

acquisition for use outside the United States of supplies or services originating from or transported through the communist areas of North Korea, Vietnam, Cambodia, or Cuba. Exceptions are permitted for emergency procurements or for items not available from another source and for which there is no acceptable substitute.⁷³⁷ In addition, DoD is precluded from procuring manual typewriters containing components manufactured in Warsaw Pact countries unless the products of that country are accorded most-favored-nation treatment.⁷³⁸

Similar restrictions are sometimes imposed against non-communist countries and even against individual foreign companies. Section 316 of the FY87 National Defense Authorization Act precludes DoD from procuring petroleum products from Angola.⁷³⁹ The restriction may be waived by specified Assistant Secretaries of the military department concerned if such waiver is deemed "in the best interest of the Government."⁷⁴⁰

Finally, the Multilateral Export Control Enhancement Amendments Act imposes restrictions on purchases from Toshiba Corporation, the Toshiba Machine Company, Kongsberg Vaapenfabrikk, and Kongsberg Trading

⁷³⁷FAR 25.703.

⁷³⁸10 U.S.C.A. §2507(c) (Supp. 1989). See also DFARS 225.7004. Note that this restriction was previously set forth at 10 U.S.C.A. §2400(c). The DFARS provision still references the old citation.

⁷³⁹Pub. L. No. 99-661, 100 Stat. 3816 (1986). See also DFARS 225.702(S-70); DFARS 252.225-7022 (Certification and Agreement by Contractors Currently Producing Petroleum Products in Angola (Apr 1987)).

⁷⁴⁰DFARS 225.703(b)(S-70).

Company.⁷⁴¹ The restriction prohibits "all executive agencies, departments, and instrumentalities of the United States...from contracting with, or procuring...the products or services of" such companies between December 28, 1988 and December 28, 1991.⁷⁴² The restriction also applies to procurements from the subsidiaries and successors of such companies and from joint ventures of which they are a part.⁷⁴³ It also requires cancellation or termination of certain existing contracts with such companies and precludes the exercise of options under existing contracts not so terminated.⁷⁴⁴ Exceptions are permitted for procurements of essential defense items.⁷⁴⁵ The restriction also does not apply to procurements of spare parts, component parts essential to U.S. production, routine maintenance of existing products, or information and technology.⁷⁴⁶ Procurements of products specifically designed for and sold under the name of other companies pursuant to pre-existing business arrangements and procurements of components "substantially transformed" during manufacture of another product by other companies are also exempted.⁷⁴⁷

⁷⁴¹Pub. L. No. 100-418, 102 Stat. 1107 (1988). See also FAR Subpart 25.10. The restrictions arose in response to the alleged unauthorized export by these companies of sensitive technology to the Warsaw Pact.

⁷⁴²FAR 25.1002(a).

⁷⁴³FAR 25.1002(b).

⁷⁴⁴FAR 25.1002(c).

⁷⁴⁵FAR 25.1003(a).

⁷⁴⁶FAR 25.1003(b).

⁷⁴⁷FAR 25.1003(c) & (d).

CHAPTER FOUR

THE TRADE AGREEMENTS ACT OF 1979

In 1947, the United States and several other prominent industrial nations initiated the General Agreement on Tariffs and Trade (GATT).⁷⁴⁸ The GATT, which was intended to facilitate the growth of free international trade, subsequently served as the framework for several rounds of international trade negotiations aimed at reducing or eliminating barriers to such trade. The first six rounds of negotiation, conducted between 1947 and 1967, concentrated on reducing tariffs applicable to products traded among and between the signatory nations.⁷⁴⁹ The seventh round of negotiations, designated the "Tokyo Round", was conducted between 1973 and 1979 and concentrated on eliminating non-tariff barriers to international trade.⁷⁵⁰ The Tokyo Round resulted in a number of proposed international "codes", including the Agreement on Government Procurement.⁷⁵¹ One of the primary goals of

⁷⁴⁸Note, *Eliminating Nontariff Barriers to International Trade: The MTN Agreement on Government Procurement*, 12 N.Y.U. J. Int'l L. & Pol. 315 (1979).

⁷⁴⁹*Id.* The number of signatories to the GATT has continued to grow, and is now in excess of 85 members. See Jones, *The GATT-MTN System and the European Community As International Frameworks For the Regulation Economic Activity: The Removal of Barriers to Trade in Government Procurement*, 8 Md. J. Int'l L. & Trade 53, 55 n.4 (1984).

⁷⁵⁰See Note, *supra* note 748, at 316.

⁷⁵¹*Id.* See also, J. Cibinic & R. Nash, *Formation of Government Contracts* 978 (1986).

that Agreement is to eliminate the application of government buy-national practices to products of signatory nations, by requiring that such products be accorded treatment "no less favorable" than that accorded domestic products of the acquiring nation.⁷⁵² The various agreements resulting from the Tokyo Round, including the Agreement on Government Procurement, are implemented through the Trade Agreements Act of 1979.⁷⁵³

The commercial benefit of the Agreement on Government Procurement to domestic firms is questionable. Although initial estimates indicated the Agreement would result in \$20-25 billion in new foreign trade opportunities for U.S. firms, a GAO study places the actual value at approximately \$4 billion, little of which represents any true "new" trade.⁷⁵⁴ In contrast, it is estimated that the United States' implementation of the Agreement has opened up approximately \$17-18 billion in new U.S. government procurements for foreign firms.⁷⁵⁵

⁷⁵²Jones, *supra* note 749, at 75-76. The GATT itself did not provide a basis for preventing such discriminatory government buying practices. In fact, Article III(8)(a) specifically exempted government procurements from the "most favorable nation" requirements generally imposed by the GATT. *Id.*, at 68-70. For a good discussion of the other aspects of the Agreement on Government Procurement, see Note, *Technical Analysis of the Government Procurement Agreement*, 11 Law & Pol'y Int'l Bus. 1345 (1979).

⁷⁵³19 U.S.C.A. §§2501 *et seq.* (1980 & Supp. 1989). The provisions on government procurement are found in §§2511-2518.

⁷⁵⁴General Accounting Office, Report No. NSIAD-84-117, *The International Agreement On Government Procurement: An Assessment of Its Commercial Value and U.S. Government Implementation*, at 12 (Jul. 16, 1984).

⁷⁵⁵*Id.* See also, Note, *International Trade: Government Procurement of Telecommunications Equipment*, 22 Harv. Int'l L. J. 464, 469 n.36 (1981).

Although Congress has recently passed legislation aimed at reducing this wide disparity in benefits,⁷⁵⁶ the effectiveness of such legislation remains to be seen. In the meantime, domestic contractors must remain aware of and understand the effects of the Agreement on federal procurements if they are to compete effectively with foreign firms.

A. EFFECT ON DOMESTIC PREFERENCE REQUIREMENTS

Section 301 of the Trade Agreements Act of 1979 authorizes the President to waive "discriminatory purchasing requirements" with respect to "eligible products" of certain designated countries.⁷⁵⁷ Such waiver may only be granted for procurements of (1) products of countries that are parties to the Agreement on Government Procurement and abide by the terms of such Agreement; (2) products of countries, other than a major industrial country, that are not parties to the Agreement but nonetheless provide reciprocal benefits to United States products and suppliers; or (3) products of least developed countries.⁷⁵⁸ Through Executive Order 12260, the President has delegated authority to grant

⁷⁵⁶ See the discussion of the Omnibus Trade & Competitiveness Act of 1988 at pp. 109-112, *supra*, and pp. 180-182, *infra*.

⁷⁵⁷ 19 U.S.C.A. §2511(a) (1980).

⁷⁵⁸ 19 U.S.C.A. §2511(b) (1980).

such waivers to the United States Trade Representative.⁷⁵⁹ Under such authority, the Trade Representative has waived application of the domestic preference requirements of the Buy American Act and the Balance of Payments Program to eligible products of the designated countries.⁷⁶⁰ The waiver applies only to procurements by certain U.S. Government agencies⁷⁶¹ above a specified dollar threshold,⁷⁶² and does not extend to the additional domestic preference restrictions imposed by individual authorization or appropriation acts.⁷⁶³ The exceptions to the Buy American Act and the Balance of Payments Program domestic preference restrictions created by the Trade Agreements Act of 1979 are implemented in FAR Part 25.4.

1. "Designated Countries" and "Eligible Products"

As implemented in the FAR, the Trade Agreements Act of 1979 requires that for procurements of "eligible products" covered by the Act, offers

⁷⁵⁹Exec. Order No. 12260, Dec. 31, 1980, 3 C.F.R. 311 (1980), as amended by Exec. Order No. 12347, Feb. 23, 1982, 3 C.F.R. 133 (1982); Exec. Order No. 12388, Oct. 14, 1982, 3 C.F.R. 225 (1982); Exec. Order No. 12474, Apr. 17, 1984, 3 C.F.R. 202 (1984). An amended version may be found in Office of the Federal Register, National Archives and Records Administration, *Codification of Presidential Proclamations and Executive Orders*, 717-719 (1961-1985).

⁷⁶⁰See FAR 25.402(a)(1).

⁷⁶¹FAR 25.406. The list of covered Executive agencies set forth in this section corresponds to a list of agencies designated by the President under Executive Order 12260.

⁷⁶²FAR 25.402(a)(1). A discussion of the dollar threshold limitations is set forth at pp. 170-173, *infra*.

⁷⁶³See FAR 25.403(d)(1) and DFARS 25.403(d).

of "designated country end products" be evaluated without regard to Buy American Act and Balance of Payments Program restrictions.⁷⁶⁴ The countries which currently qualify as "designated countries" are listed under FAR 25.401. A "designated country end product" is any article that is "wholly the growth, product, or manufacture of [a] designated country" or, if made "in whole or in part of materials from another country,...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 so transformed."⁷⁶⁵ The FAR rather broadly defines "eligible product" as any "designated country end product or a Caribbean Basin country end product."⁷⁶⁶ The definition of such term by the DFARS is, at least in theory, somewhat more limited. The DFARS sets forth a detailed list of Federal Supply Classifications and provides that the exceptions granted by the Trade Agreements Act apply only to items that fall within one of the listed classifications.⁷⁶⁷ As a practical matter, however, the list of

⁷⁶⁴FAR 25.402(a)(1). *See also*, Marbex, Inc., Comp. Gen. Dec. B-225799, May 4, 1987, 87-1 CPD ¶468; American Seating Co., Comp. Gen. Dec. B-224487, Jul. 30, 1986, 86-2 CPD ¶129; Qualimetrics, Inc., Comp. Gen. Dec. B-222726, Jun. 3, 1986, 86-1 CPD ¶519; Presto Lock, Inc., Comp. Gen. Dec. B-218766, Aug. 16, 1985, 85-2 CPD ¶183, *req. for reconsid. denied*, Comp. Gen. Dec. B-218766.2, Nov. 21, 1985, 85-2 CPD ¶581.

⁷⁶⁵FAR 25.401. The regulatory provision is taken directly from the designated country "rule of origin" established in the Trade Agreements Act of 1979. 19 U.S.C.A. §2518(4)(B) (1980).

⁷⁶⁶FAR 25.401. For a discussion of the treatment of Caribbean Basin country end products, *see* the text and accompanying notes at pp. 83-84, *supra*.

⁷⁶⁷DFARS 25.403(S-70).

eligible classifications set forth in the DFARS is sufficiently broad to encompass virtually any item not otherwise specifically excepted from coverage of the Act.

As a means of encouraging other countries to become parties to and abide by the terms of the Agreement on Government Procurement or to at least provide reciprocal benefits for U.S. products and suppliers, section 302 of the Trade Agreements Act prohibits the procurement from non-designated country sources of items that would otherwise qualify as "eligible products".⁷⁶⁸ The same prohibition is carried directly into the FAR.⁷⁶⁹ Thus, offers of otherwise eligible products from non-designated sources must ordinarily be rejected.⁷⁷⁰ However, if no products from designated countries are offered by any offeror, the agency may properly apply to the Trade Representative for waiver of the restriction against procurement of non-designated country products.⁷⁷¹ Of course, the prohibition against procurement of non-designated country products does not preclude the procurement of domestic source end products within the meaning of the Buy American Act.⁷⁷² Rather, the

⁷⁶⁸19 U.S.C.A. §2512(a) (1980). See also, Data Transformation Corp., GSBGA No. 8982-P, 87-3 BCA ¶20,017 (1987).

⁷⁶⁹FAR 25.402(c).

⁷⁷⁰See, e.g., Marbex, Inc., Comp. Gen. Dec. B-225799, May 4, 1987, 87-1 CPD ¶468; W.H. Smith Hardware Co., Comp. Gen. Dec. B-219405.2, Oct. 25, 1985, 85-2 CPD ¶460; Mercer Electronics Co., Comp. Gen. Dec. B-212873, Feb. 9, 1984, 84-1 CPD ¶161, *aff'd on reconsid.*, Comp. Gen. Dec. B-212873.2, Jul. 23, 1984, 84-2 CPD ¶79.

⁷⁷¹See Jewett-Cameron Lumber Corp., Comp. Gen. Dec. B-223779.2, Apr. 24, 1987, 87-1 CPD ¶433.

⁷⁷²Marbex, Inc., Comp. Gen. Dec. B-225799, May 4, 1987, 87-1 CPD ¶468.

Trade Agreements Act only results in the evaluation of domestic end products and designated country end products on an equal basis, without application of the normal Buy American Act or Balance of Payments Program differentials.⁷⁷³

2. Minimum Purchase Threshold

The Trade Agreements Act of 1979 and the exceptions which it affords from the restrictions of the Buy American Act and the Balance of Payments Program do not apply to procurements of a value less than 130,000 Special Drawing Right units.⁷⁷⁴ The United States Trade Representative is required to periodically determine the equivalent dollar value of such units and publish such determination in the Federal Register.⁷⁷⁵ Such determinations are a matter of discretion not subject to review by the GAO.⁷⁷⁶ Effective through 1990, the Trade Representative has determined that the dollar threshold to be \$156,000.⁷⁷⁷ If the estimated value of the proposed acquisition is below this amount, the restrictions of the Buy American Act and Balance

⁷⁷³ *Id.*

⁷⁷⁴ Exec. Order No. 12260, §1-104, initially established the threshold at 150,000 units. Effective February 14, 1988, the threshold was reduced to 130,000 units. 53 Fed. Reg. 3284 (1988). "Special Drawing Right" refers to the unit of account of the international reserve established and maintained by the International Monetary Fund. Jones, *supra* note 749, at 72 n.46.

⁷⁷⁵ Exec. Order No. 12260, §1-104. See also FAR 25.402(a)(1).

⁷⁷⁶ Sparklet Devices, Inc., Comp. Gen. Dec. B-223089, May 22, 1986, 86-1 CPD ¶482.

⁷⁷⁷ 53 Fed. Reg. 3284 (1988).

of Payments Program are applied to all foreign offers (unless otherwise waived through another applicable exception) and the restriction against the procurement of non-designated country end products does not apply.⁷⁷⁶ Lower thresholds apply with respect to Israeli end products (\$50,000) and Canadian end products (\$25,000).⁷⁷⁹

Agencies are not permitted to divide acquisition requirements into more than one procurement solely for purposes of reducing the estimated value below the applicable dollar threshold.⁷⁸⁰ For requirements contracts, the Agency estimate of its projected needs is controlling for purposes of determining the dollar value of the acquisition.⁷⁸¹ Similarly, in delivery order contracts, the total estimated dollar value of the acquisition, rather than the value of any given order, determines whether the procurement is subject to the Trade Agreements Act.⁷⁸² In calculating the estimated value of the acquisition, the value of any applicable options must be included.⁷⁸³ The method of calculating the value of products "acquired" by "lease, rental, or lease-purchase" contracts varies, depending on the type of contract concerned and its

⁷⁷⁶FAR 25.402(a)(1).

⁷⁷⁹FAR 25.402(a)(2) and (3). For a further discussion of the special treatment accorded Israeli and Canadian end products, see the text and accompanying notes a pp. 77-83, *supra*.

⁷⁸⁰FAR 25.402(d).

⁷⁸¹W.H. Smith Hardware Co., Comp. Gen. Dec. B-219405.2, Oct. 25, 1985, 85-2 CPD ¶460.

⁷⁸²See Tic-La-Dex Business Systems, Inc., Comp. Gen. Dec. B-235016.2, Oct. 6, 1989, 89-2 CPD ¶323.

⁷⁸³FAR 25.402(a)(5).

duration. For fixed-term contracts of 12 months or less, the estimated dollar value of the lease is used as the acquisition value.⁷⁸⁴ For fixed-term contracts of more than twelve months, the estimated value of the lease "plus the estimated residual value of the leased equipment at the conclusion of the contemplated term of the contract" is used as the acquisition value.⁷⁸⁵ Finally, for indefinite-term contracts, or in situations in which there is doubt as to the duration of the lease, the acquisition value is determined by multiplying the estimated monthly payment by 48.⁷⁸⁶

One unique problem presented by the dollar threshold is how to evaluate the bid or offer of a designated country source which on its face falls below the threshold but rises above the threshold when the Buy American Act or Balance of Payments differential is applied. The issue was addressed by the GAO for the first time in *Leland Limited, Inc.*, in 1986.⁷⁸⁷ In response to a DoD solicitation for carbon dioxide cylinders used to inflate pneumatic flight vests, *Leland* offered a designated country end product at the lowest un-evaluated bid price of \$130,000. The next lowest bid, offering a domestic source end product, was \$160,000. However, the Trade Agreements Act dollar threshold at the time was \$149,000 and, because *Leland's* bid fell below that amount, a

⁷⁸⁴FAR 25.402(a)(4)(i).

⁷⁸⁵FAR 25.402(a)(4)(ii).

⁷⁸⁶FAR 25.402(a)(4)(iii)-(iv).

⁷⁸⁷*Leland Limited, Inc.*, Comp. Gen. Dec. B-224175, Dec. 24, 1986, 86-2 CPD ¶113, *aff'd on reconsid.*, Comp. Gen. Dec. B-224175.2, Feb. 17, 1987, 87-1 CPD ¶168.

50% evaluation differential was added to its bid, making the evaluated bid price approximately \$195,000. The domestic offer of \$160,000 therefore became the lowest evaluated bid and was awarded the contract. Had *Leland* instead bid \$149,000 (the applicable threshold amount), no evaluation differential would have been applied and it would have been awarded the contract. In response to *Leland's* protest, the Comptroller concluded that such a result was nonsensical and held that in such circumstances, the Buy American Act or Balance of Payments Program evaluation differential should be applied only up to the applicable threshold amount.⁷⁹⁸ Thus, *Leland's* evaluated bid became \$149,000 and it was awarded the contract.

B. EXCEPTIONS

As indicated from the above discussion, there exist two inherent "exceptions" to the application of the Trade Agreements Act in that, as implemented through Executive Order 12260, it only applies to procurements of the listed executive agencies above the specified dollar threshold.⁷⁹⁹ In addition, the regulations provide for several other exceptions.⁸⁰⁰ One such exception is that permitted for purchases essential to the national security or national defense.⁸⁰¹ For

⁷⁹⁸ *Id.*

⁷⁹⁹ These exceptions are re-iterated in FAR 25.403(a) (dollar threshold exception) and FAR 25.403(l) (listed agency exception).

⁸⁰⁰ The exceptions addressed in the FAR correspond to those provided in the Agreement on Government Procurement, primarily through Article VIII. See Note, *supra* note 752, at 1348-49.

⁸⁰¹ FAR 25.403(d).

procurements by DoD, such exception may be granted on a case-by-case basis by the Deputy Assistant Secretary of Defense (P&L) or a designee.⁷⁹² For all other agencies, the exception may only be evoked in accordance with guidance established by the United States Trade Representative.⁷⁹³ The Act also does not apply to construction contracts, research and development contracts, purchases by the U.S. Army Corps of Engineers, purchases of items for resale, or purchases from federal prisons or from the blind or other severely handicapped.⁷⁹⁴ Also excepted are purchases of certain products from Caribbean Basin countries⁷⁹⁵ and service contracts.⁷⁹⁶ The Act does, however, apply to services incidental to the procurement of eligible products as long as the value of such incidental services does not exceed the value of the product itself.⁷⁹⁷ Finally, the Act does not apply to small business set-aside procurements.⁷⁹⁸ In this regard, the mere inclusion of a provision in the solicitation that tie offers are to be resolved in favor of small business concerns does not establish a small business preference sufficient to remove the procurement from the coverage of the

⁷⁹²FAR 25.403(d)(1); DFARS 225.402(b)(1); DFARS 225.403(d).

⁷⁹³FAR 25.403(d)(2).

⁷⁹⁴FAR 25.403(e) and (g)-(j).

⁷⁹⁵FAR 25.403(m). See also the text and accompanying notes at pp. 83-84, *supra*.

⁷⁹⁶FAR 25.403(f).

⁷⁹⁷*Id.*

⁷⁹⁸FAR 25.403(c).

Act.⁷⁹⁹ Although no general exception is permitted for labor surplus area set-asides,⁸⁰⁰ the labor surplus area preference may be accorded to small business concerns.⁸⁰¹

C. THE AGREEMENT ON TRADE IN CIVIL AIRCRAFT

Section 303 of the Trade Agreements Act authorizes the President to waive application of the Buy American Act restrictions with respect to procurements of civil aircraft and related articles from countries that are parties to the Agreement on Trade in Civil Aircraft.⁸⁰² Such authority has been delegated to the U.S. Trade Representative⁸⁰³ and was exercised by the Trade Representative on February 19, 1980.⁸⁰⁴ As implemented in the FAR, the waiver provides that Buy American Act restrictions shall not be applied to procurements of civil aircraft and related articles that are either "wholly the growth, product, or

⁷⁹⁹Tic-La-Dex Business Systems, Inc., Comp. Gen. Dec. B-235016.2, Oct. 6, 1989, 89-2 CPD ¶1323.

⁸⁰⁰An exception for such procurements does exist, however, with respect to offers of Israeli products priced between the lower threshold (\$50,000) for such products and the normal Trade Agreements Act threshold (currently \$156,000). FAR 25.404(b).

⁸⁰¹FAR 25.404(a).

⁸⁰²19 U.S.C.A. §2513 (1980). The provision does not address waiver of other domestic preference restrictions such as those imposed by the Balance of Payments Program, and the regulations are equally silent on this issue. However, for procurements in excess of the applicable dollar threshold, it would appear that the normal Trade Agreements Act exceptions provided through FAR Part 25.4 would also apply to procurements of civil aircraft and related articles.

⁸⁰³Exec. Order No. 12188, 45 Fed. Reg. 990 (1980).

⁸⁰⁴45 Fed. Reg. 12349 (1980). See also FAR 25.104(a).

manufacture" of a country that is a party to the Agreement on Trade in Civil Aircraft or, if made "in whole or in part of materials from another country...[have] 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 [they were] so transformed."⁸⁰⁵ Countries which are currently parties to the Agreement on trade in Civil Aircraft are listed in FAR 25.104(a). "Civil aircraft and related articles" are expansively defined to include not only the aircraft concerned, but also the aircraft engines, related ground flight simulators, and the parts, components, and subassemblies procured for incorporation into all such items.⁸⁰⁶ Procurements of such items by DoD are excluded.⁸⁰⁷

D. IMPLEMENTATION AND ENFORCEMENT

1. Required Clauses and Certifications

With respect to procurements of civil aircraft and related articles, the FAR requires inclusion of a provision which details the waiver of the restrictions of the Buy American Act granted for such procurements in accordance with the above discussion.⁸⁰⁸ No separate certification is required from the contractor with respect to the source of the items for which this particular exemption is sought. For all other

⁸⁰⁵FAR 25.104(b).

⁸⁰⁶FAR 25.101.

⁸⁰⁷ *Id.*

⁸⁰⁸FAR 52.225-2 (Waiver of Buy American Act for Civil Aircraft and Related Articles (Apr 1984)).

procurements covered by the Trade Agreements Act, the FAR requires offerors to certify that, unless otherwise indicated, only domestic end products, Caribbean Basin country end products, or designated country end products are being offered and will be provided under the contract.⁸⁰⁹ A separate provision contractually requiring the contractor to comply with the Buy American Act and Trade Agreements Act is also required.⁸¹⁰ Similar, but slightly expanded alternative clauses are required for DoD procurements.⁸¹¹

Because the Trade Agreements Act certification is structured similar to and is actually a part of the Buy American Act certification, it is interpreted and applied in accordance with the same rules applicable to the standard Buy American Act certification.⁸¹² Thus, the contracting officer is normally entitled to rely on the offeror's certification as sufficient evidence that the offeror can and will comply with the requirements of the Act as certified.⁸¹³ However, if the contracting officer has actual or constructive knowledge of, or a reasonable basis to suspect a miscertification, he or she must take reasonable steps to

⁸⁰⁹FAR 52.225-8 (Buy American Act--Trade Agreements Act--Balance of Payments Program Certificate (May 1986)). For a discussion of Caribbean Basin country requirements, see the text and accompanying notes at pp. 83-84, *supra*.

⁸¹⁰FAR 52.225-9 (Buy American Act--Trade Agreements Act--Balance of Payments Program (May 1986)).

⁸¹¹See DFARS 225.407.

⁸¹²For an in depth discussion of such rules, see the text and accompanying notes at pp. 96-101, *supra*.

⁸¹³FAR 25.407(b).

verify the accuracy of the certification.^{§14} Contractors are permitted to change the originally intended plan of performance after contract award to ensure compliance with the certification.^{§15}

Although the Trade Agreements Act and Buy American Act certifications are interpreted and applied in the same manner, the *effect* of the Trade Agreements Act certification differs significantly. Because the Buy American Act only imposes a preference for domestic source end products, a certification that foreign end products will be supplied does not require rejection of the offer, but merely results in the application of the appropriate evaluation differential to the price of that offer.^{§16} However, in procurements subject to the Trade Agreements Act, agencies are prohibited from procuring foreign end products from non-designated countries.^{§17} Thus, if the offeror indicates in the Trade Agreements Act certification or elsewhere in its offer an intent to supply foreign end products from a non-designated

^{§14}Automated Business Systems & Services, Inc., GSBGA No. 9213-P, *et al.*, 88-1 BCA ¶20,405 (1987).

^{§15}*Id.* (The offeror mistakenly believed that one of the products which it intended to supply was a designated country end product. Upon learning of its mistake after contract award, it immediately took steps to secure the item from a designated country source).

^{§16}*See, e.g.,* Lenzar Optics Corp., Comp. Gen. Dec. B-225432, Mar. 4, 1987, 87-1 CPD ¶246; Yohar Supply Co., 66 Comp. Gen. 251 (1987), 87-1 CPD ¶152; California Mobile Communications, Comp. Gen. Dec. B-224398, Aug. 29, 1986, 86-2 CPD ¶244.

^{§17}*See* text and accompanying notes at pp. 167-69. *supra*.

country, the offer must be rejected.⁸¹⁸ If a bid or offer is ambiguous as to whether designated or non-designated country end products are to be supplied, it must be interpreted as offering non-designated country end products and thus rejected.⁸¹⁹

During contract performance, a contractor's obligation to supply only domestic or designated country end products is enforced in the same manner as the Buy American Act in procurements not subject to the Trade Agreements Act.⁸²⁰

2. Contractor Right of Action

The nature of the Trade Agreements Act presents some unique difficulties for offerors who feel they have been unfairly treated in connection with procurements subject to the Act. First, because the Act precludes any private remedies not specifically addressed in the Act itself, offerors cannot successfully base a protest on a claim that the underlying procurement action violated the Trade Agreements Act.⁸²¹ Rather, the protest must be based on the regulatory provisions (FAR)

⁸¹⁸ See, e.g., *Marbex, Inc.*, Comp. Gen. Dec. B-225799, May 4, 1987, 87-1 CPD ¶468; *W.H. Smith Hardware Co.*, Comp. Gen. Dec. B-219405.2, Oct. 25, 1985, 85-2 CPD ¶460; *Mercer Electronics Co.*, Comp. Gen. Dec. B-212873, Feb. 9, 1984, 84-1 CPD ¶161, *aff'd on reconsid.*, Comp. Gen. Dec. B-212873.2, Jul. 23, 1984, 84-2 CPD ¶179.

⁸¹⁹ See *Marbex, Inc.*, Comp. Gen. Dec. B-225799, May 4, 1987, 87-1 CPD ¶468.

⁸²⁰ See text and accompanying notes at pp. 101-109, *supra*.

⁸²¹ See generally, *Arrowhead Metals, Ltd. v. United States*, 8 Cl.Ct. 703, 715 (1985) (interpreting 19 U.S.C.A. §§2504(d) and 2551).

that implement the Act.⁸²² Second, although the GAO will entertain protests against an agency's determination of whether the Act applies or whether an offered item qualifies as a domestic or designated country end product,⁸²³ it will not entertain protests on matters unrelated to the Trade Agreements Act from offerors of non-designated country end products.⁸²⁴ Because the agency is precluded from procuring non-designated country end products, offerors of such products are ineligible for award and thus are not interested parties within the meaning of GAO bid protest regulations.⁸²⁵

Offerors attempting to protest awards under solicitations subject to the Act must take care in drafting the protest to ensure that they do not inadvertently run afoul of the limitations which these rules create.

E. THE OMNIBUS TRADE & COMPETITIVENESS ACT

In addition to amending the Buy American Act,⁸²⁶ the Omnibus Trade & Competitiveness Act of 1988 amended the Trade Agreements Act of 1979 to permit sanctions against countries which are signatories to the Agreement on Government Procurement but do not abide by the terms of

⁸²² *Id.*

⁸²³ See, e.g., Tic-La-Dex Business Systems, Inc., Comp. Gen. Dec. B-235016.2, Oct. 6, 1989, 89-2 CPD ¶1323; Marbex, Inc., Comp. Gen. Dec. B-225799, May 4, 1987, 87-1 CPD ¶1468.

⁸²⁴ Jewett-Cameron Lumber Corp., Comp. Gen. Dec. B-223779.2, Apr. 24, 1987, 87-1 CPD ¶1433 (GAO refused to entertain protest of adverse responsibility determination from offeror of a non-designated country product).

⁸²⁵ *Id.*

⁸²⁶ See text and accompanying notes at pp. 109-112, *supra*.

that Agreement or which maintain "a significant and persistent pattern or practice of discrimination against United States products or services which results in identifiable harm to United States businesses."⁸²⁷ The amendment requires the President to initially identify such countries to Congress not later than April 30, 1990 and to update such report on an annual basis.⁸²⁸ Once such countries are identified, the United States Trade Representative is required to consult with the government of each country so identified to obtain compliance with the terms of the Agreement or the cessation of the discriminatory procurement practices.⁸²⁹ If an offending country which is a party to the Agreement on Government Procurement fails to take such action, the Trade Representative must initiate formal dispute resolution procedures under the Agreement within 60 days.⁸³⁰ If the dispute is not resolved within a year, any exception to the Buy American Act or Balance of Payments Program restrictions that would otherwise be available under the Trade Agreements Act for procurements from such country must be suspended.⁸³¹ If the matter is still not satisfactorily resolved by the end of the following year, the President is required to revoke application of the Trade Agreements Act as to procurements from sources of such country.⁸³²

⁸²⁷§7003, Pub. L. No. 100-418, 102 Stat. 1107, 1548-1552 (1988). The amendment is to be codified at 19 U.S.C. §§2515(d)-(k).

⁸²⁸19 U.S.C.A. §2515(d)(1) (Supp. 1989).

⁸²⁹19 U.S.C.A. §2515(e) (Supp. 1989).

⁸³⁰19 U.S.C.A. §2515(f)(1) (Supp. 1989).

⁸³¹19 U.S.C.A. §2515(f)(3)(A) (Supp. 1989).

⁸³²19 U.S.C.A. §2515(f)(3)(B) (Supp. 1989).

If the offending country is not a party to the Agreement on Government Procurement, revocation of any exceptions to U.S. domestic preference restrictions afforded to sources within that country under the Trade Agreements Act must occur 60 days after unsuccessful consultation by the U.S. Trade Representative.⁸³³ The President is authorized to re-instate application of the Trade Agreements Act if he determines that the country concerned has ceased the discriminatory procurement practices.⁸³⁴ The President may also grant exceptions to the requirement for sanctions under the amendment if he determines that such sanctions "would harm the public interest of the United States."⁸³⁵ Moreover, no sanctions may be imposed if the President determines that such action would have an "adverse impact on competition", either by limiting a procurement to one source, or by unduly limiting competition to an insufficient number of offerors to ensure procurement of items of the "requisite quality at competitive prices."⁸³⁶ The requirements imposed by the amendment expire April 30, 1996 unless other wise extended before that date.⁸³⁷

⁸³³19 U.S.C.A. §2515(g) (Supp. 1989)

⁸³⁴19 U.S.C.A. §§2515(f)(5) and 2515(g)(3) (Supp. 1989).

⁸³⁵19 U.S.C.A. §§2515(f)(4) and 2515(g)(2) (Supp. 1989).

⁸³⁶19 U.S.C.A. §2515(h) (Supp. 1989).

⁸³⁷§7004, Pub. L. No. 100-418, 102 Stat. 1107, 1548-1552 (1988). This "sunset" provision is set forth at 41 U.S.C.A. §10a note (Supp. 1989).

CHAPTER FIVE

CONCLUSION

The sheer number of statutory and regulatory provisions imposing domestic preference requirements in the federal procurement arena, coupled with the even greater number of existing exceptions, poses obvious difficulties for government contractors attempting to understand and comply with such requirements. The problem is further exacerbated by the fact that the language of such provisions is often far from clear. The struggle by the courts, Boards of Contract Appeals, and the Comptroller General to come to grips with this lack of clarity has at times resulted in some very fine legal and factual distinctions, and even inconsistent holdings.

The resulting confusion is clearly a significant concern for contractors. Contractors which do not understand the intricacies of existing domestic preference provisions risk loss of valuable contracts to more knowledgeable competitors. Moreover, contractors deemed not to be in compliance during contract performance are subject to substantially higher performance costs resulting from forced replacement of non-compliant supplies or materials. Civil and criminal penalties, as well as suspension or debarment, though much less common, are also very real possibilities.

Government procurement officials must be equally concerned. Confusion surrounding applicable procurement requirements invariably leads to a greater number of protests by disgruntled offerors. The very

process of evaluating and responding to such protests necessarily results in increased cost to the government. Moreover, protests often cause significant delays in the award of the contract concerned and thus fulfillment of the underlying agency need. Efforts to ensure compliance with unclear domestic preference requirements during contract performance also result in increased costs for the government, as well as additional delays in filling agency needs as contractors are forced to replace non-conforming supplies or materials. Finally, the extra costs associated with replacing such non-conforming items are not borne solely by the contractor, but are often passed on to later customers, including the government, in the form of higher prices on the next procurement.

All of the above factors dictate the need for significant and lasting reform in both existing federal domestic preference laws and in the way such provisions are enacted. Given the continued vitality of protectionist forces in Congress and the competing liberal international free-trade policies pursued by past and present administrations, it is extremely unlikely that such reform could or even should result in either the elimination of all domestic preference laws or in a substantial strengthening of such laws. However, a number of changes are possible that would go a long way toward eliminating many of the current difficulties attending the administration of such laws while still accommodating the conflicting interests of protectionists and free-trade advocates.

One change that is needed is the elimination of or at least a substantial reduction in the number of *ad hoc* domestic preference

provisions attached to authorization and appropriation acts. Many of these provisions are the result of last minute amendments added without significant thought or debate at the behest of Congressional constituents seeking protection from foreign competition, sometimes in relation to specific procurements. This "legislation by impulse" often results in unclear language and even duplicate coverage with other existing domestic preference provisions. Moreover, many of these provisions, once enacted, tend to be blindly repeated year after year long after their original purpose has been served. Finally, such provisions may, in the long run, actually harm, rather than help domestic industry in that they tend to reduce incentives for modernization, act as an impetus for increased purchases of American firms by foreign companies seeking to comply with the domestic origin requirements, and cause U.S. allies to retaliate with reciprocal buy national measures, thereby restricting U.S. export markets.^{***}

As an alternative to such *ad hoc* provisions, Congress should rely on DoD's existing discretionary authority to protect industries that are truly essential to the national defense through appropriate industrial mobilization base restrictions.^{***} If the industry concerned is not essential to the national defense, then other forms of assistance, such as government subsidized loans, could be effectively used to encourage the industrial modernization necessary to make that industry more competitive in the international arena. Finally, if protection of a

^{***} See Secretary of Defense Report to Congress, *supra* note 535, at 5-11.

^{***} See text and accompanying notes at pp. 134-138, *supra*.

particular industry or industries through authorization or appropriation act restrictions is deemed absolutely necessary, a standard format for such provisions, using well thought out, clearly defined language should be adopted. Further, such provisions, once initiated, should not thereafter be indefinitely repeated year after year. Rather, a standard limit on the number of years for which such a provision could be repeated before it must be eliminated or, if necessary, enacted as permanent legislation, should be adopted. Such a pre-determined time limit, if made known to the industry concerned, would provide needed temporary relief from foreign competition and at the same time incentivize the industry to modernize its capabilities to make it more competitive in the international arena after the restriction expires.

A second major reform needed is a substantial revision of the Buy American Act to eliminate the current artificial emphasis placed on the importance of "manufacture". As is clear from the earlier discussion of this concept,⁴⁰ boards, courts, and the Comptroller General have been struggling unsuccessfully for years to provide a workable definition of this seemingly illusive concept. Moreover, focusing on the place of manufacture, particularly at the component and end product level, permits knowledgeable contractors to manipulate the manufacturing process to pass off as "domestic" items which are of predominantly foreign content.⁴¹ To eliminate this problem, the Buy American Act should be revised to require only that greater than fifty percent of the

⁴⁰ See text and accompanying notes at pp. 37-48, *supra*.

⁴¹ *Id.*

total cost of a given end product or construction material arise domestically. Such an approach would shift the current artificial focus from the place of intermediate stages of manufacture to the true domestic content of the item concerned and would thus come far closer to fulfilling the original intent of the Buy American Act.

Finally, both Congress and the Executive branch should strive to ensure, to the greatest extent possible, that the domestic preference requirements imposed by the Buy American Act and other statutes, such as, for example, the various transportation acts discussed in this study, are uniformly stated and uniformly applied. Use of different terms in such statutes to accomplish the same underlying purpose, *i.e.*, the creation of a preference for domestic source goods, serves no useful purpose and only complicates the efforts of industry and government procurement officials attempting to understand and comply with each new provision. Further, the continued different application of any given domestic preference requirement between different federal agencies, such as the 50% differential employed by DoD under the Buy American Act versus the 6% and 12% differentials employed by other agencies, should be closely examined and, if no longer necessary, eliminated.

Until these or similar corrective measures are taken, contractors and government procurement officials must continue to struggle with the potentially bewildering array of statutes, executive orders, regulations, and case law that impose and implement existing domestic preference policies in federal procurement.