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# *Focus*

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## FEATURE COMMENT: Country Of Origin Requirements For Intangible Software

Most U.S. Government procurements of information technology products are subject to a "country of origin" requirement pursuant to the Trade Agreements Act (TAA), 19 USCA § 2501 et seq. Customs and Border Protection, which has the authority to make country of origin determinations for Government procurement purposes, has issued numerous rulings involving computer equipment that includes downloaded software.

However, it had not previously addressed software to be purchased and downloaded in intangible form; that is, without any CD or other equipment or device purchased at the same time. This FEATURE COMMENT discusses two CBP rulings that address the TAA country of origin of software to be sold to the U.S. Government by electronic download, and the standard that CBP used to determine the country of origin of that software.

**Determining Country of Origin under the TAA**—The TAA applies to most Government acquisitions of supplies (and services) with an estimated value over $204,000, Federal Acquisition Regulation 25.402(b), although there are certain exceptions and exemptions. The TAA restricts the Government's purchases to only "U.S.-made" or "designated country" end products.

Under the TAA, a U.S.-made end product is one that is either (a) "mined, produced or manufactured in the [U.S.]," or (b) "substantially transformed in the [U.S.] into a new and different article of commerce with a name, character or use distinct from that of the article or articles from which it was transformed." FAR 25.003. Designated countries are countries that are signatories to the World Trade Organization Government Procurement Agreement, countries with which the U.S. has free trade agreements (e.g., NAFTA) that provide for reciprocal nondiscriminatory treatment for public procurement purposes, and certain developing and Caribbean Basin countries. See FAR 25.003.

Like a U.S.-made end product, a designated country end product is wholly the growth, product or manufacture of a designated country, or has been substantially transformed in a designated country. A number of countries, including China and India, are currently *not* designated countries.

Determining whether and where substantial transformation has occurred is often critical to country of origin determinations under the TAA. Substantial transformation for TAA purposes is determined on a case-by-case basis considering the "totality of the circumstances." This includes:

> The country of origin of the item's components, extent of the processing that occurs within a country, and whether such processing renders a product with a new name, character, and use are primary considerations in such cases. Additionally, factors such as the resources expended on product design and development, the extent and nature of post-assembly inspection and testing procedures, and worker skill required during the actual manufacturing process will be considered when determining whether a substantial transformation has occurred. No one factor is determinative.

CBP HQ Ruling H215555, July 13, 2012; see also FAR 25.001(c)(2).

**Determining Country of Origin for Intangible Software**—CBP's two decisions on the country of origin of intangible software to be purchased and downloaded in intangible form, without any CD or equipment purchased at the same time, both focused on the site of the "software build."

The first, a June 8, 2012 nonbinding advisory ruling, HQ H192146, considered the country of

 

origin of Talend Inc.'s database management (DM) software and application integration (AI) software. This software was to be sold to the U.S. Government by electronic download upon purchase.

The ruling described a seven-step process for development of the DM software consisting of (1) research, (2) development of a graphical user interface, (3) development and writing of software specifications and architecture, (4) programming of source code, (5) software build, (6) testing and validation, and (7) preparation of the software for distribution (burning on to server media from which it will be downloaded when purchased). CBP described programming as involving the creation of "components which will be used to build the machine-executable computer software, but it is not the final software product and in fact is not executable computer software code." CBP then described software build as including "the process of methodically converting source code files into standalone lines, routines and subroutines of software object code files into standalone lines, routines and subroutines of software object code that can be run by a computer."

The ruling also identified the country or countries in which each of the steps occurred, and Talend's estimates of the approximate percentage of the work represented by each step in the process. According to CBP, the first three steps in the software development process took place in France, while the programming, or writing of source code components, occurred in China. The software build, which apparently accounted for about 20 percent of the workload, occurred in France, while the testing occurred in China, and the burning for distribution occurred in France or the U.S.

Development of the AI software involved a similar process. According to CBP, some of the initial steps, such as programming, occurred in various countries, including France and Germany. The software build occurred in either France or Germany, and the burning occurred in France.

CBP found that the DM software was substantially transformed in France because the "primary design and software build occur[red] in France." CBP found that the AI software was substantially transformed in France or Germany because that was "where the software build [was] performed." Accordingly, CBP found that the countries of origin for Government procurement purposes of the DM and AI software were France, and France or Germany, respectively.

In reaching that result, CBP repeated the substantial transformation test stated above. It also discussed the decision of the U.S. Court of International Trade in *Data Gen. Corp. v. U.S.*, 4 CIT 182 (1982), in which the court found that programming a programmable read-only memory chip substantially transformed the chip. CBP has repeatedly cited this decision in rulings that involve downloading software to a device or programming some physical device. However, CBP did not explain how the holding in *Data General* relates to the result for intangible software, or why the software build was critical to CBP's assessment of substantial transformation.

CBP again addressed intangible software in HQ H243606, a final determination issued in December 2013. 78 Fed. Reg. 75362 (Dec. 11, 2013). That ruling involved AvePoint's DocAve software, which CBP described as "a comprehensive suite of applications for Microsoft SharePoint." CBP once again described a seven-step software development process. It stated that several of the steps (including software build) were performed in the U.S., and that the others (including programming of source code) were performed in the U.S. and China. It also noted that approximately 68 percent of the allocated work took place in the U.S., and 32 percent was performed in China.

CBP found that the "software build performed in the U.S. substantially transforms the software modules developed in China and the U.S. into a new article with a new name, character and use." Accordingly, CBP found that the DocAve software was a product of the U.S. for purposes of Government procurement. CBP again relied primarily on the decision in *Data General*, but it also further explained the importance of the software build in its determination. It stated,

> During the software build process, the source code modules developed in the U.S. and China are transferred to a server in the U.S., where the U.S. software development team creates DocAve Software by compiling the source code into object code, and works out incompatibilities or bugs by re-writing or correcting source code as needed. Moreover, the U.S. team creates all the lines of the object code, makes all the software executable files in various versions and languages, and constructs the installation package as an easily installable unit. In addition, 90% of the software development research is performed in the U.S., as are aspects of programming of the source code and testing and validation, such that 68% of the development of DocAve Software is attributed to work performed in the United States. Given these

 

> facts, we find that the country of origin of DocAve Software is the United States for purpose[s] of U.S. Government procurement.

CBP noted other steps in the software development process that occurred either partially or entirely in the U.S., but it singled out the software build as the action that effected a substantial transformation of the product.

**Conclusion**—These two CBP rulings provide important guidance for companies that sell intangible software to the U.S. Government. They also reflect the two different types of country of origin rulings for Government procurement purposes that are available from CBP under 19 CFR pt. 177, subpt. B, "advisory rulings" and "final determinations." An advisory ruling discusses but does not formally apply country of origin legal principles to a particular set of facts. A final determination interprets and applies established country of origin laws and regulations to a specific set of facts, and gives the highest degree of assurance regarding TAA status.

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