The Basics of the Trade Agreements Act

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Introduction

Trade Agreements Act ("TAA") compliance has gained increased visibility in the GSA contracting community. For example, GSA's Industrial Operation's Analysts ("IOAs") are conducting TAA compliance reviews during visits to contractors. Several office supply company GSA contractors -- among them some household names -- have recently reached seven-figure settlements in cases brought under the civil False Claims Act ("FCA") for alleged TAA non-compliance. These settlements have prompted some independent dealers/resellers who hold GSA schedule contracts to ask suppliers for specific representations and warranties of TAA compliance in connection with letters of supply and, in some cases, to agree to indemnify the GSA contract holder for financial consequences of any TAA non-compliance. In addition, in a recent bid protest, *Wyse Technology, Inc.*, B-29745, January 24, 2006, GAO overturned an award based on the fact that the awardee expressly declined to certify that the product to be provided would comply with the TAA as required by the terms of the solicitation.

Overview of the TAA

The TAA applies to U.S. Government acquisitions over a certain dollar threshold, generally $193,000 for the acquisitions of supplies or services, although some individual Free Trade Agreements (e.g., Canada, Mexico, Chile, and Australia) apply lower thresholds. *See* FAR 25.601; FAR 25.1101; FAR 25.1103. It is GSA's stated position that its Federal Supply Schedule Contracts meet the applicable TAA threshold. Contracts to which the TAA applies incorporate the FAR's Trade Agreements Act clause, at FAR 52.225-5 (January 2005), and Trade Agreements Act Certification, at FAR 52.225-6 (2005) or FAR 52.212-3(g)(4) (Jan. 2005) with the latter being included in the offeror representations and certifications for contracts for commercial items.

The TAA essentially provides that the Government may acquire only "U.S.-made or designated country end products." The Act requires contractors to certify that each end product meets the applicable requirements. "End products" are defined as "those articles, materials and supplies to be acquired for public use." FAR 25.003. "Designated countries" are Caribbean Basin countries, WTO GPA countries, Free Trade Agreement Countries, and certain "least

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developed" countries as listed in FAR 52.225-5. The TAA essentially requires that end products from designated countries be treated the same as U.S.-made products for government procurement purposes, and prohibits the acquisition of end products from other, non-designated countries. As such, the TAA provides an exception to the Buy America Act ("BAA"), which is intended to promote the acquisition of "domestic [US] end products." *See* FAR 25.100-102; *see also* FAR 52.225-1; 52.225-2. In other words, where the TAA applies, the BAA does not apply.

Several countries that are major suppliers of goods or services to the U.S. market, such as China, India, Malaysia, Thailand, and Taiwan, are not "designated countries" within the definition of the TAA. Therefore, items that are considered end products of those countries are not eligible for being placed on GSA schedules unless no U.S.-made or designated country end products are available. One of the stated policy reasons underlying the prohibition on government acquisition of products from these countries is that the U.S. needs to use the leverage of its procurement market as a means for gaining market access in countries like China.

The TAA applies a rule-of-origin requirement to the end product being supplied and requires that end products acquired by the Government must be "wholly the growth, product or manufacture" of the U.S. or of a designated country, or "substantially transformed [in the U.S. or a designated country] . . . into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed." *See* FAR 25.003.

Unlike determinations under its cousin the BAA, the determination of whether there has been substantial transformation for TAA purposes is ***not*** based primarily on the value or percentage of U.S. (or designated country) content (components), but on whether the article in question has been given a different character or use as a result of the process it underwent in the U.S. (or designated country); *i.e.*, has been "substantially transformed." *Compare* FAR 52.225-1(a), BAA clause, *with* FAR 52.225-5(a), TAA clause. "Substantial transformation" can present complex issues of interpretation and application that must be considered on a case-by-case basis, based on determinations of the Bureau of Customs and Border Protection ("Customs"). Customs has authority to make country of origin determinations for TAA purposes. *See* 19 C.F.R. 122.21 *et al*.

A contractor or supplier faced with a country of origin issue and having to make a country of origin representation for government procurement purposes could seek either an "advisory ruling" or a "final determination" from Customs as to specific products or representative class(es) of products. An advisory ruling is a non-binding, non-reviewable written statement issued by the Director, Commercial Rulings Division, Headquarters, U.S. Customs Service, under 19 C.F.R. Part 177, Subpart B, which does no more than call attention to a well established interpretation or principle of law relating to the country of origin, without applying it to a particular set of facts. A final determination is a binding judicially reviewable statement issued by the Assistant Commissioner, Office of Regulations and Rulings, Headquarters, U.S. Customs Service, in response to a written request submitted under the provisions of 19 C.F.R. Part 177, Subpart A that interprets and applies the provisions of law and regulation relating to the country of origin to a specific set of facts. A final determination from Customs gives the highest degree of assurance regarding TAA status. However, a contractor or supplier could, alternatively, make a self-assessment based on publicly available Customs rulings, but because those rulings are based on the specific facts and legal issues presented to Customs by the

manufacturer/importer, care must be taken in relying on them as applied to other products and processes.

As noted above, GSA FSS contracts typically include a TAA Certification which requires the offeror to certify that "each end product . . . is a U.S.-made [or designated country] product." The TAA Certification also provides for identification of any non-U.S./non-designated end products; however, that provision does not in itself permit a contractor to include such end products under a GSA or other government contract to which the TAA applies. Rather, Government agencies may only purchase such products where the Contracting Officer ("CO") CO determines that U.S./designated country products are not available. This is known as an "unavailability determination." However, it is our understanding that, as a matter of practice, GSA COs will not make unavailability determinations applicable to a GSA contract as a whole. In addition to the TAA Certificate, GSA FSS contracts also typically include a provision requiring contractors (including dealer/reseller contractors) to provide a price list that includes a statement that "all items are U.S.-made end products [or] designated country end products . . . as defined in the [TAA]."

Special Considerations for Contractors

The TAA can present significant compliance issues for GSA FSS contractors. Clearly, manufacturers or resellers with direct contracts with GSA face those issues the most directly, as they are in privity of contract with the Government and are subject to reviews, audits and investigations. Failure to understand and comply with the TAA compliance also creates a risk of potentially substantial civil liability, as the recent FCA settlements noted above suggest, or conceivably, even potential criminal liability.

Companies that do not hold GSA schedule contracts, but instead sell through resellers, can also face TAA compliance issues. Such companies typically need to have an understanding of the TAA because they may be asked to provide a representation or certification of TAA compliance to their resellers as part of their letters of supply. Dealers or resellers may also ask suppliers for indemnification agreements covering TAA non-compliance, or, depending on the terms of the contract with its supplier, otherwise seek commercial damages from the supplier. Moreover, it is also conceivable that the Government might try to proceed against a supplier if the supplier knowingly ignored TAA compliance as to products made available for resale to the government. Therefore, emerging technology companies that have viewed selling through resellers as a way of getting an entrée to the federal market while managing government contract compliance risks, need to be sensitive to this issue.

Conclusion

Foreign acquisition rules are an important and high visibility compliance issue in the GSA arena. TAA compliance is a subject of increased emphasis within GSA. As *Wyse Technology* illustrates, some companies may use bid protests to "police" TAA compliance by competitors, thus putting awards at risk. Moreover, it is also clear that the "relator bar" has demonstrated an interested in this area as well. Consequently, any company involved in GSA contracting at any tier needs to emphasize compliance with these rules.