GSA Issues Notice Concerning Trade Agreements Act and "Made in America" Compliance

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On May 5, 2016—without advance warning—thousands of U.S. General Services Administration (GSA) Multiple Award Schedule (MAS) contract holders received a notice requiring them to verify—within one week—the country of origin (COO) for all products on their Schedule contracts. This Notice continues a trend of increased congressional and regulatory scrutiny over "Made in the USA" claims for products sold pursuant to the GSA Schedule, as well as compliance with applicable laws, such as the Trade Agreements Act (TAA), 19 U.S.C. § 2501, et seq.

I. The Trade Agreements Act (TAA)

The TAA is the enabling statute that implements numerous multilateral and bilateral international trade agreements and other trade initiatives. Under the TAA, contractors must provide either U.S.-made or designated-country end products. "Designated countries" are countries that are signatories to the World Trade Organization Government Procurement Agreement, a Free Trade Agreement Country, and certain developing and Caribbean Basin countries.[1] Importantly, India, China, Malaysia and Philippines are not

[1] "Designated country" means any of the following countries:

(1)A World Trade Organization Government Procurement Agreement country (Armenia, Aruba, Austria, Belgium, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea (Republic of), Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Netherlands, Norway, Poland, Portugal, Romania, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Taiwan (known in the World Trade Organization as "the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu (Chinese Taipei))", or United Kingdom);

(2)A Free Trade Agreement country (Australia, Bahrain, Canada, Chile, Colombia, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Korea (Republic of), Mexico, Morocco, Nicaragua, Oman, Panama, Peru, or Singapore);

(3)A least developed country (Afghanistan, Angola, Bangladesh, Benin, Bhutan, Burkina Faso, Burundi, Cambodia, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Djibouti, Equatorial Guinea, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Haiti, Kiribati, Laos, Lesotho, Liberia, Madagascar, Malawi, Mali, Mauritania, Mozambique, Nepal,

designated countries. **If a product or service has a COO that is not TAA-eligible, it may *not* be supplied in connection with TAA-covered procurements without a government waiver**.

The TAA applies to U.S. Government acquisitions over a certain dollar threshold (currently $191,000 for most covered supply contracts). Since the estimated dollar value of each GSA Schedule exceeds the established TAA threshold, it is GSA's position that the TAA is applicable to all Schedules.

To meet the TAA's COO requirement, items must either be:

a. Wholly grown, produced, or manufactured in the U.S. or a designated country; or

b. **Substantially transformed** into new and different articles of commerce in the U.S. or a Designated Country. *See* 19 USC 2518(4)(b).

A "substantial transformation" occurs when a new and different article of commerce emerges from a process with a new name, character or use different from that possessed by the article prior to processing. The test is based on a totality of the circumstances. Generally speaking, a "complex and meaningful" manufacturing process will satisfy the test, while "mere assembly" of components which leaves the identity of the imported article intact will not.

GSA Schedule Contractors who may source components for their products from non-designated countries must ensure these components are substantially transformed either in the United States or a designated country. Determining the COO of an end product is typically a complex and involved process. To assist in this analysis, contractors may seek either an advisory opinion or final determination from U.S. Customs and Border Protection (CBP). Pursuant to Subpart B of Part 177, 19 CFR § 177.21 *et seq*., which implements Title III of the TAA, CBP issues country of origin advisory rulings and final determinations as to whether an article is or would be a product of a designated country or instrumentality for products offered for sale to the U.S. Government.

II. The GSA Notice

The GSA Notice requires each vendor with products listed on GSA Advantage to review their entire product offering and submit a spreadsheet that verifies the COO for each product approved on the GSA contract. For any item found to be manufactured in the United States or a TAA designated country, the vendor must provide either:

- A copy of the Certificate of Origin; or
- A certification from the manufacturer on official letterhead verifying the product(s) they supply are compliant with Trade Agreements Act.

Schedule contractors were required to provide this spreadsheet and proof of compliance within five business days of receiving the Notice. The Notice further states that where a vendor discovers items are manufactured in a non- designated country, the vendor must:

Niger, Rwanda, Samoa, Sao Tome and Principe, Senegal, Sierra Leone, Solomon Islands, Somalia, South Sudan, Tanzania, Timor-Leste, Togo, Tuvalu, Uganda, Vanuatu, Yemen, or Zambia); or

(4)A Caribbean Basin country (Antigua and Barbuda, Aruba, Bahamas, Barbados, Belize, Bonaire, British Virgin Islands, Curacao, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saba, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Saint Eustatius, Saint Maarten, or Trinidad and Tobago).

- Submit a request to delete all non-TAA compliant products from the schedule contracts;
- Submit an updated catalog to GSA Advantage with these products removed; and
- Send an updated price list to the National Schedules Information Center.

Similarly, for items where it is determined that the incorrect COO is provided, the vendor must submit a request to correct the COO in GSA Advantage.

The Notice concludes that, moving forward, any product represented as having a COO that is TAA compliant, but is later found to be manufactured in any non-TAA compliant country, or is represented as Made In America but determined to not be, could result in the removal of the vendor's entire GSA Advantage file and/or subject the contract to cancellation.

III. Reasons for the Notice

The Notice appears driven by multiple forces outside GSA. It explains that over the last year, GSA has responded to multiple Congressional inquiries and Freedom of Information Act (FOIA) requests regarding "failed compliance" with the TAA and Made in America designations. GSA states that in each of those inquiries, the allegations were substantiated and the products at issue were found not to be made in the United States or a designated country.

In referencing Congressional inquiries, GSA appears to be referring, at least in part, to efforts initiated by U.S. Senator Charles Schumer to review "Made in the USA" designations on the GSA Advantage website. In January, Sen. Schumer sent a letter to the GSA on behalf of Sherrill Manufacturing requesting the agency conduct a review of flatware identified as being "Made in America." According to Sen. Schumer, Sherrill is "currently the only American-made flatware left; all other flatware companies currently produce their products overseas." Schumer wrote that the company was being unfairly disadvantaged as competitors were improperly labeling flatware as U.S.-origin on the GSA website. In March, Sen. Schumer announced that the GSA would be removing 11 companies based on false "Made in the USA" claims.

In addition, TruthInAdvertising.Org (TINA.org) has been involved in ongoing communications with GSA regarding the accuracy of representations on the GSA Advantage website. In March, TINA.org sent a letter to the GSA compiling a sampling of 118 alleged errors where products manufactured abroad were labeled as wholly made in the United States. TINA.org based their claims off of origin representations on the manufacturer's website. After further correspondence, the GSA responded in April that it reviewed the errors and took action as appropriate, listing the number of contracts with products that were either modified, removed or confirmed as made in the USA.

IV. Compliance Efforts Moving Forward

Schedule Contractors determining that products on a GSA Schedule are not TAA compliant will need to take appropriate action as outlined in the Notice. The GSA reiterated in its Notice that GSA Schedule contract holders have a fiduciary duty to determine compliance with the TAA and to ensure that all COO representations in GSA Advantage are accurate regardless of any information provided by suppliers or manufacturers.

In addition, if you are a manufacturer or supplier who supports GSA Schedule Contractors, you may be asked by your customer to make a certification regarding the COO of your products. Conducting a

comprehensive review of your supply chain can serve as a preventative and proactive measure against future complications should it be discovered that non-TAA compliant end products were supplied to the U.S. Government.

Ultimately, if non-compliant products have been delivered to the U.S. government, Schedule Contractors may need to make mandatory disclosures pursuant to FAR 52.203-13 and FAR Subpart 9.4. Moreover, the delivery of non-compliant products can subject contractors to potential criminal and civil penalties, such as due to violations of the False Claims Act.

If you have any questions about the content of this Alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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