

# Pragmatism wins the day in GAO Buy American protest

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Recently, the Government Accountability Office (GAO) issued a bid protest decision<sup>1</sup> regarding the application of Buy American Act<sup>2</sup> (BAA) requirements to a solicitation for construction. In this decision, GAO rejected the agency's determination that an offeror's bid was nonresponsive because the offeror failed to provide certain required information for the evaluation of a potential BAA exception. A summary of the decision and our takeaways are below.

## BRIEF PRIMER REGARDING THE APPLICATION OF THE BAA TO FEDERAL CONSTRUCTION PROJECTS

Passed in 1933 during the Great Depression, the BAA was designed to support United States labor and manufacturing by establishing certain federal government procurement requirements related to the purchase of domestic supplies and the incorporation of domestic materials into construction projects in the United States.

With respect to construction projects, FAR subpart 25.2<sup>3</sup> requires contractors to incorporate "domestic construction materials," unless the contracting officer determines that an exception applies or the requirements are otherwise waived by the Trade Agreements Act<sup>4</sup> (TAA), as implemented in FAR subpart 25.4.<sup>5</sup>

A "construction material" is an "article, material, or supply brought to the construction site by the Contractor or a subcontractor for incorporation into the building or work." A "construction material" that is mined, produced or manufactured in the United States generally qualifies as a "domestic construction material."<sup>6</sup> A "foreign construction material" is a construction material that is not domestic.

One common exception to the BAA's requirement to incorporate only "domestic construction material" is the unreasonable cost exception.<sup>7</sup> Under this exception, a contractor may incorporate "foreign construction material" into a project if the Government's contracting officer determines that the cost of the identified foreign construction material exceeds the cost of comparable domestic construction material by more than six percent.

To aid the contracting officer's evaluation, the FAR requires the contractor to provide certain information about the construction material, like pricing information. The contracting officer also "must add to the offered price 6 percent of the cost of any foreign construction material proposed for exception ... based on the unreasonable cost of domestic construction materials." This six-percent evaluation factor is intended to provide a preference to contractors incorporating domestic construction materials.

The TAA generally waives BAA requirements when the procurement is valued in excess of certain specified dollar thresholds. The TAA allows government contractors to incorporate domestic construction materials and "designated country construction materials."

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"Designated country construction materials" include construction materials that are "wholly the growth, product, or manufacture" of certain foreign countries with which the United States has negotiated a trade agreement, or construction materials that are "substantially transformed" in these countries when such construction materials consist "in whole or in part of materials from another country."

The TAA, however, does not apply under certain circumstances, like for acquisitions set aside for small businesses.

## GAO'S DECISION

In *Addison Constr. Co.*, B-416525.2, Sept. 4, 2018, 2018 CPD ¶ 292,<sup>8</sup> the Department of Energy (DOE) issued an invitation for bid (IFB) for the construction and completion of a capacitor bank at the Liberty Substation for the DOE Western Area Power Administration's (WAPA) Desert Southwest Region.



The IFB included FAR 52.225-9 (Buy American – Construction Materials)<sup>9</sup> and FAR 52.225-10<sup>10</sup> (Notice of Buy American Requirement – Construction Materials).<sup>11</sup>

In its bid, Addison requested that the contracting officer allow Addison to use three foreign construction materials pursuant to the unreasonable cost exception in FAR 52.225-9(b)(3).

Although Addison provided certain information – like a description of the relevant material along with pricing information – in furtherance of its unreasonable cost exception request, Addison failed to provide all the information required under FAR 52.225-9(c)(1). As a result, the contracting officer rejected the bid as nonresponsive.<sup>12</sup>

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Addison protested, arguing that “its bid met the essential requirements of the solicitation, including those governing requests for exceptions to the Buy American Act based on the unreasonable cost of domestic material.”

GAO ultimately sided with Addison, finding that DOE improperly rejected Addison’s bid as nonresponsive. GAO explained that, although Addison’s bid failed to include all required information related to the BAA exception, “it nonetheless included sufficient information for the agency to understand the foreign material being provided, and the quantity and costs of such material.”

Accordingly, GAO “recommend[ed] that DOE investigate whether the foreign construction materials listed in Addison’s bid qualify for an exception to the Buy American Act on the basis of unreasonable cost.”

## TAKEAWAYS

### A pragmatic result, but with limits

*Addison Constr. Co.* reinforces that a contractor’s bid should not be rejected as nonresponsive simply because the contractor fails to provide certain information related to a BAA exception that can otherwise be “obtained by the agency through its own investigation and would not affect the relative standing of the bidder.”

However, the holding of this decision does not necessarily mean that a contractor gets a free pass in every instance. A contractor’s failure to provide certain information – like the specific amount of foreign material to be used and the price of that material – probably would not provide “sufficient information for the agency to understand the foreign material being provided, and the quantity and costs of such material.”

### The real lesson learned

Perhaps the most important lesson learned from *Addison Constr. Co.* relates to GAO’s recommendation that the agency conduct an investigation to determine whether the proposed foreign construction materials qualify for the BAA’s unreasonable cost exception because the contractor failed to provide all pertinent information.

There simply is no reason why a contractor should not provide the necessary information about its proposed construction materials if it seeks to avail itself of the unreasonable cost exception. Allowing the agency to fill-in the gaps because of a failure to provide all the necessary information leaves too much to chance, *i.e.*, relying on the agency’s independent investigation instead of providing the information for the agency to review.

## NOTES

<sup>1</sup> <https://bit.ly/2PvyXyl>

<sup>2</sup> 41 U.S.C. §§ 8301–8305.

<sup>3</sup> <https://bit.ly/2JobmdA>

<sup>4</sup> 19 U.S.C. §§ 2501–2581.

<sup>5</sup> <https://bit.ly/2PtqtYF>

<sup>6</sup> A manufactured construction material that does not qualify as a commercially available off-the-shelf (COTS) item also must satisfy a cost of components test. Under this test, the cost of the construction material’s domestic components must exceed 50 percent of the cost of all its components.

<sup>7</sup> Other exceptions include the public interest exception (*i.e.*, when the application of the BAA “would be impracticable or inconsistent with the public interest”) and the nonavailability exception (*i.e.*, when the material is not available in the United States in “sufficient and reasonably available commercial quantities of a satisfactory quality”).

<sup>8</sup> <https://bit.ly/2PvyXyl>

<sup>9</sup> <https://bit.ly/2AzgXLe>

<sup>10</sup> <https://bit.ly/2qiDypl>

<sup>11</sup> Because the acquisition was a small business set aside and because the value project was estimated to be between \$1 and \$5 million, the TAA did not apply.

<sup>12</sup> FAR 52.225-10(d)(3) states: "If the Government determines that a particular exception requested in accordance with paragraph (c) of the clause at FAR 52.225-9 does not apply, the Government will evaluate only those offers based on use of the equivalent domestic construction material, and the offeror shall be required to furnish such domestic construction material. An offer based on use of the foreign construction material for which an exception was requested — (i) Will be rejected as nonresponsive if this acquisition is conducted by sealed bidding; or (ii) May be accepted if revised during negotiations."

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