Aggressive Enforcement Increases Importance of "Country of Origin" Compliance in Federal Contracting

Legal Alert
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Garvey Schubert Barer Legal Update, August 7, 2013.

Many federal contracts, including all GSA schedule contracts, are subject to the Trade Agreements Act ("TAA"). TAA requirements are nearly always "flowed down" to subcontractors and suppliers. The TAA provides that products delivered under the contract must either be made or "substantially transformed" in a "designated country." "Designated" countries include nations that are party to certain multi-lateral trade agreements. Even though a large amount of products are made there, China is not a "designated country." Neither is India, Thailand, Malaysia, Indonesia, or Vietnam, among others.

Each year, GSA and DOJ extract large settlements from contractors in False Claims Act cases based on vendors supplying items in violation of the TAA. Yet, each year, contractors continue to face liability for supplying products made in "non-designated" countries under contracts subject to the TAA.

On July 30, 2013, GSA's Inspector General announced settlement of a qui tam False Claims Act case filed by a competing bidder who lost a procurement to supply lamps for four federal buildings in Illinois. The unsuccessful bidder filed a Freedom of Information Act request to find out the make and model of the awardee's lamps. The bidder then simply asked the manufacturer of the items in an e-mail where the awardee's lamps were made, and found out that the country of origin was China.

In June 2013, the DOJ intervened in a qui tam False Claims Act case alleging that a GSA vendor supplied paper shredders manufactured in China, in violation of the TAA, seeking a large

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amount in damages and fines. The vendor has sought dismissal on grounds that its "country of origin" designation process is largely automated, and depends on information provided by suppliers. The case is pending. The vendor produced over 1.5 million pages of documents in the GSA investigation, before the Government intervened in the lawsuit.

In March 2013, DOJ announced a $5 million False Claims Act settlement with a reseller of information technology, equipment, services, and office supplies, on claims including sale of products made in China.

Last year, a vendor of refurbished networking equipment agreed to pay $2 million to partially settle a qui tam False Claims Act case filed by a former executive of the vendor, based on the vendor's supplying products made in China, Indonesia, Malaysia and Thailand.

These cases are reminders that every business supplying products or services to the federal government should be sensitive to all "country of origin" requirements incorporated into the contract or subcontract, including the TAA, Buy American Act, Berry Amendment, and others, and must vet its supply chain to make sure that it supplies only compliant items. Failing to do so invites competitors, disgruntled employees, and the Government to pursue claims for damages and penalties. GSA or agency investigations can be very expensive, time consuming, and create tremendous uncertainty, even if the Government decides ultimately not to take action. In such cases, the target still may face litigation from a private party who initiated a qui tam case on the Government's behalf.

Please call Ben Lambiotte, Buzz Bailey, or John Knab if you need help interpreting country of origin requirements, which can be complex and difficult to apply, or if you suspect that a competitor is supplying non-compliant goods or services.

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