

Bid Protests: A Buy American Enforcement Tool, At Least Sometimes

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For nearly a century, “Buy American” provisions and similar laws have mandated or otherwise instituted purchasing preferences for U.S. materials and products when using federally-appropriated funds. Recently, these requirements have become more stringent through executive orders, legislation, and implementing regulations, including E.O. 14005 (resulting in revisions to procurement regulations implementing the Buy American Act (BAA), addressed in our [prior advisory](#)) and the Build America, Buy America provisions of the Infrastructure Investment & Jobs Act (attaching to federal financial assistance).

Greater emphasis on the BAA and similar laws from the White House and Congress is likely to result in increased scrutiny from agency leaders, inspectors general, auditors, contracting officers, and others, followed by use of a variety of enforcement mechanisms. As noted in our prior advisory, government customers may seek to address non-compliance with these requirements through contractual remedies like rip-and-replace directives, nonpayment, price renegotiation, or termination, or, on the administrative side, through suspension or debarment from future contracting. Noncompliance with domestic sourcing laws also can result in civil false claims allegations from the Department of Justice or whistleblowers, as well as criminal liability, in severe cases. Sometimes, companies also can seek enforcement against competitors through the bid protest process, as a recent bid protest decision from the Government Accountability Office highlights.

In *Unico Mechanical Corporation—Costs* (B-420355.5), Unico, an unsuccessful offeror, had alleged (among other protest arguments) that the U.S. Army Corps of Engineers improperly waived BAA requirements in awarding a contract for replacement of generator turbine shut off valves and control systems to competitor McMillen, LLC. The Corps took corrective action after filing its agency report, and in a costs decision, GAO found Unico’s protest regarding the BAA waiver clearly meritorious because the agency failed to document its BAA waiver.

The facts of the case provide insight as to how Unico learned of its basis to protest. Prior to the offer due date, at least one offeror sought a BAA waiver for two butterfly valves on the grounds that they were not available from domestic manufacturers at a reasonable cost, and so the agency conducted market research by contacting manufacturers, including Unico. Based on these contacts, the Corps identified Unico and at least two other domestic manufacturers with an ability to provide BAA-compliant valves, and denied the waiver request.

McMillen later requested that the agency waive the BAA provisions for the two butterfly valves as well as a hydraulic power unit, on the grounds that they were not available from domestic

manufacturers at a reasonable cost. The Corps initially denied McMillen's request, but after seeking additional information from McMillen, the Corps awarded the contract to McMillen and exempted the foreign material in a post-award contract modification, without justifying the exemption in the contract file. In the absence of any documentation that the Corps had actually waived the BAA, GAO concluded that the award to McMillen violated the BAA and its implementing regulations. And even if the Corps had waived the BAA, its waiver was unreasonable because McMillen's initial survey included only one foreign and one domestic supplier, without any indication that these sources were the only available, and its supplemental survey included additional foreign suppliers but ignored additional domestic suppliers like Unico that the agency knew could produce BAA-compliant valves.

Absent a circumstance like the procuring agency contacting a protesting company as part of BAA market research, it can be difficult for a protester to challenge an awardee's noncompliance with the BAA. The legal standard is high: a contracting officer generally can rely on an offeror's self-certification of BAA compliance; only if an agency has reason to believe that a firm will not provide domestic products need the agency go beyond a firm's representation of compliance with the BAA. *Sea Box, Inc.*, B-420130, B-420130.2, Nov. 18, 2021, 2021 CPD ¶ 364. A protester must raise more than inference or speculation when alleging that a competitor's product does not comply with its BAA certification. *Id.* Companies typically lack the specific information needed to challenge a BAA certification.

But this does not make BAA certifications ironclad. Publicly available schedule listings or marketing materials might call into question a company's BAA compliance, and proposals are often produced as part of the agency report or administrative record. A company might even have declined to provide a certification altogether (as was the case in *Wyse Technology, Inc.*, B-297454, Jan. 24, 2006, 2006 CPD ¶ 23). Given increasing domestic content requirements in response to E.O. 14005, companies should consider tracking their competitors' ability to comply with the BAA as well as their own. This goes for all levels of the supply chain. Subcontractors or domestic suppliers often have greatest insight into foreign sources of supply and may want to consider working with a prime offeror to challenge an awardee's BAA compliance or an agency's waiver, to ensure standing requirements for any protest are met. (At GAO, the most common forum for bid protests, protests must be filed by an actual or prospective bidder or offeror with a direct economic interest in the procurement.) Companies protecting their awards, meanwhile, should meticulously support the government with research to support an unreasonable cost or other exception, or should otherwise maintain records demonstrating compliance. The bid protest process may not be the BAA's primary enforcement mechanism, but companies should keep in mind that non-compliance remains an issue to be considered in protesting and defending awards.