



Report to the Ranking Member,
Subcommittee on the Legislative
Branch, Committee on Appropriations,
U.S. Senate

December 2018

BUY AMERICAN ACT

Actions Needed to Improve Exception and Waiver Reporting and Selected Agency Guidance

Accessible Version

GAO Highlights

Highlights of [GAO-19-17](#), a report to the Ranking Member, Subcommittee on the Legislative Branch, Committee on Appropriations, U.S. Senate

Why GAO Did This Study

The Buy American Act of 1933, as amended, is the main U.S. law promoting domestic purchasing. The Act permits agencies to buy foreign end products only under certain exceptions, such as when domestic items are not available at a reasonable cost. Further, U.S. trade agreements waive the Buy American restrictions for certain products.

GAO was asked to review implementation of the Buy American Act. This report assesses the extent to which (1) the federal government procures foreign products through Buy American Act exceptions and waivers; and (2) selected agencies provide training and guidance to implement the Act.

GAO reviewed laws, regulations, and policies related to the Buy American Act and analyzed data for fiscal year 2017 from FPDS-NG. GAO also analyzed a non-generalizable sample of 38 contracts from DOD, HHS, DHS, and VA—the agencies with the most obligations for products in fiscal year 2017. The 38 awards selected include a mix of foreign and domestic products, as well as dollars obligated. Finally, GAO interviewed cognizant contracting and policy officials from the selected agencies.

What GAO Recommends

GAO is recommending that OMB take steps to improve Buy American Act data and that HHS, DHS, and VA improve agency guidance and training on implementing the Act. All of the agencies either concurred or generally concurred with GAO's recommendations.

View [GAO-19-17](#). For more information, contact William T. Woods at (202) 512-4841 or WoodsW@gao.gov.

December 2018

BUY AMERICAN ACT

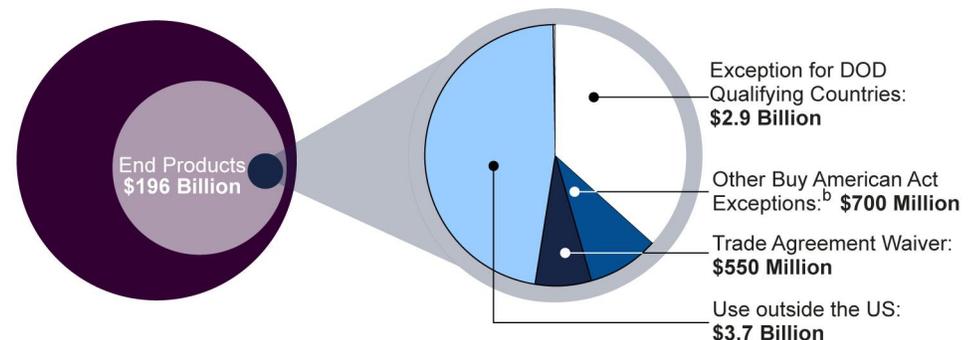
Actions Needed to Improve Exception and Waiver Reporting and Selected Agency Guidance

What GAO Found

According to data reported in the Federal Procurement Data System-Next Generation (FPDS-NG) in fiscal year 2017, foreign end products accounted for less than 5 percent—about \$7.8 billion—of federal obligations for products potentially subject to the Buy American Act. Federal agencies procured foreign products using exceptions to Buy American Act requirements, as well as through waivers or when the Buy American Act did not apply, as shown in the figure.

Federal Obligations for Foreign End Products, Fiscal Year 2017

Total Federal Obligations: \$508 Billion Foreign End Product Obligations: \$7.8 billion^a



^a This includes nearly \$16 million for awards under the micro-purchase threshold (generally \$3,500 at the time of our review) that were not subject to the Buy American Act.

^b Other Buy American Act exceptions include public interest (excluding DOD Qualifying Countries), domestic non-availability, unreasonable cost, commercial information technology, and commissary resale

Source: GAO analysis of federal procurement data. | GAO-19-17

The amount of foreign end products purchased could be greater than reported in FPDS-NG, however, due to reporting errors and system limitations. GAO found that 6 of the 38 contracts reviewed from the Departments of Defense (DOD), Health and Human Services (HHS), Homeland Security (DHS), and Veterans Affairs (VA) inaccurately recorded waiver or exception information. FPDS-NG system limitations compound these errors because it does not fully capture Buy American Act data. Among other things, the database does not always enable agencies to report the use of exceptions or waivers on contracts for both foreign and domestic products, reducing data accuracy. The Office of Management and Budget (OMB) is considering strategies to improve Buy American Act data.

The four agencies GAO reviewed varied in their approaches to Buy American Act training and guidance. DOD reports that it will have trained more than 18,000 personnel by the end of 2018. DHS reports training almost 1,400 people—approximately 94 percent of its contracting staff—as of April 2018. Some VA courses mention the Act, but none is focused specifically on implementing its requirements. HHS does not have agency-level training or guidance on the Act. GAO found that contracting officers for the contracts it reviewed face challenges implementing Buy American Act requirements. Having specific and targeted Buy American Act guidance and training can better ensure that agencies meet the Act's requirements.

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Abbreviations

DFARS	Defense Federal Acquisition Regulation Supplement
DOD	Department of Defense
HHS	Department of Health and Human Services
DHS	Department of Homeland Security
VA	Department of Veterans Affairs
FAR	Federal Acquisition Regulation
FPDS-NG	Federal Procurement Data System – Next Generation
HCA	Head of Contracting Activity
OFPP	Office of Federal Procurement Policy

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December 18, 2018

The Honorable Chris Murphy
Ranking Member
Subcommittee on the Legislative Branch
Committee on Appropriations
United States Senate

Dear Senator Murphy:

Each year, the federal government obligates hundreds of billions of dollars to procure goods and services—reporting \$508 billion in fiscal year 2017 alone. Congress has enacted a variety of laws commonly referred to as domestic preference laws that establish preferences or requirements for federal agencies to purchase domestically produced goods, products, and materials.

The Buy American Act, enacted during the Great Depression in 1933, is one of the most prominent domestic preference laws.¹ The Act requires federal procurement of domestic products, but permits federal agencies to procure foreign products under certain exceptions, such as where domestic end products are not reasonably available in sufficient quantities of a satisfactory quality. The restrictions also may be waived under international trade agreements so that the goods provided by designated countries can compete on an equal footing with domestic products.

Congress and the administration have undertaken efforts to increase opportunities for domestic manufacturers. In the current Congress, bills have been introduced related to the Buy American Act. In April 2017, the president issued an Executive Order stating that it shall be the policy of the executive branch to maximize the use of domestic goods in an effort to, among other things, stimulate economic growth and create jobs in the United States.²

You asked us to review federal agency implementation of the Buy American Act. This report assesses the extent to which (1) the federal

¹ Buy American Act, Pub. L. No. 72-428 (1933), codified at 41 U.S.C. §§ 8301-8305.

² Exec. Order No. 13,788, 82 Fed. Reg. 18,837 (Apr. 21, 2017).

government procures foreign products through Buy American Act exceptions and waivers; and (2) selected agencies provide training and guidance to implement the Buy American Act requirements.

To assess the extent of the federal government's procurement of foreign end products through exceptions and waivers to the Buy American Act, we analyzed data from the Federal Procurement Data System-Next Generation (FPDS-NG) for fiscal year 2017, which represented the most recent and complete data available at the time of our review. We analyzed the fiscal year 2017 data to identify the dollars obligated. We used the categories within the FPDS-NG "Place of Manufacture" and "Country of Product or Service Origin" fields to determine whether agencies characterized the origin of a product as either domestic or foreign. We conducted data checks for obvious errors, such as verifying that agencies did not use exceptions that were not applicable. We also made some minor adjustments to mitigate potential data reliability issues. Based on these steps, we determined that FPDS-NG data were sufficiently reliable to allow us to calculate the approximate extent of obligations for foreign end products and the use of Buy American Act exceptions and the Trade Agreements Act waiver. Because of the reporting errors and data system limitations we identified, however, as described later in this report, we are unable to precisely determine the amount spent on foreign end products through the use of exceptions and waivers.

We supplemented our analysis by reviewing documentation from a non-generalizable sample of 38 contracts from four selected agencies—the Departments of Defense (DOD), Health and Human Services (HHS), Homeland Security (DHS), and Veterans Affairs (VA)—which had the highest obligations for the types of goods that may be subject to the Buy American Act. The non-generalizable sample of 38 contracts and orders were selected from among the following contracting offices in the four agencies:

- DOD: Defense Logistics Agency, Land and Maritime
- HHS: National Institutes of Health and the Office of the Assistant Secretary for Preparedness and Response
- DHS: United States Coast Guard
- VA: Veterans Health Administration

We selected these contracts to obtain a mix of awards that reported foreign product acquisitions authorized by the various Buy American

exceptions or trade agreement waivers, and to ensure contracts that reported the purchase of domestic end products were also represented. We also interviewed cognizant contracting officials and analyzed contract file documentation to determine how Buy American requirements were implemented or waived.

To assess the extent to which selected agencies provide training and guidance to implement the Buy American Act, we reviewed training materials and acquisition regulations, policies, and guidance from the four selected agencies—DOD, HHS, DHS, and VA—and interviewed officials responsible for acquisition policy and training. We also reviewed the Federal Acquisition Regulation (FAR), as well as relevant work from the DOD Inspector General regarding DOD’s compliance with Buy American Act requirements. A more detailed description of our scope and methodology is included in appendix I.

We conducted this performance audit from October 2017 to December 2018 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Background

The Buy American Act of 1933 was enacted during the Great Depression when there was a need to create and preserve jobs for American workers, and it established a preference for the federal government to buy domestic end products.³ Many of the products the federal government buys—including aircraft engines and medical supplies—are end products that may be subject to the requirements of the Buy

³ The Buy American Act also applies to construction materials, which are treated differently from other domestic end items when applying cost differentials. The Buy American Act does not apply to the acquisition of services but can apply to the supplies purchased through a services contract.

American Act. Further, the Buy American Act does not apply to products that are purchased for use outside the United States⁴ or

Domestic end products are defined as:

- unmanufactured products mined or produced in the United States;
- end products manufactured in the United States provided that (a) the product is a commercially available off-the-shelf item; or (b) the cost of the components mined, produced, or manufactured in the United States exceeds 50 percent of the total cost of all components.

Source: Federal Acquisition Regulation | GAO-19-17

obtained through contracts under the micro-purchase threshold, which was generally \$3,500 in fiscal year 2017.⁵

End products that are not considered domestic under the Buy American Act are treated as foreign. This characterization is based on the origin of the end product—that is, where the product is manufactured or produced—and not the vendor’s location. For example, a vendor located in Finland may supply end products manufactured in the United States, in which case these products would be treated as domestic products. Conversely, a vendor located in the United States may supply end products manufactured in Finland. In this case, the end products would be considered foreign.

Buy American Act Exceptions and Waivers

Although the Buy American Act establishes a preference for domestic end products, there are situations in which agencies can procure foreign end products through established exceptions to the Buy American requirements. In addition, under the Trade Agreements Act of 1979, the United States has waived domestic purchasing requirements—including the Buy American Act—for certain acquisitions of foreign end products

⁴ While the Buy American Act does not restrict foreign end products for use outside of the United States, DOD’s Balance of Payments Program applies restrictions similar to Buy American to DOD purchases of supplies and construction materials for use outside of the United States. The DOD Balance of Payments restrictions do not apply to certain categories of end products, including petroleum products such as fuel. DFARS 225.7501.

⁵ The fiscal year 2017 and 2018 National Defense Authorization Acts generally increased the micro-purchase threshold from \$3,500 to \$5,000 for defense and then \$10,000 for both defense and civilian agencies, respectively. See National Defense Authorization Act for Fiscal Year 2017, Pub. L. No. 114-328, §§ 217, 821 (2016); National Defense Authorization Act for Fiscal Year 2018, Pub. L. No. 115-91, § 806 (2017). The Department of Defense implemented the fiscal year 2017 increase in class deviations during the period reviewed by GAO; however, the DOD acquisitions included in our review were above the \$5,000 micro-purchase threshold that became applicable during fiscal year 2017. The increase to \$10,000 was not implemented in the applicable regulations until August 31, 2018. We use the \$3,500 micro-purchase threshold throughout this report.

from countries that are party to international trade agreements or are considered designated countries by the U.S. Trade Representative.⁶

Exceptions to the Buy American Act

In implementing the Buy American Act, the FAR sets forth several exceptions that permit federal agencies to buy foreign end products. These include situations when a domestic end product is not produced in sufficient quantities or cases where the cost would be unreasonable to buy a domestic end product. The steps that contracting officers must take to determine or document an exception will vary depending on the circumstances of the acquisition. For example, a written determination from the Head of Contracting Activity (HCA) or a delegate may be necessary to determine non-availability in some cases. However, a written determination may not be required when an acquisition is conducted through full and open competition, is synopsised, and no domestic offer is received. Other exceptions to the Buy American Act restrictions on the purchase of foreign products, such as the exception for commercial information technology, are blanket exceptions that do not require a written determination. In addition, some agencies have specified additional considerations that must precede a determination and what level of authority is appropriate for certain determinations.⁷ The five Buy American Act exceptions that apply government-wide and the corresponding determination standards in the FAR are listed in Table 1.

Table 1: Federal Acquisition Regulation (FAR) Exceptions to the Buy American Act

Exception	Description	Determinations
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⁶ 19 U.S.C. §§ 2501-2582. The Trade Agreements Act provides the authority for the President to waive the Buy American Act for eligible products from countries that have signed an international trade agreement with the U.S., or that meet certain other criteria, such as being a least developed country. This waiver authority has been delegated to the U.S. Trade Representative. For the purpose of this report, when referring to situations where the Buy American Act has been waived by the U.S. Trade Representative, we refer to this as a “Buy American Act waiver” or a “trade agreements act waiver”.

⁷ For example, the Defense Federal Acquisition Regulation Supplement specifies the use of a price evaluation factor greater than that required in the Federal Acquisition Regulation when determining an exception based on unreasonable cost. DFARS § 225.105.

Exception	Description	Determinations
Public interest	The head of the agency makes a determination that requiring a domestic preference would be inconsistent with the public interest. This exception applies when an agency has an agreement with a foreign government that provides a blanket exception to the Buy American Act.	Determined by the head of the agency but can be delegated
Domestic non-availability	Articles, materials, or supplies, either as a class or individually, are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.	Class determinations for articles such as coffee and bauxite are listed in FAR 25.104 and are published for comment at least once every 5 years Individual determinations, when required, are made by the Head of Contracting Activity (HCA), but can be delegated
Unreasonable cost	Purchasing the material domestically would burden the government with an unreasonable cost. If a domestic offer is not the low offer, this exception applies an evaluation factor to foreign offers: 6 percent is added if the lowest domestic offer is a large business and 12 percent is added if it is a small business.	Determined by the contracting officer
Commercial information technology	The restriction on foreign end products does not apply to information technology acquisitions that are for commercial items.	No FAR requirement
Commissary resale	Contracting officers may purchase foreign products for commissary resale.	No FAR requirement

Source: GAO summary of Federal Acquisition Regulation | GAO-19-17.

Department of Defense Qualifying Countries
Exempt from Buy American Act Restrictions

Australia	Japan
Austria	Latvia
Belgium	Luxembourg
Canada	the Netherlands
Czech Republic	Norway
Denmark	Poland
Egypt	Portugal
Estonia	Slovenia
Finland	Spain
France	Sweden
Germany	Switzerland
Greece	Turkey
Israel	United Kingdom
Italy	

Source: Defense Federal Acquisition Regulation Supplement | GAO-19-17

Individual federal agencies may make blanket determinations of situations in which the Act’s restrictions should not apply to that agency’s procurements, when it is not in the public interest to restrict the purchase of foreign end products. For example, over the years, DOD has entered into reciprocal procurement agreements with 27 foreign counterparts. DOD determined that it would be inconsistent with the public interest to apply the Buy American Act restrictions on products from these 27 qualifying countries.⁸ Thus, if an offer includes end products from a qualifying country, those products are not restricted by the Buy American Act and the acquisition of qualifying country end products does not require higher approval. This public interest exception for qualifying countries applies only to contracts awarded by DOD.

Trade Agreements Act Waivers

Federal agencies can purchase eligible foreign end products from designated countries when the Buy American Act’s requirements are waived because of the terms of an international trade agreement or other criteria, such as a designation by the U.S. Trade Representative as a least developed country.⁹ In accordance with the Trade Agreements Act of 1979, the president has the authority to waive the Buy American Act.¹⁰ For eligible products that come from countries covered by the World Trade Organization’s Government Procurement Agreement, Free Trade Agreements, and the Israeli Trade Act, the Buy American Act has been

⁸ DFARS § 225.872-1. For the purposes of this report, we refer to DOD’s application of the public interest exception to qualifying countries as the “DOD qualifying countries exception.” DOD’s determinations with regard to qualifying countries are a result of reciprocal defense procurement agreements and other international agreements. According to DOD, the purpose of such agreements is to promote rationalization, standardization, and interoperability of defense equipment with allies and friendly governments. See 72 Fed. Reg. 58832 at 58833 (Oct. 17, 2007).

⁹ 19 U.S.C. §§ 2501-2582 and FAR Subpart 25.4. Specifically, under FAR § 25.402(a)(1), offers of eligible products from countries that have signed an international trade agreement with the United States, or that meet certain other criteria, such as being a least developed country, receive equal consideration with domestic offers. Moreover, under FAR § 25.403(c), in acquisitions covered by the World Trade Organization Government Procurement Agreement, agencies shall acquire only U.S.-made or designated country end products or U.S. or designated country services, unless offers for such end products or services are either not received or are insufficient to fulfill the requirements. A designated country is defined as a World Trade Organization Government Procurement Agreement country, a Free Trade Agreement country, a least developed country, or a Caribbean Basin country. See FAR § 25.003 for the list of designated countries.

¹⁰ This authority has been delegated to the U.S. Trade Representative.

waived so that these items receive nondiscriminatory consideration and are on equal footing with domestic end products.¹¹ In total, these agreements cover approximately 60 countries—overlapping with all but two of the DOD qualifying countries.¹² Appendix II highlights the overlap.

Unlike DOD’s blanket public interest exception for qualifying countries, the Buy American Act requirements are only waived under a trade agreement if the acquisition is of a certain value set by the U.S. Trade Representative. Current trade agreement thresholds, at or above which the requirements are waived, range from \$25,000 for contracts for eligible products from Canada to \$180,000 for the 45 other parties to the World Trade Organization’s Government Procurement Agreement.¹³ Table 2 lists the parties eligible for trade agreements and the associated threshold for supply contracts.

Table 2: Trade Agreements Act Countries and Thresholds for Certain Supply Contracts

Trade Agreement	Parties	Dollar Threshold Above which Buy American Act Requirements Are Waived
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¹¹ The World Trade Organization Government Procurement Agreement is a framework that opens government procurement to international competition and provides foreign suppliers with the same access as domestic suppliers. For the purposes of the Trade Agreements Act, an item is manufactured either (a) where it is wholly manufactured, or (b) where it is “substantially transformed” into the end product, even if its component parts were manufactured elsewhere.

¹² In February 2017, GAO reported on procurements under the World Trade Organization Government Procurement Agreement, see GAO, *Government Procurement: United States Reported Opening More Opportunities to Foreign Firms Than Other Countries, but Better Data Are Needed*, [GAO-17-168](#) (Washington, D.C.: February 9, 2017).

¹³ The World Trade Organization Government Procurement Agreement threshold was previously valued at \$191,000 but decreased to \$180,000 effective January 1, 2018. The contracts included in our sample were subject to the \$191,000 threshold as they were awarded in fiscal year 2017. Dollar thresholds are subject to revision approximately every 2 years under the Agreement.

Trade Agreement	Parties	Dollar Threshold Above which Buy American Act Requirements Are Waived
World Trade Organization Government Procurement Agreement	Armenia, Aruba, Austria, Belgium, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hong Kong, Hungary, Iceland, Ireland, Israel, Italy, Japan, Republic of Korea, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Moldova, Montenegro, the Netherlands, New Zealand, 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)”), Ukraine, United Kingdom);	180,000
Free Trade Agreements (FTA): Australia FTA	Australia	80,317
Free Trade Agreements (FTA): Bahrain FTA	Bahrain	180,000
Free Trade Agreements (FTA): Central America-Dominican Republic Free Trade Agreement	Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua	80,317
Free Trade Agreements (FTA): Chile FTA	Chile	80,317
Free Trade Agreements (FTA): Columbia FTA	Columbia	80,317
Free Trade Agreements (FTA): Korea FTA	Republic of Korea	100,000
Free Trade Agreements (FTA): Morocco FTA	Morocco	180,000
Free Trade Agreements (FTA): North American Free Trade Agreement	Canada Mexico	25,000 80,317
Free Trade Agreements (FTA): Oman FTA	Oman	180,000
Free Trade Agreements (FTA): Panama FTA	Panama	180,000
Free Trade Agreements (FTA): Peru FTA	Peru	180,000
Free Trade Agreements (FTA): Singapore FTA	Singapore	80,317
Israeli Trade Act	Israel	50,000

Source: Federal Acquisition Regulation | GAO-19-17

The FAR specifies certain conditions in which trade agreements do not apply, even if the acquisition is above the requisite threshold value set by

the U.S. Trade Representative.¹⁴ In these cases, the Buy American Act would apply. These conditions include, but are not limited to:

- acquisitions that do not use full and open competition, when the limitation of competition would preclude the procedures applicable to acquisitions covered by trade agreements;¹⁵
- certain sole-source acquisitions for commercial items using simplified acquisition procedures;¹⁶
- acquisitions set aside for small businesses;
- acquisition of ammunition, arms, or war materials, or for purchases indispensable for national security or national defense purposes; and
- acquisitions from federal prison industries or nonprofit agencies employing people who are blind or severely disabled.

If the contracting officer determines that a trade agreement applies to a particular acquisition, which waives the Buy American restrictions, that determination does not require additional review at a higher level. This is similar to other circumstances where Buy American Act restrictions do not apply, such as for the acquisition of products for use outside the United States or contracts valued below the micro-purchase threshold.

Certifying Product Country of Origin

The Buy American Act's applicability is based on the country of origin of the product being supplied, rather than the country of the vendor offering the product to the government. Vendors who propose to do business with the U.S. government are required to certify as to where their products are manufactured or produced—whether in the United States or in a designated country covered by the Trade Agreements Act.

Vendors can provide an annual certification applicable to all of their contracts through the federal government's contractor registry, known as the System for Award Management (SAM).¹⁷ Through SAM, a vendor

¹⁴ FAR § 25.401.

¹⁵ This applies to acquisitions under FAR subpart 6.2 Full and Open Competition After Exclusion of Sources and FAR subpart 6.3 Other Than Full and Open Competition.

¹⁶ This applies to acquisitions under FAR § 13.501(a).

¹⁷ FAR Subpart 4.12.

identifies the country of origin for foreign products associated with a broad category of products. For example, a vendor could state that it provides aircraft components that originate in France and Mexico. Vendors also have the option not to certify the origin of their products in SAM, but instead provide information about foreign end products in their individual offers for contracts. Contracting officials include the relevant clauses in solicitations and contracts in accordance with regulation to require vendor certification. For example, the clause at FAR 52.225-2, Buy American Certificate, requires the offeror to certify that each end product is a domestic end product, or list any foreign end products and their country of origin.

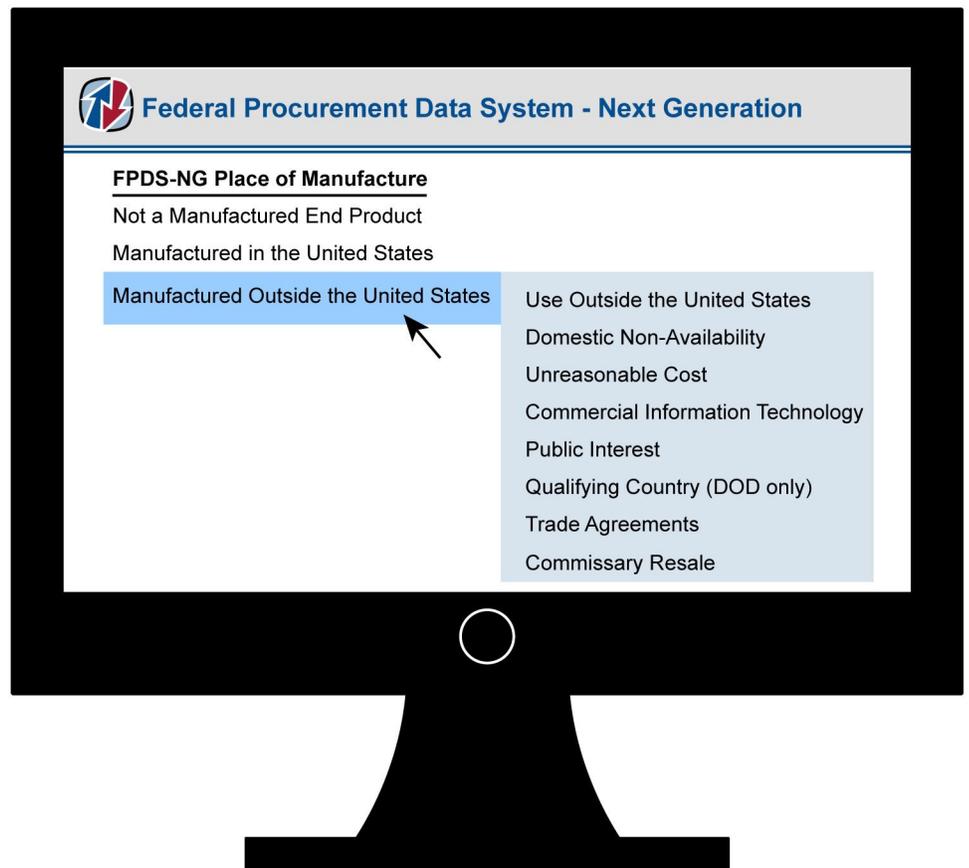
Federal Procurement Data System-Next Generation

Once a contract is awarded, the awarding agency must enter certain information into FPDS-NG, a government-wide database for contract awards and obligations. The Office of Federal Procurement Policy (OFPP) within the Office of Management and Budget provides the overall direction for FPDS-NG, which is managed by the General Services Administration. FPDS-NG data can be populated through the individual systems agencies use to develop contracts. Agencies are responsible for the quality of the information transmitted to FPDS-NG, including data captured on the contract value and whether the foreign product acquisition is authorized by one of the Buy American Act exceptions or a trade agreement. This information is recorded at the contract level, or at the delivery order level for orders from indefinite delivery contracts.¹⁸ For certain product categories—essentially those that represent end products—FPDS-NG requires that contracting staff enter information in the “Place of Manufacture” drop-down data field, as shown in Figure 1. This field must be populated for all reported manufactured end products, including those valued under the micro-purchase threshold, which at the time of our review was generally \$3,500. Options in this field include indicating that the product is made in the United States, or that it is made outside the United States and qualifies under one of the Buy American Act exceptions, or that it is subject to the requirements of a trade agreement instead of the Buy American Act requirements.

¹⁸ Indefinite delivery contracts are used to acquire supplies and services when the exact time or exact quantities are not known at the time of contract award. FAR § 16.501-2 Individual orders specifying the services to be performed or supplies to be delivered are placed against the initial or base contract. FAR § 16.505.

In 2018, FPDS-NG data on agencies' historical reporting of the use of Buy American exceptions were added to the website on which agencies post contracting opportunities (www.fbo.gov). According to OFPP, this allows vendors selling domestic products to more easily see how agencies acquire foreign goods pursuant to Buy American Act exceptions.

Figure 1: Options for Reporting Place of Manufacture in the Federal Procurement Data System-Next Generation (FPDS-NG)



Source: GAO presentation of FPDS-NG information. | GAO-19-17

Agencies Report Applying Buy American Act Exceptions and Waivers but Data Quality Issues Exist

In fiscal year 2017, the federal government obligated approximately \$7.8 billion for the acquisition of foreign end products, which accounts for less than 5 percent of total federal contract obligations for end products in that year. We observed differences in how civilian agencies and DOD apply Buy American Act exceptions and waivers. In our review of 38 contracts and orders from four agencies—DOD, HHS, DHS, and VA—we found 6 instances where the place of manufacture information was misreported in FPDS-NG. We further identified system limitations in how FPDS-NG captures information.

Foreign End Products Accounted for Less Than 5 Percent of Contract Obligations for Products Potentially Subject to the Buy American Act in Fiscal Year 2017

Based on our analysis of FPDS-NG data, almost 40 percent of federal contract obligations in fiscal year 2017—totaling approximately \$196 billion—were for domestic and foreign end products, such as aircraft parts, that may be subject to the Buy American Act. Less than 5 percent of these obligations—approximately \$7.8 billion—were reported as foreign end products. This is consistent with the information agencies reported in FPDS-NG in the previous 4 years, with foreign end products accounting for approximately 3 to 8 percent of goods subject to Buy American Act restrictions between fiscal years 2013 through 2016. The foreign end products in fiscal year 2017 primarily came from South Korea, the United Kingdom, Afghanistan, Canada, Mexico, and the United Arab Emirates, which together accounted for almost half of the total foreign end products reported. Appendix III shows the federal government's obligations for foreign end products from various countries for fiscal year 2017.

The procurement of foreign end products is permitted by the flexibilities available under the Buy American Act's exceptions and waivers. Agencies also procured foreign end products through means separate from the exceptions allowed under the Buy American Act, primarily in cases where the Act would not apply.

- Agencies reported obligating more than \$700 million to procure foreign end products by applying one of the five government-wide Buy American Act exceptions—such as domestic non-availability or unreasonable cost—in FPDS-NG for fiscal year 2017.
- Agencies reported obligating approximately \$550 million to procure foreign end products as permitted by the Trade Agreements Act, which waives the Buy American Act’s domestic preference requirements for US trading partners when eligible products are covered by trade agreements and are above certain dollar thresholds.
- DOD also obligated nearly \$2.9 billion to procure foreign products from countries with which it has reciprocal procurement agreements, using what is referred to as the DOD qualifying country exception. This is an exercise of the authority available to agencies under the Buy American Act’s public interest exception.¹⁹ DOD determined that it is not in the public interest to restrict the purchase of foreign end products from 27 countries.²⁰ All but two of these qualifying countries are also US trading partners, so some of these awards for eligible products may be authorized by a trade agreement. However, the qualifying country exception allows DOD to procure foreign end products without regard to dollar thresholds or other trade agreement eligibility limitations.
- Agencies also procured foreign end products, such as fuel, to be used outside the United States, in which circumstance the Buy American Act’s requirements do not apply. For fiscal year 2017, these obligations accounted for almost \$3.7 billion—about 47 percent of all dollars obligated for foreign end products, as reported in FPDS-NG.

Figure 2 highlights fiscal year 2017 obligations, including agencies’ reported spending on foreign end products under the Buy American Act exceptions and other means.

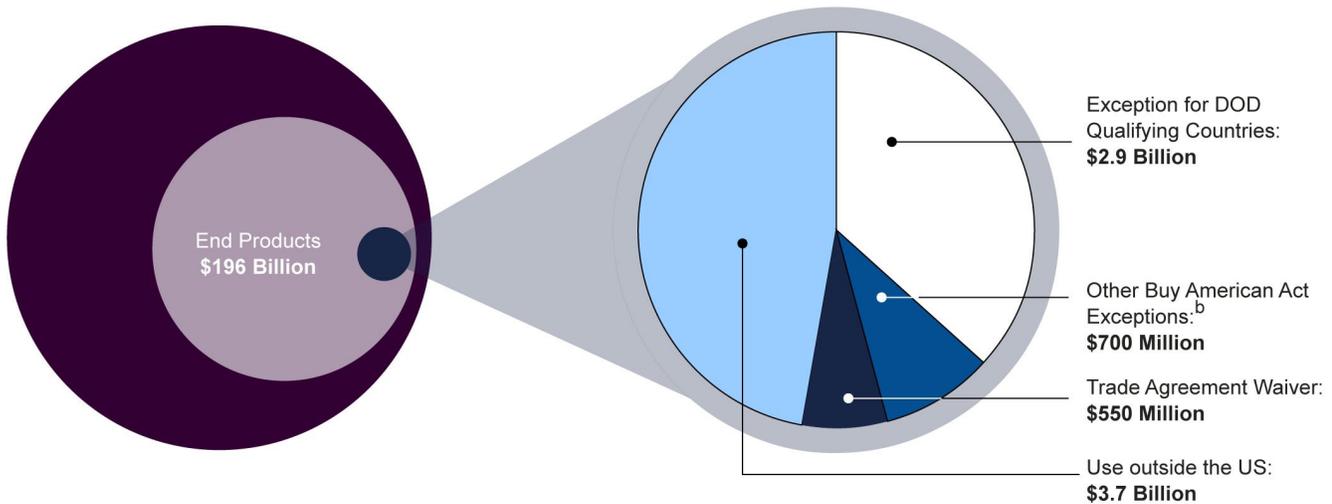
¹⁹ As a result of memoranda of understanding and other international agreements, DOD has determined it inconsistent with the public interest to apply restrictions of the Buy American Act statute or the Balance of Payments Program to the acquisition of qualifying country end products from countries listed in DFARS § 225.872-1.

²⁰ DOD’s qualifying country exception does not limit the authority of the Secretary of a military department to restrict acquisitions to domestic sources or reject an otherwise acceptable offer from a qualifying country source when considered necessary for national defense reasons. See DFARS § 225.872-1(c).

Figure 2: Foreign End Product Contract Obligations and Associated Exceptions and Waivers, Fiscal Year 2017

Total Federal Obligations: \$508 Billion

Foreign End Product Obligations: \$7.8 billion^a



^a This includes nearly \$16 million for awards under the micro-purchase threshold (generally \$3,500 at the time of our review) that were not subject to the Buy American Act.

^b Other Buy American Act exceptions include public interest (excluding DOD Qualifying Countries), domestic non-availability, unreasonable cost, commercial information technology, and commissary resale

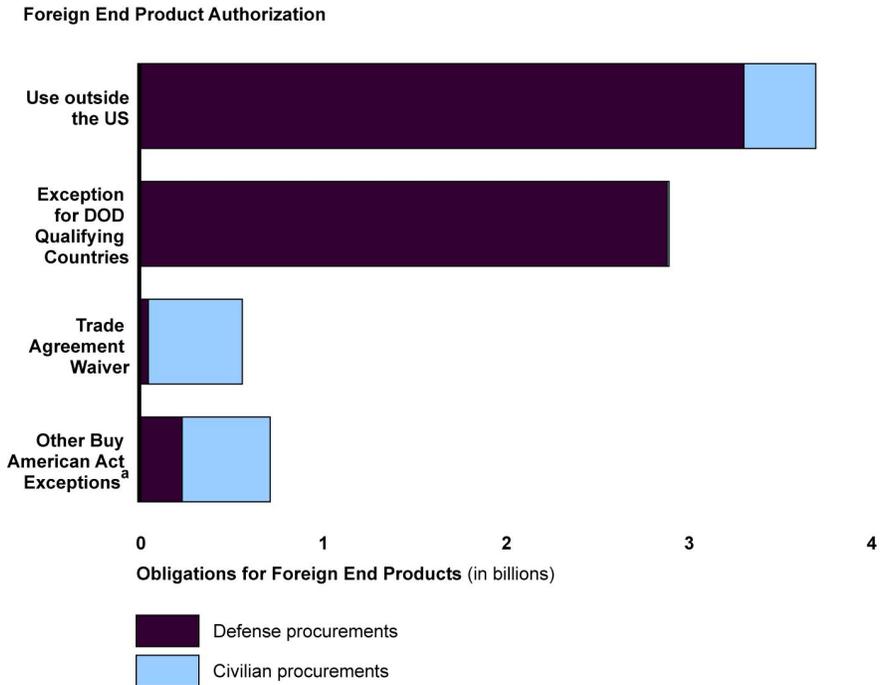
Source: GAO analysis of federal procurement data. | GAO-19-17

DOD Buys Most Foreign End Products for Use Outside the United States while Civilian Agencies Report a Wide Array of Buy American Act Exceptions and Waivers

DOD accounted for more than 80 percent—roughly \$6.4 billion—of the total obligations for foreign end products in fiscal year 2017. Almost all of DOD purchases were either for use outside of the United States, so were not subject to Buy American Act restrictions, or were reported under the public interest exception for DOD qualifying countries. In contrast, civilian agencies report a more varied mix of the exceptions and waivers of the Buy American Act. The civilian agencies—which are unable to apply DOD’s qualifying country exception—were more likely to report buying foreign end products based on trade agreements or another exception to the Buy American Act requirements. Figure 3 shows how DOD and the civilian agencies acquired foreign end products authorized by the various exceptions and waivers of the Buy American Act.

Figure 3: Defense and Civilian Agencies Reported Buy American Act Exceptions and Waivers, Fiscal Year 2017

Awards under the micro-purchase threshold (generally \$3,500 at the time of our review) are not included in the totals shown below.



^a Other Buy American Act exceptions include public interest (excluding DOD Qualifying Countries), domestic non-availability, unreasonable cost, commercial information technology, and commissary resale.

Source: GAO analysis of federal procurement data. | GAO-19-17

From our review of FPDS-NG data, the civilian agencies are more likely to cite one of the five Buy American Act exceptions or a trade agreement waiver when buying foreign end products, and thus take corresponding actions to document or approve the authority cited. For example, in our review of contracts from four agencies, VA obligated \$71,000 for medical imaging equipment from Canada, and had to consider whether a trade agreement waiver applied. The manufacturer was determined to be the only source available and the contracting officer determined the acquisition was authorized by a Buy American exception based on domestic non-availability, which can require additional review.

In contrast, DOD may make a similar contract award for equipment from Canada based on the qualifying countries exception. DOD acquisitions, then, may be authorized by exceptions such as domestic non-availability when a required item does not come from a qualifying country. For

example, we reviewed a \$744,000 DOD award for vehicle equipment that was only available from South Africa—which is not one of the DOD qualifying countries and not covered by any of the trade agreements—so the acquisition was authorized by the domestic non-availability exception.

In addition, the civilian agencies also reported buying foreign end products for use outside the United States but to a lesser extent than DOD. For example, this included one of the contracts we reviewed, an HHS award for Ebola vaccines manufactured in the Netherlands, with \$44.7 million obligated in fiscal year 2017. This contract was reported as used outside the United States because it is primarily stored overseas.

Coding Errors and System Limitations Highlight Data Reliability Issues

FPDS-NG is the primary means for capturing procurement data regarding the Buy American Act, but we found that agencies may not always input reliable information on the extent to which exceptions or waivers authorized the acquisition of foreign end products. In addition, some aspects of how FPDS-NG is structured could lead to additional data reporting errors.

In the non-generalizable sample of 38 contracts and orders we examined from DOD, HHS, DHS, and VA, we found 6 awards where information related to the Buy American Act was incorrectly reported in FPDS-NG. In three of the six contracts, agencies recorded the wrong exception or waiver, most often because of an error when reporting the place of manufacture in FPDS-NG. For example, DOD reported a \$22,000 contract for vehicle equipment from South Africa as a Buy American Act exception due to unreasonable cost. But the contract file indicated that the exception that applied was domestic non-availability. DOD officials acknowledged the error and corrected it in FPDS-NG during the course of our review.

In the three remaining contracts, agencies misreported whether an end product came from the United States or another country. For example, DHS incorrectly recorded that an \$18 million contract was for aircraft accessories and other parts manufactured in the United States, even though file documentation showed the contract was for Italian-produced spare parts from the original equipment manufacturer. The Italian-produced spare parts were available from existing inventory maintained by the manufacturer and were needed immediately to meet a mandatory

operational requirement. Officials from DHS acknowledged the recording oversight, attributed it to a mistake when entering information in FPDS-NG, and have since corrected the error in response to our observation.

Additionally, FPDS-NG has system limitations that could hinder complete and accurate reporting of Buy American Act information:

- **DOD Qualifying Country Exceptions and Trade Agreement Waivers.** FPDS-NG requires that information on the type of Buy American Act exception or waiver applied be provided when end products are reported as foreign. But FPDS-NG does not identify errors associated with this process. For example, we reviewed an \$8.3 million DHS contract for engines manufactured in Germany that was recorded as a DOD qualifying country exception in FPDS-NG, although this exception is not available to civilian agencies. Contracting officials corrected the data in FPDS-NG during the course of our review. Further, FPDS-NG does not prevent agencies from reporting trade agreement waivers when the contracts are valued below applicable thresholds or waivers do not apply, such as for small business set asides. For example, in the fiscal year 2017 data we reviewed, more than 5 percent of contract obligations reported for trade agreement waivers were for awards set-aside for small businesses, which would not be eligible under the Trade Agreements Act. OFPP officials noted that because of the various dollar thresholds applicable to different trade agreements, adding automatic thresholds in FPDS-NG to guide contracting staff in reporting an applicable trade agreement could lead to additional data errors in the procurement database.
- **Awards under the Micro-purchase Threshold.** Although the Buy American Act requirements do not apply to contract awards valued below the micro-purchase threshold—generally \$3,500 in fiscal year 2017—the FPDS-NG ‘Place of Manufacture’ field does not have an option to indicate whether a contract is under the threshold. Instead, contracting officers entering information for awards under the micro-purchase amount must still state whether the product is domestic or foreign. If the product is foreign, the officials must select a Buy American Act exception authorizing the purchase, even though no exception is needed at these dollar levels. As a result, when agencies report in FPDS-NG that a Buy American Act exception or waiver applied for a procurement valued at less than \$3,500, that information would not be accurate. Based on our review, this may have involved about \$16 million in fiscal year 2017 obligations.

- **Awards for both Foreign and Domestic Products.** When reporting data for contracts that include multiple end products from both the United States and a foreign country, FPDS-NG only allows for one country of origin to be identified. Contracting officers told us that they typically will report a foreign end product in FPDS-NG when the foreign products account for the preponderance of the contract value. Thus, in cases where a contract includes foreign end products that do not account for the preponderance of the contract's value, the value of these foreign end products would not be reported in FPDS-NG. We have previously reported that FPDS-NG has similar limitations in other fields, such the type of product or service provided, which prevent contracting officers from identifying more than one condition.²¹ According to OFPP, a recent change in the FAR requiring contract reporting at the line item level should provide greater transparency of all products included in a contract.²²
- **Buy American Act Exceptions and Waivers under Indefinite Delivery Contracts.** The way FPDS-NG captures data for Buy American Act exceptions and waivers for some indefinite-delivery contracts results in inaccurate data reporting. When an indefinite-delivery contract is initially awarded, FPDS-NG functionality does not give contracting staff the option to enter information for the 'Place of Manufacture' field. Instead, this information is typically captured once an order is placed on the contract. In our review of FPDS-NG data across the four agencies, however, we found that in some cases obligations are reported on the initial indefinite delivery contract so the Buy American Act exceptions or waivers are not recorded. This occurred with multiple agencies, but particularly at HHS, where information for almost 28 percent of HHS obligations for end products in fiscal year 2017 was not captured in FPDS-NG because the obligations were reported in the system through the initial contracts rather than orders. As a result, the applicability of the Buy American Act for HHS contracts totaling almost \$1.9 billion in fiscal year 2017 was unreported in FPDS-NG.

DOD, DHS, and VA officials told us they identified FPDS-NG reporting as an area of concern. GAO Standards for Internal Controls in the Federal

²¹ GAO, *Defense Acquisitions: Continued Management Attention Needed to Enhance Use and Review of DOD's Inventory of Contracted Services*, [GAO-13-491](#) (Washington, D.C.: May 23, 2013)

²² Federal Acquisition Regulation, Uniform Use of Line Items, 82 Fed. Reg. 4709 (Jan. 13, 2017) (to be codified at 48 C.F.R. pt. 4).

Government state that management should use quality information to support objectives, and that such data should be complete and accurate.²³

In response to the 2017 Executive Order calling for federal agencies to assess their implementation of the Buy American Act requirement, OFPP officials told us they are identifying potential strategies for improving the information agencies submit to FPDS-NG. As OFPP weighs potential options for FPDS-NG reporting, implementing enhancements to reduce data entry errors and ensure that the data collected are complete and accurate would help enable the system to provide the most useful information possible. Ensuring information is correctly reported in FPDS-NG is critical because the data are used to inform procurement policy decisions and facilitate congressional oversight.

Agency Approaches to Training and Guidance Varied and Certain Contracting Practices Highlight Buy American Act Implementation Concerns

The four agencies we reviewed—DOD, HHS, DHS, and VA—took different approaches to provide training and guidance for the Buy American Act requirements. Contracting officers faced challenges when procuring products subject to the Buy American Act. For example, we found instances in which contracting officers applied a waiver or exception to contracts where the waiver did not apply and did not have complete guidance for required determinations or reviews. There also were challenges in confirming product origin information when vendors did not provide consistent information.

Agency Approaches to Guide Implementation of Buy American Act Requirements Varied

The four agencies we reviewed varied in the mix of training and guidance provided to aid contracting officers in implementing the requirements of the Buy American Act. Three of the four agencies—DOD, DHS and VA—

²³ GAO, *Standards for Internal Control in the Federal Government*, [GAO-14-704G](#) (Washington, D.C.: Sept. 2014).

supplemented the federal acquisition regulation, which implements the requirements of the Buy American Act and Trade Agreements Act, with their own acquisition regulations. In addition, DHS and DOD have recently updated existing training or added new training and guidance. VA issued policy memoranda in 2017, emphasizing the importance of meeting Buy American Act requirements, but has not added training or provided specific guidance. HHS does not provide department-level training or guidance related to the Buy American Act. Most of the DHS and DOD contracting officers we spoke to reported that they had attended training and several found the guidance provided by the training to be helpful. HHS and VA contracting officials described confusion due to the lack of resources available at their respective agencies.

DOD Updated Its Buy American Act Training in 2017

In 2017, in response to a series of recommendations from the DOD Inspector General to re-emphasize Buy American Act training and guidance, the Defense Acquisition University introduced an updated training course that specifically focuses on the requirements and implementation of the Buy American Act.²⁴ While not mandatory, a June 2017 memo notified all DOD services and the defense agencies that members of their contracting workforce should complete this training as part of their professional development. At the current pace of enrollment, DOD officials anticipate approximately 18,000 people will have taken this course by the end of September 2018, which is a seven-fold increase over previous graduation rates. Incorporated into these trainings were supplemental on-the-job tools to assist contracting officers when awarding contracts for end products subject to the Buy American Act requirements. One such tool is a flowchart outlining applicable solicitation provisions or contract clauses based upon the awarded contract's total dollar value. DOD contracting officials we interviewed from Defense Logistics Agency's (DLA) Land and Maritime division had completed the agency-level Buy American Act training and said it served as a good refresher, with some noting that most of the training they had received on the subject came when they were first hired.

DOD provides regulations and guidance on Buy American Act requirements through both the Defense Federal Acquisition Regulation

²⁴ These reports are summarized in U.S. Dept. of Defense, Inspector Gen., Report No. DODIG-2018-070, Summary Report of DOD Compliance with the Berry Amendment and the Buy American Act (2018).

Supplement (DFARS) and the accompanying Procedures, Guidance and Information. DOD contracting officers use the provisions and clauses in DFARS to address the public interest exception for DOD qualifying countries. In addition, as a part of the updated training, the Defense Pricing and Contracting Office developed two documents to provide additional Buy American Act guidance.²⁵ One outlines a step-by-step approach contracting officers can follow to determine whether the Buy American Act applies to their particular procurement and, if so, whether the use of an exception or waiver is appropriate. The second assists contracting officers with evaluating all offers—foreign and domestic—when price is the determining factor.

In addition, we found that DLA supplements the available Defense Acquisition University training and guidance with a robust level of support, including annual training and subject matter expertise. DLA contracting officers told us that while they found the updated training helpful, they also appreciated the training course internal to their agency, as it addresses the types of procurements they typically handle in their day-to-day work, such as buying spare parts. Further, DLA contracting officers noted that they use the job aid provided through the local training.

DHS Added Buy American Act Training and Revised Policy

DHS introduced training courses in 2017 that specifically focus on the requirements and implementation of the Buy American Act, including a mandatory training course for DHS contracting officers. DHS reported that 94 percent of contracting staff had taken the required course as of April 2018. DHS developed these courses in response to the 2017 Executive Order to ensure its staff was familiar with the Buy American Act requirements. Incorporated into these training courses are supplemental on-the-job tools to assist contracting officers when awarding contracts for end products subject to the Buy American Act requirements, such as a flowchart outlining applicable solicitation provisions or contract clauses based upon contract dollar value. Contracting officials generally view the training and tools they received as beneficial. For example, several DHS contracting officials we interviewed said that the agency's new course provided a helpful review on the topic, while one contracting officer specifically noted that the course materials are useful to new staff, to help them understand the Act's waivers and exceptions.

²⁵ The Defense Pricing and Contracting Office was formerly known as the Defense Procurement and Acquisition Policy office.

DHS also revised its acquisition manual in December 2017 to add further detail regarding the Buy American Act requirements. Specifically, DHS updated its acquisition manual to provide contracting officers more explicit FPDS-NG reporting instructions for procurements subject to the Buy American Act, as well as discretion to purchase domestic end products at or below the micro-purchase threshold. Additional changes include increasing the documentation and level of managerial review required to use several of the exceptions to the Buy American Act. For example, prior to 2018—which includes the time period in which the DHS contracts and orders we reviewed were awarded—the head of individual contracting offices had the authority to approve domestic non-availability and unreasonable cost exceptions, with a notification made to the DHS Chief Procurement Officer. But under the new policy, the use of these exceptions must have the concurrence of the HCA—who is responsible for contracting activities within individual DHS components—and be approved by the department’s Chief Procurement Officer. Table 3 outlines these changes.

Table 3: Department of Homeland Security’s (DHS) Revised Documentation and Review Requirements for Buy American Act Exceptions

n/a	Required Documentation		Required Determinations	
	Before	2018 Update	Before	2018 Update
Public Interest	None specified.	The request shall include a discussion of whether the cost advantage of a foreign product is the result of dumped or subsidized steel, iron, or manufactured goods, and shall integrate any findings as appropriate.	This authority is delegated to the Head of the Contracting Activity (HCA) for the component.	The determination may only be made by the Secretary and must first be concurred with by the component HCA and the DHS Chief Procurement Officer.
Domestic Non-Availability	None specified.	For awards not requiring a written non-availability determination, the contracting officer notifies the DHS Chief Procurement Office at the time it is decided the determination is not warranted, but no less than 5 calendar days prior to award.	This authority is delegated to the head of the contracting office and the determination shall be submitted to the DHS Chief Procurement Officer.	The determination shall be concurred with by the component HCA and approved by the DHS Chief Procurement Officer.

n/a	Required Documentation		Required Determinations	
	Before	2018 Update	Before	2018 Update
Unreasonable Cost	None specified.	If a factor higher than 6 and 12 percent is determined to be more appropriate for an acquisition, the contracting officer shall document the use of the higher factor by altering the appropriate solicitation provision.	This authority is delegated to the head of the contracting office and the determination shall be submitted to the DHS Chief Procurement Officer.	The determination shall be concurred with by the component HCA and approved by the DHS Chief Procurement Officer.
Resale	None specified.	None specified.	None specified.	The determination shall be concurred with by the component HCA and approved by the DHS Chief Procurement Officer.

Source: GAO analysis of DHS documents | GAO-19-17

Updated VA Guidance Does Not Address Recent Procurement Changes That Prompt Buy American Considerations

In September 2017, VA issued guidance to reinforce existing Buy American Act requirements. The policy memorandum encourages the HCAs within VA to institute reviews of awarded contracts subject to the Buy American Act to ensure compliance. As of September 2018, policy officials did not know how many HCAs had taken this step. Further, the guidance emphasizes the importance of Buy American Act training for its acquisition workforce. VA policy officials explained that the Buy American Act is introduced in several VA training courses, but the agency does not have a specific course on implementing the Buy American Act requirements or provide additional instruction or tools. During the course of our review, VA officials said that some of the HCAs had added internal training on the Buy American Act. In addition, VA contracting staff has the option of taking training offered outside the agency, such as the updated Defense Acquisition University course on the Buy American Act. This training is not required.

Contracting officials we spoke to at VA said they struggled with the details of awarding contracts subject to Buy American Act requirements because they are not provided sufficient agency-specific training and guidance on the topic. Moreover, several contracting staff noted an increased need for training due to recent changes in VA contracting practices. Specifically, in response to a 2016 Supreme Court decision, VA has increased

contracting efforts with veteran-owned small businesses through the Veterans First Contracting Program.²⁶ As a result, contracting officials explained they have reduced their use of schedule contracts, in which the determinations related to the Buy American Act requirements were made with the initial awards. As one contracting officer explained, prior to this change, more than 90 percent of her division's procurements were through VA schedule contracts in which Buy American Act applicability had already been established. However, this shift in contracting practices means contracting officers will more frequently need to consider the applicability of the Buy American Act, but contracting officers have not received specific guidance or training to do so. Noting the significance of this change, one contracting officer stated she approached VA management to obtain Buy American Act training for her division, but such training was not available.

Federal internal controls state that agencies should ensure that training is aimed at developing and retaining employee knowledge, skills, and abilities to meet changing organizational needs.²⁷ In September 2018, we reported that VA was experiencing difficulties implementing multiple aspects of the Veterans First policy, and we recommended that VA provide more targeted implementation training.²⁸ As VA moves forward to implement this training, incorporating the Buy American Act requirements will be important to provide greater assurance that staff has the knowledge and skills needed to navigate the changing procurement environment.

²⁶ *Kingdomware Technologies, Inc. v. United States*, 136 S. Ct. 1969 (2016). Kingdomware decided that the Veterans Benefits, Health Care, and Information Technology Act of 2006, 38 U.S.C. § 8127, requires VA contracting officials to use set asides—restrict competition to veteran-owned small businesses if there is a reasonable expectation that at least two such businesses will submit offers and the award can be made at a fair and reasonable price—even when the agency will otherwise meet its annual small business contracting goals.

²⁷ [GAO-14-704G](#)

²⁸ GAO, *Veterans First Program: VA Needs to Address Implementation Challenges and Strengthen Oversight of Subcontracting Limitations*. [GAO-18-648](#) (Washington, D.C.: Sept. 24, 2018).

HHS Does Not Provide Department-wide Buy American Act Training or Guidance

HHS does not have agency-level Buy American training or guidance. The HHS Acquisition Regulation Supplement does not address foreign acquisitions. HHS officials told us that efforts to develop guidance that would address Buy American Act requirements are underway, but they do not know when they will be finalized and made available to contracting officers, and could not describe the extent to which they will address Buy American Act implementation. The HHS contracting officers we interviewed discussed informal Buy American Act training their divisions had developed because department-level training was not available. For example, at HHS' National Institutes of Health, a contracting official told us about a training course she recently developed because her office was taking on the administration of additional contracts for which the Buy American Act requirements would apply. Contracting officers at HHS' Office of Biomedical Advanced Research and Development Authority described informal training on the agency's contract writing system— included as part of their weekly internal staff meetings—that provides additional guidance on how to appropriately complete certain data fields relevant to the Buy American Act.

Agencies Face Challenges Applying Waivers and Exceptions Where Guidance and Training Is Incomplete or Does Not Exist

In our analysis of 38 contracts from across the four agencies, we found that agencies faced various levels of challenge in applying the Trade Agreements Act waivers and Buy American Act exceptions to acquire foreign end products. This was particularly apparent in cases where contracting officers had to determine if a trade agreement applied or cases which required a determination that a domestic end product was not sufficiently available, in accordance with the domestic non-availability exception to the Buy American Act requirements. Contracting staff also had difficulty determining the origin of products in light of incomplete or conflicting information.

Trade Agreements Act Incorrectly Applied

Of the six contracts we reviewed reporting that a trade agreement applied to the foreign end products purchased, we found two cases in which this waiver did not apply to the contracts in question. The value of the contract

is one determining factor for whether a trade agreement waives the Buy American Act requirements, although the FAR also states additional factors that would affect applicability under a trade agreement. The two contracts we found, both from VA, had total dollar values at award—\$8,435 and \$11,950, respectively—that were less than any of the thresholds at which trade agreement waivers of the Buy American Act are applicable. Both contracts were for products from countries that are party to the World Trade Organization Government Procurement Agreement, so the value of the acquisition would have to be equal to or exceed \$191,000—the threshold that was in effect at the time of award—for waivers from Buy American requirements to apply. Contracting officials in both cases were generally unaware that the applicable threshold was not met, making the trade agreement waiver inapplicable.

Although VA has added Buy American Act guidance since these contracts were awarded early in fiscal year 2017, the information currently available does not provide sufficient detail to assist contracting officers when awarding contracts in these situations. For example, the guidance VA provided contracting officers in September 2017 does not emphasize consideration of the applicable trade agreement thresholds or include information on how contracting officers should determine the applicable waiver or exception. When contracting officers procure foreign end products, the type of waiver or exception used to support the purchase matters—particularly when required additional steps and review are not completed because the wrong waiver or exception was applied. We found that the two VA contracts with foreign end products were incorrectly reported as the Trade Agreements Act waiver having applied. If one of the other Buy American Act exceptions permitting purchases of foreign end products had applied, contracting officers may have been required to obtain higher-level review or complete a written determination.

In addition, we reviewed contracts that show some of the complexities contracting officers face beyond applying the dollar thresholds when determining if an award for foreign end products is eligible under the Trade Agreements Act waiver of the Buy American Act. Specifically, we found instances where DHS contracting officials took different approaches for non-competed awards for similar foreign-manufactured products. For example, we reviewed a non-competed \$58 million DHS award for acquiring spare aircraft parts from an original equipment manufacturer located in a foreign country that is party to the World Trade Organization Government Procurement Agreement. DHS reported in FPDS-NG that the procurement was waived by the Trade Agreements Act. However, we also reviewed two other sole-source awards from DHS

for similar products—spare aircraft parts from two separate manufacturers in foreign countries that are also party to the World Trade Organization Government Procurement Agreement—that were instead reported as subject to the Buy American Act, but excepted due to the non-availability of domestic products.

Contracting officers may come to different conclusions for similar products, in part, because of the multiple factors that have to be considered when determining whether an acquisition is subject to the Buy American Act and whether any waivers or exceptions apply. However, available guidance does not always address these complexities. For example, agencies need to decide if other conditions, such as the procurement of products deemed indispensable for national security or national defense purposes apply to an acquisition that would make a trade agreement inapplicable.²⁹ Further, if the product's country of origin is considered a designated country under the World Trade Organization Government Procurement Agreement, officials need to determine that the product is eligible under that agreement.

DHS updated its training and guidance for the Buy American Act, which includes a job aid outlining at what dollar values solicitation provisions and contract clauses under a trade agreement waiver are applicable. However, it does not address other situations in which contracts may not be eligible under the Trade Agreements Act, such as non-eligible products or products for national defense purposes.

For the other agencies in our review, we found that DOD's updated Buy American Act training and its acquisition supplement both address trade agreement eligibility, but HHS does not yet have Buy American guidance to address this topic. Federal internal control standards state that agencies should communicate quality information internally to achieve their objectives and that they should select the appropriate methods of communication.³⁰ When written guidance is not available, agencies may miss opportunities to ensure appropriate steps are taken to meet Buy American Act requirements.

²⁹ FAR § 25.401(a).

³⁰ [GAO-14-704G](#).

Guidance for Determining Domestic Non-Availability Exceptions Incomplete

Our review of 38 contracts also included 8 contracts for foreign end products pursuant to the domestic non-availability exception. In certain situations, such as when contracts are awarded without full and open competition, this exception requires an approved written determination. The FAR establishes requirements for domestic non-availability determinations, but agencies can delegate the level of review required or specify information to be included in the determination.³¹

Three of the agencies we reviewed—DOD, DHS, and VA—provide supplemental guidance on the process for making determinations, including who must make the determination when applying a domestic non-availability exception. However, DHS policy officials told us that when the agency uses the domestic non-availability exception for a sole-source acquisition, the written justification that the FAR requires for non-competed awards should suffice as the documentation to support the non-availability determination as well. The practice of using sole-source justifications to support Buy American determinations is not addressed in DHS guidance. According to DHS policy updated in 2018, determinations of domestic non-availability must be concurred with by the HCA and approved by the Chief Procurement Officer. Federal and DHS acquisition regulations, however, state that some justifications can be approved at a lower level. In the absence of further guidance, this difference in approval levels could result in inconsistent application within the department.

In addition, as previously noted HHS does not yet have Buy American Act guidance so the department does not provide information on how to make determinations. According to federal internal control standards, agencies should communicate quality information internally to achieve their objectives and that they should select appropriate communication methods.³² When written guidance is not available, agencies may miss opportunities to ensure that contracting officers take the steps needed to meet requirements when applying a domestic non-availability exception.

³¹ The Head of the Contracting Activity (HCA) is responsible for reviewing individual written determinations of domestic non-availability unless all of the following conditions are present: the acquisition was conducted through use of full and open competition; the acquisition was synopsisized in accordance with FAR § 5.201, and; no offer for a domestic end product was received. FAR § 25.103(b)(2)-(3). This authority may be delegated.

³² [GAO-14-704G](#).

Inconsistent Information and Guidance Limits Efforts to Accurately Determine Product Origin

Knowing the country of origin of the products the federal government buys is necessary to implement the Buy American Act, but contracting officers do not always have access to accurate information on originating countries. The FAR and the DFARS provide various clauses which, when incorporated into contracts, require vendors to certify that the end products they provide to the government are domestic and, if necessary, declare the foreign countries from which they provide products.³³ Vendors frequently certify this information through the System for Award Management (SAM), the government-wide system used to collect vendors' annual representations and certifications.³⁴

Contracting officers may rely on the information vendors provide about their product origins, but they are generally expected to take actions to verify incomplete or conflicting information when they have reason to believe that a vendor will be providing a non-compliant product. We found that SAM certifications and offers did not always include accurate information on end products from foreign countries. In 6 of the 38 contracts that we reviewed—from DHS, HHS, and VA—the vendors certified that they only provided domestic end products although the end products provided were foreign. In all of these cases, the contracting officers knew that the acquisitions included foreign end products. For example, we reviewed two DHS awards for spare aircraft parts from an Italian-based company, one of which was reported in FPDS-NG under the domestic non-availability exception to the Buy American Act, and the other which was incorrectly reported as being manufactured in the United States but has since been corrected. Contracting officials said they knew the parts were made in Italy based on extensive experience contracting with the company and, in part, because they had visited the production location. Contracting officials—including some at HHS and VA—said they use SAM as their primary source to determine whether the vendor is

³³ The clause at FAR 52.225-1 requires vendors to certify for domestic items, while clauses at 52.225-3 and 52.225-5 require certification for eligible products under free trade agreements and the World Trade Organization trade agreement, respectively.

³⁴ We have previously reported on the development of the System for Award Management (SAM), see GAO, *Federal Contracting: Effort to Consolidate Governmentwide Acquisition Data Systems Should Be Reassessed*, [GAO-12-429](#) (Washington, D.C.: Mar. 15, 2012).

offering domestic end products. Others reported some awareness of the limitations of SAM certifications.³⁵

At all four agencies, contracting officials emphasized that it is important to ask questions when end product origin information is not readily available—or if there is conflicting information—but agency guidance that we reviewed does not address this need or provide information on how to do so. Only the local training offered by DOD’s DLA addresses other sources of information, which officials said was helpful because it is specific to the industries with which they work. Instead, some officials described how they rely on their experience to know how to verify products’ origins but this can be problematic, particularly with newer staff. For example, in one contract we reviewed VA contracting officials acknowledged that a new contracting specialist at VA did not follow-up when the product origin certification was not provided and assumed all of the items procured were domestic. During the course of our review, the contracting specialist’s supervisor said that she contacted the vendor and learned that some of the items provided were in fact foreign end products. The foreign products were not considered to account for the preponderance of the contract so were not reported in FPDS-NG, but the contracting officer was acting with incomplete information at the time of award.

Further, in 4 of the 38 contracts that we reviewed, it is not clear how contracting staff took steps to obtain product origin information in situations where it was not provided in SAM. In these cases—which include contracts for both domestic and foreign end products—the vendors had opted not to certify their product origins in SAM, but instead said that they would provide the information with their individual proposals. However, based on the information in the contract files, the proposals did not include this information. For example:

- Three of the contracts we reviewed from HHS—all reported as purchasing end items manufactured in the United States—did not certify product origin in SAM. The supervising contracting officer for two of the awards explained that his contracting staff regularly check the vendor’s written representations and certifications provided in the

³⁵ An agency may rely on a vendor’s affirmative certification that it will provide a domestic part, where the solicitation only requires such a certification, absent some reason to question the certification. See *Pacific Lock Co.*, B-405800, Dec. 27, 2011, 2011 CPD ¶286 at 2.

offer, because the SAM certifications are general and do not always apply to the specific equipment they buy. However, the three contract files we reviewed did not include manufacturing or origin information.

- The vendor for a DHS contract that was reported as manufactured in the United States did not certify this information in SAM. The contracting officer said that he checks SAM for product origin information, but in the documents we reviewed there is no evidence of the information in the contract file.

Federal internal control standards state that agencies should communicate the necessary quality information needed to achieve the agency's objectives, thereby enabling personnel to address risks.³⁶ Providing guidance regarding the situations in which contracting officers should verify product origin information with vendors may help agencies better meet the requirements of the Buy American Act.

Conclusions

Although purchases for foreign end products account for less than 5 percent of federal procurement spending in fiscal year 2017, it is important that these purchases be consistent with the domestic-purchasing restrictions in the Buy American Act. This requires that Buy American Act exceptions and trade agreement waivers be used only when applicable, and that agencies report accurate data on the extent to which they are used. However, data reporting errors by contracting staff and FPDS-NG limitations mean that data on the use of exceptions and waivers are not fully captured. The federal agencies all have responsibilities to ensure Buy American Act data are accurate and complete. The lack of good data can hinder congressional oversight of the extent to which foreign end products are procured as authorized by one of the exceptions or waivers of the Buy American Act.

Agencies have taken varied approaches for providing information to contracting officers that navigate the complexities and nuances associated with applying the different Buy American Act exceptions or trade agreement waivers. DOD has added such detailed information through its revised training course and policy guidance. Adding these types of targeted information to address challenging areas would help contracting officers at other agencies implement the Buy American Act's

³⁶ [GAO-14-704G](#).

domestic preferences, as well as related exceptions and waivers. Further, to accurately determine how exceptions and waivers apply requires complete product origin information. Although the responsibility to certify the origins of products supplied to the federal government rests with the contractors, contracting officers would benefit from resources that help them identify information that may be inconsistent, to ensure that accurate information is available.

Recommendations for Executive Action

We are making four recommendations, one each to the Office of Management and Budget, DHS, VA, and HHS.

The Director of the Office of Management and Budget should instruct the Office of Federal Procurement Policy:

- To facilitate additional training to improve the understanding of the contracting workforce regarding the Buy American Act requirements; and
- To facilitate clarifying revisions to FPDS-NG, where needed, and provide training and guidance for recording Buy American Act information in FPDS-NG to improve the accuracy of the Buy American data. **(Recommendation 1)**

The Secretary of Homeland Security should clarify existing guidance in the Homeland Security Acquisition Manual or update training to help contracting officials:

- Identify the factors that should be considered in order to determine the applicability of the Trade Agreements Act and waiver of the Buy American Act;
- Document determinations of the use of Buy American exception for domestic non-availability and ensure the required approvals are obtained, particularly when such determinations are evidenced through justifications for other than full and open competition; and
- Identify sources of information available for determining product origin and the steps they should take to verify information that is inconsistent. **(Recommendation 2)**

The Secretary of Veterans Affairs should clarify existing guidance, or provide training or other instruction, to help contracting officials:

- Address the applicability of the Buy American Act requirements and provide instruction on how to implement the requirements, including in any training developed to implement the Veterans First policy;
- Identify the factors that should be considered in order to determine the applicability of the Trade Agreements Act and waiver of the Buy American Act; and
- Identify sources of information available for determining products' origins and the steps they should take to verify information that is inconsistent. **(Recommendation 3)**

The Secretary of Health and Human Services should provide guidance, training, or other instruction to help contracting officials:

- Identify the factors that should be considered in order to determine the applicability of the Trade Agreements Act and waiver of the Buy American Act;
- Document determinations of the use of Buy American exceptions for domestic non-availability and ensure the required approvals are obtained; and
- Identify sources of information available for determining products' origins and the steps they should take to verify information that is inconsistent. **(Recommendation 4)**

Agency Comments and Our Evaluation

We provided a draft of this report to DOD, HHS, DHS, VA, and the Office of Management and Budget for review and comment. DOD reviewed the report, but did not offer comments. HHS, DHS, and VA provided written responses, which are reproduced in Appendices IV, V, and VI of this report, respectively. A senior official within the Office of Federal Procurement Policy (OFPP) at the Office of Management and Budget provided a response via email. In addition, HHS, DHS, and OFPP provided technical comments, which we incorporated into the report where appropriate.

In their responses, HHS, DHS, VA agreed, and OFPP generally agreed, with our findings and recommendations. The written response from HHS and DHS included information on the steps each agency plans to take to address the recommendations. Specifically, HHS stated that the agency will evaluate ways to provide additional training and guidance to contracting officials. DHS stated that it will provide guidance on the

applicability of the Buy American Act and the Trade Agreements Act in certain situations and the documentation and approvals required when awarding non-competed contracts that require an exception. Additionally, DHS plans to update training regarding actions contracting officers should take when there are discrepancies in product origin information.

VA concurred with our three-part recommendation and described some of the actions the agency plans to take in response. However, VA's comments do not fully address our recommendation. Specifically, we recommended that VA clarify guidance or provide training to identify factors that could help contracting officers determine the applicability of Trade Agreements Act waivers of the Buy American Act. The comments from VA, however, only restate the existing Buy American Act exceptions and make no mention of Trade Agreements Act waivers. Further, we recommended that VA identify sources of information regarding product origin and the steps to be taken to verify inconsistent product origin information. VA's response only noted that contracting officers are responsible for conducting market research and ensuring that all product origin requirements are met. VA did not outline any additional steps the agency would take to help contracting officers navigate the complexities inherent in this area. Going forward, VA will need to develop a more robust and responsive approach in order to fully implement our recommendation.

We are sending copies of this report to the appropriate congressional committees; the Secretaries of the Departments of Defense, Health and Human Services, Homeland Security, and Veterans Affairs; the Director of the Office of Management and Budget; and other interested parties. In addition, the report is available at no charge on the GAO website at <http://www.gao.gov>.

If you or your staff have any questions about this report, please contact me at (202) 512-4841 or woodsw@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. GAO staff who made key contributions to this report are listed in appendix VII.

Sincerely Yours,

A handwritten signature in black ink that reads "William T. Woods". The signature is written in a cursive, flowing style.

William T. Woods
Director, Contracting and National Security Acquisitions

Appendix I: Objectives, Scope and Methodology

The objectives of this report are to assess the extent to which (1) the federal government procures foreign products through Buy American Act exceptions and waivers; and (2) selected agencies provide training and guidance to implement the Buy American Act requirements.

To address both of these objectives, we reviewed relevant laws and policies, such as sections of the Federal Acquisition Regulation (FAR); the Buy American Act as amended; the Trade Agreements Act of 1979 as amended; federal acquisition regulation supplements from audited agencies such as the Department of Defense Federal Acquisition Regulation Supplement (DFARS); the Executive Order “Buy American, Hire American” of 2017; the World Trade Organization’s Agreement on Government Procurement; and memorandums, policy, guidance, and instructions related to the Buy American Act.

To assess the federal government procurement of foreign products, including those procured through citing exceptions and waivers of the Buy American Act, we analyzed data from the Federal Procurement Data System-Next Generation (FPDS-NG) for fiscal year 2017, which was the most recent and complete data available at the time of our review. We analyzed procurement data in FPDS-NG across the federal government in fields relevant to the Buy American Act’s domestic preference requirements, including the product service code, country of product origin, and place of manufacture, in addition to fields such as the contract value and dollars obligated. We reviewed the place of manufacture field in particular as it contains information on how the Buy American Act applies to the contract, including whether the preponderance of the obligations is for manufactured end products and, if so, whether they are manufactured in or outside of the United States.¹ When manufactured outside of the

¹ FPDS-NG Manufactured End Products are defined as product and service codes (1000 – 9999) excluding lumber and related wood materials (5510), agricultural supplies (87**), live animals (88**), subsistence items (89**), crude grades of plant materials (9410), miscellaneous crude animal products, inedible (9430), miscellaneous crude agricultural and forestry products (9440), ores (9610), minerals (9620), additive metal materials (9630).

United States, this field also captures the reason the purchase was permissible, which we analyzed to assess the dollar obligations associated with the various Buy American exceptions or trade agreement waiver reported, as well as when products were used outside of the United States. We also analyzed data from FPDS-NG to identify the countries where foreign end products were reported to be manufactured and the associated dollars obligated in fiscal year 2017. In addition, we met with officials from the Office of Management and Budget, Office of Federal Procurement Policy to better understand ongoing reviews of the data in FPDS-NG that pertains to the Buy American Act.

In our analysis of FPDS-NG data, we took steps to minimize issues that might affect data reliability. Specifically, we analyzed FPDS-NG data to identify potential errors and inconsistencies, such as non-eligible agencies reporting the use of exceptions for DOD qualifying countries, or reporting trade agreement waivers for contracts valued less than minimum thresholds for trade agreements. We made minor adjustments to minimize potential data reporting issues, including aggregating the exceptions reported, and where appropriate, limiting our analysis to one year of data, fiscal year 2017. Based on these steps, we determined that FPDS-NG data were sufficiently reliable to allow us to calculate the approximate extent of obligations for foreign end products and the use of the Buy American Act exceptions and the Trade Agreements Act waiver. However, we are unable to precisely determine the amount spent on foreign end products through the use of exceptions and waivers because of the reporting errors and data system limitations we identified in this report.

Using FPDS-ND data, we identified four agencies—the Departments of Defense (DOD), Health and Human Services (HHS), Homeland Security (DHS), and Veterans Affairs (VA)—that had the highest fiscal year 2017 obligations in the product codes for manufactured products, which are potentially subject to the Buy American Act restrictions. In addition, to identify trends and determine if there were variations in reported obligations for foreign end products in the past, we reviewed FPDS-NG data on the Buy American exceptions and trade agreement waivers in fiscal years 2013 through 2017.

To assess the extent to which selected agencies are providing training and guidance to implement the requirements of the Buy American Act, we reviewed training course materials and regulations, policies, and other guidance available at the four agencies in our review—DOD, HHS, DHS, and VA—to determine the extent to which they address the Buy American

Act requirements. In addition, we reviewed training materials available to government employees through sources such as the Federal Acquisition Institute. We interviewed policy officials from the four agencies to understand how training and guidance had been implemented. We further reviewed relevant inspector general reports from the DOD Inspector General issued between 2015 and 2018, which made several recommendations to improve compliance with the Buy American Act, among other requirements.

Within the four agencies, we selected contracting offices that reported obligating fiscal year 2017 dollars for awards with foreign end products and awards with US-manufactured end products. We specifically focused on offices that reported a sufficient amount of foreign end product obligations and a sufficient number of contract awards to allow us to select multiple contracts. We also considered offices with a variety of Buy American exceptions and waiver types reported, in order to select a mix of contracts. The contracting offices selected were as follows:

- DOD: Defense Logistics Agency, Land and Maritime
- HHS: National Institutes of Health and the HHS Office of the Assistant Secretary for Preparedness and Response
- DHS: United States Coast Guard
- VA: Veterans Health Administration

From these offices, we selected a non-generalizable sample of 38 contracts and delivery orders awarded in fiscal year 2017. At each agency, we selected awards to include a mix of end items produced by domestic and foreign manufacturers and, when products were reported as foreign manufactured, a mix of the various exceptions and waivers cited. We also include awards across a range of value for dollars obligated above the micro purchase threshold—ranging from approximately \$5,000 to more than \$100 million—to ensure we reviewed awards both above and below the various thresholds at which the Trade Agreements Act waiver might apply. Additionally, our sample included awards for similar types of end products across agencies, including aircraft parts at DOD and DHS and medical supplies at HHS and VA, to compare practices in different agencies. We originally selected 40 awards for review—10 from each agency—but removed two awards from our sample. One was an HHS award that we determined was awarded using Other Transaction Authority and was not subject to the Buy American Act. The second excluded contract was from DHS, which was modified after

award to reflect that it was an information technology service rather than a product. As a service, it would not be subject to the Buy American Act.

We reviewed the contract files for each of the 38 awards in our sample, including documentation such as the contract and task order award, solicitations, vendors' offers or response to proposals, determination and finding memos, and FPDS-NG output documents. In addition, we reviewed the certifications each vendor provided in the System for Award Management (SAM) at the time of contract award. We interviewed contracting officials responsible for each of the 38 contracts and task orders to understand how they addressed the Buy American Act requirements, including how they determined exception or waiver applicability and product origin. We also reviewed any agency-specific or local training and guidance, tools, or job aids available to assist contracting officers in implementing the Act's requirements

We conducted this performance audit from October 2017 to December 2018 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on audit objectives.

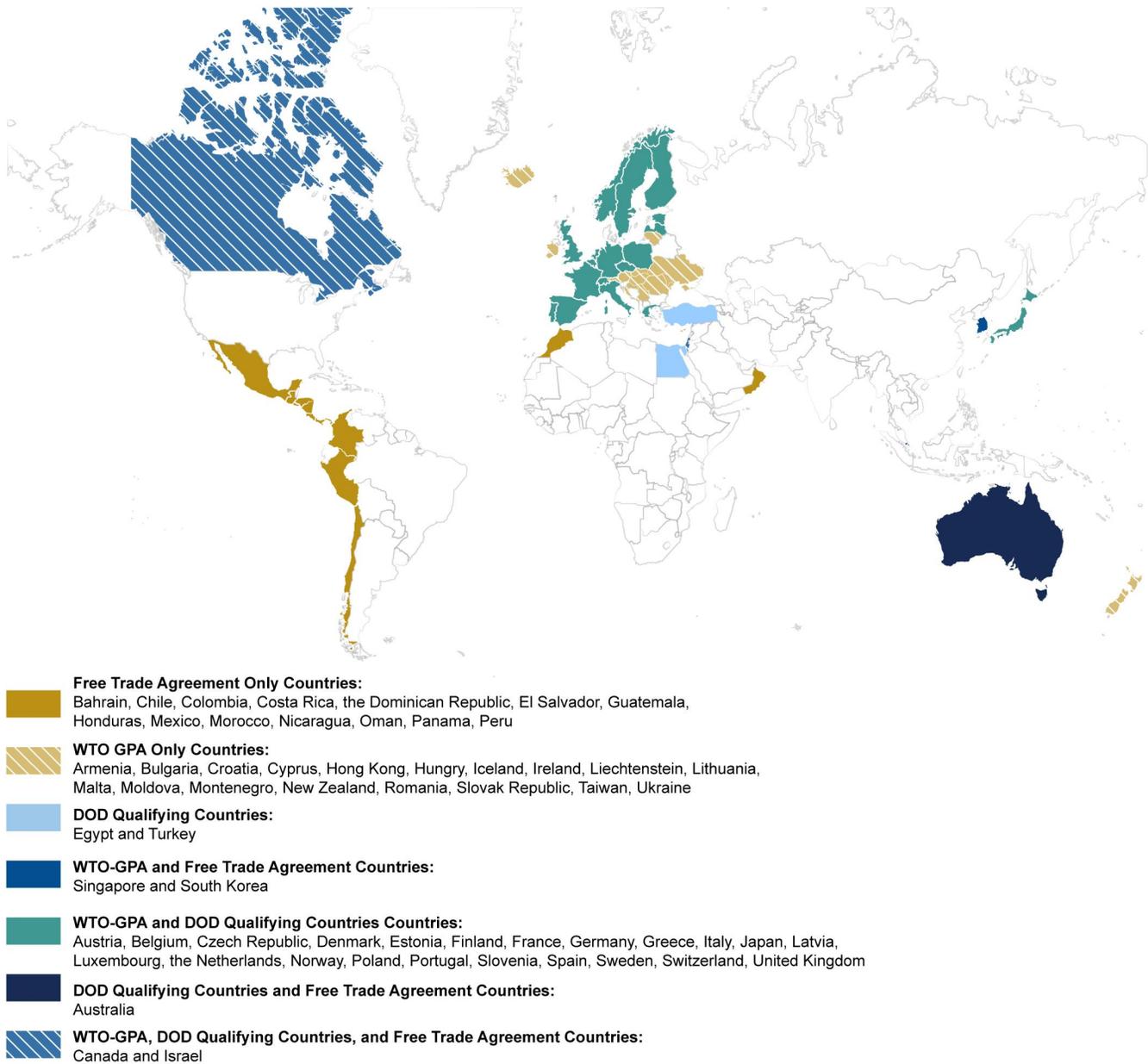
Appendix II: Countries with Free Trade Agreements or Reciprocal Defense Procurement Agreements with the United States

The United States maintains trade relationships with other countries whose specific negotiated terms results in different levels and types of applicability for waivers and exceptions to the Buy American Act. Figure 4 depicts the range of relationships that the United States maintains with other nations that allow for less restrictive purchasing of foreign end products by the federal government.¹

¹ Under the Trade Agreements Act (19 U.S.C. § 2512), in acquisitions covered by the World Trade Organization Government Procurement Agreement (WTO GPA), least developed country end products and Caribbean Basin country end products are given the same treatment as WTO GPA country end products. See FAR § 25.003 and FAR § 25.403(c). Figure 4 does not show the least developed countries or Caribbean Basin countries.

Appendix II: Countries with Free Trade Agreements or Reciprocal Defense Procurement Agreements with the United States

Figure 4: Agreements Affecting the Application of Buy American Act Requirements, by Country

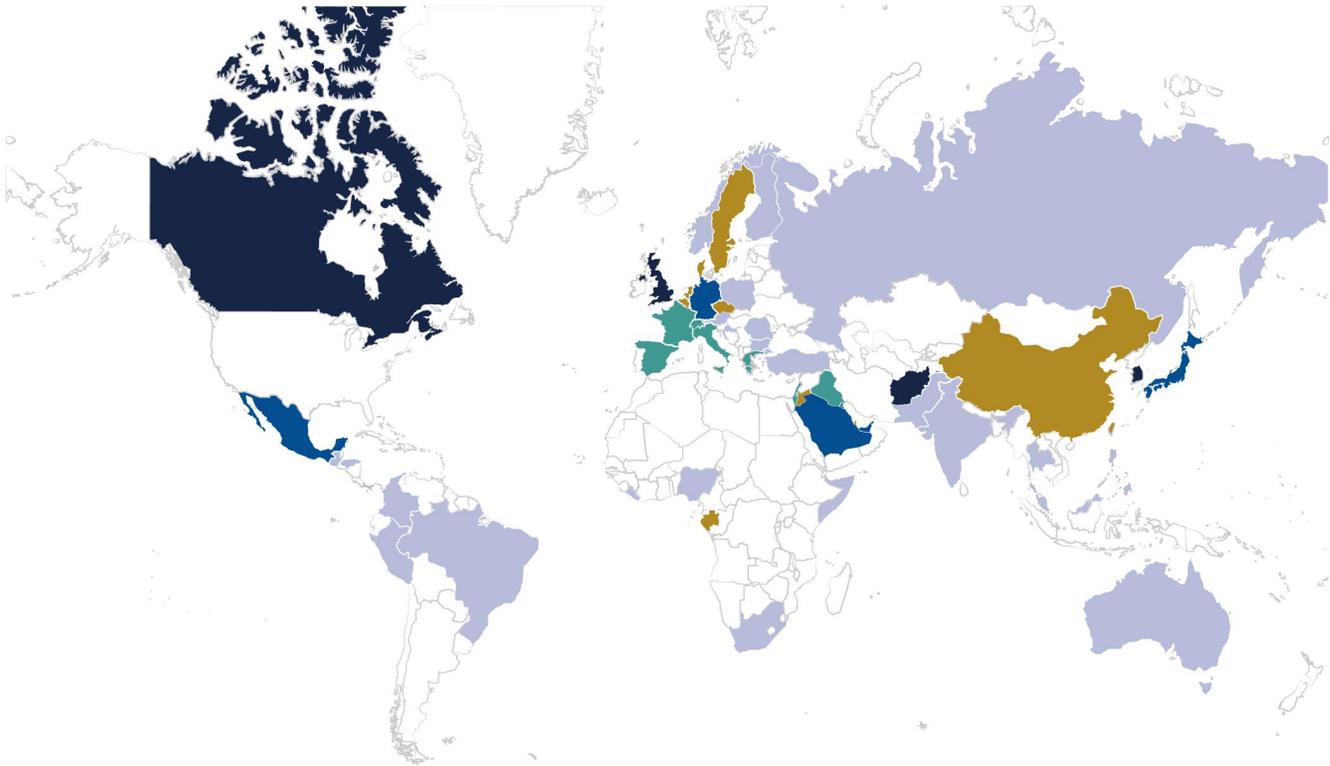


Source: GAO analysis of Federal Acquisition Regulation and other sources. | GAO-19-17

Appendix III: Federal Government Procurement of Foreign End Products, by Country

The federal government purchases foreign end products from various countries. Figure 5 highlights the different amounts of contract obligations for foreign end products from these countries for fiscal year 2017. The highest category, over \$500 million, includes 4 countries that account for almost 40 percent of all federal procurement of foreign end products. Countries where the federal government obligated less than \$5 million for the procurement of foreign end products are not included.

Figure 5: Federal Government Procurement of Foreign End Products, by Country, Fiscal Year 2017



- Over \$500 Million:** South Korea, United Kingdom, Afghanistan, Canada
- \$250 - \$500 Million:** Mexico, United Arab Emirates, Saudi Arabia, Germany, Japan, Kuwait
- \$125 - \$250 Million:** Greece, Israel, Iraq, Switzerland, France, Spain, Italy, Bahrain
- \$25 - \$125 Million:** Sweden, Denmark, the Netherlands, Belgium, China, Jordan, Czech Republic, Taiwan, Qatar, Singapore, Gabon
- \$5 - \$25 Million:** Australia, Thailand, Austria, Finland, Djibouti, Turkey, Philippines, India, Croatia, South Africa, Russia, Bulgaria, Romania, Gibraltar, Somalia, Malaysia, Brazil, Pakistan, Panama, Honduras, Norway, Nigeria, Colombia, Barbados, Liberia, Peru, Poland, Seychelles, Guatemala

Source: GAO analysis of federal procurement data. | GAO-19-17

Appendix IV: Comments from the Department of Health and Human Services

**Appendix IV: Comments from the Department
of Health and Human Services**



DEPARTMENT OF HEALTH & HUMAN SERVICES

OFFICE OF THE SECRETARY

Assistant Secretary for Legislation
Washington, DC 20201

NOV 27 2018

William T. Woods
Director, Contracts and National Security Acquisitions
U.S. Government Accountability Office
441 G Street NW
Washington, DC 20548

Dear Mr. Woods:

Attached are comments on the U.S. Government Accountability Office's (GAO) report entitled, "*Buy American Act: Actions Needed to Improve Exception and Waiver Reporting and Selected Agency Guidance*" (GAO-19-17).

The Department appreciates the opportunity to review this report prior to publication.

Sincerely,

A handwritten signature in blue ink, appearing to read "Matthew D. Bassett".

Matthew D. Bassett
Assistant Secretary for Legislation

Attachment

GENERAL COMMENTS FROM THE DEPARTMENT OF HEALTH & HUMAN SERVICES ON THE GOVERNMENT ACCOUNTABILITY OFFICE'S DRAFT REPORT ENTITLED - BUY AMERICAN ACT: ACTIONS NEEDED TO IMPROVE EXCEPTION AND WAIVER REPORTING AND SELECTED AGENCY GUIDANCE (GAO-19-17)

The U.S. Department of Health & Human Services (HHS) appreciates the opportunity from the Government Accountability Office (GAO) to review and comment on this draft report.

Recommendation 4

The Secretary of HHS should provide guidance, training, or other instruction to help contracting officials:

- Identify the factors that should be considered in order to determine the applicability of the Trade Agreements Act and waiver of the Buy American Act;
- Document determinations of the use of Buy American exceptions for domestic non-availability and ensure the required approvals are obtained; and
- Identify sources of information available for determining products' origins and the steps they should take to verify information that is incomplete.

HHS Response

HHS concurs with GAO's recommendation. HHS will evaluate ways to provide guidance, training, and instruction to help contracting officials.

Appendix V: Comments from the Department of Homeland Security



November 29, 2018

William T. Woods
Director, Contracting and National Security Acquisitions
U.S. Government Accountability Office
441 G Street, NW
Washington, DC 20548

Re: Management Response to Draft Report GAO-19-17, "BUY AMERICAN ACT:
Actions Needed to Improve Exception and Waiver Reporting and Selected
Agency Guidance"

Dear Mr. Woods:

Thank you for the opportunity to review and comment on this draft report. The U.S. Department of Homeland Security (DHS) appreciates the U.S. Government Accountability Office's (GAO) work in planning and conducting its review and issuing this report.

The Department is pleased to note GAO's positive recognition of DHS policies and training that foster effective implementation of the Buy American Act (BAA). GAO highlights that DHS introduced training courses in 2017, which specifically focus on the requirements and implementation of the BAA. The report also notes that the training courses include supplemental on-the-job tools to assist contracting officers when awarding contracts for end products subject to the BAA and that DHS contracting officials find both the tools and training helpful. Additionally, DHS revised the Homeland Security Acquisition Manual (HSAM) to provide more explicit Federal Procurement Data System – Next Generation reporting instructions to contracting officers and increase oversight and documentation requirements for several exceptions to the BAA. DHS remains committed to ensuring its acquisition workforce has the tools and guidance necessary to accurately determine the applicability of the BAA and the Trade Agreement Act (TAA) to Department procurements.

The draft report contained four recommendations, including one for DHS with which the Department concurs. Attached find our detailed response to this recommendation. Technical comments were previously provided under separate cover.

Again, thank you for the opportunity to review and comment on this draft report. Please feel free to contact me if you have any questions. We look forward to working with you again in the future.

Sincerely,



JIM H. CRUMPACKER, CIA, CFE
Director
Departmental GAO-OIG Liaison Office

Attachment

**Attachment: Management Response to the Recommendation
Contained in GAO-19-17**

GAO recommended that the Secretary of Homeland Security:

Recommendation: Clarify existing guidance in the Homeland Security Acquisition Manual or update training to help contracting officials:

- Identify the factors that should be considered in order to determine the applicability of the TAA and waiver of the BAA;
- Document determinations of the use of Buy American exception for domestic non-availability and ensure the required approvals are obtained, particularly when such determinations are evidenced through justifications for other than full and open competition; and
- Identify sources of information available for determining product origin and the steps they should take to verify information that is incomplete.

Response: Concur. The DHS Office of the Chief Procurement Officer (OCPO) will provide guidance (e.g., training, job aid, or HSAM update) to contracting officers on the:

- Applicability of the BAA and TAA when the exception in Federal Acquisition Regulation 25.401(a)(5) is applicable to the procurement; and
- Documentation and approvals required when awarding a contract using other than full and open competition when an exception to the TAA applies.

Additionally, OCPO will update training to identify the actions contracting officers should take when there is a discrepancy between the country of origin information in the representations and certifications in the System for Award Management registration for the offeror and the proposal/quotation submitted by the offeror. Estimated Completion Date: June 30, 2019.

Appendix VI: Comments from the Department of Veterans Affairs



THE SECRETARY OF VETERANS AFFAIRS
WASHINGTON

December 4, 2018

Mr. William T. Woods
Director
Contracting and National Security Acquisitions
U.S. Government Accountability Office
441 G Street, NW
Washington, DC 20548

Dear Mr. Woods:

The Department of Veterans Affairs (VA) has reviewed the Government Accountability Office's (GAO) draft report: ***"BUY AMERICAN ACT: Actions Needed to Improve Exception and Waiver Reporting and Selected Agency Guidance"*** (GAO-19-17).

The enclosure sets forth the actions to be taken to address the GAO draft report recommendation.

VA appreciates the opportunity to comment on your draft report.

Sincerely,

A handwritten signature in cursive script that reads "Robert L. Wilkie".

Robert L. Wilkie

Enclosure

Enclosure

Department of Veterans Affairs (VA) Comments to
Government Accountability Office (GAO) Draft Report
**BUY AMERICAN ACT: Actions Needed to Improve Exception and Waiver
Reporting and Selected Agency Guidance**
(GAO-19-17)

GAO Recommendation: The Secretary of Veterans Affairs should clarify existing guidance, or provide training or other instruction, to help contracting officials:

- Address the applicability of the Buy American Act requirements and provide instruction on how to implement the requirement, including in any training developed to implement the Veterans First policy.

VA Comment: Concur. On September 22, 2017, the Procurement Policy and Warrant Management Service (PPS) issued the Procurement Policy Memorandum (PPM) 2017-12, Implementation of the Buy American Laws to Maximize the Use of Goods, Products and Materials Produced in the United States (Attachment 1). This policy informed individuals responsible for obligating funds on behalf of the Department of Veterans Affairs (VA) and other acquisition professionals, that the VA Acquisition Academy (VAAA) offers twelve courses that include discussion of the Buy American statutes, seven of which also include discussion of the Trade Agreement laws. This policy also informed individuals of two online courses available through the Federal Acquisition Institute Training Application System, and further prescribed that acquisition professionals obligating funds on behalf of VA shall complete one of the courses listed in the chart below, or others that cover implementation of the Buy American statute. Of the three available resources (VAAA, Defense Acquisition University, and the Federal Acquisition Institute), other acquisition professionals are also encouraged to successfully complete courses as identified in the attached PPM.

Training Provider	Course Number	Course Title
Defense Acquisition University	CLC 027	Buy American Statute
Federal Acquisition Institute (FAITAS LMS)	FAC 063	Buy American Statute

Additionally, VA Heads of Contracting Activities have taken actions in their respective areas to include:

- Conducting internal training with their employees by overviewing current Buy American Act (BAA) and Trade Agreements Act (TAA) guidance.
- Adding Buy America training to the fiscal year (FY) 2019 national training plan so employees can request it when considering coursework.
- Ensuring that VA policy and guidance documents have been disseminated throughout all parts of their organization.
- Providing direction for files to be reviewed for compliance to make sure the appropriate BAA regulations/clauses (i.e. Federal Acquisition Regulation

Enclosure

Department of Veterans Affairs (VA) Comments to
Government Accountability Office (GAO) Draft Report
***BUY AMERICAN ACT: Actions Needed to Improve Exception and Waiver
Reporting and Selected Agency Guidance***
(GAO-19-17)

(FAR) 52.225-1, FAR 52.225-2, and FAR 52.225-3) are in solicitations and contracts.

However, PPS does plan to review the Risk Management and Compliance Service's analysis report (provided at the in-brief on September 24, 2018), to determine if findings therein may be incorporated into an existing or new training module or presentation. PPS plans to complete this action by the end of third quarter FY 2019. Also, VA is working with the appropriate internal offices to determine how best to provide additional instances of Veterans First Policy training and whether the training should be designated as mandatory. The VAAA is also integrating Fair and Reasonable Price Determinations training with a course planned for FY 2019.

- **Identify the factors that should be considered in order to determine the applicability of the Trade Agreements Act and waiver of the Buy American Act.**

VA Comment: Concur. Per FAR 25.103, VA already considers the five exceptions that could be applied to every acquisition based on what is being procured:

- Public Interest: When there is an agency agreement with a foreign Government.
- Non-Availability: When articles, materials, or supplies of the class to be acquired, either as end items or components are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.
- Unreasonable Cost: When the Contracting Officer (CO) determines that the cost of a domestic end product would be unreasonable (procedures in FAR 25.105 including adding offsets to the lowest price and in FAR 25.105 apply).
- Resale: When the purchase of foreign end products is specifically for commissary resale and for information technology that is a commercial item (when using FY 2004 or subsequent FY funds).
- VA applies the domestic non-availability exception to BAA when warranted.
- **Identify sources of information available for determining products' origins and the steps they should take to verify information that is incomplete.**

VA Comment: Concur. All VA COs are responsible for ensuring that all requirements of the law, executive orders, regulations, and all other applicable procedures including clearances and approvals, have been met. These laws and regulations include BAA, TAA, and the FAR. When procuring supplies, COs are

Enclosure

Department of Veterans Affairs (VA) Comments to
Government Accountability Office (GAO) Draft Report
***BUY AMERICAN ACT: Actions Needed to Improve Exception and Waiver
Reporting and Selected Agency Guidance***
(GAO-19-17)

required to insert clauses that require offerors to certify that their items are either BAA compliant (52.225-2, BAA Certificate), or TAA compliant (52.225-6, Trade Agreements Certificate).

Beyond performing market research, which should provide insight into vendors' past performance and history of compliance with BAA and TAA, COs are directed by FAR 25.206, Noncompliance, to take certain steps if there are allegations of Buy American statute violations (see *Klinge Corp.*, 82 Fed. Cl. at 135, which explains that when a procuring agency has reason to believe that an offeror's Trade Agreements Act certification is inaccurate, "the agency has a duty to make reasonable inquiry and satisfy itself that the product offered meets the terms of the Act").

Department of
Veterans Affairs

Memorandum

Date: September 22, 2017

From: Acting Deputy Senior Procurement Executive

Subj: VA Procurement Policy Memorandum (PPM) 2017-12, Department of Veterans Affairs' (VA) Implementation of the Buy American Laws to Maximize the Use of Goods, Products and Materials Produced in the United States (VAIQ 7812573)

To: VA Heads of Contracting Activities (HCAs)

1. Purpose. To emphasize and reinforce compliance with the Buy American Statute in VA's procurements in accordance with Executive Order 13788, *Buy American and Hire American*, dated April 18, 2017, and the Office of Management and Budget (OMB) Memorandum M-17-27, *Assessment and Enforcement of Domestic Preferences in Accordance with Buy American Laws*, dated June 30, 2017.

2. Background. Executive Order (E.O.) 13788 - *Buy American and Hire American* was signed by the President on April 18, 2017. On June 30, 2017, OMB and the Department of Commerce (DOC) jointly issued implementation guidance, OMB Memorandum M-17-27 - *Assessment and Enforcement of Domestic Preferences in Accordance with Buy American Laws*. E.O. 13788 along with OMB Memorandum M-17-27 reinforce the existing regulatory requirements in Federal Acquisition Regulation (FAR) part 25, provide emphasis for strengthening compliance with existing Buy American laws, and demonstrate the need for accurate reporting of the use of waivers and exceptions under the Buy American statute.

3. Applicability. This PPM applies to all VA contracting activities.

4. Effective Date. Immediately.

5. Expiration Date: This PPM will remain in effect until incorporated into the Veterans Affairs Acquisition Regulation (VAAR) or the Veterans Affairs Acquisition Manual (VAAM) or is otherwise rescinded.

6. Action Required. It is the policy of the VA to comply fully with the requirements of Executive Order 13788 - *Buy American and Hire American*; OMB Memorandum M-17-27 - *Assessment and Enforcement of Domestic Preferences in Accordance with Buy American Laws*; and FAR part 25, Foreign Acquisition. The key requirements of FAR subpart 25.1, Buy American—Supplies; subpart 25.2, Buy American—Construction Materials; and subpart 25.4, Trade Agreements are outlined below as the regulatory guidance that VA Contracting Officers (CO) should apply to comply with the Buy American Act. HCAs are encouraged to institute

Page 2

Subj: VA PPM 2017-12, VA Implementation of the Buy American Laws to Maximize the Use of Goods, Products and Materials Produced in the United States

reviews in accordance with PPM 2017-01, Integrated Oversight Process (IOP)/Technical Reviews (TRs), dated October 6, 2016 to ensure COs are complying with the BAA.

a. Buy American Act – Supplies (FAR subpart 25.1). FAR 25.102 establishes that except for the exceptions cited at 25.103, COs should acquire only domestic end products for public use inside the United States. FAR 25.103 Exceptions provides five exceptions and waivers for acquisitions of supplies.

b. Buy American Act – Construction Materials (FAR subpart 25.2). FAR subpart 25.2 defines specific requirements for construction materials and contains four (4) exceptions and waivers. The levels of authority and requisite analysis for each of these exceptions are found at FAR 25.202, Exceptions.

c. Trade Agreements (FAR subpart 25.4). Trade agreements with 'designated countries' establish specific exceptions to the Buy American statute. FAR 25.003 defines 'designated country' as those included in the World Trade Organization Government Procurement Agreement (WTO-GPA), U.S. Free Trade Agreements (FTA), certain least developed countries or a Caribbean Basin country. Contracting officers shall confirm the current status prior to each award that contemplates use of the Buy American statutes and ensure that any required documentation for awards based on trade agreements is contained in the contract file.

7. Reporting in eCMS/FPDS. E.O. 13788 and OMB Memorandum M-17-27 require ongoing monitoring of VA's ability to maximize the use of goods and materials produced in the United States. As with all contract award data, the data elements that provide information on VA's use of goods and materials produced in or outside the United States must be accurate. Formal quarterly FPDS audits are conducted in accordance with OMB Memorandum 'Improving Federal Procurement Data Quality – Guidance for Annual Verification and Validation' dated May 31, 2011, which currently includes Buy American data. VA's Risk Management and Compliance Service (RMCS) will conduct periodic reviews to ensure compliance.

8. Approval Levels for Exercise of Exemptions and Waivers.

a. For a determination under FAR 25.103(a), the contracting officer shall submit the request, containing all supporting facts and other pertinent information to the Deputy Senior Procurement Executive (DSPE) for submission to the Senior Procurement Executive (SPE), who will upon approval, forward the request to the Secretary for approval.

b. In accordance with FAR 25.103(b)(2)(i), the authority to make individual non-availability determinations has been formally delegated to VA Heads of Contracting Activities by delegation memorandum and is not re-delegable.

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Subj: VA PPM 2017-12, VA Implementation of the Buy American Laws to Maximize the Use of Goods, Products and Materials Produced in the United States

c. If the contracting officer considers that the non-availability of an article is likely to affect future acquisitions, the contracting officer shall forward the determination with supporting documentation to the DSPE, through the HCA, for approval along with a recommendation to the Civilian Agency Acquisition Council (CAAC) Chair to add the item(s) to the list of non-available articles in FAR 25.104. The application and approval processes for these exceptions shall be carefully conducted and documented in order to ensure that VA meets its goals of maximizing the use of domestic goods and materials and fully documenting any exceptions.

d. In accordance with FAR 25.202(a)(2), the authority to determine if domestic construction materials are not available in sufficient quantity and quality has been formally delegated to VA Heads of Contracting Activities by delegation memorandum and is not re-delegable.

9. Training on Buy American Laws. The VA Acquisition Academy (VAAA) offers twelve (12) courses that include discussion of the Buy American statutes, seven (7) of which also include discussion of Trade Agreement laws.

There are also two online courses available through the Federal Acquisition Institute Training Application System (FAITAS). Acquisition professionals obligating funds on behalf of VA shall complete one of the courses below or others that cover implementation of the Buy American statute. Other acquisition professionals are encouraged to complete courses identified herein.

Training Provider	Course Number	Course Title
Defense Acquisition University	<u>CLC 027</u>	Buy American Statute
Federal Acquisition Institute (FAITAS LMS)	<u>FAC 063</u>	Buy American Statute

(Please note that the Buy American Statute course names and numbers are subject to change.)

10. Questions or Concerns. Please direct questions regarding this PPM to the Procurement Policy and Warrant Management Service (003A2A), via email at: VA.Procurement.Policy@va.gov

/s/
Thomas A. Burgess

Appendix VII: GAO Contact and Staff Acknowledgments

GAO Contact

William T. Woods, (202) 512-4841 or WoodsW@gao.gov

Staff Acknowledgments

In addition to the contact named above, Candice Wright, Assistant Director; and Jennifer Dougherty, Analyst-in-Charge, managed this review. Skip McClinton; Erin Stockdale; Adam Cowles; Stephanie Gustafson; Julia Kennon; Anne Louise Taylor; and Robin Wilson made key contributions to this report.

Appendix VIII: Accessible Data

Data Tables

Accessible Data for Federal Obligations for Foreign End Products, Fiscal Year 2017

Category	Dollar amount
Total federal obligations	508 billion
End products	196 billion
Foreign end product obligations	7.8 billion
Exception for DOD qualifying countries	2.9 billion
Other buy American act exceptions	700 million
Trade agreement waiver	550 million
Use outside of the US	3.7 billion

Accessible Data for Figure 2: Foreign End Product Contract Obligations and Associated Exceptions and Waivers, Fiscal Year 2017

Category	Dollar amount
Total federal obligations	508 billion
End products	196 billion
Foreign end product obligations	7.8 billion
Exception for DOD qualifying countries	2.9 billion
Other buy American act exceptions	700 million
Trade agreement waiver	550 million
Use outside of the US	3.7 billion

Accessible Data for Figure 3: Defense and Civilian Agencies Reported Buy American Exceptions and Waivers, Fiscal Year 2017

n/a	Obligations for foreign products (in billions)	
Foreign end product authorization	Defense procurements	Civilian procurements
Use outside the US	3.3	0.393

n/a	Obligations for foreign products (in billions)	
	Defense procurements	Civilian procurements
Foreign end product authorization		
Exception for DOD Qualifying Countries	2.88	0.01
Trade Agreement Waiver	0.041	0.514
Other Buy American Act Exceptions	0.226	0.482

Agency Comment Letters

Accessible Text for Appendix IV Comments from the Department of Health and Human Services

Page 1

NOV 27 2018

William T. Woods

Director, Contracts and National Security Acquisitions

U.S. Government Accountability Office

441 G Street NW

Washington, DC 20548

Dear Mr. Woods:

Attached are comments on the U.S. Government Accountability Office's (GAO) report entitled, "Buy American Act: Actions Needed to Improve Exception and Waiver Reporting and Selected Agency Guidance" (GAO-19-17).

The Department appreciates the opportunity to review this report prior to publication.

Sincerely,

Matthew D. Bassett

Assistant Secretary for Legislation

Attachment

Page 2

GENERAL COMMENTS FROM THE DEPARTMENT OF HEALTH & HUMAN SERVICES ON THE GOVERNMENT ACCOUNTABILITY OFFICE'S DRAFT REPORT ENTITLED - BUY AMERICAN ACT: ACTIONS NEEDED TO IMPROVE EXCEPTION AND WAIVER REPORTING AND SELECTED AGENCY GUIDANCE {GAO-19-17}

The U.S. Department of Health & Human Services (HHS) appreciates the opportunity from the Government Accountability Office (GAO) to review and comment on this draft report.

Recommendation 4

The Secretary of HHS should provide guidance, training, or other instruction to help contracting officials:

- Identify the factors that should be considered in order to determine the applicability of the Trade Agreements Act and waiver of the Buy American Act;
- Document determinations of the use of Buy American exceptions for domestic non-availability and ensure the required approvals are obtained; and
- Identify sources of information available for determining products' origins and the steps they should take to verify information that is incomplete.

HHS Response

HHS concurs with GAO's recommendation. HHS will evaluate ways to provide guidance, training, and instruction to help contracting officials.

Accessible Text for Appendix V Comments from the
Department of Homeland Security

Page 1

November 29, 2018

William T. Woods

Director, Contracting and National Security Acquisitions

U.S. Government Accountability Office

441 G Street, NW

Washington, DC 20548

U.S. Department of Homeland Security

Washington, DC 20528

Homeland Security

Re: Management Response to Draft Report GAO-19-17, "BUY
AMERICAN ACT: Actions Needed to Improve Exception and Waiver
Reporting and Selected Agency Guidance"

Dear Mr. Woods:

Thank you for the opportunity to review and comment on this draft report. The U.S. Department of Homeland Security (DHS) appreciates the U.S. Government Accountability Office's (GAO) work in planning and conducting its review and issuing this report.

The Department is pleased to note GAO's positive recognition of DHS policies and training that foster effective implementation of the Buy American Act (BAA). GAO highlights that DHS introduced training courses in 2017, which specifically focus on the requirements and implementation of the BAA. The report also notes that the training courses include supplemental on-the-job tools to assist contracting officers when awarding contracts for end products subject to the BAA and that DHS contracting officials find both the tools and training helpful.

Additionally, DHS revised the Homeland Security Acquisition Manual (HSAM) to provide more explicit Federal Procurement Data System - Next Generation reporting instructions to contracting officers and increase oversight and documentation requirements for several exceptions to the BAA. DHS remains committed to ensuring its acquisition workforce has the tools and guidance necessary to accurately determine the applicability of the BAA and the Trade Agreement Act (TAA) to Department procurements.

The draft report contained four recommendations, including one for DHS with which the Department concurs. Attached find our detailed response to this recommendation. Technical comments were previously provided under separate cover.

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Again, thank you for the opportunity to review and comment on this draft report. Please feel free to contact me if you have any questions. We look forward to working with you again in the future.

Sincerely,

JIM H. CRUMPACKER, CIA, CFE

Director

Departmental GAO-OIG Liaison Office

Attachment

Page 3

Attachment: Management Response to the Recommendation Contained in GAO-19-17

GAO recommended that the Secretary of Homeland Security:

Recommendation: Clarify existing guidance in the Homeland Security Acquisition Manual or update training to help contracting officials:

- Identify the factors that should be considered in order to determine the applicability of the TAA and waiver of the BAA;

- Document determinations of the use of Buy American exception for domestic non-availability and ensure the required approvals are obtained, particularly when such determinations are evidenced through justifications for other than full and open competition; and
- Identify sources of information available for determining product origin and the steps they should take to verify information that is incomplete.

Response: Concur. The DHS Office of the Chief Procurement Officer (OCPO) will provide guidance (e.g., training, job aid, or HSAM update) to contracting officers on the:

- Applicability of the BAA and TAA when the exception in Federal Acquisition Regulation 25.401(a)(5) is applicable to the procurement; and
- Documentation and approvals required when awarding a contract using other than full and open competition when an exception to the TAA applies.

Additionally, OCPO will update training to identify the actions contracting officers should take when there is a discrepancy between the country of origin information in the representations and certifications in the System for Award Management registration for the offeror and the proposal/quotation submitted by the offeror. Estimated Completion Date: June 30, 2019.

Accessible Text for Appendix VI Comments from the Department of Veterans Affairs

Page 1

December 4, 2018

Mr. William T. Woods Director

Contracting and National Security Acquisitions

U.S. Government Accountability Office

441 G Street, NW

Washington, DC 20548

Dear Mr. Woods:

The Department of Veterans Affairs (VA) has reviewed the Government Accountability Office's (GAO) draft report: "BUY AMERICAN ACT: Actions Needed to Improve Exception and Waiver Reporting and Selected Agency Guidance" (GAO-19-17).

The enclosure sets forth the actions to be taken to address the GAO draft report recommendation.

VA appreciates the opportunity to comment on your draft report.

Sincerely,

Robert L. Wilkie

Enclosure

Page 2

GAO Recommendation: The Secretary of Veterans Affairs should clarify existing guidance, or provide training or other instruction, to help contracting officials:

- Address the applicability of the Buy American Act requirements and provide instruction on how to implement the requirement, including in any training developed to implement the Veterans First policy.

VA Comment: Concur. On September 22, 2017, the Procurement Policy and Warrant Management Service (PPS) issued the Procurement Policy Memorandum (PPM) 2017-12, Implementation of the Buy American Laws to Maximize the Use of Goods, Products and Materials Produced in the United States (Attachment 1). This policy informed individuals responsible for obligating funds on behalf of the Department of Veterans Affairs (VA) and other acquisition professionals, that the VA Acquisition Academy (VAAA) offers twelve courses that include discussion of the Buy American statutes, seven of which also include discussion of the Trade Agreement laws. This policy also informed individuals of two online courses available through the Federal Acquisition Institute Training Application System, and further prescribed that acquisition professionals obligating funds on behalf of VA shall complete one of the courses listed in the chart below, or

others that cover implementation of the Buy American statute. Of the three available resources (VAAA, Defense Acquisition University, and the Federal Acquisition Institute), other acquisition professionals are also encouraged to successfully complete courses as identified in the attached PPM.

Training Provider	Course Number	Course Title
Defense Acquisition University	CLC 027	Buy American Statute
Federal Acquisition Institute (FAITAS LMS)	FAG 063	Buy American Statute

Additionally, VA Heads of Contracting Activities have taken actions in their respective areas to include:

- Conducting internal training with their employees by overviewing current Buy American Act (BAA) and Trade Agreements Act (TAA) guidance.
- Adding Buy America training to the fiscal year (FY) 2019 national training plan so employees can request it when considering coursework.
- Ensuring that VA policy and guidance documents have been disseminated throughout all parts of their organization.
- Providing direction for files to be reviewed for compliance to make sure the appropriate BAA regulations/clauses (i.e. Federal Acquisition Regulation

Page 3

(FAR) 52.225-1, FAR 52.225-2, and FAR 52.225-3) are in solicitations and contracts.

However, PPS does plan to review the Risk Management and Compliance Service's analysis report (provided at the in-brief on September 24, 2018), to determine if findings therein may be incorporated into an existing or new training module or presentation. PPS plans to complete this action by the end of third quarter FY 2019. Also, VA is working with the appropriate internal offices to determine how best to provide additional instances of Veterans First Policy training and whether the training should be designated as mandatory. The VAAA is

also integrating Fair and Reasonable Price Determinations training with a course planned for FY 2019.

- Identify the factors that should be considered in order to determine the applicability of the Trade Agreements Act and waiver of the Buy American Act.

VA Comment: Concur. Per FAR 25.103, VA already considers the five exceptions that could be applied to every acquisition based on what is being procured:

- Public Interest: When there is an agency agreement with a foreign Government.
- Non-Availability: When articles, materials, or supplies of the class to be acquired, either as end items or components are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.
- Unreasonable Cost: When the Contracting Officer (CO) determines that the cost of a domestic end product would be unreasonable (procedures in FAR 25.105 including adding offsets to the lowest price and in FAR 25.105 apply).
- Resale: When the purchase of foreign end products is specifically for commissary resale and for information technology that is a commercial item (when using FY 2004 or subsequent FY funds).
- VA applies the domestic non-availability exception to BAA when warranted.
- Identify sources of information available for determining products' origins and the steps they should take to verify information that is incomplete.

VA Comment: Concur. All VA COs are responsible for ensuring that all requirements of the law, executive orders, regulations, and all other applicable procedures including clearances and approvals, have been met. These laws and regulations include BAA, TAA, and the FAR. When procuring supplies, cos are

Page 4

required to insert clauses that require offerors to certify that their items are either BAA compliant (52.225-2, BAA Certificate), or TAA compliant (52.225-6, Trade Agreements Certificate).

Beyond performing market research, which should provide insight into vendors' past performance and history of compliance with BAA and TAA, COs are directed by FAR 25.206, Noncompliance, to take certain steps if there are allegations of Buy American statute violations (see *Klinge Corp.*, 82 Fed. Cl. at 135, which explains that when a procuring agency has reason to believe that an offeror's Trade Agreements Act certification is inaccurate, "the agency has a duty to make reasonable inquiry and satisfy itself that the product offered meets the terms of the Act").

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Date: September 22, 2017

From: Acting Deputy Senior Procurement Executive

Subj: VA Procurement Policy Memorandum (PPM) 2017-12, Department of Veterans Affairs' (VA) Implementation of the Buy American Laws to Maximize the Use of Goods, Products and Materials Produced in the United States (VAIQ 7812573)

VA Heads of Contracting Activities (HCAs)

1. Purpose. To emphasize and reinforce compliance with the Buy American Statute in VA's procurements in accordance with Executive Order 13788, Buy American and Hire American, dated April 18, 2017, and the Office of Management and Budget (OMB) Memorandum M-17-27, Assessment and Enforcement of Domestic Preferences in Accordance with Buy American Laws, dated June 30, 2017.
2. Background. Executive Order (E.O.) 13788 - Buy American and Hire American was signed by the President on April 18, 2017. On June 30, 2017, OMB and the Department of Commerce (DOC) jointly issued implementation guidance, OMB Memorandum M-17-27 -Assessment and Enforcement of Domestic Preferences in Accordance with Buy American Laws. E.O. 13788 along with OMB Memorandum M- 17-27 reinforce the existing regulatory requirements in Federal Acquisition Regulation (FAR) part 25, provide emphasis for strengthening

compliance with existing Buy American laws, and demonstrate the need for accurate reporting of the use of waivers and exceptions under the Buy American statute.

3. Applicability. This PPM applies to all VA contracting activities.
4. Effective Date. Immediately.
5. Expiration Date: This PPM will remain in effect until incorporated into the Veterans Affairs Acquisition Regulation (VAAR) or the Veterans Affairs Acquisition Manual (VAAM) or is otherwise rescinded.
6. Action Required. It is the policy of the VA to comply fully with the requirements of Executive Order 13788 - Buy American and Hire American; OMB Memorandum M-17-27 - Assessment and Enforcement of Domestic Preferences in Accordance with Buy American Laws; and FAR part 25, Foreign Acquisition. The key requirements of FAR subpart 25.1, Buy American-Supplies; subpart 25.2, Buy American-Construction Materials; and subpart 25.4, Trade Agreements are outlined below as the regulatory guidance that VA Contracting Officers (CO) should apply to comply with the Buy American Act. HCAs are encouraged to institute

Page 6

reviews in accordance with PPM 2017-01, Integrated Oversight Process (IOP)/Technical Reviews (TRs), dated October 6, 2016 to ensure COs are complying with the BAA.

- a. Buy American Act- Supplies (FAR subpart 25.1). FAR 25.102 establishes that except for the exceptions cited at 25.103, COs should acquire only domestic end products for public use inside the United States. FAR 25.103 Exceptions provides five exceptions and waivers for acquisitions of supplies.
- b. Buy American Act- Construction Materials (FAR subpart 25.2). FAR subpart 25.2 defines specific requirements for construction materials and contains four (4) exceptions and waivers. The levels of authority and requisite analysis for each of these exceptions are found at FAR 25.202, Exceptions.
- c. Trade Agreements (FAR subpart 25.4). Trade agreements with 'designated countries' establish specific exceptions to the Buy

American statute. FAR 25.003 defines 'designated country' as those included in the World Trade Organization Government Procurement Agreement (WTO-GPA), U.S. Free Trade Agreements (FTA), certain least developed countries or a Caribbean Basin country. Contracting officers shall confirm the current status prior to each award that contemplates use of the Buy American statutes and ensure that any required documentation for awards based on trade agreements is contained in the contract file.

7. Reporting in eCMS/FPDS. E.O. 13788 and OMB Memorandum M-17-27 require ongoing monitoring of VA's ability to maximize the use of goods and materials produced in the United States. As with all contract award data, the data elements that provide information on VA's use of goods and materials produced in or outside the United States must be accurate. Formal quarterly FPDS audits are conducted in accordance with OMB Memorandum 'Improving Federal Procurement Data Quality-Guidance for Annual Verification and Validation' dated May 31, 2011, which currently includes Buy American data. VA's Risk Management and Compliance Service (RMCS) will conduct periodic reviews to ensure compliance.

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- a. For a determination under FAR 25.103(a), the contracting officer shall submit the request, containing all supporting facts and other pertinent information to the Deputy Senior Procurement Executive (DSPE) for submission to the Senior Procurement Executive (SPE), who will upon approval, forward the request to the Secretary for approval.
- b. In accordance with FAR 25.103(b)(2)(i), the authority to make individual non-availability determinations has been formally delegated to VA Heads of Contracting Activities by delegation memorandum and is not re-delegable.

Page 7

- c. If the contracting officer considers that the non-availability of an article is likely to affect future acquisitions, the contracting officer shall forward the determination with supporting documentation to the DSPE, through the HCA, for approval along with a recommendation to the Civilian Agency Acquisition Council (CAAC) Chair to add the item(s) to the list of non-available articles in FAR 25.104. The application and approval processes for these exceptions shall be

carefully conducted and documented in order to ensure that VA meets its goals of maximizing the use of domestic goods and materials and fully documenting any exceptions.

- d. In accordance with FAR 25.202(a)(2), the authority to determine if domestic construction materials are not available in sufficient quantity and quality has been formally delegated to VA Heads of Contracting Activities by delegation memorandum and is not re-delegable.

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(Please note that the Buy American Statute course names and numbers are subject to change.)

10. Questions or Concerns. Please direct questions regarding this PPM to the Procurement Policy and Warrant Management Service (003A2A), via email at: VA.Procurement.Policy@va.gov

/s/

Thomas A. Burgess

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