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*Pointing The Way To Success
In Government Sales*

Trade Agreements Act Risk Under GSA Schedules **Rozycki Associates – July 2009**

If you are a GSA Schedule contractor, your ability to sell products is profoundly affected by the Trade Agreements Act of 1979 (TAA)¹.

The inclusion of the Federal Acquisition Regulation (FAR) clause that implements TAA in a contract's terms and conditions prohibits a contractor from selling products on that contract which are "substantially transformed" in non-approved countries². As several large companies have found, failing to comply with TAA requirements can lead to fines in the millions of dollars.

As a responsible contractor, you must understand the Trade Agreements Act and ensure that your products are fully TAA-compliant.

The Risks

The risks of not complying with the TAA are great, as seen by the experiences of OfficeMax, Staples, and Office Depot. A "whistleblower" informed GSA that the GSA Schedule contracts of these companies included products "substantially transformed" in China. These products are generally not allowed to be sold under contracts covered by TAA. While the legal arguments are beyond the scope of this article, the net result was a fine of \$22 million spread across the three vendors³.

The basis for these fines is not found in the TAA itself. Rather the Government relied on a far more familiar enforcement mechanism: the False Claims Act. As federal contractors should know, the False Claims Act allows the Government to levy fines ranging from \$5,000 to \$10,000, plus three times the value of the goods sold **for each violation**⁴. If the Government considers each sale of a non-TAA compliant product to be a separate violation, fines can quickly rise to staggering levels for high-volume contractors.

The office supply cases were high profile, but they were not isolated. GSA takes Trade Agreements Act violations very seriously, and many enforcement actions have also been taken against smaller vendors. GSA Schedule contractors must understand all the TAA provisions to minimize their risk in the federal marketplace.

¹ The full text of the Trade Agreements Act of 1979 can be found at http://www.access.gpo.gov/uscode/title19/chapter13_.html

² Not all federal contracts are subject to the Trade Agreements Act. You should carefully examine the terms and conditions and consult with your Contracting Officer to determine whether TAA applies to your contract or solicitation.

³ The US DOJ press release announcing the fine against OfficeMax is available at: http://www.usdoj.gov/opa/pr/2005/May/05_civ_278.htm

⁴ The Taxpayers Against Fraud website will show you the importance of complying with the False Claims Act: <http://www.taf.org/>

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So what is the Trade Agreements Act?

On the simplest level, the FAR clause that implements TAA specifies where products sold to the Government under covered contracts may be “*substantially transformed into a new and different article of commerce with a name, character or use different from that of the article or articles from which it was transformed.*”

This issue of “substantial transformation” is at the heart of the law. If your product is substantially transformed in an approved country, it likely to be acceptable under TAA. If it is substantially transformed in a non-approved country, it is not likely to be acceptable.

Unfortunately, there are some tricky elements to this analysis, especially if your products are composed of parts from different countries. For example, if your products have parts made in non-compliant countries, yet are assembled together in a compliant country, is the final product compliant? The answer is not always initially clear.

This can quickly turn into an in-depth analysis, and there is a great deal of case law behind this definition.

What must I do to stay compliant?

If your GSA Schedule price list contains products not wholly assembled in the U.S. from domestically manufactured parts, or if you are contemplating acquiring a GSA Schedule, you must determine your level of compliance with the Trade Agreements Act.

First, acquire a list of countries which are acceptable under the Trade Agreements Act. This list does change, so ensure that you have the latest version. The Trade Agreements Act FAR clause (FAR 52.225-5) was last updated in June 2009, and can be found here: http://www.arnet.gov/far/current/html/52_223_226.html#wp1169151

Examining the list of acceptable countries (classified into Designated Countries, Free Trade Agreement Countries, Least Developed Countries, and Caribbean Basin Countries) will help you begin to determine whether your products are TAA-compliant.

If any of the components of your products are made in countries **not** on this list, there may be cause for concern.

Given the increased scrutiny that GSA is giving this topic, wise contractors will spend time ensuring they are completely TAA-compliant.

Rozycki Associates, LLC offers regulatory compliance assistance to companies in the federal marketplace. Please feel free to contact us for additional information.

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