



What Constitutes “Made in USA?”

By Gerard Panaro, WSTDA Legal Counsel

In response to a recent query on What does “US Made” mean, in the context of government procurement? If a finished product is assembled from imported products such as hooks, ratchets, webbing, cam buckles, etc., any or all of which are individual imported components used in tie downs or slings; using US labor; packaged and shipped; and assembling the culmination of the imported components into a finished product, does that constitute a “US made” product?

There are two answers to this question, because there are two applicable federal statutes: the Buy American Act (41 USCode §§10a-10d) and the Trade Agreements Act of 1979 (19 USCode §§2501 – 2582).

The Buy American Act (BAA)

The “Buy American Act” (41 USCode §10a – 10d) requires that supplies, services and construction materials for public use be manufactured in the United States substantially all from articles, materials or supplies mined, produced, or manufactured in the United States. The law requires federal procurement contracting officers to implement this policy.

The law is implemented through the Federal Acquisition Regulations System (48 CFR Part 25) (“FAR”).

Sec. 25.101 of the regulations states that the Buy American Act restricts the purchase of supplies (I do not believe we are dealing with “construction materials” here) that are not *domestic end* products, which is different from a *U.S.-made end* product. For manufactured end products, the Buy American Act uses a two-part test to define a “domestic end product”: 1) the article must be manufactured in the US *and* 2) the *cost of domestic components* must exceed 50% of the cost of all the components. This is what is relevant: cost: not where the final product is assembled or whether US labor is used.

A “*U.S.-made end product*” is defined (§25.003) as: “an article that is mined, produced, or manufactured in the United States or that is substantially transformed in the United States into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was transformed.”

Note that under this definition a “US made end product” is one that is manufactured in the US *or* “substantially transformed in the United States”. Your tie downs might meet this definition of a US made end product, but unfortunately, that isn’t enough; to satisfy the Buy American Act and the FAR, the product has to be a “domestic end product,” which must not only be made in the US, but at least 50% of whose components on a cost basis must also be made in the US. Sec. 25.101(b) states that a manufactured product of a small business concern is a US-made end product, *but is not a domestic end product* unless it meets this component test. There are exceptions to this rule (see below), but I don’t think any of them apply to your situation.

A “component” is “an article, material, or supply incorporated directly into an end product or construction material.” (Sec. 25.003).

There are three exceptions to these requirements: 1) “The Buy American Act does not apply with respect to articles, materials, or supplies if articles, materials, or supplies of the class or kind 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.” (Sec. 25.103(b)). 2) The government has made a class-wide determination of nonavailability (§25.03(b)(1)). I checked the classes in the FAR and none of them apply. 3) The head of the contracting agency makes an *individual* determination “that an article, material, or supply is not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality.” (Sec. 25.103(b)(2)). I doubt you’d meet this criterion.

The Trade Adjustments Act

(The following information from the opinion of the US Court of International Trade in *Xerox Corp. v. US*, 753 F.Supp.2d 1355 (2011).)

However, the TAA permits the domestic preference of the BAA to be waived under certain conditions. Sec. 2511 of the TAA permits waiver of the BAA requirements, but only in the case of countries in certain categories: 1) those that are parties to the TAA or North American Free Trade Agreement and provide reciprocal procurement opportunities to the US; 2) countries which are not major industrial countries which will comply with TAA; 3) countries which are not major industrial countries which will provide reciprocal opportunities to US products and suppliers; and 4) least developed countries. There is also a price threshold.

TAA applies a “rule of origin” which is: “An article is a product of a country or instrumentality only if ... (ii) in the case of an article which consists in whole or in part of materials from another country or instrumentality, it has been substantially transformed

into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed.”

This “substantial transformation” rule of origin stands in contrast to the rule of origin that applies under the Buy American Act. In order for a good to be considered a “domestic end product,” procurable under the BAA, it must be manufactured in the United States “substantially all from articles, materials, or supplies mined, produced, or manufactured ... in the United States.” “Substantially all” means greater than 50% domestic content.

As noted above, goods substantially transformed in the US from mostly foreign components (“US made end products”) cannot receive the BAA's domestic procurement preference, because they are distinct from domestic end products, which meet the 50% domestic content requirement of the BAA.

However, in 1990, the General Services Administration created a special category of procurable goods it denoted “U.S.-made end products.” Over the following decade or so, the U.S.-made end product came to be viewed as a sensible component of government procurement law, and exceptions were created for it by the heads of individual agencies, and eventually in the general federal acquisition regulations and defense federal acquisition regulations. As a result of these and other changes to the government procurement landscape, it has been the case for many years, and at all times relevant to this litigation, that products substantially transformed in the U.S. are highly eligible for government procurement.

Conclusion

Based on the above, it is entirely possible that the tie downs/slings are eligible for procurement by the US Agency/Department. However, it is dependent on so many factors: the interplay between the Buy American Act and the Trade Agreements Act; whether the country or countries from which the individual components are imported meet the criteria of the TAA (a determination which may have to be made by the Customs Department); price and cost of components (and perhaps the finished or “end” product); the FAR of the Department of the Army; the terms, conditions and requirements of the RFP from the Army; the input of the contracting officer; and perhaps other factors. The final answer may depend on further discussions with the contracting officer at the Agency/Department.