

Trump's Buy American Enforcement Faulted in Federal Purchasing

By Daniel Seiden

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1. General Services Administration follow through seen as weak
2. Legal challenges hampered as agency pays for foreign products

President Donald Trump 's pledge to "Buy American" may be failing to live up to its billing, at least at the General Services Administration, which delivers more than \$54 billion worth of products and services to federal agencies annually.

Contract attorneys and consultants who deal with the GSA say there's little evidence of a new, intense wave of enforcement to prevent contractors from selling Chinese or other-non-compliant products to the government that would distinguish the current administration from previous ones.

Furthermore, lackluster enforcement efforts can undercut the ability of whistleblowers and the government to challenge in court potential violations of the Buy American policy, recent rulings show.

"So far, there has been a lot of talk from the Trump administration about getting tougher on Buy American Act and Trade Agreements Act enforcement, but I have not seen it," said Merle M. DeLancey Jr., of Blank Rome LLP, Washington.

"It's business as usual," said Jennifer Schaus of Schaus & Associates, a federal contracting consultant, who also said her business hasn't seen an uptick in compliance checks or "anything out of the ordinary."

Many attorneys believed the president's April 2017 "Buy American and Hire American" executive order, and a June 2017 memorandum from the Office of Management and Budget and the Commerce Department, could push the GSA to bolster efforts to stop the purchase of some foreign-made products to the government. That, they expected, would greatly assist false claims cases raised against contractors.

Under the Buy American Act, federal agencies must purchase U.S.-produced articles. The Trade Agreements Act provides exceptions, allowing the president to designate countries that may sell goods to agencies.

BGOV Cheat Sheet: Buy America and Buy American

Major U.S. trade partners China and India aren't on the Trade Agreements Act's designated-countries list, but Canada, Mexico, and Japan are.

For contractors that agree to comply with Trade Agreements Act (Public Law 96-39) rules when they sign contracts, and are accused of non-compliance, their exposure to False Claims Act liability can hinge upon how serious the GSA is about enforcement.

U.S.-made products tend to be among these companies' best lawful options, said Patrick Suarez, president of GSAProposal.com, a company that provides GSA proposal and consulting services.

The False Claims Act (Public Law 99-562) penalizes and deters government fraud, such as misrepresenting the origins of office supplies and IT products that federal agencies buy from a GSA website.

GSA's Federal Acquisition Service "is committed to ensuring products offered through the Multiple Award Schedule Program are compliant with the Trade Agreements Act and other statutory requirements," a GSA spokesperson told Bloomberg Government.

Contractors with repeated violations of the Trade Agreements Act risk contract terminations and debarment, said Jack Coley, president and CEO of Coley Government Contract Services LLC.

Legal Troubles

When the GSA is less than aggressive, that spells trouble for whistleblowers' false claims cases. One example is the U.S. Court of Appeals for the Seventh Circuit's recent rejection of a case alleging the unlawful sale of products from China and Thailand in *United States ex rel. Berkowitz v. Automation Aids Inc.*

The court ruled that the claims lacked sufficient detail, but also said it "seems worth noting that the fact that the government has allegedly paid millions of dollars for the non-compliant products suggests that Berkowitz cannot satisfy the materiality prong" as required for a valid false claim under *Universal Health Servs. Inc. v. United States ex rel. Escobar*.

Materiality, in part, concerns whether the government would stop paying if it knew about a contractor's certain contractual, statutory, or regulatory non-compliance.

False claims defendants have successfully argued that materiality is lacking in false claims cases when the government continued to make payments despite knowledge of non-compliance.

Another case alleging defendants' unlawful sale of Chinese and Malaysian IT-products made by Cisco Systems Inc. fell short over a whistleblower's failure to plead materiality in *United States ex rel. Folliard v. Comstor Corp.*

The GSA's expressed willingness to work with vendors to address compliance problems instead of outright rejecting their payment requests undercut the materiality argument in that case, the U.S. District Court for the District of Columbia said.

That same court, however, ruled in *United States ex rel. Scutellaro v. Capitol Supply Inc.* that a case should go to a jury to assess materiality if the GSA sends a contractor "mixed signals" about compliance.

The sales at issue in those cases took place before Trump took office.

But consultants working closely with contractors say little has changed under the current administration that would make it easier to challenge contractors use of non-compliant foreign goods in court.

`Too Many Cheaters'

The GSA engaged in pretty aggressive enforcement activities around 2010, but there hasn't been an uptick or decline under the Trump Administration, said Robert Kelly, principal of GSA contractor consultant TurboGSA.

The agency regularly sends notices that prompt contractors to remove non-compliant products from availability, but "we have not seen much change in the level of TAA notice activity" since the General Services Administration began enforcing the act in 2006, said Ken Hatfield, president of SenSoft International Inc., a GSA business consultant.

The GSA made an increased effort in 2016 to remove products from schedule contracts that were non-compliant, and held several webinars, but "we have not seen a wide-scale effort to increase enforcement of TAA compliance within the GSA Schedules Program since 2016," said Heather Rattmann of Federal Schedules Inc., a GSA and Veterans Affairs contracts consultant.

"There are too many cheaters out there, and the GSA's contracting officers are so busy with new proposals, proposal modifications, and managing existing proposals that they just don't have the time for compliance," Suarez said.

When Suarez reported a company's complaints about Trade Agreements Act violations involving a competitor selling products made in China, the GSA contracting officer "told me that her office didn't have staffing to enforce compliance. So, I referred the company who brought up the issue about the competitor to the GSA's inspector general" he said.

The GSA's fiscal 2018-2022 Strategic Plan lacks any strategic plans to enhance requirements, to increase oversight, or to take action for non-compliance, said Margaret M. Cassidy of Cassidy Law in Washington and Cleveland.

"This surprised me given the administration's actions/stance on trade," she said.

Her clients haven't experienced an increase in warnings about Trade Agreements Act non-compliance or contract terminations.

Future Push

Coley, on the other hand, said since "2016 and under the Trump Administration, we've experienced a continued and increasing emphasis on TAA compliance by GSA with GSA contracting officers now requiring vendors to provide more detailed substantiation of compliance before approving products for addition to GSA Schedules."

Vendors seeking work under the recently opened office supplies schedule contract (Schedule 75) are required to have stringent letters of supply that certify suppliers' intent to cooperate on compliance and provide regular country-of-origin updates, said Barbara Kinosky of Centre Law and Consulting LLC, Tysons Corner, Va.

Trade Agreements Act compliance is still at the forefront of GSA audits, she said, and "if the new Schedule 75 requirements offer insight into the future, I suspect that even more oversight is coming to other schedules."

The government as a whole may be gearing up to be more aggressive on Buy American Act and Trade Agreements Act enforcement, Cassidy said.

She said a February 2018 report shows that the Defense Department identified Buy American Act deficiencies and recommended updating contractual language to address those requirements, and that several bills have been introduced in Congress to beef up adherence to Buy American policies.

To contact the reporter on this story: Daniel Seiden in Washington at dseiden@bgov.com

To contact the editors responsible for this story: Bennett Roth at broth@bgov.com; Paul Hendrie at phendrie@bgov.com

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